



## State of New Jersey

### GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

### FINAL DECISION

#### March 26, 2008 Government Records Council Meeting

John Paff

Complainant

v.

City of East Orange (Essex)

Custodian of Record

Complaint No. 2007-297

At the March 26, 2008 public meeting, the Government Records Council (“Council”) considered the March 19, 2008 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. Pursuant to the disjunctive use of the word “or” set forth in N.J.S.A. 47:1A-5.g., not every one of the prescribed methods for submitting an OPRA request is required under the law. Additionally, pursuant to the previously published Handbook for Records Custodians, and the GRC’s decisions set forth in Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007), and Momo v. NJ Department of Community Affairs, Division of Community Resources, GRC Complaint No. 2007-17 (September 2007), a Custodian may decline to accept OPRA requests via facsimile consistent with N.J.S.A. 47:1A-5.g. Therefore, the Custodian did not unlawfully deny the Complainant access to the requested records.
2. The Complainant failed to achieve the desired result of disclosure of the requested records since the Custodian did not unlawfully deny the Complainant access to the requested records pursuant N.J.S.A. 47:1A-5.g., Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007), and Momo v. NJ Department of Community Affairs, Division of Community Resources, GRC Complaint No. 2007-17 (September 2007). Therefore, the Complainant is not entitled to prevailing party attorney’s fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).

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 26<sup>th</sup> Day of March, 2008

Robin Berg Tabakin, Vice Chairman  
Government Records Council

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

Janice Kovach  
Government Records Council

**Decision Distribution Date: March 31, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 26, 2008 Council Meeting**

**John Paff<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-297**

v.

**City of East Orange<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. The settlement agreements that arose out of Angelic Muhammad v. East Orange et. al., Civil Action 04-4893 and Keith Hinton v. East Orange Police Department, et. al., Civil Action 04-4858.
2. Any records showing that either of the referred to settlement agreements were filed with a court.
3. Any records showing that any confidentiality order regarding the referred to litigation was issued by a court or other tribunal.

**Request Made:** November 16, 2007<sup>3</sup>

**Response Made:** November 19, 2007

**Custodian:** Cynthia Brown

**GRC Complaint Filed:** November 21, 2007

**Background**

**November 16, 2007**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter attached to an official OPRA request form.

**November 19, 2007**

Custodian's Response to the OPRA request. The Custodian responds verbally in a telephone message to the Complainant's OPRA request on the same day as receipt of such request. The Custodian asserts stating that, per the procedures established by the East Orange City Clerk, OPRA requests are not accepted via facsimile. The Custodian also referred the Complainant to "Item 1" on the City's official OPRA request form. The Custodian further states that in order for the Complainant's OPRA request to be processed, the original OPRA request must either be mailed or hand delivered to the City Clerk's Office.

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

<sup>2</sup> Represented by Jason Holt, Esq. (East Orange, NJ).

<sup>3</sup> The Complainant specifically indicates that the OPRA request was submitted via facsimile after work hours.

**November 21, 2007**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated November 16, 2007.

The Complainant asserts that on November 16, 2007, he submitted an OPRA request to the Custodian via facsimile. The Complainant also asserts that on November 19, 2007, an employee left him a voicemail denying the OPRA request because it was submitted via facsimile. The Complainant further asserts that the City is relying on Mann v. New Jersey Department of Environmental Protection (“DEP”), GRC Complaint No. 2005-129 (January 2006), which held that a state agency could, through its rulemaking process, prohibit submissions of OPRA requests via facsimile.

The Complainant contends that the City should be ordered to accept OPRA requests via facsimile for two (2) reasons: 1) East Orange is not a state agency governed by Section 4 of Executive Order No. 21 or Executive Order No. 26; and 2) the Mann decision should be overruled. The Complainant also contends that OPRA requires municipalities to honor requests that are made in writing by stating that a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically or otherwise conveyed to the appropriate custodian. N.J.S.A. 47:1A-5.g. The Complainant further contends that the touchstone to honoring a request is that it be in writing, and his request was in writing and submitted via facsimile, therefore, the request must be accepted.

The Complainant asserts that Mann should not be applied to this complaint because East Orange is not a state agency. The Complainant also asserts that in Mann, the DEP proposed rules that prohibited OPRA requests via facsimile and the GRC agreed with the reasoning that Executive Order No. 21 authorized State agencies to issue proposed rules limiting access to confidential government records. The Complainant states that he disagrees with the Mann decision and argues that it should be overruled.

The Complainant requests that the GRC find that the Custodian violated OPRA and denied access to records by refusing to accept the OPRA request via facsimile, order the Custodian to respond to the OPRA request, award attorney’s fees as provided by N.J.S.A. 47:1A-6, and fine the Custodian for her knowingly and willfully violation of OPRA.

The Complainant declines to mediate this complaint.

**December 17, 2007**

Request for the Statement of Information sent to the Custodian.

**December 24, 2007**

Custodian’s Statement of Information (“SOI”) with the Complainant’s OPRA request dated November 16, 2007. The Custodian provides the GRC with an incomplete Statement of Information. The Custodian’s submission is non-compliant with the GRC procedures and the New Jersey Superior Court decision in John Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007), because the Custodian failed to provide a

complete document index containing certain information as specifically detailed in the request for the Statement of Information.

**January 9, 2008**

Letter from the Custodian’s Assistant Corporation Counsel to the Complainant’s Counsel. The Assistant Corporation Counsel asserts that it is the City’s position that the Complainant’s OPRA request was not denied because according to “Item 1” of the City’s official OPRA request form, the City established through regulations that OPRA requests by facsimile transmission are not accepted.

**February 4, 2008**

Letter from the GRC to the Custodian. The GRC indicates that the GRC provided the Custodian with a request for a Statement of Information (“SOI”) on December 17, 2007, which specifically stated that pursuant to John Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007), the document index in “Item 9” is required. The GRC states, however, that the Custodian provided the GRC with an incomplete SOI by failing to include the document index in the SOI submitted to the GRC on December 24, 2007. Further, the GRC states that the incomplete SOI is being returned to the Custodian for completion of “Item 9” and is expected to be returned to the GRC within three (3) business days.

**February 6, 2008**

Custodian’s Statement of Information (“SOI”) including “Item 9”, in document index format.

<b>(A) List of all records responsive to Complainant’s OPRA request (include the number of pages for each record).</b>	<b>(B) List the Records Retention Requirement and Disposition Schedule for each records responsive to the Complainant’s OPRA request</b>	<b>(C) List of all records provided to Complainant, in their entirety or with redactions (include the date such records were provided).</b>	<b>(D) If records were disclosed with redactions, give a general nature description of the redactions.</b>	<b>(E) If records were denied in their entirety, give a general nature description of the record.</b>	<b>(F) List the legal explanation and statutory citation for the denial of access to records in their entirety or with redactions.</b>
The Resolutions passed on dates by the City Council, plus a copy of any settlement releases and or agreements. 4-8 pages	Must be retained by agency permanently. May only be archived.	No records were provided to the Complainant.	N/A	Records were not denied to the Complainant. The City informed the Complainant that OPRA requests by facsimile were not accepted and the Complainant’s OPRA request would be	<u>N.J.S.A.</u> 47:1A-1 et. seq.; specifically, <u>N.J.S.A.</u> 47:1A-5.f. (as related to forms). Furthermore, Part III, Section 1 of the Handbook for Records Custodians- June 2002, page 12 of 31, as published and released by the GRC. This

				processed once the OPRA was received either by mail or hand delivery.	section states that: "Some public [agencies] may not have a dedicated fax line for their records custodian and cannot accept fax requests." The Custodian also relies on any applicable case law including, but not limited to, the case cited by the Complainant in his Denial of Access Complaint to the GRC. <sup>4</sup>
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**February 8, 2008**

Letter from the Complainant’s Counsel to the GRC. The Complainant’s Counsel contends that if the GRC held in favor of the custodial agency, that ruling would be overturned on appeal. The Complainant’s Counsel also contends that there is no evidence that faxing requests to the custodial agency causes any burden whatsoever, and that the custodial agency is perfectly capable of sending and receiving faxes. The Complainant’s Counsel further contends that all OPRA requires is that requests be in writing and on a municipality’s OPRA request form; additional burdens on a requestor’s OPRA rights are illegal.

**Analysis**

**Whether the Custodian unlawfully denied access to the requested records by not accepting the Complainant’s OPRA request via facsimile?**

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or*

<sup>4</sup> Neither the Custodian nor the Custodian’s Counsel cites any specific authorities. John Paff v. City of East Orange, 2007-297 – Findings and Recommendations of the Executive Director

*kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA states:

"...[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, *or* otherwise conveyed to the appropriate custodian..." (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

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. 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. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1.

On November 16, 2007, the Complainant submitted his OPRA request via facsimile after work hours. On November 19, 2007, the Custodian asserts verbally responding in a telephone message to the Complainant stating that, per the procedures established by the City of East Orange's Clerk, OPRA requests are not accepted via facsimile and directed the Complainant to "Item 1" on the second (2<sup>nd</sup>) page of the OPRA request form.

The Complainant contends that the Custodian's choice to reject faxed submissions of OPRA requests is based on Mann v. New Jersey Department of Environmental Protection ("DEP"), GRC Complaint No. 2005-129 (January 2006), and further contends that the decision in Mann should be overruled and the Custodian herein be found to have violated OPRA.

In Mann, *supra*, the Complainant submitted an OPRA request by facsimile to the public agency. The Custodian contended that the provisions of OPRA, N.J.S.A. 47:1A-5.f, "clearly indicate that OPRA requests are to be treated formally and through the use of a standard form developed by the agency." The Custodian stated that the NJDEP's regulation governing OPRA requests, *N.J.A.C. 7:1D-3.4*, provided that "[f]orms may be hand delivered during normal business hours, mailed or transmitted electronically by e-mail to the Department Records Custodian." The Custodian claims that the NJDEP's regulation did not allow for facsimile transmittal of OPRA requests because it is difficult to ensure that they are received and/or forwarded to the Records Custodian. The Custodian stated that the NJDEP website indicates that requests may be made via email or via internet and the form provides one address where all requests are required to be sent.

The GRC determined that, pursuant to N.J.S.A. 47:1A-9.a and based on N.J.A.C. 7:1D-3.4, as well as the unpublished decision in Newark Morning Ledger Co., Publisher of the Star-Ledger, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005), the proposed rule disallowing facsimile transmittal of OPRA requests did apply; therefore, the facsimile request for records submitted by the Complainant was not a valid OPRA request and there was no denial of access.

The GRC's decision in Mann, *supra*, is not applicable to the complaint now before the Council. The City of East Orange is a municipality rather than a state agency and the procedures which it has instituted prohibiting the submission of faxed OPRA requests are not analogous to the regulation which is the subject of Mann. N.J.S.A. 47:1A-9.a requires that the provisions of OPRA "shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to ...regulation promulgated under the authority of any statute...." Moreover, the GRC has previously determined that agency policy does not supersede OPRA. *See* Janney v. Estell Manor City, GRC Complaint No. 2006-205 (December 2007).

However, OPRA does not require that a public agency accept submissions of requests for public records by fax. Additionally, there may be compelling reasons why a public agency may choose not to receive OPRA requests by means of facsimile transmissions.

Pursuant to N.J.S.A. 47:1A-5.g., OPRA requests shall be made "in writing and hand-delivered, mailed, transmitted electronically, *or* otherwise conveyed to the appropriate custodian." *Id.* This indicates that any one of the prescribed means is acceptable under the law. The disjunctive use of the word "or" indicates that not every one of the prescribed methods of conveyance is required by OPRA.

There may be various reasons why a Custodian may choose to not accept OPRA requests. In the prior GRC decision, Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007), the Council decided the issue of whether a Custodian could deny a requestor access to making photocopies with the requestor's personal photocopier. In doing such, the specific language of the findings and recommendations set forth in Hascup states:

"Administrative agencies, in general, have broad discretion in selecting the appropriate method and process for fulfilling their statutory responsibilities...specifically, under OPRA, a custodian has the discretion in developing processes so that he or she can best meet his or her obligation under OPRA. For example, a custodian has the discretion to customize an OPRA request form (so long as the items listed in N.J.S.A. 47:1A-5.f.1-7 are included), to accept, or not accept, requests by e-mail, etc."

In the prior GRC decision, Momo v. NJ Department of Community Affairs, Division of Community Resources, GRC Complaint No. 2007-17 (September 2007), the Council addressed an issue of an OPRA request being faxed to an unused fax machine.



An OPRA request that the complainant allegedly sent on November 7, 2006 was not forwarded to the custodian until December 4, 2006 because it was later concluded that the facsimile number was an unused number. Therefore, even though there was a delay in a response from the Custodian, the GRC determined that the Custodian did not violate OPRA because the OPRA request was sent to an unused fax machine and was not forwarded to the Custodian until a later date.

Similarly in this complaint before the Council, the Custodian has chosen to use her own discretion in developing processes so that she can best meet her obligations under OPRA: the Custodian has reasonably chosen not to accept requests submitted via facsimile. Within the Custodian's Statement of Information, the Custodian quotes the Handbook for Records Custodians, previously published by the GRC, as stating that some public agencies may not have a dedicated fax line for their records custodian and cannot accept fax requests. Furthermore, "Item 1" on page 2 of the City of East Orange's OPRA request form, which the Complainant signed at the bottom, specifically states that the East Orange City Clerk's Office will not accept submission of a request form by fax. Therefore, the Complainant was aware of the Custodian's procedure for accepting OPRA requests prior to the Complainant submitting his OPRA request form via facsimile.

In summary, in the complaint at hand, pursuant to the disjunctive use of the word "or" set forth in N.J.S.A. 47:1A-5.g., not every one of the prescribed methods for submitting an OPRA request is required under the law. Additionally, pursuant to the previously published Handbook for Records Custodians, and the GRC's decisions in Hascup supra, and Momo supra, a Custodian can decline to accept OPRA requests via facsimile consistent with N.J.S.A. 47:1A-5.g. Therefore, the Custodian did not unlawfully deny the Complainant access to the requested records.

**Whether the Complainant is a "prevailing party" entitled to attorney's fees pursuant to N.J.S.A. 47:1A-6?**

OPRA provides that:

"... [i]f it is determined that access has been improperly denied, the court or agency [GRC] head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee."  
N.J.S.A. 47:1A-6.

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. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). A complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.*

In the matter before the Council, the Complainant failed to achieve the desired result of disclosure of the requested records since the Custodian did not unlawfully deny the Complainant access to the requested records pursuant N.J.S.A. 47:1A-5.g., Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007), and Momo

v. NJ Department of Community Affairs, Division of Community Resources, GRC Complaint No. 2007-17 (September 2007). Therefore, the Complainant is not entitled to prevailing party attorney's fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Pursuant to the disjunctive use of the word "or" set forth in N.J.S.A. 47:1A-5.g., not every one of the prescribed methods for submitting an OPRA request is required under the law. Additionally, pursuant to the previously published Handbook for Records Custodians, and the GRC's decisions set forth in Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007), and Momo v. NJ Department of Community Affairs, Division of Community Resources, GRC Complaint No. 2007-17 (September 2007), a Custodian may decline to accept OPRA requests via facsimile consistent with N.J.S.A. 47:1A-5.g. Therefore, the Custodian did not unlawfully deny the Complainant access to the requested records.
2. The Complainant failed to achieve the desired result of disclosure of the requested records since the Custodian did not unlawfully deny the Complainant access to the requested records pursuant N.J.S.A. 47:1A-5.g., Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007), and Momo v. NJ Department of Community Affairs, Division of Community Resources, GRC Complaint No. 2007-17 (September 2007). Therefore, the Complainant is not entitled to prevailing party attorney's fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).

Prepared By:

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Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

March 19, 2008