



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**May 18, 2021 Government Records Council Meeting**

Rotimi Owoh, Esq. (o/b/o African  
American Data & Research Institute)  
Complainant

Complaint No. 2020-83

v.  
Borough of Norwood (Bergen)  
Custodian of Record

At the May 18, 2021 public meeting, the Government Records Council (“Council”) considered the May 11, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Mr. Buginsky’s written response was legally insufficient because he failed to respond to each item contained in the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).
2. Notwithstanding Mr. Buginsky’s insufficient response, he lawfully denied access to the Complainant’s March 13, 2020 OPRA request item Nos. 2-4. N.J.S.A. 46:1A-6. Specifically, Mr. Buginsky and the Custodian certified, and the record reflects, that the Borough of Norwood does not possess or maintain the requested complaints and summonses. See Simmons v. Mercado, 464 N.J. Super. 77 (App. Div.), certif. granted, 2020 LEXIS 1218 (Oct. 26, 2020); Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Although Mr. Buginsky’s response was insufficient, records responsive to the Complainant’s March 13, 2020 OPRA request item Nos. 2-4 did not exist. Additionally, the evidence of record does not indicate that Mr. Buginsky’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Buginsky’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of

Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 18<sup>th</sup> Day of May 2021

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 20, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 18, 2021 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of  
African American Data & Research Institute)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-83**

v.

**Borough of Norwood (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of:<sup>3</sup>

1. Driving Under the Influence (“DUI”) and Driving While Intoxicated (“DWI”) summonses and complaints that were prepared by the Police Department from June 2019 through present.
2. Drug possession complaints and summonses prepared and filed by the Police Department from June 2019 through present.
3. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from June 2019 through present.
4. Summonses and complaints that were prepared by your Police Department relating to each one of the defendants listed in the Drug Recognition Evaluation/Expert (“DRE”) Rolling Log.

**Custodian of Record:** Laura Borchers

**Request Received by Custodian:** March 13, 2020

**Response Made by Custodian:** April 6, 2020

**GRC Complaint Received:** April 27, 2020

**Background<sup>4</sup>**

**Request and Response:**

On March 13, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 3, 2020, Rick Buginsky responded on behalf of the Custodian providing four (4) pages of responsive records. That same

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<sup>1</sup> The Complainant represents the African American Research & Data Institute.

<sup>2</sup> Represented by Andrew Fede, Esq., of Archer & Greiner, P.C. (Hackensack, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>4</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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day, the Complainant replied to Mr. Buginsky stating that he did not see any CDR-1 or CDR-2 summons and complaints responsive to the request and asked if Mr. Buginsky was going to provide them.

On April 6, 2020, Mr. Buginsky responded stating that after reaching out to the Borough of Norwood Police Department (“NPD”), he was told that they could not compile the requested summonses and complaints. That same day, the Complainant responded to the Custodian requesting clarification and whether the Custodian intended to comply with any of the request items. On April 7, 2020, Mr. Buginsky responded to the Complainant stating that he forwarded the OPRA request to NPD’s Chief and was awaiting a response.

#### Denial of Access Complaint:

On April 27, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that all New Jersey police departments have direct access to eCDR and the ATS/ACS databases. The Complainant argued that police departments did not need the assistance or permission of any court to access the databases maintaining the responsive records.

The Complainant asserted that NPD violated OPRA by not making the requested records available and that the time to comply had expired. The Complainant also attached a court opinion believed to be relevant to the matter. The Complainant requested the GRC compel compliance with the OPRA request and to award counsel fees.

#### Statement of Information:

On May 12, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 13, 2020. The Custodian certified that the records request was sent to the NPD for completion. The Custodian certified that on April 3, 2020, Mr. Buginsky responded on her behalf providing four (4) pages of responsive records.

The Custodian asserted that the Borough of Norwood (“Borough”) provided access to the requested government records that were “made, maintained, or kept on file . . . or that have been received,” by the Borough as defined under N.J.S.A. 47:1A-1.1. The Custodian asserted that such records did not include those maintained on external databases such as eCDR and ATS/ACS. The Custodian also argued that OPRA did not require the Borough to conduct research.

The Custodian asserted that OPRA did not apply to the courts, and that N.J. Court Rules, R. 1:38 governed access to court documents. Additionally, the Custodian noted that on March 20, 2020, N.J.S.A. 47:1A-5 was amended to state that the rules governing the deadlines to respond to a request shall not apply “during a period declared pursuant to the laws of this State as a state of emergency, public health emergency, or state or local disaster emergency.” N.J.S.A. 47:1A-5(i)(2).

### Additional Submissions:

On May 27, 2020, the Complainant filed a letter brief in response to the Custodian's SOI. Therein the Complainant provided a court order issued in AADARI v. Union Township, Docket No. UNN-L-893-20, dated May 22, 2020. The Complainant also provided a transcript and order issued in AADARI v. City of Millville, Docket No. CUM-L-712-18.<sup>5</sup> The Complainant requested that the GRC follow the decisions issued by the courts in the above matters, as they addressed the same issues here.

On August 25, 2020, Custodian's Counsel submitted a letter to the GRC stating that the Appellate Division reversed the trial court in Simmons and was dispositive as to the claim that the Borough was required to research and provide the requested records. Counsel also argued that the decision vindicated prior GRC decisions regarding access to municipal court records. See Jenkins v. Borough of Island Heights (Ocean), GRC Complaint No. 2008-139 (February 2009).

On April 21, 2021, the GRC submitted a request for additional information from the Custodian. Specifically, the GRC asked the Custodian:

1. To which request item of the Complainant's March 13, 2020 OPRA request was the four (4) pages of summonses responsive?
2. Did the [Borough] possess responsive records for the remaining request items?
3. Regarding summonses and complaints generally, do NPD officers keep or maintain physical copies of the requested summonses and complaints upon submission to the municipal court?
4. Regarding summonses and complaints generally, does the [Borough] keep or maintain copies of the requested summonses and complaints in archives or storage?

On May 5, 2021, Custodian's Counsel responded to the GRC's request for additional information, providing a certification from Mr. Buginsky. Mr. Buginsky certified that the four (4) pages of summonses provided to the Complainant were responsive to item No. 1 of the Complainant's request. Mr. Buginsky also certified that no responsive records exist regarding the remaining request items. Mr. Buginsky further certified that NPD officers did not keep or maintain physical copies of the requested summonses and complaints upon submission to the municipal court. Lastly, Mr. Buginsky certified that while the Borough kept and maintained copies of the requested summonses and complaints in archives or storage, those copies that were available and responsive to the Complainant's request have been provided.

### Analysis

#### Sufficiency of Response

OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6. In Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the Council held that “. . . [t]he Custodian's response was legally

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<sup>5</sup> This matter was reversed on appeal, Simmons v. Mercado, 464 N.J. Super. 77 (App. Div.), certif. granted, 2020 LEXIS 1218 (Oct. 26, 2020).

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insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).” See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).

Here, Mr. Buginsky responded on the Custodian’s behalf providing four (4) pages of records. In response, the Complainant asserted that the responsive did not contain CDR-1 or CDR-2 summonses and complaints. Mr. Buginsky responded stating that NPD could not compile the requested records, but later stated that the request was forwarded to NPD’s Chief and was awaiting a response. However, this supplemental response did not occur until after the Complainant filed the instant complaint and upon request for additional information from the GRC.<sup>6</sup> Thus, the evidence of record supports that Mr. Buginsky’s initial response to this OPRA request was insufficient in accordance with Paff, GRC 2007-272.

As such, Mr. Buginsky’s written response was legally insufficient because he failed to respond to each item contained in the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff, GRC 2007-272. See also Lenchitz, GRC 2012-265.

### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). In Merino, GRC 2003-110, the custodian argued that the requested complaints and summonses were not subject to access since they were dated beyond the required retention period via the State’s retention schedule. The Council held that if the agency in fact possessed the responsive records, they were subject to access under OPRA even if they were supposed to have been destroyed in accordance with the retention schedule.

However, although decided during the pendency of this complaint, the GRC finds the Appellate Division’s holding in Simmons, 464 N.J. Super. 77, relevant and binding. In Simmons, the Complainant requested the same records as those at issue in the instant matter, with the custodian asserting that the records were not maintained by the Millville Police Department (“MPD”) once its officers created and submitted the records through eCDR. 464 N.J. Super. at 80. The court found that notwithstanding MPD’s access to eCDR, “it does not alter the fact that the [requested complaints and summonses are] maintained by the judiciary.” Id. at 86. The court noted that although an MPD officer initiates the creation of the responsive records, “the document is completed by eCDR and the finished product is maintained by the municipal court, or, in a larger sense, the judiciary.” Id. at 85-86.

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<sup>6</sup> Therein, the Custodian denied OPRA request item Nos. 2-4 because no records existed. Those issues will be addressed below. The GRC notes that it need not address OPRA request item No. 1 because Mr. Buginsky certified that the four (4) pages provided to the Complainant were responsive to same.  
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In the current matter, the Complainant asserted that NBPB had access to the complaints and/or summonses through eCDR and ACS/ATS, and recent superior court decisions supported his position. Mr. Buginsky responded on the Custodian's behalf stating that the NPD did not have the means of compiling the requested information. In the SOI, the Custodian asserted that the Borough did not have an obligation to conduct research within external databases maintained by the Judiciary. Additionally, in response to the GRC's request for additional information, Mr. Buginsky certified that the City's Municipal Prosecutor did not maintain the requested records, nor did officers keep or maintain physical copies of the records as a matter of official policy.

Additionally, while the Complainant noted that the Custodian had the capability of printing out the requested summonses and complaints through eCDR and ACS/ATS, the court in Simmons determined that the requested records were maintained by the Judiciary. 464 N.J. Super. at 86. The court concluded that the burden of searching for responsive records therefore should not be placed on local authorities when such records were maintained by others. Id. Thus, notwithstanding whether NBPB has electronic access to the records via eCDR, the Custodian is not obligated to conduct a search for records maintained by the Judiciary. Id.

Accordingly, notwithstanding Mr. Buginsky's insufficient response, he lawfully denied access to the Complainant's March 13, 2020 OPRA request item Nos. 2-4. N.J.S.A. 46:1A-6. Specifically, Mr. Buginsky and the Custodian certified, and the record reflects, that the Borough does not possess or maintain the requested complaints and summonses. See Simmons, 464 N.J. at 86; Pusterhofer, GRC 2005-49.

### **Knowing & Willful**

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, although Mr. Buginsky's response was insufficient, records responsive to the Complainant's March 13, 2020 OPRA request item Nos. 2-4 did not exist. Additionally, the evidence of record does not indicate that Mr. Buginsky's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Buginsky's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Prevailing Party Attorney's Fees**

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006), the Appellate Division held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008), the Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct" (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court held that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." Id. at 603 (quoting Black's Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . ." Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). "But in



interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA. [196 N.J. at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

The Complainant filed the instant complaint requesting that the GRC require the Custodian to obtain and disclose the requested summonses and complaints. However, the evidence of record indicates that the Custodian did not possess or maintain the requested records and was under no obligation to provide same.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. 423. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Mr. Buginsky's written response was legally insufficient because he failed to respond to each item contained in the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).
2. Notwithstanding Mr. Buginsky's insufficient response, he lawfully denied access to the Complainant's March 13, 2020 OPRA request item Nos. 2-4. N.J.S.A. 46:1A-6. Specifically, Mr. Buginsky and the Custodian certified, and the record reflects, that the Borough of Norwood does not possess or maintain the requested complaints and summonses. See Simmons v. Mercado, 464 N.J. Super. 77 (App. Div.), certif. granted, 2020 LEXIS 1218 (Oct. 26, 2020); Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Although Mr. Buginsky's response was insufficient, records responsive to the Complainant's March 13, 2020 OPRA request item Nos. 2-4 did not exist. Additionally, the evidence of record does not indicate that Mr. Buginsky's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Buginsky's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Samuel A. Rosado  
Staff Attorney

May 11, 2021