



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

January 31, 2012 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2009-233

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 Supplemental 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 this complaint be dismissed because the Complainant withdrew his complaint via e-mail to the GRC dated December 27, 2011 (via legal counsel) because the parties have reached an agreement in this matter. Therefore, no further adjudication is required.

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 31st Day of January, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: February 3, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 31, 2012 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2009-233

v.

**Borough of South Bound Brook
(Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies of all executive session meeting minutes for the following dates:

- April 11, 2006
- June 13, 2006
- April 10, 2007
- June 5, 2007
- July 10, 2007
- March 4, 2008
- March 11, 2008

Request Made: July 17, 2009

Response Made: None

Custodian: Donald E. Kazar

GRC Complaint Filed: August 3, 2009³

Background

December 21, 2010

Government Records Council's ("Council") Interim Order. At its December 21, 2010 public meeting, the Council considered the December 14, 2010 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, found that:

1. The Custodian timely complied with the Council's October 26, 2010 Interim Order by providing access to the requested records to the Complainant and providing certified confirmation to the GRC within the five (5) business day time frame to comply.

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Francesco Taddeo, Esq., of Francesco Taddeo, LLC (Somerville, NJ).

³ The GRC received the Denial of Access Complaint on said date.

2. Although the Custodian's failure to respond in writing within the statutorily mandated time frame resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the Custodian unlawfully denied access to the requested executive session meeting minutes, because the interaction of the request relevant to this complaint and the complaint in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009) caused some confusion and the Custodian timely complied with the Council's October 26, 2010 Interim Order, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access to the requested records under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's October 26, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

December 21, 2010

Council's Interim Order distributed to the parties.

May 2, 2011

Complaint transmitted to the Office of Administrative Law.

December 27, 2011

E-mail from the Complainant's Counsel to the GRC attaching a letter from Counsel to the Honorable Susan M. Scarola, Administrative Law Judge ("ALJ"), dated December 27, 2011. Counsel states that pursuant to the terms of an agreement reached between the parties, the Complainant withdraws this complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew his complaint via e-mail to the GRC dated December 27, 2011 (via legal counsel) because the parties have reached an agreement in this matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 24, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

December 21, 2010 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2009-233

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the December 21, 2010 public meeting, the Government Records Council (“Council”) considered the December 14, 2010 Supplemental 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 timely complied with the Council’s October 26, 2010 Interim Order by providing access to the requested records to the Complainant and providing certified confirmation to the GRC within the five (5) business day time frame to comply.
2. Although the Custodian’s failure to respond in writing within the statutorily mandated time frame resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the Custodian unlawfully denied access to the requested executive session meeting minutes, because the interaction of the request relevant to this complaint and the complaint in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009) caused some confusion and the Custodian timely complied with the Council’s October 26, 2010 Interim Order, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access to the requested records under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council’s October 26, 2010 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law.



Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 21st Day of December, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

James W. Requa, Secretary
Government Records Council

Decision Distribution Date: December 21, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 21, 2010 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2009-233

v.

**Borough of South Bound Brook
(Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies of all executive session meeting minutes for the following dates:

- April 11, 2006
- June 13, 2006
- April 10, 2007
- June 5, 2007
- July 10, 2007
- March 4, 2008
- March 11, 2008

Request Made: July 17, 2009

Response Made: None

Custodian: Donald E. Kazar

GRC Complaint Filed: August 3, 2009³

Background

October 26, 2010

Government Records Council's ("Council") Interim Order. At its October 26, 2010 public meeting, the Council considered the October 19, 2010 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, found that:

1. The Custodian's failure to specifically respond in writing to the Complainant's July 17, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by William T. Cooper, III, Esq., of Cooper & Cooper (Somerville, NJ).

³ The GRC received the Denial of Access Complaint on said date.

the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). *See* O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005).

2. The Custodian has unlawfully denied access to the requested executive session meeting minutes sought in the Complainant's July 17, 2009 OPRA request. Contrary to the Custodian Counsel's assertions, the evidence of record indicates that the Complainant was never provided with the requested records. **Thus, the Custodian shall disclose the requested executive session meeting minutes for the dates identified to the Complainant.**
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁴, to the Executive Director.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

October 27, 2010

Council's Interim Order distributed to the parties.

October 29, 2010

Custodian's response to the Council's Interim Order. The Custodian certifies that he received the Council's Interim Order on October 27, 2010. The Custodian certifies that the following minutes are being forwarded to the Complainant pursuant to the Council's Interim Order:

- Executive session meeting minutes dated April 11, 2006.
- Executive session meeting minutes dated June 13, 2006.
- Executive session meeting minutes dated April 10, 2007.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

- Executive session meeting minutes dated June 5, 2007 (with redactions).⁶
- Executive session meeting minutes dated July 10, 2007.
- Executive session meeting minutes dated March 4, 2008.
- Executive session meeting minutes dated March 11, 2008.

The Custodian certifies that the single redaction contained in the June 5, 2007 minutes was made because the information contained therein constitutes attorney-client privileged material.

Analysis

Whether the Custodian complied with the Council's October 26, 2010 Interim Order?

At its October 26, 2010 public meeting, the Council ordered that "[t]he Custodian has unlawfully denied access to the requested executive session meeting minutes sought in the Complainant's July 17, 2009 OPRA request. Contrary to the Custodian Counsel's assertions, the evidence of record indicates that the Complainant was never provided with the requested records. **Thus, the Custodian shall disclose the requested executive session meeting minutes for the dates identified to the Complainant.**"

Compliance with the Council's October 26, 2010 Interim Order was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4⁷, to the Executive Director.⁸ The Custodian provided the Complainant and the GRC with a legal certification and copies of the records requested on October 29, 2010.

Therefore, the Custodian timely complied with the Council's October 26, 2010 Interim Order by providing access to the requested records to the Complainant and providing certified confirmation to the GRC within the five (5) business day time frame to comply.

⁶ In an e-mail to the GRC on November 10, 2010, the Complainant's Counsel confirmed that the Complainant did not object to the redaction made by the Custodian.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Whether the Custodian’s unlawful denial of access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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 (Felder 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 (Berg); 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 this complaint, the Complainant argued in the Denial of Access Complaint that the Custodian knowingly and willfully violated OPRA by denying access to the requested records after receiving the Complainant’s July 17, 2009 OPRA request and after admitting that the requested records were available. In the Statement of Information (“SOF”), the Custodian’s Counsel argued that although it appears that the Complainant’s OPRA request arose from an apparent miscommunication between the parties, the Complainant was previously provided with the minutes responsive for a review in connection with a prior Denial of Access Complaint adjudicated by the Council at Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).⁹

⁹ In Verry, the Complainant argued that the Custodian had shown a pattern of violating OPRA based on several previous complaints. In its Findings and Recommendations, the GRC noted in a footnote that: “[t]he Complainant cites two (2) past complaints against the Custodian that were adjudicated by the GRC; however, the actions of a custodian are not precedential in subsequent complaints. Each complaint is adjudicated individually based on the evidence of the instant record. See Hardwick v. NJ Dept. of Robert A. Verry v. Borough of South Bound Brook (Somerset), 2009-233 – Supplemental Findings and Recommendations of the Executive Director 4

The GRC's main task in this complaint was to examine how the facts of this complaint interacted with the facts in Verry, supra and evaluate whether the Custodian unlawfully denied access to the requested records. The evidence of record indicates that the timing of the Complainant's OPRA request relevant to this complaint caused some confusion because these records were still at issue in Verry, supra. Ultimately, the Council finds that the confusion caused by the interaction of these two complaints does not rise to a level sufficient to establish that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances in the matter herein.

Therefore, although the Custodian's failure to respond in writing within the statutorily mandated time frame resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the Custodian unlawfully denied access to the requested executive session meeting minutes, because the interaction of the request relevant to this complaint and the complaint in Verry, supra caused some confusion and the Custodian timely complied with the Council's October 26, 2010 Interim Order, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access to the requested records under the totality of the circumstances.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable 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 court held that 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.* 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

Transportation, GRC Complaint No. 2007-164 (February 2008)." This practice is still valid because OPRA does not allow the GRC to consider the cumulative effect of several different complaints filed against a single custodian. However, the GRC must discuss the facts of Verry herein because such facts are intertwined with the facts of the instant complaint.

determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services ("DYFS"). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

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 (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." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th 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, but also over 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.

As the New Jersey Supreme Court noted in Mason, Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing Teeters*, *supra*, 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 then examined the catalyst theory within the context of New Jersey law, stating that:

“New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); *see also* Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon" *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

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.¹⁰ Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

The court in Mason, *supra*, at 76, held that "requestors 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 (1984)."

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight business days later, or one day beyond the statutory

¹⁰ The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

limit. *Id.* at 79. As a result, the Court shifted the burden to Hoboken to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind the City's voluntary disclosure. *Id.* Because Hoboken's February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

In the matter currently before the Council, the Complainant argued in the Denial of Access Complaint that not only had he not received a response to his OPRA request from the Custodian, the requested executive session meeting minutes were not provided. The Complainant requested that the GRC determine that the Custodian knowingly and willfully violated OPRA and also determine that the Complainant is a prevailing party entitled to reasonable attorney's fees.

The GRC, tasked with parsing out the facts of this complaint as they related to the facts in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009), determined that the Custodian's failure to respond to the Complainant's OPRA request in the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial and that the Custodian had unlawfully denied access to the requested minutes. In its October 26, 2010 Interim Order, the Council ordered the Custodian to provide access to the executive session meeting minutes requested by the Complainant. The Custodian provided certified confirmation of compliance with the Interim Order on October 29, 2010. Based on the foregoing facts, the Complainant achieved his goal of gaining access to the requested records: such action represents a change in the Custodian's conduct.

Therefore, pursuant to Teeters, *supra*, and the Council's October 26, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian timely complied with the Council's October 26, 2010 Interim Order by providing access to the requested records to the Complainant and providing certified confirmation to the GRC within the five (5) business day time frame to comply.

2. Although the Custodian's failure to respond in writing within the statutorily mandated time frame resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the Custodian unlawfully denied access to the requested executive session meeting minutes, because the interaction of the request relevant to this complaint and the complaint in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009) caused some confusion and the Custodian timely complied with the Council's October 26, 2010 Interim Order, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access to the requested records under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's October 26, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 14, 2010



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

October 26, 2010 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2009-233

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council ("Council") considered the October 19, 2010 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's failure to specifically respond in writing to the Complainant's July 17, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). *See* O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005).
2. The Custodian has unlawfully denied access to the requested executive session meeting minutes sought in the Complainant's July 17, 2009 OPRA request. Contrary to the Custodian Counsel's assertions, the evidence of record indicates that the Complainant was never provided with the requested records. **Thus, the Custodian shall disclose the requested executive session meeting minutes for the dates identified to the Complainant.**
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²**

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th Day of October, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: October 27, 2010

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2009-233

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies of all executive session meeting minutes for the following dates:

- April 11, 2006
- June 13, 2006
- April 10, 2007
- June 5, 2007
- July 10, 2007
- March 4, 2008
- March 11, 2008

Request Made: July 17, 2009

Response Made: None.

Custodian: Donald E. Kazar

GRC Complaint Filed: August 3, 2009³

Background

July 17, 2009

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form and advises that the preferred method of delivery is via e-mail.

August 3, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated July 17, 2009.
- Custodian's legal certification dated July 8, 2009.
- E-mail from the Custodian to the GRC and Complainant dated July 29, 2009⁴

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by William T. Cooper, III, Esq., of Cooper & Cooper (Somerville, NJ).

³ The GRC received the Denial of Access Complaint on said date.

Robert A. Verry v. Borough of South Bound Brook (Somerset), 2009-233 – Findings and Recommendations of the Executive Director

The Complainant states that he submitted an OPRA request to the Custodian on July 17, 2009. The Complainant states that he received no response from the Custodian as of the date of this complaint.

The Complainant states that this request was borne out of a previous complaint before the GRC. The Complainant states that in October 2008, the Complainant submitted a request for executive session meeting minutes between September 2005 and September 2008. The Complainant states that the minutes now at issue fall within those dates, but were never provided to the Complainant. *See Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009). The Complainant states that in that complaint and nine (9) days prior to the submission of this OPRA request, the Custodian provided a legal certification to the GRC stating that the records now at issue in this complaint were available to the Complainant.⁵ The Complainant states that the Custodian e-mailed the GRC on July 29, 2009 stating that the records were lost in the Clerk's Office, but that said records were located and are available to the Complainant as long as the Complainant advises how he would like to receive them.

The Complainant argues that the Custodian has knowingly and willfully violated OPRA by not providing access to the requested records even after receiving the Complainant's July 17, 2009 OPRA request and admitting that the requested records were available. The Complainant asserts that this denial of access is the second such denial to the same records that the Custodian admits are available. The Complainant asserts that even if the Custodian's previous assertion that the records were lost in the Clerk's Office were true, the records now at issue were clearly available nine (9) days prior to the submission of said request. The Complainant requests that the GRC find that the Custodian knowingly and willfully violated OPRA. Moreover, the Complainant requests that the GRC determine that he is a prevailing party entitled to reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

September 9, 2009

Request for the Statement of Information ("SOI") sent to the Custodian.

September 14, 2009

E-mail from the Custodian to the GRC. The Custodian requests an extension until September 23, 2009 to submit the requested SOI.

September 15, 2009

E-mail from the GRC to the Custodian. The GRC grants an extension until September 23, 2009 to submit the requested SOI.

⁴ This legal certification was submitted in response to the GRC's request for additional information in GRC Complaint No. 2008-253. The attached e-mail was also submitted as part of GRC Complaint No. 2008-253.

⁵ The Custodian's legal certification appears to have pertained to those records provided absent the meeting minutes later identified by the Complainant as missing in an e-mail to the GRC dated July 17, 2009.

September 23, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 17, 2009.
- Custodian's legal certification dated July 8, 2009.
- E-mail from the Custodian to the Complainant dated July 29, 2009.⁶

The Custodian certifies that he received the Complainant's OPRA request on July 20, 2009. The Custodian certifies that he responded on July 29, 2009 stating that the records at issue were previously lost in the Clerk's Office, but were located and are being made available to the Complainant.⁷

On behalf of the Custodian, Counsel states that the records requested have been the subject of a previous OPRA request. Counsel asserts that the GRC is aware that not only did the Custodian make the requested records available to the Complainant, but that the Complainant inspected said records on April 23, 2009, well before the filing of this Denial of Access Complaint. *See* Custodian's legal certification dated July 8, 2009. Counsel argues that based on the foregoing, there could have been no denial of access to the requested records.⁸

Counsel further argues that the Complainant's OPRA request is duplicative of the OPRA request at issue in GRC Complaint No. 2008-253. Counsel asserts that the records previously reviewed by the Complainant were simply misplaced in the Clerk's Office but were later located. Counsel asserts that it appears that the Complainant's OPRA requests are bordering on harassment.

Counsel contends that the Custodian has not knowingly and willfully violated OPRA because the requested records were previously provided to the Complainant for inspection. Moreover, Counsel contends that the Custodian is requesting that the Complainant advise as to the desired method of delivery because the Complainant's request for records to be provided via e-mail is not the Complainant's typical practice throughout his multitude of OPRA requests.⁹ Counsel contends that the Complainant's OPRA request apparently arose from an apparent miscommunication between the parties; however, it is important to recognize that the records were previously provided for the Complainant's inspection and review; thus, the Complainant's OPRA request is duplicative.

⁶ See Footnote No. 4.

⁷ The Custodian provided as part of the Statement of Information an e-mail that was part of the record in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).

⁸ The Custodian does not certify to the search undertaken. Additionally, the Custodian does not certify to whether any records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM")

⁹ Counsel notes that the Complainant often requests to inspect records; however, the Complainant will sometimes wait for long periods of time after requesting records to actually conduct an inspection.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

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 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 also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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. 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.

Prior to analyzing this complaint and making a determination regarding whether access to the requested records was denied, the GRC notes that, although it is not the GRC's practice to include facts from prior complaints in the adjudication of matters currently before the GRC, a discussion is necessary regarding certain facts in the matter of Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009), because said facts are integral to and interwoven with the adjudication of the instant complaint.¹⁰

In that complaint, the Custodian certified on July 8, 2009 that the Complainant inspected the requested records on April 23, 2009; however, in an e-mail to the GRC on July 17, 2009, the Complainant contended that he was not given access to all records responsive and provided a list of specific dates that the Complainant believed executive session meetings occurred.¹¹

The GRC subsequently requested a secondary certification regarding whether the Custodian had a legal authority for denying access to the missing executive session meeting minutes indicated in the Complainant's July 17, 2009 e-mail to the GRC. The Custodian certified on July 28, 2009 that the additional executive session meeting minutes were never input into the computer or filed appropriately, but that the minutes were subsequently properly entered in the computer, filed and were available for disclosure. Over the next few days, the Complainant and Custodian engaged in a series of communications that the GRC deemed to be additional information that was either not relevant to the complaint or restated the facts/assertions already presented to the GRC.

In its decision, the GRC distinguishing the facts of Verry, supra, from May v. Township of Edison (Middlesex), GRC Complaint No. 2007-165 (October 2007)(holding that the custodian violated OPRA by initially denying access to the requested record mistakenly thinking that the request should be made to the Board of Education) and Schneble v. NJ Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008)(holding that the custodian violated OPRA by performing an inadequate search prior to denying access to the complainant's OPRA request), held that:

“... because the Custodian conducted a reasonable search for the requested executive session meeting minutes, and because the Custodian certified that he was not aware of the existence of the additional executive session

¹⁰ In Verry, the Complainant argued that the Custodian had shown a pattern of violating OPRA based on several complaints previously filed. The GRC noted in a footnote that: “[t]he Complainant cites two (2) past complaints against the Custodian that were adjudicated by the GRC; however, the actions of a custodian are not precedential in subsequent complaints. Each complaint is adjudicated individually based on the evidence of the instant record. *See Hardwick v. NJ Dept. of Transportation*, GRC Complaint No. 2007-164 (February 2008).” This practice is still valid because OPRA does not allow the GRC to consider the cumulative effect of several complaints filed against a single custodian. However, the GRC must discuss the facts of Verry because such are integral to the facts underlying the instant complaint.

¹¹ The GRC had no prior notice that the Complainant filed an OPRA request for the apparently missing meeting minutes until the filing of the instant Denial of Access Complaint.

meeting minutes which were misfiled within the Custodian's Office, the Custodian did not unlawfully deny access to said minutes and has borne his burden of proving his due diligence in searching for said records pursuant to N.J.S.A. 47:1A-6."

The GRC notes that disclosure of the recently found executive session meeting minutes was not ordered.

In the matter at hand, the GRC first turns to the issue of whether the Custodian properly responded to the Complainant's July 17, 2009 OPRA request.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹² Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The Complainant argued in the Denial of Access Complaint that the Custodian failed to respond to the OPRA request at issue in this complaint. The Complainant acknowledged that the Custodian stated in an e-mail dated July 29, 2009 that the records currently at issue were located and are available to the Complainant, but the Complainant averred that said e-mail pertained to Verry, supra, and was not an official response to the Complainant's OPRA request. Further, the Complainant contended that he never received the requested executive session meeting minutes.

The Custodian subsequently certified in the SOI that the July 29, 2009 e-mail was in fact his response to the Complainant's OPRA request.

However, the evidence of record indicates that the Custodian's e-mail was actually part of a series of submissions in response to Verry, supra. OPRA specifically states that a custodian "shall promptly comply with *a request...* [for] *a government record.*" (Emphasis added.) N.J.S.A. 47:1A-5.g. Additionally, in O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005), the GRC held that the Custodian's initial response that the complainant's request was a duplicate of a previous request to the complainant's June 22, 2007 request was legally insufficient because the custodian has a duty to answer each request individually. Based on OPRA and the

¹² It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

GRC's holding in O'Shea, a custodian is vested with the responsibility to respond to each individual request within seven (7) business days after receipt of such request.

In this complaint, it is apparent based on the evidence of record in Verry, supra, that the Custodian failed to respond to the Complainant's July 17, 2009 OPRA request herein for the requested executive session meeting minutes. The evidence of record shows that, rather than a response to the Complainant's OPRA request herein, the Custodian's July 29, 2009 e-mail was, in fact, a response to an e-mail from the Complainant to the GRC also dated July 29, 2009 that related directly to Verry, supra.

The GRC's holding in O'Shea, supra, speaks to a custodian's obligation under OPRA to respond to each request individually. The GRC previously expanded its holding in O'Shea, supra, to apply to individual request items contained within a single OPRA request. See Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

The basic tenet of O'Shea, supra, can also be applied to the current matter. Although the records at issue in this complaint were also at issue in Verry, supra, the Custodian was still obligated to respond to the Complainant's OPRA request for such records and failed to do so. Rather, the evidence of record suggests that the Custodian certified that his July 29, 2009 e-mail served as his response to the Complainant's OPRA request herein merely because the records at issue were the same. This action is not supported by the Council's holding in O'Shea, supra, or the Custodian's obligation to provide a written response set forth in N.J.S.A. 47:1A-5.g.

Therefore, the Custodian's failure to specifically respond in writing to the Complainant's July 17, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra. See O'Shea, supra.

The GRC next turns to the issue of whether the Custodian unlawfully denied access to the requested executive session meeting minutes.

The Complainant argued in the Denial of Access Complaint that not only had he not received a response to his OPRA request, the requested executive session meeting minutes were not provided. The Complainant asserted that the Custodian's failure to provide access to the records even after stating that same were available amounts to a knowing and willful violation.

The Custodian argued in the SOI that the records at issue in this complaint were also at issue in Verry, supra. The Custodian's Counsel asserted that the GRC is aware that not only did the Custodian make the requested records available to the Complainant, but that the Complainant inspected said records on April 23, 2009, well prior to this complaint.

The evidence of record herein does not reflect that the Complainant was provided access to the records requested. Specifically, the records at issue herein were covered within the time frame of the OPRA request relevant to Verry, supra; however, the records sought by the Complainant in connection with the OPRA request at issue in the current matter were not part of those records which the Custodian provided for inspection on April 23, 2009. Notably, on July 17, 2009, (the same day the Complainant submitted the OPRA request which is relevant to this complaint) the Complainant brought to the attention of the GRC and Custodian that the minutes at issue herein were not provided. Only after the Complainant's e-mail and at the request of the GRC did the Custodian legally certify on July 28, 2009 that the minutes at issue herein were essentially missing and had been located.

Therefore, the Custodian has unlawfully denied access to the requested executive session meeting minutes sought in the Complainant's July 17, 2009 OPRA request. Contrary to the Custodian Counsel's assertions, the evidence of record indicates that the Complainant was never provided with the requested records. Thus, the Custodian shall disclose to the Complainant the requested executive session meeting minutes for the dates identified.

Whether the Custodian's unlawful denial of access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to specifically respond in writing to the Complainant's July 17, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). *See O'Shea v. Township of West Milford*, GRC Complaint No. 2004-17 (April 2005).
2. The Custodian has unlawfully denied access to the requested executive session meeting minutes sought in the Complainant's July 17, 2009 OPRA

request. Contrary to the Custodian Counsel's assertions, the evidence of record indicates that the Complainant was never provided with the requested records. **Thus, the Custodian shall disclose the requested executive session meeting minutes for the dates identified to the Complainant.**

3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹³, to the Executive Director.¹⁴**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 19, 2010

¹³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.