



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

March 25, 2014 Government Records Council Meeting

Jeff Carter  
Complainant

Complaint No. 2011-228

v.

Franklin Fire District #2 (Somerset)  
Custodian of Record

At the March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 18, 2014 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:

1. The Council finds that \$300 is a reasonable fee for attorneys of Counsel’s experience representing clients before the GRC. John Paff v. Bordentown Fire District No. 2 (Burlington), GRC Complaint No. 2012-153 (2013) (The rate of \$300 is reasonable for a[n] [OPRA] practitioner . . . in this geographical area.) The Council finds that Counsel’s hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.
2. The Council finds that the time spent on the file exceeds that which an experienced OPRA attorney would require. A considerable amount of time expended appears to have been done so on basic research. For example Counsel includes an entry wherein he billed solely for reviewing the OPRA seminar posted on the GRC Website. (Review of OPRA requirements by Catherine Starghill Esq., for effective representation of client. Supplemental Certification, 6/20/2013 entry.) The Council finds that a Custodian should not be expected to pay for the time a prevailing party spends coming up to speed on an area of law it is unfamiliar with. Planned Parenthood of Central New Jersey, et. al. v. The Attorney General of the State of New Jersey, et. al., 297 F.3d 253, 271 (App. Div. 2001).
3. The Council finds that Counsel’s fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). The Council finds that the time expended was not reasonable. The Council finds that 12.40 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham, Counsel**



**to the Complainant, for the amount of \$3,720.00, representing 12.40 hours of service at \$300 per hour.**

4. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

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 March, 2014

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: March 27, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Executive Director  
March 25, 2014 Council Meeting**

**Jeff Carter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-228**

v.

**Franklin Fire District #2 (Somerset)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of "Adequate Notice" ("Notice") of all Franklin Fire District No. 2 ("FFD") public meetings for the year 2011.

**Custodian of Record:** William Kleiber

**Request Received by Custodian:** June 17, 2011

**Response Made by Custodian:** None.

**GRC Complaint Received:** June 29, 2011

**Background**

August 27, 2013 Council Meeting:

At its August 27, 2013 public meeting, the Council considered the August 20, 2013 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 review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application, although largely conforming with the requirements of N.J.A.C. 5:105-2.13(b), lacks the required detail necessary to conduct a proper analysis. The time log provided by Counsel was overly broad as to time periods and vague as to work performed. There is not sufficient information to determine the nature of, and time spent by Counsel on, different tasks. Therefore, the descriptions of services provided by Counsel failed to fully comply with the requirements of N.J.C.A. 5:105-2.13(b)(5) and are in need of clarification and additional detail such that the Council is able to determine the reasonableness of the hourly rate charged and hours expended. **Accordingly, the Executive Director recommends that the Council does not award fees on this incomplete record, and that the Complainant or his attorney be permitted to submit an amended time**

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq., (Mount Bethel, PA).

<sup>2</sup> Represented by Eric M. Perkins, Esq. (Skillman, NJ).

**log to the Council in support of Counsel’s application for fee award within five (5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5) business days from the date of service of the amended time log in support of application for attorney’s fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**

2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

### Procedural History:

On August 29, 2013, the Council distributed its Interim Order to all parties.

On September 6, 2013, the Complainant responded to the Council’s Interim Order. The Complainant’s Counsel, John A. Birmingham, Jr., Esq. (“Counsel”), filed a supplemental fee certification (Certification of John A. Birmingham, Jr., Esq., September 6, 2013 (“Supplemental Certification”)) in support of his amended application (“Amended Application”) for fees.

On September 15, 2013, Counsel for the Custodian, Eric M. Perkins, Esq. (“Mr. Perkins”), filed an opposition to Counsel’s Amended Application (“Opposition”) noting that Counsel’s fee request increased dramatically. Opposition, pg.1.

### Analysis

#### Compliance

At its August 27, 2013 meeting, the Council permitted the “Complainant or his attorney . . . to submit an amended time log to the Council in support of Counsel’s application for fee award.” In addition, the Counsel ordered that “[t]he Custodian [may] object to the amended time logs[] N.J.A.C. 5:105-2.13(d).” On August 29, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Complainant’s Amended Application was due by close of business on September 6, 2013.

On September 6, 2013, the fifth (5<sup>th</sup>) business day after receipt of the Council’s Order, Counsel for the Complainant, in compliance with the Interim Order, filed an Amended Application. On September 16, 2013, the sixth (6<sup>th</sup>) business days after receipt of Counsel’s Amended Application, Mr. Perkins filed his Opposition. Although Mr. Perkin’s reply was one day late, the Council, in the interest of justice, will consider the Custodian’s submission.

#### Counsel’s Amended Application

In his Supplemental Certification Counsel certifies that “[t]he preparation of a more detailed time log required a thorough manual review of my case file . . . result[ing] in more billing entries (than originally submitted).” Counsel certifies that he actually expended 34.2 hours of time, not 13.2 hours as set forth in his original fee application, working on the file.

Accordingly, Counsel requests a total fee of \$10,260.00, as opposed to his prior request of \$3,960.00. Counsel also included in the within application the time he expended complying with the Council's August 27, 2013 Interim Order.

#### Custodian's Opposition to Amended Fee Application

Mr. Perkins filed a letter, on behalf of the Custodian, in opposition to the Amended Application of Counsel. Mr. Perkins states that the Board of Commissioners (the "Board") objected to both the original and Amended Applications. Although the Board does not object to Counsel's hourly rate, they do object to what is argued are "extreme amounts of time . . . ascribe[d]" to work performed in connection with the case. Mr. Perkins states that the Custodian is unable to rebut Counsel's fee application via line by line analysis of the timesheets because such a costly undertaking would be borne by the public.

However, Mr. Perkins argues that the within case did not involve difficult or novel issues of law. Mr. Perkins advances that the only issue was the Board's ability to provide the requested records in a timely fashion. Opposition at pg 1. Moreover, Mr. Perkins notes that the Amended Application dramatically increased the fees sought in the case.

#### **Prevailing Party Attorney Fee Award**

"Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't. of Corrections, ( "NJDPM" ) 185 N.J. 137, 152 (2005) (quoting Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted)). However, this principle is not without exception. NJDPM, 185 N.J. at 152. Some statutes, such as OPRA, incorporate a "fee-shifting measure: to ensure 'that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.'" NJDPM, 185 N.J. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989)).

New Jersey public policy, as codified in OPRA, is that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State." NJDPM, 185 N.J. at 153 (citing N.J.S.A. 47:1A-1). 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. See generally NJDPM, 185 N.J. 137. "By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight." Id. at 153. (quoting Courier News v. Hunterdon Cty. Prosecutor's Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006). Further, the Council found a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Accordingly, the Council ruled that the Complainant was a prevailing party entitled to an award of a reasonable attorney’s fee and directed the Complainant to file an application for attorney’s fees.

#### **A. Standards for Fee Award**

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” NJDPM, 185 N.J. at 153. (quoting Rendine v. Pantzer, 141 N.J. 292, 324 (1995) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983))). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. See Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting, Rendine, 141 N.J. at 337). What the fee-shifting statutes do not contemplate is that the losing party has to pay for the learning experience of attorneys for the prevailing party. See, HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing, Council Enter., Inc. v. Atl. City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Once the reasonable number of hours has been ascertained, the court should adjust the lodestar in light of the success of the prevailing party in relation to the relief sought. See Walker, 415 N.J. Super. at 606 (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004)). The lodestar amount may be adjusted, either upward or downward, depending on the degree of success achieved. See NJDPM, 185 N.J. at 153-55. OPRA neither mandates nor prohibits enhancements. Rivera v. Office of the Cnty. Prosecutor, 2012 N.J. Super. Unpub. LEXIS 2752 \*1, \* 10 (Law Div. Dec. 2012) (citing NJDPM, 185 N.J. at 157 (applying Rendine, 141 N.J. 292 (1995) to OPRA)). However, “[b]ecause enhancements are not preordained . . . enhancements should not be made as a matter of course.” NJDPM, 185 N.J. at 157.

“[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting, Hensley, 461 U.S. at 435). Notwithstanding that position, the NJDPM court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar,” but cautioned that “[o]rdinarily the facts of an OPRA case will not warrant and enhancement of the lodestar amount because the economic risk in securing access to a particular

government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157.

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at \*10-11 (citing Furst, 182 N.J. 1, 21-22 (2004) (applying R.P.C. § 1.5(a))).

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

Rivera, at 11 (citing R.P.C. 1.5(a)). In addition, N.J.A.C. 5:105-2.13(b) sets forth the information which counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by that Code section permits the reviewing tribunal to analyze the reasonableness of the requested fee.

Finally, the Appellate Division has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate the fact that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting Furey v. County of Ocean, 287 N.J. Super. 42, 46 (1996)).

## **B. Evaluation of Fee Application**

### **1. Lodestar Analysis**

#### **a. Hourly Rate**

In the instant matter Counsel is seeking a fee award of \$10,260, representing 34.2 hours of work at \$300 per hour. Counsel supports this hourly rate through a recitation of his experience and years in practice. Certification of John A. Bermingham, Esq. dated June 24, 2013, at ¶ 7.

The Council finds that \$300 is a reasonable fee for attorneys of Counsel’s experience representing clients before the GRC. Paff v. Bordentown Fire District No. 2 (Burlington), GRC Complaint No. 2012-153 (2013) (The rate of \$300 is reasonable for a[n] [OPRA] practitioner . . . in this geographical area.) Accordingly, the Council finds that Counsel’s hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.

## **b. Time Expended**

In support of his original request for a fee award Counsel submitted a certification (“Original Certification”). With his Original Certification, Counsel attached a one (1) page chart itemizing his hours and expenses (“Original Time Log”). The Original Time Log contained time entries for the period from April 1, 2012 through May 28, 2013 (the “Fee Period”). Counsel billed a total of 13.2 hours for a fee of \$3,960.00 for services during the Fee Period. Counsel’s description of services included: reviewing the complaint; researching OPRA provisions and other law; drafting, reviewing and filing a letter brief; preparing correspondence and filing other documents with the GRC; and exchanging emails with the Complainant and the GRC.

In response to the Council’s August 27, 2013 Interim Order, Counsel submitted a supplemental certification (“Supplemental Certification”) and amended time log (“Amended Time Log”) to the GRC. In his Supplemental Certification, Counsel explained that preparing a more detailed time log required him to review his file and resulted in additional billing being found. Mr. Bermingham asserted that his compliance with R.P.C. 1.5(a) and N.J.A.C. 5:105-2.13(b) resulted in an increase of 21.00 hours of billed time.

Counsel billed approximately 10 hours of service for an estimated fee of \$3,000 in connection with the requests for reconsideration in both the instant case and GRC 2011-262. Rather than split the time between the two cases, Counsel chose to bill all the time expended on the reconsideration motion in the instant matter. The Complainant was awarded fees based upon the Council’s ruling of prevailing party status. Carter v. Franklin Fire District #2 GRC 2011-228 (May 28, 2013 Interim Order). The reconsideration motion, having been filed after the ruling of prevailing party status and having been denied, provided no further benefit to the Complainant. Carter, GRC 2011-228 (May 28, 2013).

Fees for services rendered in conjunction with the motion for reconsideration are not chargeable to the Custodian. Thus, Counsel is not entitled to the approximately 10 hours or \$3,000 expenditure on the motion for reconsideration. See Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). This expenditure represents approximately 30% of the total fee applied for.

In addition, Counsel billed 12.2 hours for a fee of \$3,660 to prepare and file his Amended Application. The Council, via its August 27, 2013 Interim Order, permitted Counsel to supplement his original fee application in order to comply with R.P.C. 1.5(a), N.J.A.C. 5:105-2.13(b) and Council’s May 28, 2013 order, which awarded fees. The Council finds that the filing of the Amended Application was necessitated by Counsel’s failure to comply with the standards for filing a fee application and to provide the Council with sufficient information to make a determination of a proper award. Accordingly, the GRC finds that the costs associated with Counsel’s supplementation of his deficient application must be borne by Counsel.

Further, the Council finds that the time spent on the file exceeds that which an experienced OPRA attorney would require. A considerable amount of time expended appears to have been on basic research. For example, Counsel includes an entry wherein he billed solely for reviewing the OPRA seminar posted on the GRC Website. (Review of OPRA requirements

by Catherine Starghill Esq., for effective representation of client. Supplemental Certification, 6/20/2013 entry.)<sup>3</sup> The Council finds that a Custodian should not be expected to pay for the time a prevailing party spends coming up to speed on an area of law it is unfamiliar with. Planned Parenthood of Cent. N.J., et. al. v. The Attorney Gen. of the State of N.J., et. al., 297 F.3d 253, 271 (App. Div. 2001).

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. Although the Council finds that Counsel’s fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b), it finds the total time is excessive. Each time entry was reviewed and considered. The time expended by Counsel was evaluated in light of the work performed and the benefit to the Complainant, if any, and to determine whether it was reasonable when considered by the standards set forth in R.P.C. 1.5(a).

The GRC conducted a review of the fee application submitted. The recommendations of the Executive Director following that review are set forth in the following table:

Date of time entry	Description of Service	Time Expended (in tenths of an hour)/ and Amount Billed at \$300/hour in dollars		Findings from Fee Application Review	Adjusted Entry: Time allowed and total Amount at \$300.00/hour	
6/21/2012	Review of DOA compliant to determine representation. Review various communications filed by client with GRC since DOA complaint was filed. Enter appearance (with GRC) as counsel via email.	1.00	300.00		1.00	300.00
8/23/2012	Review email communication from GRC; indicating that GRC 2011-228 was scheduled for August 29, 2012 meeting. Follow-up email communication with the client.	0.40	120.00	Email exchange to review standard communication from GRC and follow-up with client does not warrant the time expended.	0.20	60.00
8/29/2012	Review email communication from GRC indicating that GRC; review Interim Order for GRC 2011-228.	0.60	180.00	Email exchange to review the Interim Order and standard communication from GRC does not warrant the time expended.	0.20	60.00
8/31/2012	Review email communication from GRC indicating that GRC 2011-228 was scheduled for August 29, 2012 meeting. Follow-up email communication with the client.	0.40	120.00	Duplicative of 8/23/2012 entry.	0.00	0.00
8/31/2012	Email communication client regarding GRC 2011-228.	0.20	60.00		0.20	60.00

<sup>3</sup> Counsel billed for review of an OPRA seminar which is on the GRC website. Thus 1.6 hours or approximately 5% of Counsel’s bill was time spent on his own professional development.

9/1/2012	Email communication client regarding GRC 2011-228.	0.20	60.00		0.20	60.00
9/20/2012	Email communication client regarding GRC 2011-228.	0.20	60.00		0.20	60.00
9/20/2012	Review email communication from GRC indicating that GRC 2011-228 was scheduled for September 25, 2012. Follow-up email communication with the client.	0.20	60.00		0.20	60.00
9/26/2012	Review email communication from GRC; review of Interim Order for 2011-228.	0.60	180.00	Review of email from GRC and Interim Order does not warrant .60 hour expenditure of time by an experienced practitioner.	0.40	120.00
10/18/2012	Email communication client regarding GRC 2011-228.	0.20	60.00		0.20	60.00
10/19/2012	Email communication client regarding GRC 2011-228.	0.20	60.00		0.20	60.00
10/20/2012	Email communication client regarding GRC 2011-228.	0.20	60.00		0.20	60.00
10/25/2012	Review email communication from GRC indicating that GRC 2011-228 was scheduled for October 30, 2012 meeting. Follow-up email communication with the client.	0.40	120.00	Review of standard scheduling email from GRC and communication of same to client does not warrant .40 hour expenditure of time by an experienced practitioner.	0.20	60.00
10/25/2012	Email communication client regarding GRC 2011-228.	0.20	60.00		0.20	60.00
10/26/2012	Email communication client regarding GRC 2011-228.	0.20	60.00		0.20	60.00
10/28/2012	Email communication client regarding GRC 2011-228.	0.20	60.00		0.20	60.00
10/28/2012	Email communication client regarding GRC 2011-228.	0.20	60.00	Duplicative of prior entry.	0.00	0.00
10/30/2012	Review email communication from GRC; review Interim Order for GRC 2011-228.	0.40	120.00		0.40	120.00
11/20/2012	Review email communication from GRC indicating that GRC 2011-228 was scheduled for November 27, 2012 meeting. Follow-up email communication with client.	0.40	120.00	Review of standard scheduling email from GRC and communication of same to client does not warrant .40 hour expenditure of time by an experienced practitioner.	0.20	60.00
12/19/2012	Review email communication from GRC; review of Interim Order for GRC 2011-228. Email communication with client regarding request for reconsideration.	0.20	60.00		0.20	60.00
12/27/2012	Research the following case law and following relevant documents for case preparation and request for reconsideration for GRC 2011-	2.00	600.00	The Council in its order dated December 18, 2012, awarded prevailing party fees to the Complainant. The Complainant	0.00	00.00

	228 & 2011-262; <u>Carter v. Franklin Fire District No. 2 (Somerset)</u> , GRC Complaint No. 2012-05 request for reconsideration certification (64 pages, including exhibits); <u>N.J.A.C. 5:105-2.10</u> ; <u>N.J.S.A. 47:1A-5(i)</u> . Begin drafting client certification for request for reconsideration.			moved for reconsideration which motion was denied. Thus, services performed in connection with the motion did not achieve any desired result. <i>See</i> <u>Teeters v. DYFS</u> , 387 <u>N.J. Super.</u> 423, 432 (App. Div. 2006). Counsel fees are awarded for work which contributed to the “prevailing party” finding. Thus, fees for services rendered in conjunction with the motion for reconsideration are not chargeable to the Custodian.		
12/28/2012	Research the following case law and following relevant documents for case preparation and request for reconsideration for GRC 2011-228 & 2011-262; <u>O’Shea and Paff v. Borough of Emerson</u> , No. 9008-07, slip op. at 11-12 (2008 WL 2328239) (N.J. Super. Law Div., June 3, 2008); <u>N.J.S.A. 41:1a-5(g)</u> ; <u>N.J.A.C. 5:105-2.10</u> ; <u>N.J.S.A. 47:1A-5(i)</u> . and <u>Kelley v. Township of Rockaway</u> , GRC Complaint No. 2007-11 (Interim Order October 3, 2007). Work on client’s request for reconsideration certification.	2.40	720.00	Services were performed in conjunction with the motion for reconsideration. See explanation set forth above for the 12/27/2012 time entry.	0.00	0.00
12/28/2012	Research the following case law and following relevant documents for case preparation and request for reconsideration for GRC 2011-228 & 2011-262; <u>Carroll v. Commissioners of Fire District No. 2 et. al.</u> , Docket No. SOM-L-1274-12; <u>Carter v. Franklin Fire District No. 2 (Somerset)</u> , GRC Complaint No. 2011-259; <u>N.J.A.C. 5:105-2.10</u> ; <u>N.J.S.A. 47:1a-5(g)</u> ; and <u>N.J.S.A. 47:1A-5(i)</u> . Work on client’s request for reconsideration certification.	2.00	600.00	Services were performed in conjunction with the motion for reconsideration. See explanation set forth above for the 12/27/2012 time entry.	0.00	0.00
1/2/2013	Finalize legal research regarding request for reconsideration for GRC 2011-228 & 2011-262. Finalization client’s request for reconsideration certification, along with request for reconsideration applications.	2.00	600.00	Services were performed in conjunction with the motion for reconsideration. See explanation set forth above for the 12/27/2012 time entry.	0.00	0.00
1/3/2013	Email communications with client regarding GRC 2011-228 and 2011-262 and client’s request for	0.60	180.00	Services were performed in conjunction with the motion for reconsideration. See	0.00	0.00

	reconsideration certification (30 Pages, including appendices).			explanation set forth above for the 12/27/2012 time entry.		
1/3/2013	File client's request for reconsideration combined certification and application for GRC 2011-228 & 2011-262 with GRC, Custodian, and Custodian's counsel via email.	0.20	60.00	Services were performed in conjunction with the motion for reconsideration. See explanation set forth above for the 12/27/2012 time entry.	0.00	0.00
3/5/2013	File change of address with GRC via email.	0.20	60.00		0.20	60.00
5/22/2013	Review email communications from GRC indicating that GRC 2011-228 & 2011-262 were scheduled for May 28, 2012 meeting. Follow-up email communications with client.	0.20	60.00		0.20	60.00
5/29/2013	Review email communication from GRC; review specific Interim Order for GRC 2011-228 & 2011-262. Email communications with client regarding request for reconsideration.	0.20	60.00		0.20	60.00
5/29/2013	Review email communication from GRC with Custodian's letter requesting stays for GRC 2011-228, 2011-262, and 2011-382. Several email communications with client regarding Custodian's request.	0.60	180.00	Services were performed in conjunction with the motion for reconsideration. See explanation set forth above for the 12/19/2012 time entry.	0.00	0.00
5/30/2013	Email communications with client regarding GRC 2011-228 & 2011-262.	0.40	120.00	The four time entries for Thursday, May 30, 2013; Friday, May 31, 2013 and Saturday June 1, 2013 total <b>1.60 hours</b> of time expended by Counsel exchanging emails, primarily with the Complainant. The record is unclear if the communications concern the instant case, or GRC Complaint 2011-262. Further, the record does not indicate the subject matter of the communications or if they relate to the motion for reconsideration which is not chargeable to the Custodian. Thus, there is no basis for an award of fees for these time entries.	0.00	0.00
5/31/2013	Email communications with client regarding GRC 2011-228 & 2011-262.	0.20	60.00			
6/1/2013	Email communications from Brigitte Lillie and prepare email communication to client.	0.80	240.00			
6/1/2013	Email communications with client regarding GRC 2011-228 & 2011-262.	0.20	60.00			
6/8/2013	Email communication with client regarding draft fee certification.	0.20	60.00		0.20	60.00
6/9/2013	Email communication with client regarding draft fee certification	0.20	60.00		0.20	60.00

6/10/2013	Request 10 day extension regarding the change in GRC's procedure with respect to how reasonable attorney's fee awards are handled.	0.20	60.00	The time expended requesting an extension of time is not chargeable to the Custodian.	0.00	0.00
6/10/2013	Email communication with client and email communication to GRC regarding withdrawal of 10 day extension request.	0.60	180.00	See explanation set forth above for the 6/10/2013 time entry.	0.00	0.00
6/19/2013	Email communication with client regarding the draft [of] Counsel's Letter Brief for 2011-228.	0.40	120.00	Email communication with client does not warrant .40 hour expenditure of time by experienced counsel.	0.20	60.00
6/19/2013*	Review of <u>Donato v. Township of Union</u> , GRC Complaint No. 2005-182 (February 2007) for effective representation.	0.60	180.00	Counsel expended <b>5.80 hours</b> of time from June 19, 2013 to June 20, 2013, reviewing case law for "effective representation" and another <b>1.6 hours</b> reviewing a webinar on the GRC website. Time will be awarded for research, but not for viewing the seminar which is akin to continuing legal education. <i>(See additional time entries below.)</i>	5.80 * see entries below	1,560.00
6/19/2013	Review of <u>Burnett v. County of Gloucester</u> , (App. Div. 2010) for effective representation.	0.60	180.00			
6/19/2013	Review <u>O'Shea v. Township of Fredon (Sussex)</u> , GRC Complaint No. 2007-251 (April 2008) for effective representation.	0.60	180.00			
6/19/2013	Review <u>Moore v. Township of Old Bridge</u> , GRC Complaint No. 2005-80 (August 2005) .	0.60	180.00			
6/20/2013	Email communication with client regarding draft Counsel's Letter Brief for GRC 2011-228.	0.20	60.00		0.20	60.00
6/20/2013	Review <u>N.J.S.A. 47:1A-5g</u> for effective representation of client including <u>Loigman (Complainant) v. Department of Treasury (Custodian of Record) Complaint #2004-45</u> .	0.80	240.00	* See explanation set forth above for the 6/19/2013 entry.	* See above	* See above
6/20/2013	Review OPRA requirements presentation by Catherine Starghill, Esq. for effective representation of client.	1.60	480.00	Time expended for watching a video presentation on OPRA requirements is akin to attending a continuing legal education seminar and will not be awarded.	0.00	0.00
6/20/2013	Review of <u>Caggiano v. Borough of Stanhope</u> , GRC Complaint No. 2006-220; <u>Vessio v. NJ DCA, Division of Fire Safety</u> , GRC Complaint No. 2007-188 for effective representation.	0.80	240.00	* See explanation set forth above for the 6/19/2013 entry.	* See above	* See above
6/20/2013	Review <u>Libertarian Party of Central New Jersey v. Murphy</u> , 384 N.J. Super. 136 (App. Div. 2006) and <u>Gannett Satellite Information Network, Inc. v. Borough of Raritan</u> , Docket No. SOM-L-1789-09 (December 2009)	1.20	360.00			

	for effective representation.					
6/20/2013	Review <u>Mason v. City of Hoboken</u> , 196 N.J. 51 (2008) for effective representation.	0.60	180.00			
6/23/2013	Email communication with client regarding Certified Application for GRC 2011-228.	0.20	60.00		0.20	60.00
6/24/2013	File certified application with GRC via email for an award of reasonable attorney's fees for GRC 2011-228; copy Custodian and Custodian's counsel.	0.20	60.00	The GRC finds that the within time entry denotes administrative work—filing of the letter brief. The GRC is cognizant that with the advent of advanced electronics, computers and e-filing, attorneys often work alone and/or perform tasks traditionally executed by support staff. Notwithstanding, an attorney may not be compensated at his or her standard hourly rate for counsel for tasks which could be performed by administrative and para-professional staff. The GRC finds that this task should be billed at a para professional or administrative rate. Because the record lacks any evidence of the rates Counsel routinely bills for administrative or para-professional time, no award can be made.	0.00	0.00
8/20/2013	Review email communication from GRC indicating that GRC 2011-228 & 2011-262 were scheduled for August 27, 2013 meeting. Follow-up email communications with client.	0.20	60.00		0.20	60.00
8/29/2013	Review email communication from GRC; review specific Final Decision for 2011-228 & 2011-262. Email communication with client regarding request for more detailed time logs.	0.40	120.00	Applicant's original fee application did not fully comply with requirements of <u>N.J.A.C. 5:105-2.13(b)</u> and <u>R.P.C. 1.2.</u> , and thus failed to comply with the Council's May 28, 2013 Interim Order. The Council in its August 27, 2013 Interim Order provided applicant with opportunity to amend his submission to fully comply with its previous Interim Order. The costs associated with the applicant's re-submission should be borne the Applicant.	0.00	0.00
8/30/2013	Review Rule of Professional Conduct 1.5(a) regarding detailed	0.80	240.00	See explanation set forth above for the 8/29/2013 entry.	0.00	0.00

	(sic) of counsel's time log specifically for GRC 2011-228.					
8/31/2013	Manually review entire case file for GRC 2011-228 to identify all specific entries to compile more detailed entries in compliance with the GRC's August 27, 2013 Final Decision.	2.80	840.00	See explanation set forth above for the 8/29/2013 entry.	0.00	0.00
9/4/2013	Prepare revised certification for amended time log to comply with the GRC;s August 27, 2013 Final Decision for GRC 2011-262.	1.60	480.00	See explanation set forth above for the 8/29/2013 entry.	0.00	0.00
9/6/2013	File revised certified amended time log with GRC (via email) in compliance with the GRC's August 27, 2013 Final Decision for GRC 2011-228 & 2011-262; copy Custodian and Custodian's counsel.	0.20	60.00	See explanation set forth above for the 8/29/2013 entry.	0.00	0.00
Total:		34.20	1,0260.00		12.40	3,720.00

For the reasons set forth within the Council finds that the time expended was not reasonable. The Council finds that 12.40 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham, Counsel to the Complainant, for the amount of \$3,720.00, representing 12.40 hours of service at \$300 per hour.**

## 2. Enhancement Analysis

Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that

1. The Council finds that \$300 is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. John Paff v. Bordentown Fire District No. 2 (Burlington), GRC Complaint No. 2012-153 (2013) (The rate of \$300 is reasonable for a[n] [OPRA] practitioner . . . in this geographical area.) The Council finds that Counsel's hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.
2. The Council finds that the time spent on the file exceeds that which an experienced OPRA attorney would require. A considerable amount of time expended appears to have been done so on basic research. For example Counsel includes an entry wherein he billed solely for reviewing the OPRA seminar posted on the GRC Website. (Review of OPRA requirements by Catherine Starghill Esq., for effective representation of client. Supplemental Certification, 6/20/2013 entry.) The Council

finds that a Custodian should not be expected to pay for the time a prevailing party spends coming up to speed on an area of law it is unfamiliar with. Planned Parenthood of Central New Jersey, et. al. v. The Attorney General of the State of New Jersey, et. al., 297 F.3d 253, 271 (App. Div. 2001).

3. The Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). The Council finds that the time expended was not reasonable. The Council finds that 12.40 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham, Counsel to the Complainant, for the amount of \$3,720.00, representing 12.40 hours of service at \$300 per hour.**
4. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Prepared and Approved By: Dawn R. SanFilippo  
Senior Counsel

March 18, 2014



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

August 27, 2013 Government Records Council Meeting

Jeff Carter  
Complainant

Complaint No. 2011-228

v.

Franklin Fire District #2  
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council (“Council”) considered the August 20, 2013 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 review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel’s fee application, although largely conforming with the requirements of N.J.A.C. 5:105-2.13(b), lacks the required detail necessary to conduct a proper analysis. The time log provided by Counsel was overly broad as to time periods and vague as to work performed. There is not sufficient information to determine the nature of, and time spent by Counsel on, different tasks. Therefore, the descriptions of services provided by Counsel failed to fully comply with the requirements of N.J.C.A. 5:105-2.13(b)(5) and are in need of clarification and additional detail such that the Council is able to determine the reasonableness of the hourly rate charged and hours expended. **Accordingly, the Executive Director recommends that the Council does not award fees on this incomplete record, and that the Complainant or his attorney be permitted to submit an amended time log to the Council in support of Counsel’s application for fee award within five (5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5) business days from the date of service of the amended time log in support of application for attorney’s fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**
2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.



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 27th Day of August, 2013

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: August 29, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
August 27, 2013 Council Meeting**

**Jeff Carter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-228**

**v.**

**Franklin Fire District #2<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of “Adequate Notice” (“Notice”) of all Franklin Fire District No. 2 (“FFD”) public meetings for the year 2011.

**Custodian of Record:** William Kleiber

**Request Received by Custodian:** June 17, 2011

**Response Made by Custodian:** None.

**GRC Complaint Received:** June 29, 2011

**Background**

May 28, 2013 Council Meeting:

At its May 28, 2013 public meeting, the Council considered the May 21, 2013 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 Complainant has failed to establish in his request for reconsideration of the Council’s December 18, 2012 Interim Order that: 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence, and has failed to show that the Council acted arbitrarily, capriciously or unreasonably. Further, the Complainant failed to present any evidence which was not available at the time of the Council’s adjudication which would change the substance of the Council’s decision. Thus, the Complainant’s request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In the Matter of the Petition of Comcast Cablevision of South Jersey, Inc. for a Renewal Certif. of Appr. to Cont. to Construct, Operate and Maintain a Cable

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

<sup>2</sup> Represented by Eric M. Perkins, Esq. (Skillman, NJ).

Television Sys. in the City Of Atlantic City, Cty. of Atlantic, State of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. The Council's September 25, 2012 conclusion No. 3 should be amended as follows:

“Therefore, the Complainant has achieved ‘the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.’ Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken, 196 N.J. 51 (2008). Specifically, regardless of the Custodian’s failure to submit a response to the Complainant’s OPRA request, failure to submit a Statement of Information and failure to comply with the Council’s Interim Order, the Complainant received the responsive record after the filing of this complaint. 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, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney’s fees to object to the attorney’s fees requested. N.J.A.C. 5:105-2.13(d).”**

#### Procedural History:

On May 29, 2013, the Council distributed its May 28, 2013 Interim Order (“Interim Order”) to all parties.

#### Compliance:

On June 24, 2013, eighteen (18) business days from the effective date of the Interim Order, John A. Birmingham, Esq., Counsel for the Complainant (“Counsel”), filed his fee application in accordance with N.J.A.C. 5:105-2.13(b).<sup>3</sup> The fee application and Certification of Services (“Certification”) of counsel set forth the following:

- (1) The complaint name and number: Carter v. Franklin Fire District #2, 2011-228.
- (2) Counsel’s law firm affiliation: Law Offices of John A. Birmingham, Jr., LLC.

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<sup>3</sup> N.J.A.C. 5:105-2.13(b) sets forth the requirements of a fee application, providing in relevant part: (b) . . . [t]he [fee] application must include a certification from the attorney(s) representing the complainant that includes: 1. The Council’s complaint reference name and number; 2. Law firm affiliation; 3. A statement of client representation; 4. The hourly rates of all attorneys and support staff involved in the complaint; 5. Copies of weekly time sheets for each professional involved in the complaint, which includes detailed descriptions of all activities attributable to the project in 0.1 hour (six-minute) increments; 6. Evidence that the rates charged are in accordance with prevailing market rates in the relevant community. Such evidence shall include: (i) Years of related or similar experience; (ii) Skill level; and (iii) Reputation; and 7. A detailed listing of any expense reimbursements with supporting documentation for such costs.

- (3) A statement of client representation: Counsel certified to his services, including researching OPRA laws, reviewing the previously filed complaint and the filing of “various documents.”
- (4) The hourly rate of all attorneys and support staff involved in the complaint: Mr. Bermingham, the sole professional who worked on the file, certified that he charges \$300/ hour.
- (5) Copies of time log sheets for each professional involved in the complaint: Counsel supplied a copy of his time sheets, from June 1, 2012 through May 28, 2013 (the “Fee Period”). During the Fee Period counsel billed a total of 13.2 hours for a total fee of \$3,960.00.
- (6) Evidence that the rates charged are in accordance with prevailing rates in the relevant community, including years of experience, skill level and reputation: Counsel certified to ten (10) years of teaching and legal experience, but limited experience with respect to OPRA.
- (7) Detailed documentation of expenses: Counsel is not seeking reimbursements for expenses.

Accordingly, Complainant’s Counsel filed a timely fee application with the Government Records Council (“GRC”).

### **Analysis**

In its May 28, 2013 Interim Order, the Council found the Complainant was a prevailing party and thus was entitled to submit an application for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). Counsel for Complainant filed and served<sup>4</sup> his Certification of Services, seeking a fee award of \$3,960.00, within twenty (20) business days provided for pursuant to the Court’s Interim Order.

Council’s Interim Order further provided that the Custodian was afforded ten (10) business days, from the date of service of the application for attorney’s fees, to object to Counsel’s fee request. N.J.A.C. 5:105-2.13(d). The Custodian did not submit an objection to Complainant’s application for fees.

### **Prevailing Party Attorney Fee Award**

“Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney’s fee from the loser.” New Jerseyans for a Death Penalty Moratorium v. New Jersey Dept. of Corrections, (“NJMDP”) 185 N.J. 137, 152 (2005) (quoting, Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted)). However, this principle is not without exception. NJDPM, 185 N.J. at 152. Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in

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<sup>4</sup> N.J.A.C. 5:105-2.13(c) provides in relevant part: “(c) The complainant, or his or her attorney, must serve all parties with the application for attorney’s fees and all attachments thereto.”

cases involving statutory rights, . . . and to ensure justice for all citizens.” NJDPM, 185 N.J. at 153 (quoting, Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

New Jersey public policy, as codified in OPRA, is that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” NJDPM, 185 N.J. at 153 (citing, N.J.S.A. 47:1A-1). 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. See generally, NJDPM, 185 N.J. 137. “By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” Id. at 153. (quoting, Courier News v. Hunterdon Cty. Prosec. Off., 378 N.J. Super. 539, 546 (App. Div.2005)).

In the instant matter, the Council found the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. at 432. Further, the Council found a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 73. Accordingly, the Council ruled that the Complainant was a prevailing party entitled to an award of a reasonable attorney’s fee and was directed to file an application for attorney’s fees.

#### **A. Standards for Fee Award**

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” NJDPM, 185 N.J. at 153. (quoting, Rendine, 141 N.J. at 324 (quoting, Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting, Rendine, 141 N.J. at 337). What the fee-shifting statutes do not contemplate is that the losing party has to pay for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing, Council Enter., Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Once the reasonable number of hours has been ascertained, the court should adjust the lodestar in light of the success of the prevailing party in relation to the relief sought. Walker, 415 N.J. Super. at 606 (citing, Furst v. v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004)). The

loadstar amount may be adjusted, either upward or downward, depending on the degree of success achieved. See NJDPM, 185 N.J. at 153-55. OPRA neither mandates nor prohibits enhancements. Rivera v. Office of the Cty. Prosec., 2012 N.J. Super. Unpub. LEXIS 2752 \*1, \* 10 (Law Div. Dec. 2012) (citing, NJDPM, 185 N.J. at 157 (applying, Rendine, 141 N.J. 292 (1995) to OPRA)). However, “[b]ecause enhancements are not preordained . . . enhancements should not be made as a matter of course.” NJDPM, 185 N.J. at 157.

“[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting, Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting, Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success. . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting, Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting, Hensley, 461 U.S. at 435). Notwithstanding that position, the NJDPM court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar,” but cautioned that “[o]rdinarily the facts of an OPRA case will not warrant and enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157.

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at \*10-11 (citing, Furst, 182 N.J. 1, 21-22 (2004) (applying RPC § 1.5(a))).

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

Rivera, at 11 (citing, R.P.C. 1.5(a)). In addition, N.J.A.C. 5:105-2.13(b) sets forth the information which counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by that Code section permits the reviewing tribunal to analyze the reasonableness of the requested fee.

Finally, the appellate court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate the fact that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those

individuals who require redress in the context of a recognition that limited public funds are available for such purposes.” HIP, 291 N.J. Super. at 167 (quoting, Furey v. County of Ocean, 287 N.J. Super. 42, 46 (1996)).

## **B. Evaluation of Fee Application**

### **1. Lodestar Analysis**

#### **a. Hourly Rate**

In the instant matter Counsel is seeking a fee award of \$3,960.00, representing 13.2 hours at \$300 per hour. In support of this hourly rate, Counsel submits legal precedent of the rates of attorneys that were ruled as reasonable. The Custodian does not challenge Counsel’s fee application.

With respect to Counsel’s request for a \$300 hourly rate, Counsel cites awards of \$325 to \$350 in OPRA cases of New Jersey attorneys who Counsel certifies “frequently litigate OPRA cases.” Certification of John A. Bermingham, Jr., Esq., dated June 24, 2013, (hereinafter, “Bermingham Certif.”) at ¶ 7. However, Counsel candidly states that the work required a “familiarity with the law regarding OPRA” and that his previous experience with OPRA was “limited.” Bermingham Certif. at ¶ 2 subsection 1(c). The rate of \$300 is reasonable for a practitioner with experience and skill level in this geographical area. However, for the reasons set forth below, the Council is unable to make a determination if \$300 is reasonable for this practitioner.

#### **b. Time Expended**

In support of his request for fees, Counsel submitted a log of his time. For the year period from “6/1/2012 to 5/28/2013”, Counsel billed 4.0 hours for “[r]esearch [of] various OPRA provisions and laws.”<sup>5</sup> Similarly, over the twenty (20) day period from “6/1/2012 to 6/20/2012” Counsel billed 3.6 hours for “[r]eview the DOA Complaint filed by the Complainant.” The time entries are generalized service descriptions over long periods of time and fail to detail the work performed in tenths of an hour, as the regulations require. N.J.A.C. 5:105-2.13.<sup>6</sup> “An attorney’s application should be sufficiently detailed to allow a trial court to determine the nature of the work performed and by whom, as well as the reasonableness of the hourly rate and the hours expended.” Furst, 182 N.J. 1, 25 (2005) (citing, Rendine, 141 N.J. at 317). It is unclear from the submission if Counsel was researching legal issues specific to the instant matter, or if he was researching OPRA in general in order to become familiar with the statute. Although general

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<sup>5</sup> Counsel currently has three fee applications pending before this Council: Robert A. Verry v. Borough of South Bound Brook (GRC Complaint No. 2012-153), Jeff Carter v. Franklin Fire District #2 (GRC Complaint No. 2011-228), and Jeff Carter v. Franklin Fire District #2 (GRC Complaint No. 2011-262). All three applications contain an identical time entry of three (3) or four (4) hours for: “Research various OPRA provisions and laws.” It is unclear whether this time was repetitive or shared between the files.

<sup>6</sup> N.J.A.C. 5:105-2.13 requires the provision of: copies of weekly time sheets for each professional involved in the complaint, which includes detailed descriptions of all activities attributable to the project in 0.1 hour (six-minute increments).

research into an area new to an advocate may be necessary for proper representation of his or her client, the client cannot be charged for an attorney mastering the learning curve. See, HIP, 291 N.J. Super. at 144. This is especially true where the attorney is charging an hourly rate commensurate with colleagues who have skill and expertise in the law.

Counsel's entry for 2.0 hours, which spans an entire year, denotes "[p]repare correspondence and file various documents with the GRC." The entry fails to provide specific dates or descriptions of any correspondence or documents to aid the Council in its analysis. Despite this broad description, the GRC case file contains only one filing of significance, a motion for reconsideration and a certification of the Complainant dated January 2, 2013<sup>7</sup>. However, this filing was made after the Council's September 12, 2012 Order finding the Complainant to be a "prevailing party," and thus did not contribute to the Council's finding of "prevailing party." No fees can be awarded in connection with the filing of the motion for reconsideration because the work did not bring about a change (voluntary or otherwise) in the Custodian's conduct. Teeters, 387 N.J. Super. at 432.

Another entry, for 3.6 hours, was attributed to "[e]xchange [of] several e-mails with Complainant and GRC." Since specific dates of service were not provided, the Council is unable to determine if the "various e-mails" were sent prior to or after the Council's September 12, 2012 decision. Therefore, as it is billed, no fee can be awarded in connection with this entry. Further, Counsel billed another 3.6 hours for "[r]eview the DOA Complaint" over the time period from "6/1/2013 to 6/20/2013". Again, this entry is neither specific as to date nor detail of services. The Complaint filed with the GRC is approximately seven (7) pages long. It is questionable whether a review of this document would have taken 3.6 hours over a twenty (20) day period. The entry does not provide enough information to recommend an appropriate fee award. Similarly, the entry for "[r]esearch [of] various OPRA provisions and law," dated "6/1/2012-5/28/2013," does not provide specificity as to either date or subject matter researched and thus the reasonableness cannot be determined.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application, although largely conforming with the requirements of N.J.A.C. 5:105-2.13(b), lacks the required detail necessary to conduct a proper analysis. The time log provided by Counsel was overly broad as to time periods and vague as to work performed. There is not sufficient information to determine the nature of, and time spent by Counsel on, different tasks. Therefore, the descriptions of services provided by Counsel failed to fully comply with the requirements of N.J.C.A. 5:105-2.13(b)(5) and are in need of clarification and additional detail such that the Council is able to determine the reasonableness of the hourly rate charged and hours expended. **Accordingly, the Executive Director recommends that the Council does not award fees on this incomplete record, and that the Complainant or his attorney be permitted to submit an amended time log to the Council in support of Counsel's application for fee award within five (5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5)**

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<sup>7</sup> The Certification of Jeff Carter is identical to the Certification filed in support of the Complainant's motion for reconsideration in case number 2011-288: "GRC Complaint Nos. 2011-228 *and* 2011-262" (emphasis added). The Council will not address the questions of whether Counsel split his billing for this certification between the two cases as for reasons set forth above they decline to award a fee on this filing. However, the Council notes that the time-log is devoid of any indication that time was split between two cases for the preparation of this Certification.

**business days from the date of service of the amended time log in support of application for attorney's fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**

## **2. Enhancement Analysis**

Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application, although largely conforming with the requirements of N.J.A.C. 5:105-2.13(b), lacks the required detail necessary to conduct a proper analysis. The time log provided by Counsel was overly broad as to time periods and vague as to work performed. There is not sufficient information to determine the nature of, and time spent by Counsel on, different tasks. Therefore, the descriptions of services provided by Counsel failed to fully comply with the requirements of N.J.C.A. 5:105-2.13(b)(5) and are in need of clarification and additional detail such that the Council is able to determine the reasonableness of the hourly rate charged and hours expended. **Accordingly, the Executive Director recommends that the Council does not award fees on this incomplete record, and that the Complainant or his attorney be permitted to submit an amended time log to the Council in support of Counsel's application for fee award within five (5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5) business days from the date of service of the amended time log in support of application for attorney's fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**
2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Prepared By: Dawn R. SanFilippo, Esq.  
Senior Counsel

Approved By: Brandon D. Minde, Esq.  
Executive Director

August 20, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

May 28, 2013 Government Records Council Meeting

Jeff Carter  
Complainant  
v.

Complaint No. 2011-228

Franklin Fire District No. 2 (Somerset)  
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 *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 Complainant has failed to establish in his request for reconsideration of the Council’s December 18, 2012 Interim Order that: 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence, and has failed to show that the Council acted arbitrarily, capriciously or unreasonably. Further, the Complainant failed to present any evidence which was not available at the time of the Council’s adjudication which would change the substance of the Council’s decision. Thus, the Complainant’s request for reconsideration be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council’s September 25, 2012 conclusion No. 3 should be amended as follows:

“Therefore, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, regardless of the Custodian’s failure to submit a respond to the Complainant’s OPRA request, failure to submit a Statement of Information and failure to comply with the Council’s Interim Order, the Complainant received the responsive record after the filing of this complaint. 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*. 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. *See* N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**"

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of May, 2013

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: May 29, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**May 28, 2013 Council Meeting**

**Jeff Carter<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2011-228**

v.

**Franklin Fire District No. 2 (Somerset)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of “Adequate Notice” (“Notice”) of all Franklin Fire District No. 2 (“FFD”) public meetings for the year 2011.

**Request Made:** June 17, 2011

**Response Made:** None

**GRC Complaint Filed:** June 29, 2011<sup>3</sup>

**Background**

**December 18, 2012 Council Meeting:**

At its December 18, 2012 public meeting, the Council considered the October 23, 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:

“[b]ased on judicial notice of the evidence adduced in Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint No. 2011-262, the Council should amend conclusion No. 2 of its September 25, 2012 Interim Order in the instant matter as follows:

“The Custodian’s failure to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial of access to said request and the Custodian unlawfully denied access to the responsive meeting notice pursuant to N.J.S.A. 47:1A-6. Moreover, the Custodian failed to submit a Statement of Information and further failed to comply with the Council’s August 28, 2012 Interim Order. However, the GRC recently discovered that Ms. Accardi provided the Complainant with the responsive record on July 22, 2011 and there was no

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

<sup>2</sup> William Kleiber, Custodian of Records. Represented by Eric M. Perkins, Esq. (Skillman, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

need to order disclosure thereafter. 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."

The Council's conclusion No. 3 referring this complaint to the Office of Administrative Law "for the determination of reasonable prevailing party attorney's fees" remains unchanged because evidence derived from GRC Complaint No. 2011-262 indicates that the Complainant received the responsive record following the filing of this complaint."

#### Procedural History:

On December 19, 2012, the Council distributed its Interim Order to all parties.

#### Complainant's Reconsideration:

On January 3, 2013, the Complainant filed a request for reconsideration.<sup>4</sup> The Complainant requests that the Council reconsider its December 18, 2012 Interim Order based on a mistake, new evidence<sup>5</sup> and extraordinary circumstances.

The Complainant contends that the GRC arbitrarily and capriciously held that the Custodian did not knowingly and willfully violate OPRA under the totality of the circumstances.<sup>6</sup> The Complainant contends that the GRC failed to appreciate that the Custodian never responded to his OPRA request, failed to submit a Statement of Information after two (2) requests for same from the GRC and failed to comply with the Council's August 28, 2012 Interim Order. The Complainant contends that, notwithstanding the Custodian's failure to provide any defense, the GRC still determined that the Custodian did not knowingly and willfully violate OPRA. The Complainant contends that the facts remain the same: he submitted an OPRA request on June 17, 2011, filed this complaint on June 29, 2011, after receiving no response and finally received the responsive record on July 22, 2011.<sup>7</sup> The Complainant argues that there is no evidence in the record to support the GRC's conclusion. The Complainant contends that the GRC's holding that the Custodian could not have knowingly and willfully denied access aids unscrupulous custodians by allowing them to unlawfully deny access to government records until the GRC renders a decision to disclose same. The Complainant asserts that the Custodian has repeatedly violated OPRA without any recourse from the GRC.

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<sup>4</sup> The Complainant characterizes his submission as a legal certification; however, the GRC notes that a party can only legally certify to facts and not legal arguments.

<sup>5</sup> New evidence is that which could not have been provided prior to the Council's decision because this evidence did not exist at the time.

<sup>6</sup> The Complainant requests that the GRC take judicial notice of his request for reconsideration in GRC Complaint No. 2012-05, in which the Custodian also failed to respond but was not found to have knowingly and willfully violated OPRA. There, the GRC determined that the Complainant's request was overly broad and thus invalid.

<sup>7</sup> The Complainant notes that this complaint arose following Franklin Township's denial of a similar OPRA request notwithstanding the fact that the FFD was required by law to provide the Notice to the Township. N.J.S.A. 10:4-8(d).

The Complainant contends that he has included compelling evidence as to why the Custodian denied access to the responsive record for 35 days: the FFD was found to have violated the Open Public Meetings Act (“OPMA”) on November 15, 2012, for failing to create work session minutes. Carroll v. Fire District No. 2 of Franklin Township, Docket No. SOM-L-1274-12 (November 15, 2012). The Complainant contends that meeting dates in the Notice fell under the Law Division Order, thus prompting the Custodian to deny access to the Notice to prevent the Complainant from attending the meetings. The Complainant contends that the Custodian and FFD were keeping the public in the dark about the Complainant’s multiple complaints filed with the GRC by only speaking about them in work session meetings for which no minutes were created.<sup>8</sup> The Complainant contends that these facts certainly give rise to the appearance of a knowing and willful violation. The Complainant argues that the only way to determine whether the Custodian knowingly and willfully denied access to the responsive record under the totality of the circumstances is to have a hearing before the Office of Administrative Law (“OAL”).

The Complainant argues that the GRC created a paradox by determining that the Custodian unlawfully denied access but that his 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.” The Complainant contends that it is not possible for a “deemed” denial and an unreasonable denial of access to exist in the same complaint.<sup>9</sup> The Complainant contends these statements have no basis in fact or evidence because they contradict each other.

The Complainant contends that the GRC further erred in changing its conclusion based on judicial notice of evidence submitted as part of Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint No. 2011-262. The Complainant asserts that he clearly noted in that complaint that he was providing as part of the complaint the responsive meeting notice at issue here. The Complainant contends that providing the meeting notice in GRC Complaint No. 2011-262 disproves the GRC’s position that (1) the Complainant acted in bad faith; (2) he did not submit any evidence of receipt of the records; and (3) the omission of this evidence forced an arbitrary conclusion. The Complainant contends that the GRC, failing to review the evidence in GRC Complaint No. 2011-262 for over a year, is attempting to twist the facts to alleviate the length of time it took to review and adjudicate both complaints. The Complainant contends that requestors will continue to be denied fair, impartial and objective adjudications so long as the GRC continues to invent defenses. The Complainant argues that he is the only party to officially notify the GRC that the Custodian provided the Notice to him 35 days after the submission of the OPRA request. The Complainant contends that it is prejudicial for the GRC to change its conclusions devoid of any supporting evidence “in the record.”

The Complainant thus requests that the GRC reconsider conclusion No. 2 holding that the Custodian “could not have” knowingly and willfully violated OPRA and refer this complaint to OAL for a hearing. The Complainant contends that a failure to do so would be continued

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<sup>8</sup> The Complainant contends that the GRC should order the Custodian to “produce and provide” all minutes for the meetings in which no minutes were prepared or provided to the Complainant. The GRC notes that minutes not at issue here and the GRC has no authority to order a custodian to create and provide minutes pursuant to OPMA. N.J.S.A. 47:1A-7(b).

<sup>9</sup> The Complainant notes that he is advancing similar arguments in his request for reconsideration filed in GRC Complaint No. 2011-262.

evidence of the GRC's prejudicial treatment and a continued violation of his due process right to a fair, impartial and time resolution of all complaints to include this one.

## Analysis

### Reconsideration

Parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. *N.J.A.C. 5:105-2.10*. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria*, *supra*, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

On January 3, 2013, the Complainant filed the request for reconsideration of the Council's December 18, 2012 Final Decision, nine (9) business days after the issuance of the Council's Order.

The Council should reject Complainant's request for reconsideration. The Complainant argues that the Council arbitrarily determined that there was no knowing and willful violation because of the Custodian's failure to respond in total to the OPRA request and subsequent complaint. Evidence indicates that the Custodian, at the very least, provided access to the record at issue herein, thus negating the need for the August 28, 2012 Interim Order requiring disclosure of same. Contrary to the Complainant's assertions, the Custodian did respond to the OPRA request providing access to the responsive record.

The Complainant also alleged that the Council effectively invented a defense for the Custodian. Notwithstanding the Council's ability to raise additional defenses regarding the

disclosure of records,<sup>10</sup> the Council's use of judicial notice provided competent, credible evidence that the Complainant received the responsive record which the Complainant does not dispute.

For these reasons and those set forth in its December 18, 2012 Interim Order, the Council's holding overturning its September 25, 2012 Interim Order was appropriate.

Moreover, the Complainant asserted that the Council erred in reconsidering its September 25, 2012 Interim Order based on judicial notice of GRC Complaint No. 2011-262. The Council should also reject this portion of the Complainant's request for reconsideration. In its December 18, 2012 Interim Order, the Council clearly articulated the other occasions where the Complainant submitted additional information that would favor the Complainant's position as a contrast to his failure to submit additional information here. The Council also held both the Complainant and Custodian culpable for misusing the Council's administrative resources. The Council is also under no obligation to inspect each complaint filed in order to determine whether evidence was submitted for other complaints pending before the Council. Thus, the Council made each determination with evidence on the record at the time. In each instance, the Council clearly articulated the reasons for its decisions.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: 1) that the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, *supra*. The Complainant failed to do so. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably in reconsidering its August 28, 2012 Interim Order based on judicial notice of GRC Complaint No. 2011-262. See D'Atria, *supra*. Further, the Complainant failed to present any evidence which was not available at the time of the Council's adjudication which would change the substance of the Council's decision. Thus, the Complainant's request for reconsideration should be denied. Cummings, *supra*; D'Atria, *supra*; Comcast, *supra*.

### **Prevailing Party Attorney's Fees:**

The Council's December 22, 2012 Interim Order stated that its September 25, 2012 Interim Order conclusion No. 3 holding that this complaint should be referred to the Office of Administrative Law "for the determination of reasonable prevailing party attorney's fees" remain unchanged. However, the Council should amend conclusion No. 3 to reflect that the Council will be determining the reasonable attorney's fees instead of referring same to the Office of Administrative Law. Thus, the Council's September 25, 2012 conclusion No. 3 should be amended as follows:

"Therefore, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, *supra*, at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief

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<sup>10</sup> Paff v. Township of Plainsboro, Docket No. A-2122-05T2 (App. Div. 2007), *certif. denied* by Paff v. Twp of Plainsboro, 193 N.J. 292 (2007).

ultimately achieved. Mason, *supra*. Specifically, regardless of the Custodian's failure to submit a respond to the Complainant's OPRA request, failure to submit a Statement of Information and failure to comply with the Council's Interim Order, the Complainant received the responsive record after the filing of this complaint. 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*. 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. *See* N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d)."**

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Complainant has failed to establish in his request for reconsideration of the Council's December 18, 2012 Interim Order that: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence, and has failed to show that the Council acted arbitrarily, capriciously or unreasonably. Further, the Complainant failed to present any evidence which was not available at the time of the Council's adjudication which would change the substance of the Council's decision. Thus, the Complainant's request for reconsideration be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council's September 25, 2012 conclusion No. 3 should be amended as follows:

"Therefore, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, regardless of the Custodian's failure to submit a respond to the Complainant's OPRA request, failure to submit a Statement of Information and failure to comply with the Council's Interim Order, the Complainant received the responsive record

after the filing of this complaint. 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. 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. See N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d)."**

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Brandon D. Minde, Esq.  
Executive Director

May 21, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

**INTERIM ORDER**

**December 18, 2012 Government Records Council Meeting**

Jeff Carter  
Complainant

Complaint No. 2011-228

v.

Franklin Fire District No. 2 (Somerset)  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 23, 2012 *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 based on judicial notice of the evidence adduced in Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint No. 2011-262, the Council should amend conclusion No. 2 of its September 25, 2012 Interim Order in the instant matter as follows:

“The Custodian’s failure to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial of access to said request and the Custodian unlawfully denied access to the responsive meeting notice pursuant to N.J.S.A. 47:1A-6. Moreover, the Custodian failed to submit a Statement of Information and further failed to comply with the Council’s August 28, 2012 Interim Order. However, the GRC recently discovered that Ms. Accardi provided the Complainant with the responsive record on July 22, 2011 and there was no need to order disclosure thereafter. 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.”

The Council’s conclusion No. 3 referring this complaint to the Office of Administrative Law “for the determination of reasonable prevailing party attorney’s fees” remains unchanged because evidence derived from GRC Complaint No. 2011-262 indicates that the Complainant received the responsive record following the filing of this complaint.



Interim Order Rendered by the  
Government Records Council  
On The 18<sup>th</sup> Day of December, 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: December 19, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**December 18, 2012 Council Meeting**

**Jeff Carter<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2011-228**

v.

**Franklin Fire District No. 2 (Somerset)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of “Adequate Notice” of all Franklin Fire District No. 2 (“FFD”) public meetings for the year 2011.

**Request Made:** June 17, 2011

**Response Made:** None

**Custodian:** William Kleiber

**GRC Complaint Filed:** June 29, 2011<sup>3</sup>

**Background**

**September 25, 2012**

Government Records Council’s (“Council”) Interim Order. At its September 25, 2012 public meeting, the Council considered the September 18, 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 comply with the Council’s August 28, 2012 Interim Order by not providing the responsive meeting notice to the Complainant and further failing to provide certified confirmation of compliance to the Executive Director within the prescribed deadline.
2. The Custodian’s failure to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial of access to said request and the Custodian unlawfully denied access to the responsive meeting notice pursuant to N.J.S.A. 47:1A-6. Moreover, the Custodian failed to submit a Statement of Information and further failed to comply with the Council’s August 28, 2012 Interim Order. Therefore, it is possible that the Custodian’s actions were intentional and deliberate, with

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<sup>1</sup> Represented by John A. Bermingham, Jr. Esq. (Camden, NJ).

<sup>2</sup> Represented by Eric M. Perkins, Esq. (Skillman, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

knowledge of their wrongfulness. As such, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's August 28, 2012 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, regardless of the Custodian's failure to submit a respond to the Complainant's OPRA request, failure to submit a Statement of Information and failure to comply with the Council's Interim Order, the filing of this complaint brought about the Council's decision to order disclosure of the responsive record. 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.

### Analysis

**Whether the Council should reconsider its September 25, 2012 Interim Order to amend its holding ordering that this complaint be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances?**

OPRA provides that:

"A public official, officer, employee or custodian who knowingly and 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

Moreover, pursuant to *N.J.A.C. 5:105-2.10(a)*, the Council, “at its own discretion, may reconsider any decision it renders.” *Id.*

Subsequent to the adjudication of this complaint, the GRC discovered through another complaint, Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint No. 2011-262, that the record at issue herein was disclosed to the Complainant on July 22, 2011, or 24 business days after receipt of the Complainant’s OPRA request. This fact was critical to the adjudication of this complaint; however, neither party notified the GRC that the Complainant received the responsive record and thus the GRC was forced to determine this complaint without the benefit of all evidence available to both parties at least as early as July 22, 2011.

Therefore, the Council reconsiders at its own discretion its September 25, 2012 Interim Order to amend the knowing and willful analysis based on new evidence that came to the GRC’s attention after the adjudication of this complaint.

Regarding reconsiderations, applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D’Atria, *supra*, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In its September 28, 2012 Interim Order, the Council held that:

“... the Custodian’s failure to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial of access to said request and the Custodian unlawfully denied access to the responsive meeting notice pursuant to N.J.S.A. 47:1A-6. Moreover, the Custodian failed to submit a Statement of Information and further failed to comply with the Council’s August 28, 2012 Interim Order. Therefore, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness. As such, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully

violated OPRA and unreasonably denied access under the totality of the circumstances.” *Id.* at pg. 3-4.

Subsequent to the adjudication of this complaint, the GRC reviewed the submissions relevant to GRC Complaint No. 2011-262 in preparation for adjudication. In that complaint, which shares common parties with this complaint, the Complainant submitted an OPRA request to the FFD on April 22, 2011 seeking regular and special meeting minutes for all meetings held from January 1, 2011 to April 22, 2011. Ms. Sandi Accardi (“Ms. Accardi”), FFD Secretary, responded on behalf of the Custodian providing access to minutes. Thereafter, the Complainant submitted the OPRA request at issue herein on June 17, 2011 seeking “Adequate Notice” (“Notice”) for all meetings in 2011. After receiving no response, the Complainant filed the instant complaint on June 29, 2011.

The Complainant subsequently filed GRC Complaint No. 2011-262 on August 9, 2011 arguing that although Ms. Accardi timely provided him with minutes on behalf of the Custodian, he had determined that Ms. Accardi failed to provide all responsive minutes. The Complainant openly admitted that he made this determination based on the Notice that Ms. Accardi provided to him in response to the OPRA request at issue herein on July 22, 2011. *See* GRC Complaint No. 2011-262, Denial of Access Complaint dated August 9, 2011 at pg. 5. The Complainant noted in the Denial of Access Complaint that the Custodian’s failure to respond to the OPRA request seeking the Notice was at issue before the GRC in this complaint.

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

After review of GRC Complaint No. 2011-262, the GRC has determined that it contains a fact that is critical to the proper adjudication of this complaint: the Complainant was provided with the Notice at issue herein on July 22, 2011. The GRC accepts this fact as new evidence because at no time prior to its review of GRC Complaint No. 2011-262 did either party inform the GRC that the responsive Notice was provided. The GRC thus takes judicial notice of GRC Complaint No. 2011-262. This fact was critical to the proper adjudication of this complaint and neither party directly informed the GRC of same.

The Custodian in this matter failed to provide the GRC with the Statement of Information (“SOI”), which was due on July 25, 2011 with an extended deadline of August 12, 2011. This action is a clear violation of the Council’s regulations at *N.J.A.C.* 5:105-2.4(a), which provide that “[c]ustodians *shall* submit a completed and signed [SOI] ...” (Emphasis added.) The Custodian would have been able to notify the GRC that the Notice was provided in the SOI and yet failed to submit same, thus requiring the Council to order disclosure of the record in its August 28, 2012 Interim Order. However, the

Custodian failed to respond to the Order. This action is a clear violation of the Council's promulgated regulations at *N.J.A.C. 5:105-1.3* defining an interim order as "... an order ... requiring the records custodian ... to perform some act in accordance with OPRA the compliance of which must be reported back to the Council." (Emphasis added.) *Id.* Thus, the Council determined that the Custodian's actions may have been knowing and willful in the totality of the circumstances presented to it.

Notwithstanding the Custodian's failure to respond to the GRC's request for the SOI and the Council's August 28, 2012 Order, the evidence as incorporated in this matter via judicial notice of GRC Complaint No. 2011-262 shows that the Complainant was in possession of the record less than one (1) month after filing this complaint and more than a year prior to the Council's Order. Thus, the Custodian *could not* have knowingly and willfully denied access to the Notice because the Complainant received same on July 22, 2011.

The Complainant clearly had knowledge that he received the Notice but failed to inform the GRC of such fact in connection with this complaint at any point prior to the GRC's discovery of said fact in GRC Complaint No. 2011-262. The omission of this fact amounts to a bad faith attempt to influence the Council's decision.

The GRC notes that notwithstanding the statutory requirement that a custodian must bear the burden of proving a lawful denial of access, the New Jersey Office of Administrative Law ("OAL") and the GRC have held that good faith efforts of communication between custodians and complainants are paramount and are essential to promoting the spirit of OPRA. See Wolosky v. Township of Stillwater (Sussex), GRC Complaint No. 2009-22 (September 2011). In previous complaints filed with the GRC, this Complainant has not hesitated to submit additional correspondence when it would impact the Council's decision in his favor. See Carter v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2011-74 (May 2012), Carter v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2011-75 (May 2012), Carter v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012), Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint No. 2011-101 (Interim Orders dated August 28, 2012 and September 25, 2012). In GRC Complaint No. 2011-262, the Complainant went so far as to admit that he received the Notice at issue herein in order to establish that the Custodian failed to provide him with all responsive minutes sought in his request therein. However, in the instant complaint, the Complainant curiously did not submit any evidence that he received the same Notice.

Both parties' collective failure to provide the GRC with the most critical fact created a gross misuse of the GRC's administrative resources. There was clearly no need for the Council to order disclosure of the Notice, because the evidence adduced in GRC Complaint No. 2011-262 established that such Notice was already disclosed to the Complainant on July 22, 2011. However, because both parties failed to inform the GRC of this fact, the Council ordered disclosure and subsequently refer this complaint to the OAL for a knowing and willful hearing. This unacceptable omission has thus forced an arbitrary conclusion and extensively delayed the appropriate adjudication of this complaint. Thus, the Council must revisit this complaint in order to amend its determination of whether the Custodian knowingly and willfully violated OPRA.

Therefore, based on new evidence discovered by the GRC in Carter, the Council should amend conclusion No. 2 of its September 25, 2012 Interim Order as follows:

“The Custodian’s failure to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial of access to said request and the Custodian unlawfully denied access to the responsive meeting notice pursuant to N.J.S.A. 47:1A-6. Moreover, the Custodian failed to submit a Statement of Information and further failed to comply with the Council’s August 28, 2012 Interim Order. However, the GRC recently discovered that Ms. Accardi provided the Complainant with the responsive record on July 22, 2011 and there was no need to order disclosure thereafter. 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.”

The Council’s Conclusion and Recommendation No. 3, referring this complaint to the OAL “for the determination of reasonable prevailing party attorney’s fees,” remains unchanged because evidence derived from GRC Complaint No. 2011-262 indicates that the Complainant received the responsive record following the filing of this complaint.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that based on judicial notice of the evidence adduced in Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint No. 2011-262, the Council should amend conclusion No. 2 of its September 25, 2012 Interim Order in the instant matter as follows:

“The Custodian’s failure to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial of access to said request and the Custodian unlawfully denied access to the responsive meeting notice pursuant to N.J.S.A. 47:1A-6. Moreover, the Custodian failed to submit a Statement of Information and further failed to comply with the Council’s August 28, 2012 Interim Order. However, the GRC recently discovered that Ms. Accardi provided the Complainant with the responsive record on July 22, 2011 and there was no need to order disclosure thereafter. 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.”

The Council’s conclusion No. 3 referring this complaint to the Office of Administrative Law “for the determination of reasonable prevailing party attorney’s fees” remains

unchanged because evidence derived from GRC Complaint No. 2011-262 indicates that the Complainant received the responsive record following the filing of this complaint.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

October 23, 2012<sup>4</sup>

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<sup>4</sup> This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 meeting was cancelled due to lack of quorum.  
Jeff Carter v. Franklin Fire District No. 2 (Somerset), 2011-228 – Supplemental Findings and Recommendations of the Executive Director



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

September 25, 2012 Government Records Council Meeting

Jeff Carter  
Complainant

Complaint No. 2011-228

v.

Franklin Fire District No. 2 (Somerset)  
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian failed to comply with the Council’s August 28, 2012 Interim Order by not providing the responsive meeting notice to the Complainant and further failing to provide certified confirmation of compliance to the Executive Director within the prescribed deadline.
2. The Custodian’s failure to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial of access to said request and the Custodian unlawfully denied access to the responsive meeting notice pursuant to N.J.S.A. 47:1A-6. Moreover, the Custodian failed to submit a Statement of Information and further failed to comply with the Council’s August 28, 2012 Interim Order. Therefore, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness. As such, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council’s August 28, 2012 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, regardless of the Custodian’s failure to submit a respond to the Complainant’s OPRA request, failure to submit a Statement of Information and failure to comply with the Council’s Interim Order, the filing of this complaint brought about the Council’s decision to order disclosure of the responsive



record. 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 25<sup>th</sup> Day of September, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: September 26, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jeff Carter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-228**

v.

**Franklin Fire District No. 2 (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of “Adequate Notice” of all Franklin Fire District No. 2 (“FFD”) public meetings for the year 2011.

**Request Made:** June 17, 2011

**Response Made:** None

**Custodian:** William Kleiber

**GRC Complaint Filed:** June 29, 2011<sup>3</sup>

**Background**

**August 28, 2012**

Government Records Council’s (“Council”) Interim Order. At its August 28, 2012 public meeting, the Council considered the August 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not timely respond to the Complainant’s OPRA request. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian failed to bear his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6. Thus, the Custodian must provide the requested notice for all Franklin Fire District No. 2 meetings held in 2011 to the Complainant via the preferred method of delivery, which is e-mail.

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<sup>1</sup> Represented by John A. Bermingham, Jr. Esq. (Camden, NJ).

<sup>2</sup> Represented by Eric M. Perkins, Esq. (Skillman, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

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,<sup>4</sup> to the Executive Director.<sup>5</sup>**
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.

**August 29, 2012**

Council's Interim Order distributed to the parties.<sup>6</sup>

### Analysis

#### **Whether the Custodian complied with the Council's August 28, 2012 Interim Order?**

At its August 28, 2012 meeting, the Council ordered the Custodian to:

"...provide the requested notice for all Franklin Fire District No. 2 meetings held in 2011 to the Complainant via the preferred method of delivery, which is e-mail ... **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, to the Executive Director.**"  
(Footnotes omitted.)

The Council disseminated its Order to the parties on August 29, 2012. Thus, the Custodian's response was due by close of business on September 6, 2012. As of September 10, 2012, the Custodian provided no evidence that he sent the responsive meeting notice to the Complainant via e-mail. Additionally, the Custodian did not

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<sup>4</sup> "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."

<sup>5</sup> 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.

<sup>6</sup> The GRC received no compliance from the Custodian.

provide certified confirmation of compliance to the Executive Director that he did so within the prescribed deadline.

Therefore, the Custodian failed to comply with the Council's August 28, 2012 Interim Order by not providing the responsive record to the Complainant or certified confirmation of compliance to the Executive Director.

**Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

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

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

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

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

The Custodian's failure to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial of access to said request and the Custodian unlawfully denied access to the responsive meeting notice pursuant to N.J.S.A. 47:1A-6. Moreover, the Custodian failed to submit an SOI and further failed to comply with the Council's August 28, 2012 Interim Order. Therefore, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness. As such, this complaint should be referred to the Office of

Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied 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 (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. Klagholtz*, 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)."

However, the 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). *Id.* at 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 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 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 herein filed the instant complaint requesting that the Council order disclosure of the responsive record and find that the Custodian violated OPRA by failing to respond. The evidence of record clearly indicates that the Custodian failed to respond to the Complainant's OPRA request. Specifically, the Complainant provided no evidence of a response and the Custodian did not submit an SOI. Thus, in its August 28, 2012 Order, the Council determined that the Custodian's failure to respond resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, *supra*.

The Council further ordered the Custodian to disclose of said record to the Complainant via his preferred method of delivery.

Thus, notwithstanding the Custodian's failure to comply with the Council's Order, the Complainant has achieved in principle the relief sought and is a prevailing party subject to an award of reasonable attorney's fees.

Pursuant to Teeters, *supra*, and the Council's August 28, 2012 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, regardless of the Custodian's failure to submit a respond to the Complainant's OPRA request, failure to submit an SOI and failure to comply with the Council's Interim Order, the filing of this complaint brought about the Council's decision to order disclosure of the responsive record. 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 that the Council find that:

1. The Custodian failed to comply with the Council's August 28, 2012 Interim Order by not providing the responsive meeting notice to the Complainant and further failing to provide certified confirmation of compliance to the Executive Director within the prescribed deadline.
2. The Custodian's failure to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial of access to said request and the Custodian unlawfully denied access to the responsive meeting notice pursuant to N.J.S.A. 47:1A-6. Moreover, the Custodian failed to submit a Statement of Information and further failed to comply with the Council's August 28, 2012 Interim Order. Therefore, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness. As such, this complaint should be referred to the Office of Administrative Law for a determination of whether the

Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's August 28, 2012 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, regardless of the Custodian's failure to submit a respond to the Complainant's OPRA request, failure to submit a Statement of Information and failure to comply with the Council's Interim Order, the filing of this complaint brought about the Council's decision to order disclosure of the responsive record. 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

September 18, 2012



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

August 28, 2012 Government Records Council Meeting

Jeff Carter  
Complainant

Complaint No. 2011-228

v.

Franklin Fire District No. 2 (Somerset)  
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council ("Council") considered the August 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not timely respond to the Complainant's OPRA request. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5, e.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian failed to bear his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6. Thus, the Custodian must provide the requested notice for all Franklin Fire District No. 2 meetings held in 2011 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,<sup>1</sup> to the Executive Director.<sup>2</sup>**

<sup>1</sup> "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."

<sup>2</sup> 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.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of August, 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 29, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jeff Carter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-228**

v.

**Franklin Fire District No. 2 (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of “Adequate Notice” of all Franklin Fire District No. 2 (“FFD”) public meetings for the year 2011.

**Request Made:** June 17, 2011

**Response Made:** None

**Custodian:** William Kleiber

**GRC Complaint Filed:** June 29, 2011<sup>3</sup>

**Background**

**June 17, 2011**

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

**June 29, 2011**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated June 17, 2011.

The Complainant states that he submitted an OPRA request to the FFD via e-mail and facsimile on June 17, 2011. The Complainant states that to date, the Custodian has failed to respond to the Complainant’s OPRA request.

The Complainant notes that this OPRA request is one of several OPRA requests to which the Custodian has failed to respond. The Complainant further notes that the other OPRA requests are the subjects of several complaints pending before the GRC. The Complainant asserts that the Custodian has established a pattern of violating OPRA by failing to respond within the statutorily mandated time frame.

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<sup>1</sup> Represented by John A. Bermingham, Jr. Esq. (Camden, NJ).

<sup>2</sup> Represented by Eric M. Perkins, Esq. (Skillman, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

The Complainant requests the following:

1. A determination ordering the Custodian to disclose all responsive records.
2. A determination that the Custodian violated OPRA by failing to respond to the Complainant's OPRA request in a timely manner.
3. A determination that the Custodian knowingly and willfully violated OPRA.

The Complainant does not agree to mediate this complaint.

### **July 18, 2011**

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

### **August 9, 2011**

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on July 18, 2011 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.<sup>4</sup>

## **Analysis**

### **Whether the Custodian timely responded to the Complainant's OPRA request?**

OPRA provides that:

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

Further, OPRA provides that:

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A.

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<sup>4</sup> The Custodian did not respond to the GRC's request for an SOI.

47:1A-5.g.<sup>5</sup> 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).

The Complainant submitted an OPRA request to the FFD on June 17, 2011. There is no evidence in the record indicating when the Custodian received the Complainant's OPRA request because the Custodian did not submit an SOI. Further, there is no evidence indicating that the Custodian responded to the Complainant's OPRA request.

Therefore, the Custodian did not timely respond to the Complainant's OPRA request. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

### **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 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

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<sup>5</sup> 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.

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 Complainant’s OPRA request sought adequate notice for all FFD meetings held in 2011. The Custodian did not respond and further did not submit an SOI setting forth the lawful basis for said “deemed” denial.

OPRA requires disclosure of non-exempt government records. N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.i. The Custodian never asserted that the responsive records were exempt from disclosure under OPRA. Instead, the Custodian simply did not respond to either the Complainant’s OPRA request or the GRC’s request to submit an SOI.

Therefore, the Custodian failed to bear his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6. Thus, the Custodian must provide the requested notice for all FFD meetings held in 2011 to the Complainant via the preferred method of delivery, which is e-mail.

**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 did not timely respond to the Complainant’s OPRA request. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian failed to bear his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6. Thus, the Custodian must provide the requested notice for all Franklin Fire District No. 2 meetings held in 2011 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,<sup>6</sup> to the Executive Director.<sup>7</sup>**
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

August 21, 2012

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<sup>6</sup> "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."

<sup>7</sup> 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.