



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**April 25, 2023 Government Records Council Meeting**

Rotimi Owoh, Esq. (o/b/o Delores Simmons,  
Obafemi Simmons, & Grace Woko)  
Complainant

Complaint No. 2021-182

v.

City of Passaic Police Department (Passaic)  
Custodian of Record

At the April 25, 2023 public meeting, the Government Records Council (“Council”) considered the April 18, 2023 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. The Custodian was not obligated to respond to the Complainant’s OPRA request item Nos. 4 in part and 5. Said request items are invalid because they require the Custodian to read through every court complaint or settlement agreement entered by or against the City to determine which of those records are responsive to the request items; to wit, to conduct research. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). See also Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013).
2. The Custodian unlawfully denied access to the requested complaints and summonses responsive to the Complainant’s May 27, 2021 OPRA request item Nos. 1-3. N.J.S.A. 47:1A-6. Specifically, the Custodian had an obligation to locate and retrieve responsive records created by Passaic Police Department. See Simmons v. Mercado, 247 N.J. 24, 42 (2021). The Custodian shall conduct a search for responsive records and provide same to the Complainant or notify that no responsive records exist.
3. **The Custodian shall comply with conclusion No. 2 above within ten (10) business days from receipt of the Council’s Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council’s Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**
4. The Custodian lawfully denied access to the Complainant’s OPRA request item No. 4 in part seeking complaints pertaining to misconduct, harassment, excessive use of force, or discrimination. N.J.S.A. 47:1A-6. Such records are exempt under OPRA’s exemption for personnel records and information generated in connection with any grievance filed by or against an individual or public employee. N.J.S.A. 47:1A-1.1;

N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004); Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015).

5. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a 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, 76 (2008). Specifically, the Custodian did not decide to conduct a search for responsive records until after the instant complaint was filed. Therefore, the Complainant is 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. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13(c).**

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 25<sup>th</sup> Day of April 2023

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 1, 2023**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 25, 2023 Council Meeting**

**Rotimi Owoh, Esq. (on Behalf of Delores Simmons,  
Obafemi Simmons, and Grace Woko)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-182**

v.

**City of Passaic Police Department (Passaic)<sup>2</sup>  
Custodial Agency**

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

1. Complaints and summonses prepared by your police department relating to individuals who were charged with drug possession and or drug paraphernalia by your police department from January 2020 to present.
2. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and or issued by your police department from January 2020 to present.
3. Complaints and summonses prepared by your police department relating to individuals who were charged with jaywalking by your police department from January 2020 to present.
4. Complaints that were filed against your police department or police officers for misconduct, harassment, excessive use of force and or discrimination from 2014 to the present. Request includes complaints that were filed with your police department, filed in courts and or filed in administrative agencies.
5. Settlement agreements your municipality entered with any one of your police officers who challenged his or her termination in court or through arbitration from 2014 to the present.

**Custodian of Record:** Amada Curling

**Request Received by Custodian:** May 27, 2021

**Response Made by Custodian:** August 2, 2021

**GRC Complaint Received:** August 3, 2021

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<sup>1</sup> The Complainant represents Delores Simmons, Obafemi Simmons, and Grace Woko.

<sup>2</sup> Represented by Edward J. Florio, Esq., of Florio, Kenny, Ravel, LLP (Lyndhurst, NJ).

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

Rotimi Owoh, Esq. (on Behalf of Delores Simmons, Obafemi Simmons, and Grace Woko) v. City of Passaic Police Department (Passaic), 2021-182 – Findings and Recommendations of the Executive Director

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

### Request and Response:

On May 27, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 2, 2021, Katherine Monsalve responded on the Custodian’s behalf in writing, stating that the Passaic Police Department (“PPD”) did not maintain copies of complaints or summonses on file in response to request item Nos. 1-4 and directed the Complainant to the municipal court. Ms. Monsalve also stated that clarification was needed regarding request item No. 5.

### Denial of Access Complaint:

On August 3, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian improperly denied access to request item Nos. 1-3 in the wake of the New Jersey Supreme Court’s decision in Simmons v. Mercado, 247 N.J. 24 (2021), rev’g 464 N.J. Super. 77 (App. Div. 2020). The Complainant also stated that records for request item Nos. 4 and 5 were not provided. The Complainant requested the GRC compel compliance with each request item, and to award counsel fees.

### Statement of Information:<sup>5</sup>

On April 26, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 27, 2021. The Custodian certified that Ms. Monsalve responded on her behalf on August 2, 2021, requesting clarification on request item No. 5, and directing the Complainant to submit a request to the municipal court for the remaining request items.

The Custodian asserted that at the time of the request the records were not maintained by PPD but by the municipal court. The Custodian asserted that the PPD conducted an initial search for responsive records prior to the Simmons decision. The Custodian further asserted that now that the decision is precedent, PPD is prepared to conduct a full search and provide records accordingly.

Regarding request item No. 5, the Custodian asserted it was overly broad and unclear. The Custodian argued that because no clarification was received from the Complainant, the request item remains unaddressed.

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<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.

<sup>5</sup> On September 8, 2021, this complaint was referred to mediation. On January 28, 2022, this complaint was referred back to the GRC for adjudication.

Rotimi Owoh, Esq. (on Behalf of Delores Simmons, Obafemi Simmons, and Grace Woko) v. City of Passaic Police Department (Passaic), 2021-182 – Findings and Recommendations of the Executive Director

## Analysis

### Validity of Request

#### Request Item No. 4 in Part; Request Item No. 5

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*

[MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);<sup>6</sup> N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

With respect to requests requiring research, the distinction between search and research is fact sensitive. That is, there are instances where the very specificity of a request requires only a search. As the Council determined in Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013), “. . . a valid OPRA request requires a search, not research . . . what will be sufficient to determine a proper

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<sup>6</sup> Affirmed on appeal from Bent v. Stafford Police Department, GRC Complaint No. 2004-78 (October 2004). Rotimi Owoh, Esq. (on Behalf of Delores Simmons, Obafemi Simmons, and Grace Woko) v. City of Passaic Police Department (Passaic), 2021-182 – Findings and Recommendations of the Executive Director

search will depend on how detailed the OPRA request is, and will differ on a case-by-case basis. What a custodian is not required to do, however, is to actually read through numerous [records] to determine if same is responsive: in other words, conduct research.”

Additionally, the court in Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), evaluated a request for “[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present.” Id. at 508. The Appellate Division determined that the request was not overly broad because it sought a specific type of document, despite failing to specify a particular case to which such document pertained. Id. at 515-16. Likewise, the court in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012) found a request for communications regarding the E-Z Pass benefits of Port Authority retirees to be valid because it was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information. Id. at 176.

Conversely, there are instances where a request can be specific enough to induce research, thus rendering it invalid. For instance, in Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2011-147, 2011-157, 2011-172, and 2011-181 (July 2012), the complainant submitted four (4) OPRA requests seeking copies of meeting minutes containing motions to approve other minutes. The Council, citing Taylor v. Cherry Hill Bd. of Educ. (Camden), GRC Complaint No. 2008-258 (August 2009) and Ray v. Freedom Academy Charter Sch. (Camden), GRC Complaint No. 2009-185 (August 2010), determined that the requests were overly broad:

[S]aid requests do not specify the date or time frame of the minutes sought. Rather, the requests seek those minutes at which the UCBOE motioned to approve meeting minutes for four (4) other meetings. Similar to the facts of both Taylor and Ray, the requests herein *seek minutes that refer to a topic and would require the Custodian to research the UCBOE’s meeting minutes in order to locate the particular sets of minutes that are responsive to the Complainant’s requests . . .* because the Complainant’s four (4) requests for minutes “that include a motion made by the Union City Board of Education to approve the minutes” from other meetings fail to identify the specific dates of the minutes sought and would require the Custodian to conduct research in order to locate the responsive records, the Complainant’s requests are invalid under OPRA.

[Valdes, GRC 2011-147 *et seq.* (emphasis added) (citing N.J. Builders Ass’n, 390 N.J. Super. at 180; Bent, 381 N.J. Super. at 37; MAG, 375 N.J. Super. at 546; Schuler, GRC 2007-151; Donato, GRC 2005-182. See also Valdes v. Gov’t Records Council, GRC Complaint No. 2013-278 (September 2014).]

In Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015), the court’s rationale of what amounted to research supports the Council’s decision in Valdes. There, the court reasoned that the plaintiff’s request:

[W]ould have had to make a preliminary determination as to which travel records correlated to the governor and to his senior officials, past and present, over a span of years. The custodian would then have had to attempt to single out those which

were third-party funded events. Next, he would have had to collect all documents corresponding to those events and search to ensure he had accumulated everything, including both paper and electronic correspondence. OPRA does not convert a custodian into a researcher.

[Id. at 237.]

More recently, in Carter v. N.J. Dep't of Cmty. Affairs, Div. of Local Gov't Serv., 2019 N.J. Super. Unpub. LEXIS 2510 (App. Div. Dec. 10, 2019)<sup>7</sup>, the complainant requested docketing records stemming from an appeal of an agency's final decision pertaining to a specific statute. The GRC found the request to be invalid, as it would cause the custodian to conduct research. On appeal, the court found that the request lacked a case name, party name, or docket number. The court also found that the records required the custodian "to search through thousands of cases to identify documents relevant to the request." Slip op. at \*9-10. The court further found that the custodian would have to review each file to determine whether it was applicable to the specific issue identified by the complainant. The court therefore held that the request was invalid under OPRA.

Here, the Complainant's OPRA request item No. 4 sought in part "complaints" filed in court against PPD for misconduct, harassment, use of force, or discrimination over a seven (7) year period. Additionally, request item No. 5 sought "settlement agreements" between the City of Passaic ("City") and terminated police officers over a seven (7) year period. Like the Carter request, both request items require the Custodian to conduct research by searching through seven (7) years of records, and review each complaint filed against the Borough in court, arbitration, or administrative agency and determine whether they pertained to misconduct, et al. Furthermore, such research would necessarily be a prerequisite before determining whether a settlement agreement exists as a result of an applicable complaint. Thus, these request items require the Custodian to act beyond what is required under OPRA.

Therefore, the Custodian was not obligated to respond to the Complainant's OPRA request item Nos. 4 in part and 5. Said request items are invalid because they require the Custodian to read through every court complaint or settlement agreement entered by or against the City to determine which of those records are responsive to the request items; to wit, to conduct research. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37. See also Verry, GRC 2013-43 and 2013-53.

### **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.

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<sup>7</sup> Affirmed on appeal from Carter v. N.J. Dep't of Cmty. Affairs, GRC Complaint No. 2016-262 (August 2018). Rotimi Owoh, Esq. (on Behalf of Delores Simmons, Obafemi Simmons, and Grace Woko) v. City of Passaic Police Department (Passaic), 2021-182 – Findings and Recommendations of the Executive Director

Request Item Nos. 1-3

The Council has previously held that criminal complaints and summonses are subject to disclosure. Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004); see also Mawhinney v. Egg Harbor City Police Dep't (Atlantic), GRC Complaint No. 2015-85 (January 2016).

Although decided during the pendency of this complaint, the GRC finds the Court's holding in Simmons relevant and binding. There, the Complainant requested the same or similar 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. Simmons, 247 N.J. at 32. The Court reversed the Appellate Division and found that the requested records were government records subject to disclosure under OPRA. Id. at 29. The Court found that notwithstanding which government branch created the CDR-1 and -2 forms, it is the information contained within those forms by MPD officers that is sought by AADARI. Id. at 40-41. Thus, the Court held that:

Because MPD officers create the completed CDR-1s by populating the forms with the information necessary to generate a summons and submit it to the court, there is no question that the CDR-1s are government records subject to disclosure pursuant to OPRA.

[Id.]

Additionally, the Court rejected MPD's argument that they did not maintain the records, holding that OPRA's definition of a government record is not restricted to records maintained by the agency, but rather includes records it creates, even if not maintained. Id. at 41. Thus, the Court found, "that the Judiciary might maintain on its servers the information that MPD made does not absolve MPD of its obligation to produce that information pursuant to a proper OPRA request made to MPD." Id. at 42.

In the instant matter, the Custodian responded to the Complainant on August 2, 2021, stating that the request item Nos. 1-3 were not maintained by PPD and directed same to the municipal court. The Complainant filed the instant matter on August 3, 2021, stating the Custodian's response was contrary to the Simmons decision. In the SOI, the Custodian asserted they were unaware of the Simmons decision at the time, but are now prepared to conduct a search for responsive records.

When considering the Court's decision in Simmons, the Custodian maintained the obligation to provide the Complainant with responsive records created by PPD. Notwithstanding whether PPD maintained physical copies of same, the Court held that since police departments created the CDR-1s and CDR-2s when inputting information, they were government records even if the records were maintained by the Judiciary's electronic databases. Simmons, 247 N.J. at 42.

Accordingly, the Custodian unlawfully denied access to the requested complaints and summonses responsive to the Complainant's May 27, 2021 OPRA request item Nos. 1-3. N.J.S.A.



47:1A-6. Specifically, the Custodian had an obligation to locate and retrieve responsive records created by PPD. See Simmons, 247 N.J. at 42. The Custodian shall conduct a search for responsive records and provide same to the Complainant or notify that no responsive records exist.

Request Item No. 4 in Part

The GRC notes that the Council is permitted to affirm a denial of access for reasons not raised by a custodian pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div.), certif. denied, 192 N.J. 292 (2007).<sup>8</sup> In Paff, GRC 2005-29, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. On appeal, the court held that:

The GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

[Paff, slip op. at 4.]

The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action), aff'd, 24 N.J. 139 (1957).

[Paff, slip op. at 4-5.]

To the above, OPRA provides that "[a] government record shall not include . . . information generated by or on behalf of public employers or public employees in connection . . . with any grievance filed by or against an individual . . ." N.J.S.A. 47:1A-1.1. OPRA further provides that:

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<sup>8</sup> On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).  
Rotimi Owoh, Esq. (on Behalf of Delores Simmons, Obafemi Simmons, and Grace Woko) v. City of Passaic Police Department (Passaic),  
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Notwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access . . .

[N.J.S.A. 47:1A-10.]

OPRA begins with a presumption against disclosure of personnel records and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). In Merino, GRC 2003-110, the Council held that:

[t]he Complainant’s request to review the records of complaints filed against Officer Tuttle were properly denied by the Custodian. N.J.S.A. 47:1A-10 provides in pertinent [part] that “the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a public record and shall not be made available for public access” [emphasis omitted]. As a result, records of complaints filed against Officer Tuttle and/or reprimands he has received are not subject to public access.

[Id. See also Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015)].

Here, the Complainant’s OPRA request item No. 4 in part sought access to “complaints” filed with PPD or other “administrative agencies” pertaining to misconduct, harassment, excessive use of force, or discrimination over a seven (7) year period. Upon review, the case law is clear that these “complaints” sought by the Complainant were exempt under N.J.S.A. 47:1A-10 as they pertain to allegations of misconduct by one or more police officers employed by PPD. Merino, GRC 2003-110; Wares, GRC 2014-274. For these reasons, the GRC is satisfied that the Custodian lawfully denied access to this portion of the Complainant’s OPRA request.

Therefore, the Custodian lawfully denied access to the Complainant’s OPRA request item No. 4 in part seeking complaints pertaining to misconduct, harassment, excessive use of force, or discrimination. N.J.S.A. 47:1A-6. Such records are exempt under OPRA’s exemption for personnel records and information generated in connection with any grievance filed by or against an individual or public employee. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; Merino, GRC 2003-110; Wares, GRC 2014-274.

### **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 (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. Id. at 432. 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.]

In the instant matter, the Complainant’s OPRA request sought in part complaints and summonses prepared by PPD pertaining to drug possession, drug paraphernalia, DUI/DWI, and jaywalking offenses. The Custodian responded on August 2, 2021, asserting that the records were maintained by the municipal court. The Complainant then filed the instant complaint on August 3, 2021, asserting that the Custodian should have obtained the records via PPD in accordance with the Court’s ruling. In the SOI, the Custodian stated that the City was prepared to search for responsive records considering the Court’s ruling.

In determining whether the Complainant is a prevailing party entitled to attorney’s fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. The Custodian denied access to the Complainant’s request by directing him to the municipal court. It was only after the complaint was filed that the Custodian realized that such records were subject to disclosure as government records. Thus, a causal nexus exists between this complaint and the change in the Custodian’s conduct. Mason 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney’s fees.<sup>9</sup>

Therefore, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian did not decide to conduct a search for responsive records until after the instant complaint was filed. Therefore, the Complainant is 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. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. If the**

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<sup>9</sup> The Council makes this determination with the understanding that the Complainant acted on behalf of a bona fide client at the time of the request. Although the Complainant’s status as representing an actual client has been previously challenged, the available evidence on the record is insufficient to address that issue herein. See Owoh, Esq. (O.B.O. AADARI) v. Neptune City Police Dep’t (Monmouth), GRC Complaint No. 2018-153 (April 2020) and Owoh, Esq. (O.B.O. AADARI) v. Freehold Twp. Police Dep’t (Monmouth), GRC Complaint No. 2018-155 (Interim Order dated September 29, 2020).

Rotimi Owoh, Esq. (on Behalf of Delores Simmons, Obafemi Simmons, and Grace Woko) v. City of Passaic Police Department (Passaic), 2021-182 – Findings and Recommendations of the Executive Director

**parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13(c).**

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian was not obligated to respond to the Complainant's OPRA request item Nos. 4 in part and 5. Said request items are invalid because they require the Custodian to read through every court complaint or settlement agreement entered by or against the City to determine which of those records are responsive to the request items; to wit, to conduct research. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005). See also Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013).
2. The Custodian unlawfully denied access to the requested complaints and summonses responsive to the Complainant's May 27, 2021 OPRA request item Nos. 1-3. N.J.S.A. 47:1A-6. Specifically, the Custodian had an obligation to locate and retrieve responsive records created by Passaic Police Department. See Simmons v. Mercado, 247 N.J. 24, 42 (2021). The Custodian shall conduct a search for responsive records and provide same to the Complainant or notify that no responsive records exist.
3. **The Custodian shall comply with conclusion No. 2 above within ten (10) business days from receipt of the Council's Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**
4. The Custodian lawfully denied access to the Complainant's OPRA request item No. 4 in part seeking complaints pertaining to misconduct, harassment, excessive use of force, or discrimination. N.J.S.A. 47:1A-6. Such records are exempt under OPRA's exemption for personnel records and information generated in connection with any grievance filed by or against an individual or public employee. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004); Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015).
5. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a 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, 76 (2008). Specifically, the Custodian did not decide to conduct a search for responsive records until after the instant complaint was filed. Therefore, the Complainant is 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. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13(c).**

Prepared By: Samuel A. Rosado  
Staff Attorney

April 18, 2023