



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

FINAL DECISION

October 25, 2011 Government Records Council Meeting

Robert A. Verry  
Complainant

Complaint No. 2010-86

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the October 25, 2011 public meeting, the Government Records Council (“Council”) considered the October 18, 2011 *Reconsideration* 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 Council reconsiders its Final Decision Findings and Recommendations pursuant to *N.J.A.C. 5:105-2.10(a)* to include an analysis of whether the Complainant is a prevailing party entitled to reasonable attorney’s fees because the Council previously failed to address same in its June 28, 2011 Final Decision.
2. Pursuant to *Teeters v. DYFS*, 387 *N.J. Super.* 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Additionally, pursuant to *Mason v. City of Hoboken and City Clerk of the City of Hoboken*, 196 *N.J.* 51 (2008), no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian disclosed the records at issue herein to the Complainant in response to an unrelated OPRA request and not as a product of the filing of this complaint. 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*.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of October, 2011

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: October 28, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**October 25, 2011 Council Meeting**

**Robert A. Verry<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2010-86**

v.

**Borough of South Bound Brook**  
**(Somerset)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:**

1. Employee Arleen Lih's time sheets for each position held in the Borough of South Bound Brook ("Borough") between March 13, 2010 and April 15, 2010.
2. Agenda and minutes for regular, special and executive sessions held in March 2010.<sup>3</sup>

**Request Made:** April 15, 2010  
**Response Made:** April 20, 2010  
**Custodian:** Donald E. Kazar  
**GRC Complaint Filed:** April 27, 2010<sup>4</sup>

**Background**

**June 28, 2011**

Government Records Council's ("Council") Final Decision. At its June 28, 2011 public meeting, the Council considered the June 21, 2011 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. Although the Custodian responded in writing to the Complainant's April 15, 2010 OPRA request within the statutorily mandated time frame providing records responsive to the Complainant's OPRA request that are not at issue in this complaint pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was insufficient because he failed to respond individually to each request item contained in the request. Therefore, the Custodian has violated OPRA

---

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ). Original counsel was William T. Cooper III, Esq. (Somerville, NJ), who advised the GRC on May 6, 2011 that he no longer represented the Borough.

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

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

pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

2. The Custodian failed to bear his burden of proving a lawful denial of access to the records at issue here because the fax journal provided by the Custodian does not raise to the level of competent, probative evidence that the records were successfully transmitted to the Complainant and because the Complainant twice certified that he never received the records in response to his April 15, 2010 OPRA request. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the records at issue because the Complainant received said records in response to a later OPRA request not at issue herein.
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant's request by failing to respond to each request item individually and failed to bear his burden of proving a lawful denial of access to the records at issue in this complaint pursuant to N.J.S.A. 47:1A-6, the evidence of record indicates that the Custodian made an attempt to provide the records to the Complainant on April 20, 2010 and the records at issue were subsequently provided to the Complainant on May 20, 2010 in response to another OPRA request. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was 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.

### **July 12, 2011**

Council's Final Decision distributed to the parties.

### **August 2, 2011**

Custodian's response to the Council's Final Decision. The Complainant states that he has reviewed the Council's Decision and found that it is silent as to whether the Complainant is a prevailing party. The Complainant requests that the GRC advise as to the status of this complaint as it relates to a prevailing party determination.

The Complainant states that based on the evidence of record, he would conclude that he is a prevailing party. The Complainant requests that if he is not a prevailing party, the GRC advise him as to the specific reasons therefor.

### **August 3, 2011**

E-mail from the GRC to the Complainant. The GRC states that it has deliberated the prevailing party attorney's fees issue raised by the Complainant and is considering whether to reconsider the instant complaint based on that issue.

### Analysis

Pursuant to *N.J.A.C. 5:105-2.10(a)*, the Council, “at its own discretion, may reconsider any decision it renders.” *Id.* The GRC thus reconsiders this matter of its own volition in order to amend the Council’s June 28, 2011 Final Decision.

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 ... in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L.2001, c.404 (C.47:1A-7) ... The public agency shall have the burden of proving that the denial of access is authorized by law ... *A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.*” (Emphasis added.) N.J.S.A. 47:1A-6.

In this matter, the Council rendered its Final Decision without addressing whether the Complainant was a prevailing party entitled to reasonable attorney’s fees based on the fact that neither the Complainant nor Counsel requested same. However, in Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court held that:

*“OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the [\$500.00] cap on fees and permit a reasonable, and quite likely higher, fee award. [Footnote omitted] Those changes expand counsel fee awards under OPRA.”* (Emphasis added.) *Id.* at 73-76.

Based on the Court’s specific language in Mason, *supra*, a complainant need not request that the Council determine whether he/she is a prevailing party entitled to reasonable attorney’s fees because the provision is not permissive; rather, it is mandatory.

Therefore, the Council reconsiders its Final Decision pursuant to *N.J.A.C. 5:105-2.10(a)* to include an analysis of whether the Complainant is a prevailing party entitled to reasonable attorney’s fees because the Council previously failed to address same in its June 28, 2011 Final Decision.

### **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 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840,

149 L. Ed. 2d at 863, 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).”

However, in Mason, the New Jersey Supreme Court shifted the traditional burden of proof to the responding agency in one category of cases: when an agency has failed to respond *at all* to a request within seven business days. The Court noted that:

“OPRA requires that an agency provide access or a denial no later than seven business days after a request. The statute also encourages compromise and efforts to work through certain problematic requests. But under the terms of the statute, the agency must start that process with some form of response within seven business days of a request. *If an agency fails to respond at all within that time frame, but voluntarily discloses records after a requestor files suit, the agency should be required to prove that the lawsuit was not the catalyst for the agency's belated disclosure.* Such an approach is faithful to OPRA’s clear command that an agency not sit silently once a request is made.” (Emphasis added). Mason v. City Clerk of the City of Hoboken, 196 N.J. 51, 77 (2008).

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight (8) business days later, or one (1) day beyond the statutory limit. *Id.* at 79. As a result, the Court shifted the burden to Hoboken to prove that the plaintiff’s lawsuit, filed on March 4, was not the catalyst behind the City’s voluntary disclosure. *Id.* Because Hoboken’s February 20 response included a copy of a memo dated February 19 -- the seventh (7<sup>th</sup>) business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff’s lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

The Complainant filed the instant complaint arguing that the Custodian unlawfully denied access to the records at issue herein in response to his April 15, 2010 OPRA request. The evidence of record indicates that although the Custodian responded to the Complainant via facsimile on the third (3<sup>rd</sup>) business day after receipt of the Complainant’s ORPA request, it was unclear whether the records at issue herein were provided to the Complainant. The evidence of record further indicates that the Complainant submitted an unrelated OPRA request on May 10, 2010 for the records at issue herein.<sup>5</sup> The Custodian provided access to the records requested on May 17, 2010.

---

<sup>5</sup> The Complainant’s May 10, 2010 OPRA request was not at issue in this complaint; however, the records sought in that complaint were at issue here.  
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2010-86 – Supplemental Findings and Recommendations of the Executive Director 7

These facts are corroborated by the Complainant's August 16, 2010 legal certification and subsequent correspondence between the parties.

In its June 28, 2011 Final Decision, the Council determined that the Custodian's response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008). The Council further determined that the Custodian failed to bear his burden of proving a lawful denial of access because the Custodian provided no competent, credible evidence to prove that he faxed the records at issue to the Complainant as part of his response. However, the Council also declined to order disclosure of the records at issue herein because the evidence of record indicated that the Complainant had already received the records in response to his May 10, 2010 OPRA request.

A determination of the Complainant's status as a prevailing party hinges on whether the filing of this complaint "brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, supra, at 432. The evidence is clear that the Complainant received the records at issue herein on May 17, 2010, during the pendency of this complaint. However, the evidence indicates that the Custodian provided these records in response to the Complainant's May 10, 2010 OPRA request, which is not at issue herein. Thus, although the instant complaint was pending before the GRC, at the time the Complainant received the records responsive to his April 15, 2010 OPRA request, the evidence is clear that the Custodian disclosed the records at issue as part of his obligation to respond to an unrelated OPRA request and not as a result of the filing of this complaint. Moreover, in its June 28, 2011 Final Decision, the GRC declined to order disclosure of any records based on the foregoing.

Thus, the Complainant is not a prevailing party in this matter because he received the records in connection to an OPRA request not at issue in this complaint and the GRC declined to disclose the records at issue based on this fact.

Therefore, pursuant to Teeters, supra, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason, supra, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian disclosed the records at issue herein to the Complainant in response to an unrelated OPRA request and not as a product of the filing of this complaint. 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Council reconsiders its Final Decision Findings and Recommendations pursuant to N.J.A.C. 5:105-2.10(a) to include an analysis of whether the Complainant is a prevailing party entitled to reasonable attorney's fees

because the Council previously failed to address same in its June 28, 2011 Final Decision.

2. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian disclosed the records at issue herein to the Complainant in response to an unrelated OPRA request and not as a product of the filing of this complaint. 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*.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

October 18, 2011



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**FINAL DECISION**

**June 28, 2011 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2010-86

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the June 28, 2011 public meeting, the Government Records Council (“Council”) considered the June 21, 2011 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. Although the Custodian responded in writing to the Complainant’s April 15, 2010 OPRA request within the statutorily mandated time frame providing records responsive to the Complainant’s OPRA request that are not at issue in this complaint pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was insufficient because he failed to respond individually to each request item contained in the request. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian failed to bear his burden of proving a lawful denial of access to the records at issue here because the fax journal provided by the Custodian does not raise to the level of competent, probative evidence that the records were successfully transmitted to the Complainant and because the Complainant twice certified that he never received the records in response to his April 15, 2010 OPRA request. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the records at issue because the Complainant received said records in response to a later OPRA request not at issue herein.
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant’s request by failing to respond to each request item individually and failed to bear his burden of proving a lawful denial of access to the records at issue in this complaint pursuant to N.J.S.A. 47:1A-6, the evidence of record indicates that the Custodian made an attempt to provide the records to the Complainant on April 20, 2010 and the records at issue were subsequently provided to the Complainant on May 20, 2010 in response to another OPRA request. Additionally, the evidence of record does not indicate that the Custodian’s violation



of OPRA had a positive element of conscious wrongdoing or was 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.

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 28<sup>th</sup> Day of June, 2011

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: July 12, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 28, 2011 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-86**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Employee Arleen Lih's time sheets for each position held in the Borough of South Bound Brook ("Borough") between March 13, 2010 and April 15, 2010.
2. Agenda and minutes for regular, special and executive sessions held in March 2010.<sup>3</sup>

**Request Made:** April 15, 2010

**Response Made:** April 20, 2010

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** April 27, 2010<sup>4</sup>

**Background**

**April 15, 2010**

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.

**April 20, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3<sup>rd</sup>) business day following receipt of such request. The Custodian provides records not at issue in the instant complaint to the Complainant via facsimile.

**April 27, 2010**

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated April 15, 2010.

---

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ). Original counsel was William T. Cooper III, Esq. (Somerville, NJ), who advised the GRC on May 6, 2011 that he no longer represented the Borough.

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

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

The Complainant states that he submitted an OPRA request to the Custodian on April 15, 2010. The Complainant states that the Custodian responded in writing on April 20, 2010 providing access to records not at issue in the instant complaint but failed to provide access to the requested records:

1. Employee Arleen Lih's time sheets for each position held in the Borough of South Bound Brook ("Borough") between March 13, 2010 and April 15, 2010.
2. Agenda and minutes for regular, special and executive sessions held in March 2010.

The Complainant states that the seventh (7<sup>th</sup>) business day after the Custodian's receipt of the OPRA request was April 26, 2010. The Complainant states that as of April 27, 2010, the Custodian failed to respond in writing to such request granting access to the records at issue in this complaint or requesting an extension of time to provide same.

The Complainant does not agree to mediate this complaint.

**June 7, 2010**

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

**June 14, 2010**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until June 21, 2010 to submit the requested SOI.

**June 14, 2010**

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until June 21, 2010 to submit the requested SOI.

**June 21, 2010**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 15, 2010.
- Records responsive to the Complainant's OPRA request:
  - Ms. Arleen Lih's time sheets from March 8, 2010 to April 16, 2010 (3 pages).
  - Public session minutes of the Borough's March 2, 2010 meeting.
  - Public session minutes of the Borough's March 9, 2010 meeting.

The Custodian certifies that he received the Complainant's OPRA request on or about April 15, 2010. The Custodian certifies that he responded to said request in writing on April 20, 2010 providing access to the requested records.

The Custodian states that the Complainant argued in the Denial of Access Complaint that the Custodian failed to provide access to the records at issue in this

complaint. However, the Custodian certifies that all records responsive to the Complainant's request were provided to the Complainant on April 20, 2010.<sup>5</sup>

### **July 29, 2010**

Custodian's legal certification attaching a facsimile journal dated April 23, 2010.<sup>6</sup> The Custodian certifies that he received an OPRA request from the Complainant on April 15, 2010. The Custodian certifies that he gathered the requested records and on April 20, 2010 sent the records to the Complainant via facsimile. The Custodian certifies that the Borough's fax machine was not working properly, either because the roller was skipping or because of the number of pages being faxed caused a paper jam. The Custodian certifies that based on the foregoing, he made several attempts to send the records to the Complainant via facsimile.

The Custodian certifies that attached is a fax journal reflecting that he attempted to fax the requested records six (6) times on April 20, 2010.

The Custodian asserts that in his past dealings with the Complainant, the Complainant would contact the Custodian if there appeared to be an issue with the transmission of records via facsimile. The Custodian certifies that the Complainant did not contact him on April 20, 2010.

### **August 16, 2010**

Complainant's legal certification attaching the following:

- Complainant's OPRA request dated May 17, 2010.
- Ms. Arleen Lih's time sheets from April 5, 2010 to April 30, 2010 (2 pages).
- Public session minutes of the Borough's March 2, 2010 meeting.
- Public session agenda dated March 9, 2010.
- Public session minutes of the Borough's March 9, 2010 meeting.

The Complainant certifies that this certification is in response to the Custodian's SOI and the Custodian's legal certification dated July 29, 2010. The Complainant certifies that he did not receive the records at issue on April 20, 2010. The Complainant certifies that based on the foregoing, the Complainant resubmitted the same OPRA request at issue in this matter to the Custodian on May 17, 2010. The Complainant certifies that the Custodian responded to such request on May 20, 2010 providing access to the requested records via facsimile.

The Complainant asserts that he would not have resubmitted his OPRA request to the Custodian on May 17, 2010 if he had previously received the records requested. The Complainant states that the Custodian must bear the burden of proving that denying

---

<sup>5</sup> The Custodian did not certify to the search undertaken. Additionally, the Custodian did not certify to whether any 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 ("DARM").

<sup>6</sup> The GRC has no record of requesting a certification from the Custodian. It appears that the Custodian chose to supply this certification on his own volition.



access to the records at issue in this complaint was lawful. The Complainant states that the Custodian acknowledged in the legal certification that he had problems faxing the records to the Complainant on April 20, 2010. The Complainant argues that it is impossible for the Custodian to bear his burden of proof when the Complainant received records not at issue in the instant complaint<sup>7</sup> and the Custodian admitted to having issues transmitting the requested records via facsimile on April 20, 2010.

#### **April 27, 2011**

E-mail from the GRC to the Complainant's Counsel. The GRC states that it is in need of additional information. The GRC states that the Complainant submitted a certification dated August 16, 2010 in which he certified that the Custodian did not provide the records at issue in this complaint when he responded to the Complainant's April 15, 2010 OPRA request. The GRC states that the Complainant further certified that because he did not receive the records at issue, he resubmitted "the same request on May 17, 2010." The GRC states that the Complainant certified that on May 20, 2010, the Custodian successfully faxed to the Complainant the same documents previously requested; however, it is unclear whether the Complainant ever received the records at issue in this complaint in response to the April 15, 2010 OPRA request.

The GRC requests that the Complainant legally certify as to whether the Custodian ever provided the records at issue in this complaint to the Complainant in response to the April 15, 2010 OPRA request. The GRC requests that Counsel provide the Complainant's legal certification by April 29, 2011.

#### **May 6, 2011**

E-mail from the GRC to the Complainant's Counsel. The GRC states that it sent Counsel a request for a legal certification from the Complainant via e-mail on April 27, 2011. The GRC states that the Complainant's legal certification was due on April 29, 2011. The GRC states that it is not yet in receipt of this legal certification.

The GRC advises that if it does not receive the Complainant's legal certification within three (3) business days from Counsel's receipt of this e-mail, that is, by close of business on May 11, 2011, this complaint will proceed to adjudication based only on the information contained in the evidence of record.

#### **May 6, 2011**

Complainant's legal certification. The Complainant certifies that his OPRA request sought, among other records, the records at issue in this complaint. The Complainant certifies that he did not receive the records at issue in response to his April 15, 2010 OPRA request.

#### **May 6, 2011**

E-mail from the Custodian to the GRC. The Custodian argues that the Complainant's legal certification is erroneous. The Custodian contends that the Complainant posts records he receives from the Borough on [www.sbbdems.com](http://www.sbbdems.com). The

---

<sup>7</sup> These records were requested as part of the Complainant's April 15, 2010 OPRA request and were received by the Complainant; hence, they are not at issue in the instant complaint. *See also* F.N. No. 3. Robert A. Verry v. Borough of South Bound Brook (Somerset), 2010-86 – Findings and Recommendations of the Executive Director 4

Custodian argues that if the GRC visits this website they will find the timesheets responsive to request Item No. 1 that the Complainant certifies he did not receive. The Custodian states that he certified in the SOI that the Complainant received the records via facsimile. The Custodian questions how the records could be posted by the Complainant on www.sbbdems.com if the Complainant certifies he did not receive same.

**May 6, 2011**

E-mail from the Complainant's Counsel to the GRC attaching the Custodian's legal certification dated July 29, 2010.

Counsel argues that the Custodian cannot accurately certify to what the Complainant received considering that the facsimile journal attached to the Custodian's certification shows two (2) document jams and three (3) other faxes of varying page lengths.

Counsel further asserts that the records posted on www.sbbdems.com are the records provided to the Complainant in response to his resubmitted May 17, 2010 OPRA request and not the April 15, 2010 OPRA request at issue here.

**May 6, 2011**

E-mail from the Custodian to the Complainant's Counsel. The Custodian questions the validity of the Complainant's legal certification. The Custodian argues that it appears that the Complainant falsely certified that he never received the records at all. The Custodian reiterates the facts contained in his July 29, 2010 legal certification that records were successfully transmitted to the Complainant after a fax machine jam and the Complainant never contacted the Custodian to advise that some records were not transmitted. The Custodian states that based on the foregoing, the Custodian assumed that the Complainant received the records.

**May 6, 2011**

E-mail from the Complainant's Counsel to the Custodian. Counsel argues that based on all of the evidence of record, the Complainant has continued to maintain that he never received the records at issue in this complaint until after said complaint was filed.

**May 7, 2011**

E-mail from the Custodian to the Complainant's Counsel. The Custodian states that the Complainant posted the Borough's March meeting minutes to www.sbbdems.com on March 17, 2010, which was nearly a month before he submitted his April 15, 2010 OPRA request for the same minutes. The Custodian states that this proves the Complainant was in possession of at least the requested meeting minutes before requesting them on April 15, 2010. The Custodian notes that the Complainant certified he never received those minutes and now Counsel is arguing that they were received after this complaint was filed.

The Custodian requests that the GRC take appropriate action on what appears to be a false certification submitted by the Complainant.

## Analysis

### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

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

OPRA 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 GRC first addresses whether the Custodian’s response to the Complainant’s OPRA request was sufficient.

The Complainant filed this Denial of Access Complaint arguing that the Custodian provided access to some records in a timely manner, but failed to provide the records at issue here. The Complainant further stated that the Custodian failed to grant access, deny access or request an extension of time to provide the records within the statutorily mandated time frame. Further, the Custodian did not provide as part of the

SOI or in any subsequent correspondence with the GRC regarding this complaint a written response detailing how the Custodian was responding to each request item. The Custodian simply indicated that he faxed records to the Complainant on April 20, 2010. Thus, the evidence of record indicates that the Custodian failed to respond to each request item individually.

In Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the complainant's counsel asserted that the custodian violated OPRA by failing to respond to each of the complainant's request items individually within seven (7) business days. The GRC contemplated how the facts in Paff applied to its prior holding in O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005)(that the custodian's initial response that the complainant's request was a duplicate of a previous request was legally insufficient because the custodian has a duty to answer each request individually). The Council reasoned that, "[b]ased on OPRA and the GRC's holding in O'Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request." The GRC ultimately held that:

"[a]lthough the Custodian responded in writing to the Complainant's August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g." See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009) and Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).

Based on OPRA and the GRC's holding in Paff, *supra*, a custodian is vested with the responsibility to respond to each individual request item contained in an OPRA request within the statutorily mandated time frame.

Here, although the Custodian provided access to records not at issue in this complaint via facsimile in a timely manner, the evidence of records indicates that the Custodian provided no written response to the Complainant regarding the records at issue here. OPRA provides that a custodian shall comply or indicate the specific basis thereof in the event that a record cannot be disclosed. N.J.S.A. 47:1A-5.g.

Therefore, although the Custodian responded to the Complainant's April 15, 2010 OPRA request within the statutorily mandated time frame providing records responsive to the Complainant's OPRA request that are not at issue in this complaint pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was insufficient because he failed to respond individually to each request item contained in the request. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff, *supra*.

The GRC next addresses whether the Custodian unlawfully denied access to the records at issue in this complaint.

In the SOI, the Custodian certified that all records at issue in this complaint were provided to the Complainant on April 20, 2010. The Custodian subsequently submitted a legal certification on July 29, 2010 attaching a copy of a facsimile journal dated April 23, 2010. The Custodian certified that the attached journal proved that he attempted to fax the records at issue here to the Complainant six (6) times on April 20, 2010 because his fax machine was having technical issues. The Custodian further asserted that because the Complainant did not contact the Custodian regarding missing records, the Custodian assumed that all records were successfully transmitted.

The Complainant submitted a counter-certification on August 16, 2010. The Complainant certified that because he did not receive the records at issue in this complaint on April 20, 2010, the Complainant submitted a second request for said records on May 17, 2010. The Complainant certified that the Custodian provided access to the records at issue in this complaint on May 20, 2010. The Complainant further argued that the Custodian could not bear his burden of proving a lawful denial of access to the records at issue here because he easily provided them in response to the May 17, 2010 OPRA request.

Pursuant to a request for additional information from the GRC, the Complainant again certified that he never received the records at issue here in response to his April 15, 2010 OPRA request. The Custodian rebutted that the Complainant's certification should be considered erroneous because the requested minutes at issue were posted to a website by the Complainant on March 17, 2010 which is before the Complainant's OPRA request which is the subject of this complaint. The Complainant's Counsel responded to the Custodian's rebuttal asserting that the Custodian could not accurately certify what the Complainant received because the facsimile journal the Custodian provided to the GRC on July 29, 2010 showed two (2) document jams and three (3) other faxes of varying page lengths. The Complainant's Counsel further maintained that requested minutes posted to the website by the Complainant were received in response to the May 17, 2010 OPRA request.

Pursuant to OPRA, the Custodian "shall have the burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6. The evidence of record in this complaint suggests that although the Custodian may have attempted to transmit the records at issue here via the Complainant's preferred method of delivery, an error in the operation of the fax machine the Custodian was using caused an inadvertent denial of access. Additionally, the Complainant twice certified that he did not receive the records at issue in this complaint in response to his April 15, 2010 OPRA request. The Complainant additionally certified that he did not receive the records until after making a second (2<sup>nd</sup>) request on May 17, 2010. Moreover, although the Custodian argued that the requested minutes were posted to [www.sbbdems.com](http://www.sbbdems.com) on March 17, 2010, by the time the GRC searched this website for said minutes it found that this website in fact had no actual minutes posted to the website; rather, an empty subfolder was created on March 17, 2010.

Based on the foregoing, the Custodian failed to bear his burden of proving a lawful denial of access to the records at issue here because the fax journal provided by the Custodian does not raise to the level of competent, probative evidence that the records were successfully transmitted to the Complainant and because the Complainant twice

certified that he never received the records in response to his April 15, 2010 OPRA request. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the records at issue because the Complainant received said records from the Custodian in response to a later OPRA request not at issue herein.

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

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Felder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant’s request by failing to respond to each request item individually and failed to bear his burden of proving a lawful denial of access to the records at issue in this complaint pursuant to N.J.S.A. 47:1A-6, the evidence of record indicates that the Custodian made an attempt to provide the records to the Complainant on April 20, 2010 and the records at issue were subsequently provided to the Complainant on May 20, 2010 in response to another OPRA request not at issue herein. Additionally, the evidence of record does not indicate that the Custodian’s violation of

OPRA had a positive element of conscious wrongdoing or was 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing to the Complainant's April 15, 2010 OPRA request within the statutorily mandated time frame providing records responsive to the Complainant's OPRA request that are not at issue in this complaint pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was insufficient because he failed to respond individually to each request item contained in the request. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian failed to bear his burden of proving a lawful denial of access to the records at issue here because the fax journal provided by the Custodian does not raise to the level of competent, probative evidence that the records were successfully transmitted to the Complainant and because the Complainant twice certified that he never received the records in response to his April 15, 2010 OPRA request. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the records at issue because the Complainant received said records in response to a later OPRA request not at issue herein.
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant's request by failing to respond to each request item individually and failed to bear his burden of proving a lawful denial of access to the records at issue in this complaint pursuant to N.J.S.A. 47:1A-6. the evidence of record indicates that the Custodian made an attempt to provide the records to the Complainant on April 20, 2010 and the records at issue were subsequently provided to the Complainant on May 20, 2010 in response to another OPRA request. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was 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.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

June 21, 2011