



**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**  
*Acting Commissioner*

**FINAL DECISION**

**February 23, 2010 Government Records Council Meeting**

John Paff  
Complainant

Complaint No. 2009-53

v.

Township of Blairstown (Warren)  
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 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. For the purposes of OPRA, a settlement agreement constitutes a contract, access to which shall ordinarily be granted immediately pursuant to N.J.S.A. 47:1A-5.e.
2. The Custodian’s search for the requested settlement agreement which included her own files, the Police Department, the Township Attorney and the Risk Management Consultant, was reasonable. Without any knowledge that any settlement agreement existed, and a specific request in place for the Township Attorney to be notified of any settlement discussions, it would be unreasonable for the Custodian to conduct an open-ended search for the requested settlement agreement. As such, the Custodian has not unlawfully denied access to the requested settlement agreement because she certified that said record did not exist within the Borough’s files at the time of the Complainant’s OPRA request. Additionally, because the Custodian provided the Complainant with a written response to his request on the first (1<sup>st</sup>) business day following receipt of said request, the Custodian has not violated N.J.S.A. 47:1A-5.e.
3. Because the Custodian’s search for the requested settlement agreement which included her own files, the Police Department, the Township Attorney and the Risk Management Consultant, was reasonable, as well as because the Custodian has not unlawfully denied access to the requested settlement agreement because she certified that said record did not exist within the



Borough's files at the time of the Complainant's OPRA request, 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 under the totality of the circumstances.

4. The Complainant is not 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) because the complaint has not brought about a change in the Custodian's conduct, which had a basis in law.

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 23<sup>rd</sup> Day of February, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: March 2, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 23, 2010 Council Meeting**

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

**GRC Complaint No. 2009-53**

v.

**Township of Blirstown (Warren)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Settlement agreement in John Nodzak v. Blirstown, Federal Court Docket Civil No. 07-1067.<sup>3</sup>

**Request Made:** February 5, 2009

**Response Made:** February 6, 2009 and February 10, 2009

**Custodian:** Phyllis E. Pizzaia

**GRC Complaint Filed:** February 24, 2009<sup>4</sup>

**Background**

**February 5, 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.

**February 6, 2009**

Custodian's response to the OPRA request. The Custodian responds via e-mail to the Complainant's OPRA request on the first (1<sup>st</sup>) business day following receipt of such request. The Custodian states that there are no records responsive to the Complainant's OPRA request on file in the Custodian's office. The Custodian states that the Officer in Charge of the Blirstown Police Department also indicated that there are no records responsive to the Complainant's OPRA request on file in his office.

**February 10, 2009**

Custodian's subsequent response to the OPRA request. The Custodian states that in confirmation of her e-mail to the Complainant dated February 6, 2009, neither her

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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 Robert J. Benbrook, Esq., of Benbrook & Benbrook, LLC (Clinton, NJ).

<sup>3</sup> The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

office, nor the Police Department, maintain any records responsive to the Complainant's OPRA request.

**February 24, 2009**

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

- Complainant's OPRA request dated February 5, 2009
- Custodian's response to the Complainant's OPRA request dated February 6, 2009
- Custodian's subsequent response to the Complainant's OPRA request dated February 10, 2009

The Complainant states that he submitted his OPRA request on February 5, 2009 seeking access to a copy of a settlement agreement. The Complainant states that the Custodian provided a written response to his OPRA request on February 10, 2009 in which the Custodian indicated that neither the Clerk's Office, nor the Police Department maintain the requested settlement agreement. The Complainant states that he subsequently received said settlement agreement from the Blairstown Joint Insurance Fund pursuant to a separate OPRA request.<sup>5</sup>

The Complainant asserts that the Custodian utilized a carefully worded response to avoid providing the Complainant with the requested settlement agreement. The Complainant states that the Council has previously held that a government record includes records that may be located in the possession, custody or control of the public agency's employees or contractors. *See Schuler v. Borough of Bloomsbury (Hunterdon)*, GRC Complaint No. 2007-151 (February 2009); *Meyers v. Borough of Fair Lawn*, GRC Complaint No. 2005-127 (May 2006); *Baldwin v. Township of Readington*, GRC Complaint No. 2006-165 (September 2009).

Additionally, the Complainant states that the New Jersey Superior Court has considered a similar issue. Specifically, the Complainant states that in *South Plainfield Republican Organization v. Buttligieri*, MID-L-6593-05 (Sup. Ct. Nov. 10, 2005) (letter decision) (Ciccone, P.J.S.C.), *rev'd in part*, MID-L-6593-05, 2007 WL 1891301 (App. Div. July 3, 2007),<sup>6</sup> the Plaintiff sought a settlement agreement which was in the possession of the Defendant Borough's joint insurance fund. The Complainant states that the court ordered the Borough to produce a copy of the settlement agreement from the files of the Borough's joint insurance fund.

The Complainant contends that based on the cases cited above, the Custodian should have sought access to the requested settlement agreement from the Borough's joint insurance fund. The Complainant requests that the Council find the Custodian to be in violation of OPRA for denying access to the requested settlement agreement, order the Custodian to provide a copy of the requested settlement agreement to the Complainant, and find that the Complainant is entitled to an award of reasonable prevailing party attorney's fees. Further, the Complainant does not agree to mediate this complaint.

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<sup>5</sup> The Complainant attached a copy of said OPRA request and settlement agreement to his Denial of Access Complaint.

<sup>6</sup> The Complainant attached a copy of said decision to his Denial of Access Complaint.  
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**March 2, 2009**

Custodian Counsel's Certification. The Custodian's Counsel certifies that he received a telephone call from the Custodian on February 5, 2009 regarding the OPRA request which is the subject of this Denial of Access Complaint. Counsel states that the Custodian informed him that the Township did not maintain a copy of the requested settlement agreement. Counsel states that the Custodian also advised that the Police Department was not in possession of the agreement or aware that a settlement had been reached.

Counsel certifies that he informed the Custodian that he was not in possession of the requested settlement agreement, nor did he have any knowledge that any settlement had been reached. Counsel certifies that he advised the Custodian that no such settlement could have taken place absent the Township's consent which historically is sought by him in his official capacity as Township Attorney at the request of the insurance company and/or its designated trial counsel. Additionally, Counsel certifies that he informed the Custodian that he specifically requested Thomas Keenan, Esq., the trial counsel retained by the insurance carrier to defend this matter, to inform the Township Attorney of any settlement discussions as they occurred. Counsel attaches a copy of his letter to Mr. Keenan dated May 23, 2007.

However, Counsel certifies that the information he provided the Custodian was incorrect since a settlement had been entered into on January 12, 2009. Counsel certifies that said settlement was completed under circumstances where neither the Township Police Department, Township Clerk, Township Attorney, or Township insurance agent were informed of, had any knowledge of, or had any reason to believe that said settlement had occurred. Thus, Counsel contends that the Custodian did not knowingly and willfully violate OPRA.

**March 2, 2009**

Risk Management Consultant's Certification. Sharon S. Cooper certifies that she is the Risk Management Consultant with Brown and Brown of New Jersey, Inc. ("Brown"). Ms. Cooper certifies that Brown is the insurance agent for Public Alliance Insurance Coverage Fund which provides various forms of insurance to municipalities including Blairstown Township. Ms. Cooper certifies that she is the consultant for Blairstown Township.

Ms. Cooper certifies that on or about February 5, 2009 she received a telephone call from the Blairstown Township Clerk in which the Clerk asked if Brown was in receipt of, or had any knowledge of, the existence of a written settlement agreement entered into between the Township of Blairstown and John Nodzak involving litigation in the U.S. District Court of New Jersey under Docket No. 07-1067. Ms. Cooper certifies that she informed the Custodian that to her knowledge the case had not been settled. Ms. Cooper certifies that she based her statement to the Custodian on the fact that neither Brown nor she had been informed of any settlement. Ms. Cooper certifies that the Custodian also informed her that she had posed the same question to the Township Attorney who was also not aware of the existence of any settlement agreement.

Ms. Cooper certifies that she subsequently learned that the insurance fund, through legal counsel retained by the fund, had entered into a written settlement. Ms. Cooper certifies that she did not acquire said information via communications from the insurance fund or counsel as she would have expected, but rather via an article in *The Express Times* newspaper.

Additionally, Ms. Cooper certifies that all prior litigation involving alleged police misconduct required Township consent before the insurance fund could effectuate a settlement. As such, Ms. Cooper contends that it is reasonable that the Township Attorney would have been so confident that no settlement had been entered into since he had not given any consent for such a settlement.

**March 18, 2009**

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

**March 23, 2009**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated February 5, 2009
- Custodian’s response to the Complainant’s OPRA request dated February 6, 2009
- Custodian’s subsequent response to the Complainant’s OPRA request dated February 10, 2009
- Custodian’s telephone statement dated February 20, 2009<sup>7</sup>
- Custodian Counsel’s Certification dated March 2, 2009
- Risk Management Consultant’s Certification dated March 2, 2009<sup>8</sup>

The Custodian certifies that she received the Complainant’s OPRA request on February 5, 2009. The Custodian certifies that she searched her records and did not locate the requested settlement agreement. The Custodian certifies that she then contacted Sgt. Stephen Losey, Officer in Charge of the Blairstown Police Department, who informed the Custodian that his office did not maintain the requested record. The Custodian certifies that she contacted the Township Attorney who also indicated that he did not maintain the requested record and that he was not aware of a settlement in the requested case. The Custodian certifies that she next contacted Sharon Cooper, Blairstown’s Risk Management Consultant to the Public Alliance Insurance Coverage Fund (“PAIC”), at the suggestion of the Township Attorney, and Ms. Cooper informed the Custodian that her office did not maintain the requested settlement agreement and that she was unaware if said agreement actually existed. The Custodian certifies that she e-mailed the Complainant on February 6, 2009 to inform him that no records responsive to his OPRA request existed. Additionally, the Custodian certifies that she sent the Custodian a follow-up letter indicating same on February 10, 2009.

The Custodian also certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of

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<sup>7</sup> The Custodian includes said billing record to document her telephone calls to the Township Attorney and the Risk Management Consultant.

<sup>8</sup> The Custodian attached additional records which are not relevant to the adjudication of this Denial of Access Complaint.

Archives and Records Management (“DARM”), the requested records must be maintained on file for twenty (20) years after the conclusion of the litigation.

### **March 25, 2009**

Complainant’s amended Denial of Access Complaint pursuant to *N.J.A.C. 5:105-2.3(h)(1)*.<sup>9</sup> The Complainant adds the following arguments to his Denial of Access Complaint:

The Complainant asserts that the Custodian’s search for the requested settlement agreement appears negligent and heedless since the evidence presented in her SOI indicates that she contacted various Township employees in search of said record, with the exception of the one person who would have maintained said record – the trial counsel handling the matter. The Complainant states that the Custodian’s Counsel does not explain why he did not contact the trial counsel in an attempt to locate the settlement agreement.

The Complainant asserts that the Township’s argument in this complaint is that no one was aware of any settlement. The Complainant contends that ignorance of the existence of a record is no defense. The Complainant states that in *Schneble v. New Jersey Department of Environmental Protection*, GRC Complaint No. 2007-220 (April 2008), the Council held that the Custodian violated OPRA by erroneously referring the requestor to another agency when NJDEP in fact maintained possession of the requested records.

Additionally, the Complainant claims that a settlement agreement is a contract and thus immediate access ordinarily shall be granted to said records pursuant to N.J.S.A. 47:1A-5.e.

### **April 1, 2009**

Letter from Custodian’s Counsel to GRC. The Custodian’s Counsel asserts that the Complainant’s allegation that the Custodian had a statutory obligation to go beyond a search of her own records, inquiry with the Police Department, liability insurance company agent and Township Attorney to locate requested records is baseless. Counsel contends that the Custodian conducted a diligent search for the requested record and should not be charged with having violated OPRA because she was incorrectly informed that the settlement agreement did not exist.

## **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.

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<sup>9</sup> Submitted by the Complainant’s Counsel.  
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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 ... A government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA]... information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA provides that:

“*[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.*”(Emphasis added). N.J.S.A. 47:1A-5.e.

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.

The Custodian certified that she received the Complainant’s OPRA request on February 5, 2009. The Custodian certified that her search for the requested settlement agreement consisted of searching her own records, contacting the Police Department, the Township Attorney and the Risk Management Consultant, all of whom indicated that they were not in possession of the requested settlement agreement nor did they have any knowledge that any such settlement agreement existed. Thus, the Custodian certified that she provided the Complainant with a written response via e-mail dated February 6, 2009, the first (1<sup>st</sup>) business day following receipt of the Complainant’s request, in which the Custodian indicated that no records responsive exist. The Custodian certified that she followed up her e-mail response with a letter to the Complainant dated February 10, 2009.

The Complainant claims that a settlement agreement is a contract and thus immediate access ordinarily shall be granted to said records pursuant to N.J.S.A. 47:1A-5.e. Said provision of OPRA specifically states that “[i]mmediate access ordinarily shall



be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” Said provision does not mention that settlement agreements are considered contracts and thus subject to the immediate access provision. As such, the Council looks to the courts for guidance on this issue.

In Brundage v. Estate of Carambio, 195 N.J. 575, 600-01, 951 A.2d 947 (2008), the court held that “a settlement is a contract governed by principles of contract law.” (Quoting Thompson v. City of Atlantic City, 190 N.J. 359, 379 (2007)).

Therefore, for the purposes of OPRA, a settlement agreement constitutes a contract, access to which shall ordinarily be granted immediately pursuant to N.J.S.A. 47:1A-5.e.

Additionally, in Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), the court held that settlement agreements related to sexual harassment complaints filed in Superior Court were subject to public access. Further, the court in Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008) held that the public has the right to access confidential settlement agreements which are entered into by private parties under seal in civil court.

In this instant complaint, the Custodian certified that she received the Complainant’s OPRA request on February 5, 2009 and provided a written response indicating that no records responsive exist on February 6, 2009, the first business day following receipt of the Complainant’s request. Within the one (1) business day turnaround, the Custodian certified that she searched her own records, contacted the Police Department, the Township Attorney and the Risk Management Consultant, all of whom indicated that they were not in possession of the requested settlement agreement. Thus, the Custodian did provide the Complainant with an immediate response to his request for the settlement agreement given her search for said record. However, before the Council can conclude whether the Custodian violated the immediate access provision of OPRA, the Council must address whether the Custodian was obligated to contact the Township’s insurance fund to locate the requested settlement agreement.

The Custodian’s Counsel certified that he advised the Custodian that no such settlement could have taken place absent the Township’s consent which historically is sought by him in his official capacity as Township Attorney at the request of the insurance company and/or its designated trial counsel. Additionally, Counsel certified that he informed the Custodian that he specifically requested Thomas Keenan, Esq., the trial counsel retained by the insurance carrier to defend this matter, to inform the Township Attorney of any settlement discussions as they occurred and provided the GRC with a copy of the letter by which he requested the trial counsel to do so.

However, the Complainant states that he received the requested settlement agreement from the Blairstown Joint Insurance Fund pursuant to a separate OPRA request. As such, the Complainant asserts that the Custodian conducted an insufficient search for the requested settlement agreement because the Custodian failed to contact the one person who would have maintained said record – the trial counsel handling the

matter. The Complainant states that the Custodian's Counsel does not explain why he did not contact the trial counsel in an attempt to locate the settlement agreement. In support of his argument, the Complainant states that the Council has previously held that a government records includes records that may be located in the possession, custody or control of the public agency's employees or contractors. See Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (February 2009); Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006); Baldwin v. Township of Readington, GRC Complaint No. 2006-165 (September 2009).

Under OPRA, the definition of a "government record" is any record:

"that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof." N.J.S.A. 47:1A-1.1.

The Complainant claims that the Custodian in this instant complaint was obligated to contact PAIC to locate the requested settlement agreement is based on the premise that PAIC classifies as "any officer, commission, agency or authority of the" municipality pursuant to N.J.S.A. 47:1A-1.1. The Complainant bases his complaint on Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (February 2009). In said complaint, the Council held that:

"[b]ecause the work done by the Borough Engineer, Robert Zederbaum, is directly related to and arises from business done by him on behalf of the Borough of Bloomsbury (even if the Borough Engineer is not an actual employee of the Borough, he maintains a contractual relationship with the Borough), the requested records maintained on file by the Borough Engineer are considered government records pursuant to N.J.S.A. 47:1A-1.1 and are subject to public access."

In said complaint, some of the requested records were maintained by the Borough Engineer. The individual identified as the Borough Engineer is employed by Heritage Consulting Engineers. However, according to the Borough of Bloomsbury's website at [http://www.bloomsburynewjersey.com/d\\_contact.htm](http://www.bloomsburynewjersey.com/d_contact.htm), Robert Zederbaum is listed as the Borough's Engineer. As such, the Counsel concluded that Mr. Zederbaum classified as an "officer, commission, agency or authority of the" municipality whose records were made, maintained, kept on file, or received in the course of the Borough's official business. N.J.S.A. 47:1A-1.1.

The Complainant also cites to Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006) in support of his argument. In said complaint, the Council held that e-mails contained on the Mayor's home computer relating to Borough business are considered government records. The Mayor in this complaint classifies as an "officer, commission, agency or authority of the" municipality whose records were made,

maintained, kept on file, or received in the course of the Borough's official business. N.J.S.A. 47:1A-1.1.

Regarding this instant complaint, the Blirstown Joint Insurance Fund that the Complainant refers to is actually the Public Alliance Insurance Coverage Fund ("PAIC"). According to PAIC's website at <http://www.paicfund.com/>: "PAIC operates as a state regulated joint insurance fund. Its member[s] elect a seven-member Executive Committee, which is responsible for the fund's operations." PAIC's website further states:

**"How Can a Municipality or Other Public Entity Join PAIC?"**

The entity's risk management consultant submits underwriting information to PAIC. PAIC will review the information to determine the entity's eligibility. If eligible, PAIC will issue a proposal. Upon acceptance of PAIC's proposal and completion of membership documents, the entity will become a member of PAIC."

Pursuant to *N.J.A.C. 1:1-15.2(a)* and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant's record of convictions, because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. See Sanders v. Division of Motor Vehicles, 131 N.J. Super. 95 (App.Div. 1974). As such, the Council takes judicial notice of the information contained on PAIC's website which describes the agency's function and structure.

Further, the Complainant states that he submitted a separate OPRA request directly to PAIC for the settlement agreement and received said agreement. Thus, PAIC responded to the Complainant's OPRA request as an independent agency. As a state regulated insurance fund to which municipalities apply to join, PAIC does not classify as an "officer, commission, agency or authority of the [municipality] or of any political subdivision thereof" pursuant to N.J.S.A. 47:1A-1.1.

The Complainant bases his complaint on South Plainfield Republican Organization v. Buttligieri, MID-L-6593-05 (Sup. Ct. Nov. 10, 2005) (letter decision) (Ciccone, P.J.S.C.), rev'd in part, MID-L-6593-05, 2007 WL 1891301 (App. Div. July 3, 2007), wherein the Plaintiff sought a settlement agreement was in the possession of the Defendant Borough's joint insurance fund. The Complainant states that the court ordered the Borough to produce a copy of the settlement agreement from the files of the Borough's joint insurance fund.

The crux of the trial court's decision hinged on whether the requested settlement was a "government record" for the purposes of OPRA or whether said record constituted attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The court concluded that the settlement agreement was a

government record subject to public access under OPRA and ordered it be disclosed to the Plaintiff. In the Appellate Division's recitation of the facts in Buttligieri, *supra*, the court stated that:

“[t]he Borough asserted that it was not in possession of the settlement agreement, deposition transcripts, nor any other portion of the litigation file. The Borough did not participate in, authorize, or approve the settlement. The funds for the settlement of the Pinto litigation were paid by the Middlesex County Joint Insurance Fund, an independent body, and not directly by the Borough. *The only document relating to the litigation, which was in the possession of the Borough, was the stipulation of dismissal with prejudice filed with the Clerk of the Superior Court.*” (Emphasis added).

Thus, in Buttligieri, *supra*, the defendant Borough, while not in possession of the requested settlement agreement, had knowledge that some settlement had been reached because the Borough maintained a copy of the stipulation of dismissal.

These facts are distinguishable from the facts presented in this instant matter. Specifically, the Custodian, Township Attorney and Risk Management Consultant all certified that they were not aware that any settlement had taken place at the time of the Complainant's OPRA request. The Custodian's Counsel certified and provided evidence that he had specifically requested the trial counsel handling the subject litigation to notify him of any settlement discussions and that he had not been so notified at the time of the Complainant's OPRA request. Further, the Custodian's Counsel certified that such settlement discussions were normally commenced after receiving approval from Counsel's office, which had not taken place at the time of the Complainant's OPRA request. As such, the Custodian, Police Department, Township Attorney and Risk Management Consultant had no knowledge that any settlement agreement existed at the time of the Complainant's OPRA request. Without any knowledge that any settlement agreement existed, and a specific request in place for the Township Attorney to be notified of any settlement discussions, it would be unreasonable for the Custodian to conduct an open-ended search for the requested settlement agreement. Moreover, Custodian Counsel's reliance on the May 23, 2007 letter to trial counsel in which he specifically requested to be notified of future settlement discussions is reasonable; because he had no reason to believe that any settlement discussions had taken place, Custodian's Counsel did not unreasonably fail to ask trial counsel for the requested settlement agreement at the time of the Complainant's OPRA request.

However, the Complainant contends that ignorance of the existence of a record is no defense. In support of this argument, the Complainant cites to Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), wherein the Council held that the Custodian violated OPRA by erroneously referring the requestor to another agency when the Department of Environmental Protection in fact maintained possession of the requested records.

The facts in Schneble, *supra*, are also distinguishable from the facts presented in this instant complaint. Specifically, in Schneble, *supra*, the agency itself maintained

possession of the requested record and the Custodian admitted to conducting an insufficient search. In this instant complaint, the requested settlement agreement was not maintained on file by the Township, Police Department, Township Attorney or the Risk Management Consultant. The record at issue was maintained by the joint insurance fund and thus was not in the immediate possession of the Township.

Additionally, in Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009), the Council held that:

“[b]ecause the Custodian conducted a reasonable search for the requested special meeting minutes in the Board of Education’s ledger minute book and six (6) archived boxes of records, and because the Custodian certified that he was not aware of the existence or the contents of the box labeled ‘Nancy’s Copies’ in which the Custodian’s assistant located portions of the requested minutes, 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.”

In this instant complaint, the Custodian searched her own records, contacted the Police Department, the Township Attorney and the Risk Management Consultant, all of whom indicated that they were not in possession of the requested settlement agreement, nor did they have any knowledge that any such settlement agreement existed at the time of the Complainant’s OPRA request. In fact, the Township Attorney had previously contacted the trial attorney handling the litigation which is the subject of this complaint and asked to be kept abreast of any settlement discussions. The Township Attorney certified that he had not received any information that would indicate that any settlement discussions or an actual settlement had taken place.

Therefore, the Custodian’s search for the requested settlement agreement which included her own files, the Police Department, the Township Attorney and the Risk Management Consultant was reasonable. Without any knowledge that any settlement agreement existed, and a specific request in place for the Township Attorney to be notified of any settlement discussions, it would be unreasonable for the Custodian to conduct an open-ended search for the requested settlement agreement. As such, the Custodian has not unlawfully denied access to the requested settlement agreement because she certified that said record did not exist within the Borough’s files at the time of the Complainant’s OPRA request. Additionally, because the Custodian provided the Complainant with a written response to his request on the first (1<sup>st</sup>) business day following receipt of said request, the Custodian has not violated N.J.S.A. 47:1A-5.e.

**Whether the Custodian’s actions rise 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.

The Complainant asserts that the Custodian’s search for the requested settlement agreement appears negligent and heedless since the evidence presented in her SOI indicates that she contacted various Township employees in search of said record, with the exception of the one person who would have maintained said record – the trial counsel handling the matter.

The Custodian’s Counsel certified that said settlement was completed under circumstances where neither the Township Police Department, Township Clerk, Township Attorney, or Township insurance agent were informed of, had any knowledge of, or any reason to believe that said settlement had occurred. Thus, Counsel contends that the Custodian did not knowingly and willfully violate OPRA.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (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).

Because the Custodian’s search for the requested settlement agreement which included her own files, the Police Department, the Township Attorney and the Risk Management Consultant was reasonable, as well as because the Custodian has not unlawfully denied access to the requested settlement agreement because she certified that said record did not exist within the Borough’s files at the time of the Complainant’s OPRA request, 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 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 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 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)). The court in Buckhannon 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 (7<sup>th</sup> ed. 1999). 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 this instant complaint, the Complainant sought a finding from the Council that the Custodian violated OPRA by failing to obtain a copy of the requested settlement agreement from PAIC and provide said record to the Complainant immediately. The Complainant also sought an order from the Council directing the Custodian to disclose the record to the Complainant.

However, as stated above, the Custodian’s search for the requested settlement agreement which included her own files, the Police Department, the Township Attorney and the Risk Management Consultant was reasonable. As such, the Custodian has not unlawfully denied access to the requested settlement agreement because she certified that said record did not exist within the Borough’s files at the time of the Complainant’s OPRA request.

Therefore, the Complainant is not 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, because the complaint has not brought about a change in the Custodian’s conduct, which had a basis in law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. For the purposes of OPRA, a settlement agreement constitutes a contract, access to which shall ordinarily be granted immediately pursuant to N.J.S.A. 47:1A-5.e.
2. The Custodian’s search for the requested settlement agreement which included her own files, the Police Department, the Township Attorney and the Risk Management Consultant, was reasonable. Without any knowledge that any settlement agreement existed, and a specific request in place for the Township Attorney to be notified of any settlement discussions, it would be unreasonable for the Custodian to conduct an open-ended search for the requested settlement agreement. As such, the Custodian has not unlawfully denied access to the requested settlement agreement because she certified that said record did not exist within the Borough’s files at the time of the Complainant’s OPRA request. Additionally, because the Custodian provided the Complainant with a written response to his request on the first (1<sup>st</sup>) business day following receipt of said request, the Custodian has not violated N.J.S.A. 47:1A-5.e.



3. Because the Custodian's search for the requested settlement agreement which included her own files, the Police Department, the Township Attorney and the Risk Management Consultant, was reasonable, as well as because the Custodian has not unlawfully denied access to the requested settlement agreement because she certified that said record did not exist within the Borough's files at the time of the Complainant's OPRA request, 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 under the totality of the circumstances.
4. The Complainant is not 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) because the complaint has not brought about a change in the Custodian's conduct, which had a basis in law.

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Executive Director

February 16, 2010