



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
Commissioner

FINAL DECISION

September 25, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-111

v.

City of Plainfield (Union)
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 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 this complaint from the Office of Administrative Law via letter from his legal counsel dated September 4, 2012. 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 25th Day of September, 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: September 27, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 25, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-111

v.

**City of Plainfield (Union)²
Custodian of Records**

Records Relevant to Complaint:

Any and all reports associated with Plainfield Police Division incident numbers 09-2405 and 09-2423 via e-mail.³

Request Made: March 31, 2010

Response Made: April 16, 2010

Custodian: Abubakar Jalloh, Deputy City Clerk

GRC Complaint Filed: May 25, 2010⁴

Background

April 25, 2012

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 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, found that:

1. Because the Custodian, within the time provided by the Council’s February 28, 2012 Interim Order, as extended, certified that the records that were disclosed to the Complainant on April 16, 2010 and August 12, 2010 constituted all of the records associated with Plainfield Police Division incident numbers 09-2405 and 09-2423, the Custodian has complied with the terms of said Order in a timely manner.

2. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, and although the Custodian

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

² Represented by David L. Minchello, Esq., Antonelli Minchello, P.C. (Union, NJ).

³ There were other records requested that are not relevant to this complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

unlawfully denied the Complainant access to all of the requested records in a timely manner, the Custodian did disclose the requested records to the Complainant. Furthermore, the evidence of record does not reveal that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, 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.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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, 73-76 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian failed to disclose any and all reports associated with CAD incident numbers 09-2405 and 09-2423. The Complainant subsequently filed a Denial of Access Complaint on May 25, 2010 and the Custodian then disclosed an incident report associated with CAD report number 09-2405 on August 12, 2010. 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. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

April 27, 2012

Council's Interim Order distributed to the parties.

April 27, 2012

Complaint transmitted to the Office of Administrative Law ("OAL").

September 4, 2012

Letter from Complainant's Counsel to the Administrative Law Judge and the GRC. Counsel states that this matter has been resolved and 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 this complaint from the Office of Administrative Law via letter from his legal counsel dated September 4, 2012. Therefore, no further adjudication is required.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

September 18, 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

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

April 25, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-111

v.

City of Plainfield (Union)
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 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:

1. Because the Custodian, within the time provided by the Council’s February 28, 2012 Interim Order, as extended, certified that the records that were disclosed to the Complainant on April 16, 2010 and August 12, 2010 constituted all of the records associated with Plainfield Police Division incident numbers 09-2405 and 09-2423, the Custodian has complied with the terms of said Order in a timely manner.
2. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, and although the Custodian unlawfully denied the Complainant access to all of the requested records in a timely manner, the Custodian did disclose the requested records to the Complainant. Furthermore, the evidence of record does not reveal that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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, 73-76 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian failed to disclose any and all reports associated with CAD incident numbers 09-2405 and 09-2423. The Complainant subsequently filed a Denial of Access Complaint on May 25, 2010 and the Custodian then disclosed an incident report associated with CAD report number 09-2405 on August 12, 2010. 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. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ..justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 25th Day of April, 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: April 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 25, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-111

v.

**City of Plainfield (Union)²
Custodian of Records**

Records Relevant to Complaint:

Any and all reports associated with Plainfield Police Division incident numbers 09-2405 and 09-2423 via e-mail.³

Request Made: March 31, 2010

Response Made: April 16, 2010

Custodian: Abubakar Jalloh, Deputy City Clerk

GRC Complaint Filed: May 25, 2010⁴

Background

February 28, 2012

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 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 respond in writing to the 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 (Interim Order dated October 31, 2007).

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

² Represented by David L. Minchello, Esq., Antonelli Minchello, P.C. (Union, NJ).

³ There were other records requested that are not relevant to this complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

2. The Custodian shall disclose to the Complainant all field reports, field supplementary reports, official reports and crash investigation reports associated with Plainfield Police Division incident numbers 09-2405 and 09-2423.
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order by either (a) disclosing said records to the Complainant and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director, or (b) providing a certification, in accordance with N.J. Court Rule 1:4-4, to the Executive Director averring that the records that were disclosed to the Complainant on April 16, 2010 and August 12, 2010 constitute all of the records associated with Plainfield Police Division incident numbers 09-2405 and 09-2423.**
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.

February 29, 2012

Council's Interim Order ("Order") distributed to the parties.

March 2, 2012

Letter from the Custodian's Counsel to the GRC. Custodian's Counsel requests an extension of time until March 12, 2012 to comply with the Council's Interim Order.

March 2, 2012

E-mail from the GRC to the Custodian's Counsel. The GRC grants the Custodian an extension of time until March 12, 2012 to comply with the Council's Order.

March 9, 2012

E-mail from the Custodian's Counsel with the following attachments:

- Plainfield Police Division Captain Steven Soltys' certification dated March 8, 2012
- Custodian's certification dated March 8, 2012

The Custodian's Counsel states that the certifications he attached from Captain Soltys and the Custodian establish that the records that were disclosed to the Complainant on April 16, 2010 and August 12, 2010 constitute all of the records associated with incident numbers 09-2405 and 09-2423.

Captain Soltys certifies that he reviewed the Complainant's OPRA request dated March 31, 2010, wherein the Complainant requested the records relevant to this complaint. Captain Soltys certifies that on April 16, 2010 he disclosed to the Complainant one (1) Computer Aided Dispatch ("CAD") report each for incident number 09-2405 and 09-2423. Captain Soltys further certifies that on August 12, 2010 he disclosed to the Complainant one (1) police report associated with incident number 09-2423. Captain Soltys certifies that he personally searched the internal records of the Plainfield Police Department (sic) for any reports associated with incident number 09-2405; however, Captain Soltys certifies that no report associated with said incident number exists and that the CAD report states that there is no report associated with incident number 09-2405. Captain Soltys further certifies that the records that were disclosed to the Complainant on April 16, 2010 and August 12, 2010 constitute all of the records associated with incident numbers 09-2405 and 09-2423.

The Custodian certifies that based on the representations made by Captain Soltys in his certification dated March 8, 2012, the records that Captain Soltys disclosed to the Complainant on April 16, 2010 and August 12, 2010 constitute all of the records associated with Plainfield Police Division incident numbers 09-2405 and 09-2423.

Analysis

Whether the Custodian complied with the Council's February 28, 2012 Interim Order?

At its February 28, 2012 public meeting, the Council determined that within five (5) business days from receipt of the Council's Order the Custodian must comply with the Council's Order by (a) disclosing to the Complainant all field reports, field supplementary reports, official reports and crash investigation reports associated with Plainfield Police Division incident numbers 09-2405 and 09-2423 and simultaneously providing certified confirmation of compliance to the Executive Director, or (b) providing a certification to the Executive Director averring that the records that were disclosed to the Complainant on April 16, 2010 and August 12, 2010 constitute all of the records associated with Plainfield Police Division incident numbers 09-2405 and 09-2423.

On March 2, 2012, the Custodian's Counsel requested and was granted by the GRC an extension of time until March 12, 2012 to comply with the Council's Order. The Custodian's Counsel sent an e-mail to the GRC dated March 9, 2012 forwarding certifications from Captain Soltys of the Plainfield Police Division and the Custodian. The certifications averred that the records that were disclosed to the Complainant on April 16, 2010 and August 12, 2010 constituted all of the records associated with Plainfield Police Division incident numbers 09-2405 and 09-2423; thereby satisfying alternative (b) of the Council's Order in a timely manner.

Accordingly, because the Custodian, within the time provided by the Council's February 28, 2012 Interim Order, as extended, certified that the records that were disclosed to the Complainant on April 16, 2010 and August 12, 2010 constituted all of

the records associated with Plainfield Police Division incident numbers 09-2405 and 09-2423, the Custodian has complied with the terms of said Order in a timely manner.

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.

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)).

Here, although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, and although the Custodian unlawfully denied the Complainant access to all of the requested records in a timely manner, the Custodian did disclose the requested records to the Complainant. Furthermore, the evidence of record does not reveal that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, 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 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. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) 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 the instant complaint, the Custodian disclosed to the Complainant CAD records that were responsive to the Complainant's request for incident numbers 09-2405 and 09-2423 on April 16, 2010, but did not disclose any other records that may have been responsive to the Complainant's request, such as police field reports associated with the CAD incident numbers. The Complainant filed a Denial of Access Complainant demanding any and all reports associated with said incident numbers on May 25, 2010. The Custodian subsequently disclosed an incident report associated with CAD report number 09-2405 on August 12, 2010.

Pursuant to Teeters, *supra*, 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. Specifically, the Custodian failed to disclose any and all reports associated with CAD incident numbers 09-2405 and 09-2423. The Complainant subsequently filed a Denial of Access Complaint on May 25, 2010 and the Custodian then disclosed an incident report associated with CAD report number 09-2405 on August 12, 2010. 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. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian, within the time provided by the Council's February 28, 2012 Interim Order, as extended, certified that the records that were disclosed to the Complainant on April 16, 2010 and August 12, 2010 constituted all of the records associated with Plainfield Police Division incident numbers 09-2405 and 09-2423, the Custodian has complied with the terms of said Order in a timely manner.
2. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days, and although the Custodian unlawfully denied the Complainant access to all of the requested records in a timely manner, the Custodian did disclose the requested records to the Complainant. Furthermore, the evidence of record does not reveal that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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, 73-76 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian failed to disclose any and all reports associated with CAD incident numbers 09-2405 and 09-2423. The Complainant subsequently filed a Denial of Access Complaint on May 25, 2010 and the Custodian then disclosed an incident report associated with CAD report number 09-2405 on August 12, 2010. 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. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant

public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

April 18, 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

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

February 28, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-111

v.

City of Plainfield (Union)
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council ("Council") considered the February 21, 2012 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 respond in writing to the 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, e.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).¹
2. The Custodian shall disclose to the Complainant all field reports, field supplementary reports, official reports and crash investigation reports associated with Plainfield Police Division incident numbers 09-2405 and 09-2423.
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order by either (a) disclosing said records to the Complainant and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4², to the Executive Director,³ or (b) providing a certification, in accordance with N.J. Court Rule 1:4-4, to the Executive Director averring that the records that were disclosed to the Complainant on April 16, 2010 and August 12, 2010 constitute all of the**

¹ The Council declines to address the Complainant's preferred method of delivery (e-mail) because the Complainant does not raise said issue in his Denial of Access Complaint.

² "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."

³ 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.

records associated with Plainfield Police Division incident numbers 09-2405 and 09-2423.

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 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: February 29, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 28, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-111

v.

**City of Plainfield (Union)²
Custodian of Records**

Records Relevant to Complaint:

Any and all reports associated with Plainfield Police Division incident numbers 09-2405 and 09-2423 via e-mail.³

Request Made: March 31, 2010

Response Made: April 16, 2010

Custodian: Abubakar Jalloh, Deputy City Clerk

GRC Complaint Filed: May 25, 2010⁴

Background

March 31, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above via a letter request referencing the Open Public Records Act ("OPRA").

April 16, 2010

Custodian's response to the OPRA request. Captain Steven Soltys of the Plainfield Police Division responds to the Complainant's OPRA request on the eleventh (11th) business day following receipt of such request by personally delivering the requested records to the Complainant.⁵

April 16, 2010

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian that he has received some of the records responsive to his request but questions whether he received from the Custodian all of the records relevant to this request.

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

² Represented by David L. Minchello, Esq., Ventantonio & Wildenhain, P.C. (Warren, NJ).

³ There were other records requested that are not relevant to this complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ No written response accompanied the records.

April 19, 2010

E-mail from the Custodian to Plainfield Police Division Director's Secretary Deirdre Martin. The Custodian informs Ms. Martin that Captain Soltys personally delivered the requested records to the Complainant on April 16, 2010.

May 25, 2010

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

- Complainant's OPRA request dated March 31, 2010
- E-mail from the Complainant to the Custodian dated April 16, 2011

The Complainant's Counsel states that the Complainant filed his OPRA request on March 31, 2010 and that in response to said request the Complainant received a single page report for each incident.⁶ The Complainant's Counsel states that on April 16, 2010, the Complainant informed the Custodian that the Complainant did not believe that he received all of the records responsive to his request. Counsel also states that the Complainant asked the Custodian to confirm whether additional records responsive to his request exist but that the Complainant never received a reply from the Custodian. Counsel further states that the Complainant sufficiently identified the type of records he is seeking.

The Complainant's Counsel asks that the Council order the Custodian to produce any and all reports associated with incident numbers 09-2405 and 09-2423 and determine that the Complainant is the prevailing party and entitled to reasonable attorney fees.

The Complainant does not agree to mediate this complaint.

June 22, 2010

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

June 28, 2010

Telephone call from the Custodian's Counsel to the GRC. The Custodian's Counsel informs the GRC that he is in receipt of the request for the SOI. Counsel further informs the GRC that he is in the process of attempting to settle this complaint with the Complainant's Counsel and will submit a request to the GRC for an extension of time to prepare and submit the SOI.

June 28, 2010

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel informs the GRC that the Custodian is in the process of gathering the balance of the records responsive to the Complainant's request and asks for an extension of time until July 12, 2010 to prepare and submit the SOI.

⁶ The two incidents are numbered 09-2405 and 09-2423. The single page reports are Computer Aided Dispatch ("CAD") reports which correspond to each of the incident numbers and were responsive to part of the Complainant's OPRA request but were not responsive to the Complainant's request for the records relevant to this complaint.

June 28, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC grants the Custodian an extension of time until July 12, 2010 to prepare and submit the SOI.

July 9, 2010

E-mail from the Custodian's Counsel to the Complainant's Counsel. The Custodian's Counsel informs the Complainant's Counsel that he is forwarding the CAD reports for incident numbers 09-2405 and 09-2423. The Custodian's Counsel asks the Complainant's Counsel to review the records with the Complainant and thereafter confirm that the Complainant will withdraw the complaint.

July 30, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC informs the Custodian's Counsel that it has been over a month since the Custodian received the request for the SOI and, because it appears that the Complainant is not withdrawing the complaint, the Custodian must complete and submit the SOI to the GRC by August 6, 2010.

July 30, 2010

E-mail from the Complainant's Counsel to the GRC. Counsel informs the GRC that he has received certain records from the Custodian's Counsel and is in the process of evaluating whether the Complainant's request has been satisfied.

July 30, 2010

E-mail from the GRC to the Complainant's Counsel. The GRC informs the Complainant's Counsel that because he is evaluating the records he received from the Custodian's Counsel, the GRC is granting the Custodian an extension of time until August 13, 2010 to prepare and submit the SOI.⁷

August 12, 2010

E-mail from the Custodian's Counsel to the Complainant's Counsel. The Custodian's Counsel informs the Complainant's Counsel that he has attached an incident report associated with CAD Report No. 9002423 and that CAD Report No. 9002405 does not have an associated incident report.

August 13, 2010

Custodian's incomplete SOI submitted to the GRC.⁸

August 13, 2010

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian informing the Custodian that although the SOI was received by the GRC on August 13,

⁷ The Custodian's Counsel was copied on this e-mail.

⁸ The Custodian submits the SOI to the GRC but the SOI does not include a copy of the Complainant's underlying OPRA request or a response to question number 8. Moreover, the SOI is not signed by the Custodian.

2010, the SOI is incomplete. The GRC informs the Custodian that the SOI did not include a copy of the Complainant's OPRA request which formed the basis of the complaint, that it was not responsive to question number 8, and that it was not signed by the Custodian. The GRC further informs the Custodian that the SOI is being returned to the Custodian for completion. The GRC informs the Custodian that the SOI must be completed and returned to the GRC by August 18, 2010.

August 18, 2010

Custodian's SOI with the following attachments:

- Copy of two-page CAD Incident Report No. 9002405 dated January 19, 2009
- Copy of two-page CAD Incident Report No. 9002423 dated January 19, 2009
- Police Division Incident Report for Case No. 09-2125 dated January 19, 2009
- Complainant's OPRA request dated March 31, 2010
- E-mail from the Custodian to Ms. Martin dated April 19, 2010
- E-mail from the Custodian's Counsel to the Complainant's Counsel dated August 12, 2010

The Custodian certifies that his search for the requested records involved directing a review of the police records by the Plainfield Police Division. The Custodian certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable to this complaint.

The Custodian certifies that he received the Complainant's OPRA request on March 31, 2010 and that he responded to said request on April 16, 2010 and August 12, 2010.⁹ The Custodian certifies that the records which are responsive to the Complainant's request are:

- CAD report and log event for incident number 09-2405
- CAD report and log event for incident number 09-2423
- A police report associated with CAD incident number 09-2423

The Custodian further certifies that the CAD reports and log events for incident numbers 09-2405 and 09-2423 were provided to the Complainant on April 16, 2010 and the police report associated with CAD incident number 09-2423 was provided to the Complainant on August 12, 2010.

The Custodian certifies that the complaint should be dismissed and attorney fees should not be awarded to the Complainant because all of the records responsive to the Complainant's request have been disclosed to the Complainant. The Custodian further certifies that the Complainant has not met the requirements for prevailing party attorney

⁹ The Custodian disclosed an additional record responsive to the Complainant's request on August 12, 2010 but this occurred after the Complainant's filing of the Denial of Access Complaint; therefore it should properly be considered a response to the complaint rather than the OPRA request.

fees pursuant to *N.J.A.C. 5:105-2.13(a)*; therefore attorney fees should not be awarded to the Complainant.

August 27, 2010

E-mail from the GRC to the Complainant's Counsel. The GRC requests that Counsel obtain a certification from the Complainant wherein the Complainant certifies that he has either received all of records responsive to the request from the Custodian or that he has not received all of records responsive to the request from the Custodian, and if the latter, that the Complainant certify which records responsive to the request the Custodian has failed to disclose to the Complainant.

September 13, 2010

E-mail from the Complainant's Counsel to the GRC. Counsel forwards to the GRC a certification prepared by the Complainant wherein the Complainant certifies that he is an expert in the area of police accountability and that, as such, he knows that the Custodian failed to disclose to him all of the records responsive to his request. Specifically, the Complainant certifies that the following reports would have been prepared for Plainfield Police incident numbers 09-2405 and 09-2423: field reports, field supplementary reports, official reports and crash investigation reports. The Complainant certifies that these types of police records are likely maintained in a file cabinet rather than stored electronically. The Complainant further certifies that the Custodian failed to disclose any of these reports to him.

Analysis

Whether Custodian properly responded to the Complainant's OPRA request?

OPRA 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.

Further, OPRA 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 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.¹⁰ 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 (Interim Order dated October 31, 2007).

In this complaint, the parties agree that the Complainant delivered his OPRA request to the Custodian on March 31, 2010. As such, the Custodian's written response to the OPRA request was due no later than April 12, 2010. However, the evidence of record indicates that the Custodian never responded to the Complainant, rather, he forwarded the request to the Plainfield Police Division so that they could search their files for the records responsive to the complaint. The evidence of record further reveals that the Custodian subsequently learned that Plainfield Police Captain Soltys personally delivered the requested records to the Complainant on April 16, 2010 and the Custodian subsequently memorialized this information in an e-mail addressed to the Plainfield Police Director's secretary dated April 19, 2010.

OPRA requires that a custodian must respond in writing within seven (7) business days after receipt of an OPRA request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. or the request is "deemed" denied. Here, the evidence of record reveals the Custodian did not respond to the Complainant in any manner whatsoever. Instead, the Custodian forwarded the Complainant's OPRA request to the Plainfield Police Department whereupon Captain Soltys personally delivered to the Complainant on April 16, 2010 the records that Captain Soltys believed were responsive to the request. Thus, because there is no evidence in the record to establish that the Custodian responded in writing to the Complainant's OPRA request on or before April 12, 2010, the Complainant's OPRA request is "deemed" denied.

Accordingly, the Custodian's failure to respond in writing to the 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, supra.¹¹

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

¹⁰ 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.

¹¹ The Council declines to address the Complainant's preferred method of delivery (e-mail) because the Complainant does not raise said issue in his Denial of Access Complaint.

“...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 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.

Although the Complainant used terminology in his OPRA request that may appear to have rendered the request overly broad, the request is neither broad nor unclear. In Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of “[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present.” *Id.* at 508. The Appellate Division determined that the request sought a specific type of document and therefore was not overly broad. *Id.* at 515-16. Similarly, in the instant Complainant the Complainant also requested “any and all reports,” but he has limited his request to those that are associated with police incident numbers. A police incident number is very specific. It identifies an event that occurred at a specific time or within a specific time frame on a date certain. As such, there are a finite number of reports that are associated with police incident numbers. Here, because the Complainant identified a type of government record, i.e. reports, within a specific time frame as circumscribed by the incident number, the request is not overly broad. Accordingly, in this complaint the Custodian’s search was not open-ended, nor did it require research, but rather required the Custodian to locate those reports which corresponded to a specific police incident number.

In this matter, Plainfield Police Captain Soltys personally delivered to the Complainant the records responsive to Item Number 1 of the Complainant's OPRA request on April 16, 2010; however, none of the records responsive to Item Number 2, which are the records relevant to this complaint, were delivered to the Complainant. The Complainant via e-mail dated April 16, 2010 questioned whether the records he received were all of the records responsive to his request because he stated that he had reason to believe the disclosed records did not comprise all of the records related to incident numbers 09-2405 and 09-2423. The Custodian never replied to the Complainant's inquiry.

Thereafter, on August 12, 2010, the Custodian disclosed to the Complainant an incident report associated with incident number 9002423. The Custodian concomitantly informed the Complainant that there are no associated incident reports for incident number 9002405. Although the evidence of record reveals that the Custodian limited his search for reports associated with incident numbers 09-2405 and 09-2423 to *incident reports*, the Complainant's request clearly seeks all reports associated with the two (2) incident numbers, not just incident reports.

The Complainant filed a certification with the GRC dated September 13, 2010 in which he identified other reports that are associated with incident numbers 09-2405 and 09-2423. The Complainant certified that other reports associated with the aforementioned incident numbers which are responsive to his request and should have been disclosed to him are field reports, field supplementary reports, official reports, and crash investigation reports. The Complainant certified that these types of police records are typically stored in a file cabinet and that they were withheld from disclosure by the Custodian.

Accordingly, the Custodian shall disclose to the Complainant all field reports, field supplementary reports, official reports and crash investigation reports associated with Plainfield Police Division incident numbers 09-2405 and 09-2423.

Whether the Custodian's 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 respond in writing to the 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 (Interim Order dated October 31, 2007).¹²
2. The Custodian shall disclose to the Complainant all field reports, field supplementary reports, official reports and crash investigation reports associated with Plainfield Police Division incident numbers 09-2405 and 09-2423.
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order by either (a) disclosing said records to the Complainant and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹³, to the Executive Director,¹⁴ or (b) providing a certification, in accordance with N.J. Court Rule 1:4-4, to the Executive Director averring that the records that were disclosed to the Complainant on April 16, 2010 and August 12, 2010 constitute all of the records associated with Plainfield Police Division incident numbers 09-2405 and 09-2423.**
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.

¹² The Council declines to address the Complainant's preferred method of delivery (e-mail) because the Complainant does not raise said issue in his Denial of Access Complaint.

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.

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012