



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 25, 2017 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-100

v.

Franklin Fire District No. 1 (Somerset)
Custodian of Record

At the July 25, 2017 public meeting, the Government Records Council (“Council”) considered the July 18, 2017 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 the Council dismisses the complaint because the Complainant’s Counsel withdrew the matter via facsimile to the Office of Administrative Law and via e-mail to the GRC on July 10, 2017. 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 July, 2017

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 28, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 25, 2017 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-100

v.

**Franklin Fire District No. 1 (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies of the current “agreement” between the Franklin Fire District No. 1 (“FFD”) Commissioners and each FFD fire department or company referenced in the approved budget for fiscal year 2011 for the following budget line items:

1. 11-01-26-310-103 Agreement.
2. 11-01-28-320-103 Agreement.
3. 11-01-44-330-103 Agreement.
4. 11-01-56-340-103 Agreement.

Request Made: January 25, 2011

Response Made: February 5, 2011

Custodian: Melissa Kosensky

GRC Complaint Filed: April 6, 2011

Background

July 31, 2012 Council Meeting:

At its July 31, 2012 public meeting, the Council considered the July 24, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The current Custodian timely complied with the Council’s June 26, 2012 Interim Order by providing access (via Counsel) to the requested records to the Complainant via e-mail and providing certified confirmation to the GRC within the prescribed time frame to comply.
2. Although the original Custodian’s failure to respond in writing in the statutorily mandated time frame resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g)

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

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

and N.J.S.A. 47:1A-5(i), and the original Custodian failed to bear her burden of proving a lawful denial of access to the responsive agreements pursuant to N.J.S.A. 47:1A-6, the current Custodian timely complied with the Council's June 26, 2012 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original 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 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the current Custodian provided the Complainant with the responsive 2010 agreements in accordance with the Council's June 26, 2012 Interim Order. 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.

Procedural History:

On August 3, 2012, the Council distributed its Interim Order to all parties. On January 14, 2013, the instant complaint was transmitted to the Office of Administrative Law ("OAL"). On July 10, 2017, Complainant's Counsel sent a letter to the OAL via facsimile to withdraw his consolidated complaint. Counsel simultaneously e-mailed the letter to the GRC.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss the complaint because the Complainant's Counsel withdrew the matter via facsimile to the Office of

Administrative Law and via e-mail to the GRC on July 10, 2017. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

July 18, 2017



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

INTERIM ORDER

July 31, 2012 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-100

v.

Franklin Fire District No. 1 (Somerset)
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian timely complied with the Council’s June 26, 2012 Interim Order by providing access (via Counsel) to the requested records to the Complainant via e-mail and providing certified confirmation to the GRC within the prescribed time frame to comply.
2. Although the original Custodian’s failure to respond in writing in the statutorily mandated time frame resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the original Custodian failed to bear her burden of proving a lawful denial of access to the responsive agreements pursuant to N.J.S.A. 47:1A-6, the current Custodian timely complied with the Council’s June 26, 2012 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original 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 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the current Custodian provided the Complainant with the responsive 2010 agreements in accordance with the Council’s June 26, 2012 Interim Order. 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 31st Day of July, 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: August 3, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-100

v.

**Franklin Fire District No. 1 (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies of the current “agreement” between the Franklin Fire District No. 1 (“FFD”) Commissioners and each FFD fire department or company referenced in the approved budget for fiscal year 2011 for the following budget line items:

1. 11-01-26-310-103 Agreement.
2. 11-01-28-320-103 Agreement.
3. 11-01-44-330-103 Agreement.
4. 11-01-56-340-103 Agreement.

Request Made: January 25, 2011

Response Made: February 5, 2011

Custodian: Melissa Kosensky

GRC Complaint Filed: April 6, 2011³

Background

June 26, 2012

Government Records Council’s (“Council”) Interim Order. At its June 26, 2012 public meeting, the Council considered the June 19, 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 failed to respond to the Complainant’s clarified OPRA request. As such, the Custodian’s failure to respond in writing to the Complainant’s clarified 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

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

² Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

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

Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Custodian failed to bear her burden of proving a lawful denial of access to the responsive 2010 agreements. N.J.S.A. 47:1A-6. Thus, the Custodian must provide same to the Complainant via the preferred method of delivery, which is e-mail.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

June 27, 2012

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

July 3, 2012

E-mail from the Custodian's Counsel to the Complainant's Counsel attaching the 2010 agreements responsive to the Complainant's January 25, 2011 OPRA request. Counsel states that pursuant to the Council's Order received on June 27, 2012, attached are the agreements responsive to the Complainant's OPRA request.

July 5, 2012

Custodian's response to the Council's Order attaching an e-mail from the Custodian's Counsel to the Complainant's Counsel dated July 3, 2012 (with attachments).

The Custodian certifies that he has served as custodian for the FFD since March 2011. The Custodian certifies that the FFD received the Council's Order on June 27, 2012. The Custodian certifies that pursuant to said Order, the Custodian's Counsel

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

⁵ Satisfactory compliance requires that the Custodian deliver the records 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.

provided the responsive 2010 agreements to the Complainant's Counsel via e-mail on July 3, 2012.

Analysis

Whether the Custodian complied with the Council's June 26, 2012 Interim Order?

At its June 26, 2012 meeting, the Council ordered the Custodian to:

"...provide same to the Complainant via the preferred method of delivery, which is e-mail ... The Custodian shall comply ... within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director." (Footnotes omitted.)

The Council disseminated its Interim Order to the parties on June 27, 2012. Thus, the current Custodian's response was due by close of business on July 5, 2012.

On July 3, 2012, the Custodian's Counsel e-mailed the Complainant's Counsel the responsive 2010 agreements. Thereafter on July 5, 2012, the current Custodian provided certified confirmation of compliance to the Executive Director that Counsel forwarded the responsive agreements to the Complainant's Counsel via e-mail on July 3, 2012.⁷

Therefore, the current Custodian timely complied with the Council's June 26, 2012 Interim Order by providing access (via Counsel) to the requested records to the Complainant via e-mail and providing certified confirmation to the GRC within the prescribed time frame to comply.

Whether the original 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.

⁶ "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."

⁷ The GRC notes that neither party indicated whether the record was provided with redactions.

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 original Custodian’s failure to respond in writing in the statutorily mandated time frame resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the original Custodian failed to bear her burden of proving a lawful denial of access to the responsive agreements pursuant to N.J.S.A. 47:1A-6, the current Custodian timely complied with the Council’s June 26, 2012 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original 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 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), *cert. 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)."

The Complainant's Counsel filed this complaint on April 6, 2011 requesting that the GRC determine that the original Custodian violated OPRA by failing to disclose the responsive agreements to the Complainant. The Council subsequently ordered the current Custodian in its June 26, 2012 Interim Order to provide the responsive agreements to the Complainant. The current Custodian submitted certified confirmation of compliance on July 5, 2012 certifying that the Custodian's Counsel e-mailed the responsive records to the Complainant's Counsel on July 3, 2012. Therefore, the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

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 current Custodian provided the Complainant with the responsive 2010 agreements in accordance with the Council's June 26, 2012 Interim Order. 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. The current Custodian timely complied with the Council's June 26, 2012 Interim Order by providing access (via Counsel) to the requested records to the Complainant via e-mail and providing certified confirmation to the GRC within the prescribed time frame to comply.
2. Although the original Custodian's failure to respond in writing in the statutorily mandated time frame resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the original Custodian failed to bear her burden of proving a lawful denial of access to the responsive agreements pursuant to N.J.S.A. 47:1A-6, the current Custodian timely complied with the Council's June 26, 2012 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original 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 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the current Custodian provided the Complainant with the responsive 2010 agreements in accordance with the Council’s June 26, 2012 Interim Order. 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: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

June 26, 2012 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-100

v.

Franklin Fire District No. 1 (Somerset)
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council ("Council") considered the June 19, 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 failed to respond to the Complainant's clarified OPRA request. As such, the Custodian's failure to respond in writing to the Complainant's clarified 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 October 31, 2007).
2. The Custodian failed to bear her burden of proving a lawful denial of access to the responsive 2010 agreements. N.J.S.A. 47:1A-6. Thus, the Custodian must provide same to the Complainant via the preferred method of delivery, which is e-mail.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
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.

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

² Satisfactory compliance requires that the Custodian deliver the records 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.

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

Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 2012

Steven F. Ritardi, Esq., Acting 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: June 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 26, 2012 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-100

v.

**Franklin Fire District No. 1 (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies of the current “agreement” between the Franklin Fire District No. 1 (“FFD”) Commissioners and each FFD fire department or company referenced in the approved budget for fiscal year 2011 for the following budget line items:

1. 11-01-26-310-103 Agreement.
2. 11-01-28-320-103 Agreement.
3. 11-01-44-330-103 Agreement.
4. 11-01-56-340-103 Agreement.

Request Made: January 25, 2011

Response Made: February 5, 2011

Custodian: Melissa Kosensky

GRC Complaint Filed: April 6, 2011³

Background

January 25, 2011

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA. The Complainant indicates that the preferred method of delivery is via e-mail. The Complainant further requests that the Custodian confirm receipt of this OPRA request via e-mail.

January 27, 2011

E-mail from the Custodian to the Complainant attaching the FFD’s official OPRA request form. The Custodian acknowledges receipt of the Complainant’s OPRA request. The Custodian requests that the Complainant fill out the attached form.

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

² Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

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

January 28, 2011

E-mail from the Complainant to the Custodian. The Complainant states that he electronically submitted several OPRA requests to which the Custodian responded. The Complainant asks the Custodian to explain why he must fill out the official OPRA request form.

February 5, 2011

Custodian's response to the OPRA request. On behalf of the Custodian, Mr. William T. Cooper, III, Esq. ("Mr. Cooper"), previous FFD Counsel, responds in writing via letter to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request.⁴ Mr. Cooper states that access to the Complainant's OPRA request is denied because there are no approved agreements for 2011 as the budget has not been passed. Mr. Cooper requests that the Complainant advise whether he is seeking proposed agreements or copies of those agreements approved in 2010.

February 6, 2011

E-mail from the Complainant to the Custodian. The Complainant states that he will accept the agreements that were in effect on January 25, 2011, the date of his OPRA request.

April 6, 2011

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

- Complainant's OPRA request dated January 25, 2011.
- E-mail from the Custodian to the Complainant dated January 27, 2011.
- E-mail from the Complainant to the Custodian dated January 28, 2011.
- E-mail from Mr. Cooper to the Complainant dated February 5, 2011.
- E-mail from the Complainant to the Custodian dated February 6, 2011.

The Complainant's Counsel states that the Custodian failed to provide the Complainant with the agreements responsive to his OPRA request.

Counsel states that the Complainant submitted an OPRA request to the Custodian on January 25, 2011. Counsel states that the Custodian acknowledged receipt of same on January 27, 2011 and requested that the Complainant fill out an official OPRA request form. Counsel states that Mr. Cooper responded in writing on February 5, 2011 denying access to the Complainant's OPRA request stating that no approved agreements for 2011 exist because the budget had not been passed. Counsel states that on February 6, 2011 and in direct response to Mr. Cooper's request for clarification, the Complainant e-mailed the Custodian stating that he would accept the agreements in effect at the time of his OPRA request.

Counsel notes that the Complainant was aware that the FFD's annual agreements contained language keeping them in effect until either a new annual agreement was

⁴ The Custodian certifies in the Statement of Information that she received the Complainant's OPRA request on January 27, 2011. Further, Mr. Cooper responded on a Saturday.

executed or the agreement was terminated by either party. Counsel notes that his clarification clearly implied that he would accept the approved 2010 agreements.

Counsel contends that although the statutorily mandated time frame passed and despite his February 6, 2011 clarification, the Custodian has failed to provide the responsive records or contact the Complainant seeking further clarification. Counsel asserts that the Complainant's OPRA request is thus "deemed" denied.

Counsel requests the following:

1. A determination that the Custodian violated OPRA by failing to provide the responsive records to the Complainant.
2. A determination that the Complainant is a prevailing party entitled to reasonable attorney's fees. N.J.S.A. 47:1A-6.
3. A determination whether the Custodian knowingly and willfully violated OPRA.

The Complainant does not agree to mediate this complaint.

May 17, 2011

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

May 20, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that the FFD recently retained him on April 15, 2011. Counsel requests an extension of fifteen (15) business days to submit the SOI. Counsel states that this extension is necessary to allow Counsel to familiarize himself with the complaint and obtain a sworn statement from the Custodian.

May 24, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until June 14, 2011 to submit the SOI for the reasons stated by Counsel.

May 24, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that he is working with the Complainant's Counsel to resolve this matter. Counsel thus requests an extension of time until July 1, 2011 to submit the SOI. Counsel states that this extension will allow sufficient time to resolve this complaint and to allow the FFD to approve any proposed settlement at its June meeting, which occurs on the fourth (4th) Monday of the month.

May 24, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC states that it will generally grant one (1) extension of five (5) business days to submit an SOI. The GRC states that it has already granted Counsel an extension of fifteen (15) business days. The GRC states that regardless of any pending settlement, the GRC declines to grant another extension of time. The GRC states that Counsel must submit the SOI by close of business on June 14, 2011.

May 24, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel requests that the GRC reconsider its denial of a second extension of time.

June 14, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel requests a short extension of time until the first (1st) week of July because the parties have come to a resolution in this matter which is due to be approved by the FFD Commissioners at the end of the month.

June 16, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC states that it is in receipt of Counsel's request for an extension of time to submit the SOI. The GRC states that per Counsel's previous request for an extension, the GRC declines to grant another extension of time. The GRC further states that as the deadline to submit the SOI has already passed, the new deadline to submit same is June 17, 2011.

June 17, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated January 25, 2011.
- E-mail from the Custodian to the Complainant dated January 27, 2011.
- E-mail from Mr. Cooper to the Complainant dated February 5, 2011.
- E-mail from the Complainant to the Custodian dated February 6, 2011.

The Custodian certifies that her search for the requested records involved asking Mr. Cooper to review the Complainant's OPRA request and provide legal advice.

The Custodian also 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.

The Custodian certifies that she received the Complainant's OPRA request on February 27, 2011. The Custodian certifies that she acknowledged receipt of the request on the same day. The Custodian certifies that she subsequently forwarded the OPRA request to Mr. Cooper for his review. The Custodian certifies that Mr. Cooper responded in writing to the Complainant on February 5, 2011, a Saturday, seeking clarification of the Complainant's OPRA request. The Custodian certifies that Mr. Cooper sought clarification because the FFD had not yet approved agreements for 2011; however, the FFD did possess 2010 agreements. The Custodian certifies that the Complainant responded to her via e-mail on February 6, 2011 stating that he would accept the 2010 agreements.

The Custodian certifies that her failure to provide the Complainant with the responsive agreements appears to be an inadvertent oversight. The Custodian certifies that numerous OPRA requests were pending at this time and Mr. Cooper was reviewing many of them. The Custodian certifies that it became difficult to track the OPRA requests

because she was not a regular employee of the FFD with office hours. The Custodian further certifies that because of the upcoming election as well as the subsequent transitioning of the current Custodian, her failure to provide the records was a mistake.

The Custodian certifies that she was an unpaid, elected official for the FFD on a one (1) year term and did not maintain office hours. The Custodian certifies that as an elected official, she was required to utilize limited free time in order to respond properly to OPRA requests filed on almost a daily basis. The Custodian further certifies that she did not have any full-time or part-time office hours to respond to OPRA requests. The Custodian certifies that from January 10, 2011 through January 25, 2011, the FFD received 22 OPRA requests for various records, or an average of two (2) OPRA requests per business day. The Custodian notes that prior to this point, the FFD routinely received between three (3) and five (5) OPRA requests on an annual basis. The Custodian certifies that although the task of sufficiently responding to multiple OPRA requests became almost impossible, she attempted to ensure that either she or the FFD's legal counsel requested extensions of time to respond.

The Custodian contends that her oversight in this matter was not intentional. The Custodian further asserts that her actions do not rise to the level of a knowing and willful violation based on the extraordinary circumstances presented herein.

Analysis

Whether the Custodian failed to respond to the Complainant's clarified 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.⁵ 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 October 31, 2007).

Moreover, should a requestor amend or clarify an OPRA request, it is reasonable that the time frame for a custodian to respond should begin anew; thus, providing a custodian with the statutorily mandated time frame to respond to the new or altered OPRA request. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

In the instant matter, Mr. Cooper responded in writing on behalf of the Custodian on February 5, 2011, six (6) business days after receipt of the OPRA request, seeking clarification of the Complainant's OPRA request. Specifically, Mr. Cooper stated that the FFD had not yet approved the 2011 agreements; thus, Mr. Cooper requested that the Complainant advise whether he wanted copies of the proposed agreements for 2011 or the current 2010 agreements. The Complainant provided clarification on February 6, 2011, a Sunday. The Custodian certified to this fact in the SOI. Thus, the Custodian was required to respond to the Complainant's clarified OPRA request by February 16, 2011. The Custodian, however, clearly failed to respond in writing to the Complainant's clarified OPRA request at all. Thus, the Custodian's failure to respond to the Complainant's clarification results in a "deemed" denial of access pursuant to Kelley, *supra*.

Therefore, the Custodian failed to respond to the Complainant's clarified OPRA request. As such, the Custodian's failure to respond in writing to the Complainant's clarified 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*.

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:

⁵ 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.

“... 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.

The records at issue in this complaint are agreements between the FFD and each FFD fire department or company for 2010. The Custodian certified in the SOI that she forwarded the OPRA request to Mr. Cooper for his review. The Custodian further certified that Mr. Cooper responded in writing to the Complainant on February 5, 2011 seeking clarification of the OPRA request, which the Complainant provided on February 6, 2011.

OPRA requires disclosure of non-exempt government records. N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.i. Although the Custodian certified in the SOI that her failure to provide the responsive records was an inadvertent mistake, there is no evidence in the record to indicate that she ever provided said records to the Complainant inclusive of a redaction index, if necessary, via e-mail (the Complainant’s preferred method of delivery). Additionally, the Custodian never asserted that the responsive records were exempt from disclosure under OPRA.

Therefore, the Custodian failed to bear her burden of proving a lawful denial of access to the responsive 2010 agreements. N.J.S.A. 47:1A-6. Thus, the Custodian must provide same to the Complainant via the preferred method of delivery, which is e-mail.

The GRC further notes that the Custodian acknowledged receipt of the Complainant’s OPRA request on January 27, 2011, and requested that the Complainant complete an official OPRA request form. The Complainant responded on January 28, 2011, disputing that he had to complete the form. The GRC further notes that there is no evidence in the record that the Complainant ever completed and submitted his request on the FFD’s official form as requested by the Custodian. However, the GRC notes that the Custodian’s request that the Complainant complete an official Township OPRA request form is an impermissible limitation on access pursuant to Renna v. County of Union, 407

N.J. Super. 230 (App. Div. 2009), because the Complainant's e-mailed OPRA request clearly invoked OPRA and made clear the nature of the request.

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?

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 failed to respond to the Complainant's clarified OPRA request. As such, the Custodian's failure to respond in writing to the Complainant's clarified 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 October 31, 2007).
2. The Custodian failed to bear her burden of proving a lawful denial of access to the responsive 2010 agreements. N.J.S.A. 47:1A-6. Thus, the Custodian must provide same to the Complainant via the preferred method of delivery, which is e-mail.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**

⁶ "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."

⁷ Satisfactory compliance requires that the Custodian deliver the records 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.

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

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

June 19, 2012