



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

February 25, 2014 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-234

v.

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

At the February 25, 2014 public meeting, the Government Records Council (“Council”) considered the February 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 that this complaint be dismissed because the Complainant (via Counsel) withdrew his complaint in a letter to the Honorable Susan M. Scarola, Administrative Law Judge, dated January 24, 2014, because the parties have agreed to settle the matter. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 25th Day of February, 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: February 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 25, 2014 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-234

v.

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

Records Relevant to Complaint: Copies of e-mails from December 1, 2010 through February 2, 2011 regarding insurance sent or received by the following:

- The Custodian
- Mr. William T. Cooper, III, Esq. (“Mr. Cooper”)
- Mr. Louis L. Hajdu-Nemeth, Jr.
- Mr. Bernard Louie Pongratz
- Mr. Timothy A. Szymborski
- Mr. James J. Wickman
- Mr. Tony Presutti
- Mr. Robert R. Scheer

Custodian of Record: Melissa Kosensky³
Request Received by Custodian: February 2, 2011
Response Made by Custodian: None
GRC Complaint Received: July 12, 2011

Background

March 22, 2013 Council Meeting:

At its March 22, 2013 public meeting, the Council considered the March 15, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The current Custodian complied with the Council’s January 29, 2013 Interim Order because the Custodian provided the responsive records to the Complainant and

¹ Represented by John A. Bermingham, Jr., Esq. (Camden, NJ). Mr. Bermingham entered notice of appearance before the GRC on February 15, 2012.

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

³ The current Custodian of Record is Tim Szymborski, who replaced Ms. Melissa Kosensky on March 1, 2011.

simultaneously submitted certified confirmation of compliance to the GRC within the extended time frame.

2. The Custodian's failure to respond to the Complainant's OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and the Custodian failed to bear her burden of proving a lawful denial of access to the requested records. However, the current Custodian timely complied with the Council's Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Id. at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the current Custodian provided responsive records pursuant to the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. 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 Dep't of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Twp. of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances . . . justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Procedural History:

On March 26, 2013, the Council distributed its Interim Order to all parties. On May 13, 2013, the complaint was transmitted to the Office of Administrative Law ("OAL").

On January 24, 2014, the Complainant's Counsel sent a letter to the Honorable Susan M. Scarola, Administrative Law Judge, withdrawing this complaint because the parties have agreed to settle the matter.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant (via Counsel) withdrew his complaint in a letter to the Honorable Susan M. Scarola, Administrative Law Judge, dated January 24, 2014, because the parties have agreed to settle the matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

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

February 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

INTERIM ORDER

March 22, 2013 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-234

v.

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

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 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 current Custodian complied with the Council’s January 29, 2013 Interim Order because the Custodian provided the responsive records to the Complainant and simultaneously submitted certified confirmation of compliance to the GRC within the extended time frame.
2. The Custodian’s failure to respond to the Complainant’s OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and the Custodian failed to bear her burden of proving a lawful denial of access to the requested records. However, the current Custodian timely complied with the Council’s Order. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the current Custodian provided responsive records pursuant to the Council’s Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees. Based on the New Jersey Supreme Court’s decision



in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 22nd Day of March, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: March 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 22, 2013 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-234

v.

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

Records Relevant to Complaint: Copies of e-mails from December 1, 2010 through February 2, 2011 regarding insurance sent or received by the following:

- The Custodian
- Mr. William T. Cooper, III, Esq. (“Mr. Cooper”)
- Mr. Louis L. Hajdu-Nemeth, Jr.
- Mr. Bernard Louie Pongratz
- Mr. Timothy A. Szymborski
- Mr. James J. Wickman
- Mr. Tony Presutti
- Mr. Robert R. Scheer

Request Made: February 2, 2011

Response Made: None

GRC Complaint Filed: July 12, 2011³

Background

At its January 29, 2013 public meeting, the Council considered the January 22, 2013 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 bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access,

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA). Mr. Bermingham entered notice of appearance before the GRC on February 15, 2012.

² Melissa Kosensky, Custodian of Records. The current Custodian of Record is Tim Szymborski, who replaced Ms. Kosensky on March 1, 2011. Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

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

denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Custodian failed to bear her burden of proving a lawful denial of access to any responsive records. N.J.S.A. 47:1A-6. **Thus, the Custodian must either disclose the responsive records or, if no records responsive exist, certify to this fact.**
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, if applicable, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

The Council distributed its Interim Order (“Order”) to all parties on January 30, 2013. On February 20, 2013, the Custodian responded to the Council’s Order, copying the Complainant’s Counsel.⁶ The Custodian certified that attached were the records responsive to the Complainant’s OPRA request. The Custodian also attached a document index identifying four (4) e-mails exempt from N.J.S.A. 47:1A-1.1. as follows:

Information which us a communication between public agency & insurance carrier

1. E-mail from insurance carrier to Jim Wickman dated February 1, 2011.
2. E-mail from Jim Wickman to insurance carrier dated February 1, 2011.

Attorney-client privilege

1. E-mail from Counsel Re: Insurance coverage – Millstone Valley Fire Department dated December 31, 2010.

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

⁵ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁶ Custodian’s Counsel requested and was granted an extension until February 20, 2013 to respond to the Interim Order.

2. E-mail from Counsel Re: Insurance coverage – Millstone Valley Fire Department dated December 31, 2010.

Analysis

Compliance

At its January 29, 2013 meeting, the Council ordered the Custodian to:

“... either disclose the responsive records or, if no records responsive exist, certify to this fact ... The Custodian shall comply ... within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, if applicable, 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 1:4-4,⁷ to the Executive Director.”

The Council disseminated its Order on January 30, 2013. Thereafter, the Custodian’s Counsel timely sought an extension of time until February 20, 2013, which the GRC granted. The current Custodian responded on February 20, 2013 providing responsive records to the Complainant (via Counsel) and sending certified confirmation of compliance to the GRC. Additionally, the Custodian advised that access to four (4) e-mails was denied pursuant to N.J.S.A. 47:1A-1.1. The Complainant did not take issue with the Custodian’s denial.

Therefore, the current Custodian complied with the Council’s January 29, 2013 Interim Order because the Custodian provided the responsive records to the Complainant and simultaneously submitted certified confirmation of compliance to the GRC within the extended time frame.

Knowing & Willful

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

⁷ "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."

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 resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and the Custodian failed to bear her burden of proving a lawful denial of access to the requested records. However, the current Custodian timely complied with the Council’s Order. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party 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.*

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 Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, *supra*, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

“OPRA itself contains broader language on attorney’s fees than the former RTKL did. OPRA provides that ‘[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.’ N.J.S.A. 47:1A-6. Under the prior RTKL, ‘[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney’s fee not to exceed \$500.00.’ N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.” (Footnote omitted.) Mason at 73-76 (2008).

The Court in Mason, *supra*, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).”

In 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.

In determining whether the Complainant herein is a prevailing party, the GRC acknowledges that the Custodian's failure to respond in writing in a timely manner resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Thus, the burden of proving that this complaint was not the catalyst for providing the responsive records to the Complainant shifts to the Custodian pursuant to Mason, *supra*.

There is no evidence indicating that the Custodian responded or intended to respond to the Complainant's OPRA request. The Custodian actually states in the SOI that she unintentionally failed to respond. Moreover, the GRC ordered the Custodian to disclose records pursuant to its January 29, 2013 Order, which the current Custodian did on February 20, 2013. Thus, the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Pursuant to Teeters, *supra*, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the current Custodian provided responsive records pursuant to the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's January 29, 2013 Interim Order because the Custodian provided the responsive records to the Complainant and

simultaneously submitted certified confirmation of compliance to the GRC within the extended time frame.

2. The Custodian's failure to respond to the Complainant's OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and the Custodian failed to bear her burden of proving a lawful denial of access to the requested records. However, the current Custodian timely complied with the Council's Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the current Custodian provided responsive records pursuant to the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

March 15, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
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RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

January 29, 2013 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-234

v.

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

At the January 29, 2013 public meeting, the Government Records Council ("Council") considered the January 22, 2013 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 bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. 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 her burden of proving a lawful denial of access to any responsive records. N.J.S.A. 47:1A-6. **Thus, the Custodian must either disclose the responsive records or, if no records responsive exist, certify to this fact.**
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, if applicable, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

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

² Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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 29th Day of January, 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: January 30, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 29, 2013 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-234

v.

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

Records Relevant to Complaint: Copies of e-mails from December 1, 2010 through February 2, 2011 regarding insurance sent or received by the following:

- The Custodian
- Mr. William T. Cooper, III, Esq. (“Mr. Cooper”)
- Mr. Louis L. Hajdu-Nemeth, Jr.
- Mr. Bernard Louie Pongratz
- Mr. Timothy A. Szyborski
- Mr. James J. Wickman
- Mr. Tony Presutti
- Mr. Robert R. Scheer

Request Made: February 2, 2011

Response Made: None

Custodian: Melissa Kosensky³

GRC Complaint Filed: July 12, 2011⁴

Background

February 2, 2011

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

February 7, 2011

E-mail from the Custodian to the Complainant attaching the Franklin Fire District’s (“FFD”) official OPRA request form. The Custodian acknowledges receipt of

¹ Represented by John A. Bermingham, Jr., Esq. (Camden, NJ). Mr. Bermingham entered notice of appearance before the GRC on February 15, 2012.

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

³ The current Custodian of Record is Tim Szyborski, who replaced Ms. Melissa Kosensky on March 1, 2011.

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

the Complainant's OPRA request. The Custodian requests that the Complainant fill out the attached form.

February 8, 2011

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

July 12, 2011

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

- Complainant's OPRA request dated February 2, 2011.
- E-mail from the Custodian to the Complainant dated February 7, 2011.
- E-mail from the Complainant to the Custodian dated February 8, 2011.

The Complainant states that he submitted an OPRA request to the Custodian on February 2, 2011. The Complainant states that the Custodian acknowledged receipt of said request on February 7, 2011 and asked the Complainant to fill out an official OPRA request form. The Complainant states that he replied on February 8, 2011 asking the Custodian why he needed to fill out an official form.⁵

The Complainant states that as of July 11, 2011, the Custodian has not responded to the OPRA request at issue herein. The Complainant further notes that this OPRA request is one of several requests in which the Custodian failed to respond in a timely manner. The Complainant states that the other OPRA requests are currently the subjects of complaints awaiting adjudication before the GRC.⁶

The Complainant thus contends that the Custodian has established a pattern of knowingly and willfully failing to respond to the Complainant's OPRA requests. The Complainant requests the following:

1. A determination that the Custodian has violated OPRA by failing to respond within the statutorily mandated time frame.
2. A determination ordering disclosure of all responsive records.
3. A determination that the Custodian knowingly and willfully violated OPRA.

The Complainant does not agree to mediate this complaint.

July 14, 2011

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

⁵ The Complainant states that because the Custodian never responded, he did not resubmit his OPRA request on the FFD's official OPRA request form.

⁶ See Carter v. Franklin Fire District No. 1 (Somerset), GRC Complaint Nos. 2011-70, 2011-71, 2011-72, 2011-73, 2011-74, 2011-75, 2011-76 and 2011-100. The GRC notes that all of these were subsequently adjudicated by the GRC.

July 22, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC states that pursuant to a brief telephone conversation, Counsel indicated that the current Custodian is having technological issues and did not receive the GRC's request for an SOI. The GRC states that it will resend the request for an SOI to the Custodian and that the new deadline to submit same is July 29, 2011.

July 27, 2011

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

July 27, 2011

E-mail from the Complainant to the GRC. The Complainant requests that the GRC consider that the Complainant copied the Custodian's Counsel, who is already representing the Custodian in several complaints before the GRC, on his e-mail filing the instant complaint with the GRC. The Complainant states that he opposes Counsel's request for an extension of time to submit the SOI.

August 2, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until August 9, 2011 to submit the SOI.

August 9, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated January 26, 2011.⁷
- Complainant's OPRA request dated January 31, 2011.⁸
- Complainant's OPRA request dated February 1, 2011.⁹
- Complainant's OPRA request dated February 2, 2011.¹⁰
- Complainant's OPRA request dated February 2, 2011.¹¹
- Complainant's OPRA request dated February 2, 2011.¹²
- Complainant's OPRA request dated February 2, 2011.¹³

⁷ This OPRA request is not at issue in the instant complaint. However, said request sought multiple types of records for the time period December 23, 2010 to January 26, 2011 regarding multiple subjects and identifying nine (9) persons associated with the FFD.

⁸ See F.N. No. 7. This OPRA request multiple types of records and was the request at issue in Carter v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2011-73 (Interim Order dated September 25, 2012).

⁹ See F.N. No. 7. This OPRA request sought multiple types of records from January 1, 2000 to February 1, 2011 regarding resolutions and identifying fifteen (15) persons associated with the FFD.

¹⁰ See F.N. No. 7. This OPRA request sought e-mails from January 1, 2007 to February 2, 2011 regarding ethics and identifying twelve (12) persons associated with the FFD.

¹¹ See F.N. No. 7. This OPRA request sought e-mails from January 1, 2000 to February 2, 2011 regarding workplace violence or harassment and identifying fifteen (15) persons associated with the FFD.

¹² See F.N. No. 7. This OPRA request sought e-mails from January 1, 2000 through February 2, 2011 regarding personnel policies and procedures and identifying fifteen (15) persons associated with the FFD.

- Complainant's OPRA request dated February 2, 2011.¹⁴
- Complainant's OPRA request dated February 2, 2011.¹⁵
- Complainant's OPRA request dated February 2, 2011.
- E-mail from the Custodian to the Complainant dated February 7, 2011.
- Complainant's OPRA request dated February 21, 2011.¹⁶
- E-mail from William T. Cooper, III, Esq. ("Mr. Cooper"), previous FFD Counsel, to the Complainant dated March 22, 2011 in response to the Complainant's February 21, 2011 OPRA request.

The Custodian certifies that her search for the requested records involved forwarding the Complainant's OPRA request to Mr. Cooper along with several other requests received from the Complainant.

The Custodian certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services is not applicable because all records are still in existence.

The Custodian certifies that she received the Complainant's OPRA request on February 2, 2011. The Custodian certifies that she acknowledged receipt of the Complainant's OPRA request on February 7, 2011. The Custodian certifies that due to an apparent miscommunication, she unintentionally failed to respond providing the responsive records to the Complainant. The Custodian further certifies that because Mr. Cooper previously denied access to a similar request seeking insurance information, the Custodian did not need to respond to the OPRA request at issue herein. The Custodian certifies that Mr. Cooper had advised her not to respond to multiple requests seeking essentially the same records for which access was already denied by the FFD.

The Custodian certifies that she was an elected member of the Board of Commissioners ("Board"). The Custodian certifies that as an elected official, she was forced to utilize her personal time to handle OPRA requests. The Custodian certifies that the FFD conducts a reorganization on March 1 of every year because of possible turnover from election results. The Custodian certifies that she was not re-elected in 2011; thus, the Board had to transition to the current Custodian. The Custodian certifies that she received approximately 39 OPRA requests from January 1, 2011 through the date of the OPRA request at issue herein with the Complainant accounting for 37 of them. The Custodian certifies that although the task of sufficiently responding to multiple OPRA requests became almost impossible, she attempted to ensure that either she or the FFD's legal counsel requested extensions of time to respond.

¹³ See F.N. No. 7. This OPRA request sought e-mails from January 1, 2000 through February 2, 2011 regarding employee salaries and benefits and identifying fifteen (15) persons associated with the FFD.

¹⁴ See F.N. No. 7. This OPRA request sought e-mails from January 1, 2009 to February 2, 2011 regarding resolutions and identifying nine (9) persons associated with the FFD.

¹⁵ See F.N. No. 7. This OPRA request sought e-mails from January 1, 2008 to February 2, 2011 regarding commissioner salaries and identifying ten (10) persons associated with the FFD.

¹⁶ See F.N. No. 7. This OPRA request sought e-mails from December 28, 2010 through February 21, 2011 regarding insurance and identifying eleven (11) persons associated with the FFD.

The Custodian contends that because of the number of OPRA requests received and the fact that she was an elected official utilizing her personal time to respond to same, the Custodian simply failed to respond to the Complainant's OPRA request. The Custodian asserts that the Complainant never followed up with the FFD and following her defeat in the February election, this request was simply overlooked. The Custodian asserts that there may have also been some confusion because the Complainant previously submitted a request at the end of January 2011 seeking approximately ten (10) years of e-mails regarding insurance issues that Mr. Cooper denied as being overly broad.

The Custodian certifies that with all the simultaneous requests submitted to the FFD, the Custodian mistakenly failed to respond to this OPRA request. The Custodian asserts that she was not able to respond in a timely manner based on the totality of the circumstances; however, this "deemed" denial of access does not amount to a knowing and willful violation under OPRA under the totality of the circumstances. The Custodian notes that notwithstanding her failure to respond, it is important to note that many of the responsive e-mails may have been exempt from disclosure under OPRA as attorney-client privileged material or as information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office. N.J.S.A. 47:1A-1.1.

August 19, 2011

Letter from the Complainant to the GRC with the following attachments:

- Memorandum of the Custodian dated March 11, 2010.
- Voucher dated March 16, 2010.
- E-mail from Ms. Debi Nelson ("Ms. Nelson"), Administrative Aide, to the Custodian dated August 4, 2010.
- E-mail from the Custodian to Ms. Nelson dated August 4, 2010.
- Complainant's OPRA request dated January 21, 2011.
- E-mail from Ms. Nelson to the Custodian (undated).
- E-mail from the Custodian to Ms. Nelson dated January 23, 2011.
- E-mail from Ms. Nelson to the Custodian dated January 25, 2011 (attaching 2007 FDS forms).
- Fire Department Safety Officers Association Certificate of Participation ("Certificate") dated January 23, 2011 to January 26, 2011.
- Voucher dated February 1, 2011.
- Ten (10) OPRA requests dated from January 26, 2011 to February 21, 2011.¹⁷

The Complainant recapitulates the facts of this complaint and contends that he offers the following new evidence to refute the Custodian's legal certification contained in the SOI. The Complainant notes that the Custodian certified that her elected position was unpaid; however, she submitted a voucher for a \$5,000 "Commissioner's fee" to the FFD on March 16, 2010. The Complainant argues that the Custodian was also issued a smartphone enabling her to effectively use e-mail from any location. *See* Memorandum of the Custodian dated March 11, 2010.

¹⁷ This OPRA requests were also attached to the Custodian's SOI.

The Complainant further disputes that the Custodian was personally overburdened with tracking and responding to the FFD's OPRA requests. The Complainant states that the FFD employs Ms. Nelson to perform such duties and has done so since OPRA's inception. The Complainant notes that an e-mail from Ms. Nelson to the Custodian dated August 4, 2010 proves that Ms. Nelson was handling the tracking of OPRA requests and gathering of records at least as early as August 2010. The Complainant requests that the GRC obtain a legal certification from the FFD on how their administrative aide processes OPRA requests.

The Complainant argues that the Custodian contradicted herself in the SOI by certifying that her failure to respond was both a mistake and based on advice of Counsel. The Complainant contends that if the Custodian was advised to not respond to the OPRA request by Mr. Cooper, she could not have mistakenly forgotten to respond. The Complainant notes that the Custodian provided no supporting evidence that she (1) forwarded the OPRA request to Mr. Cooper, or (2) that he advised her in writing to not respond.

The Complainant further argues that because the Custodian and Custodian's husband were subjects identified in the OPRA request, the Custodian should have recused herself from handling the instant OPRA request. The Complainant further contends that the Custodian and Mr. Cooper, who was also identified in the OPRA request, had a personal interest in denying and or delaying a response to this OPRA request. The Complainant also notes that in those ten (10) OPRA requests seeking e-mails, the Custodian was identified nine (9) times, her father-in-law was identified seven (7) times and Mr. Cooper was identified in all ten (10) requests. The Complainant further argued that the Custodian had a vested personal interest in not providing any e-mails regarding this issue because of a high profile sexual harassment case involving her father-in-law.

The Complainant argues that although the Custodian certified that she was being overburdened with OPRA requests, the number of requests filed directly related to the number of times the Custodian and Mr. Cooper denied the Complainant access to records. The Complainant contends that he was forced to refine and resubmit multiple OPRA requests. The Complainant further asserts that in effort to not slow down the GRC's process, the Complainant has only filed complaints based on the more egregious denials of access. The Complainant notes that of the ten (10) OPRA requests noted in the SOI, the Complainant has not filed a single Denial of Access Complaint even though the Custodian either never responded or unlawfully denied access to same.¹⁸ The Complainant contends that the requests submitted as part of the SOI actually support his argument that the Custodian and Mr. Cooper have repeatedly ignored requests or unlawfully applied a blanket denial to valid OPRA requests that the Complainant crafted by reviewing the GRC's website.

¹⁸ The Complainant requests guidance from the GRC as to whether he should file any additional complaints from these ten (10) OPRA requests. The GRC notes that it has no authority to direct a requestor on whether they should file a complaint, as the requestor is the only person who can legally file a complaint with either the Superior Court or GRC. N.J.S.A. 47:1A-6.

The Complainant also disputes the Custodian's assertion that the Complainant should have contacted the FFD to check on the status of his OPRA request. The Complainant argues that he is under no obligation to check on the status of his request. The Complainant contends that contrary to Custodian's attempt to shift the burden to him to follow up on OPRA requests, the Custodian has enjoyed free legal counsel while the Complainant has spent untold hours without legal representation in an attempt to gain unfettered access to government records.

The Complainant requests that the GRC take judicial notice of the long held legal principal of "false in one, false in all" that the New Jersey Supreme Court held in State v. Ernst, 32 N.J. 560 (1960) and invalidate the Custodian's certifications in this complaint and all others filed against her.¹⁹ The Complainant contends that the attached evidence factually and completely contradicts the Custodian's SOI certifications. The Complainant further contends that the evidence provided in the SOI and in this letter prove that time and again the Custodian and Mr. Cooper have knowingly and willfully violated OPRA under the totality of the circumstances and should be subject to the civil penalty. N.J.S.A. 47:1A-11.

The Complainant thus reiterates from his denial of access complaint that he requests the GRC order disclosure of the responsive records and find that the Custodian and Mr. Cooper knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.²⁰

August 19, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel objects to the Complainant's August 19, 2011 submission. Counsel asserts that the GRC's regulations do not permit a complainant to submit reply papers. Counsel thus requests that the GRC not consider the Complainant's submission.

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

¹⁹ The Complainant has filed several complaints with the GRC against the Custodian.

²⁰ The remainder of the correspondence submitted by the Complainant restates the facts/assertions already presented to the GRC or is not relevant to the instant complaint.

... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5(i).

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). As also prescribed under N.J.S.A. 47:1A-5(i), a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).²¹ 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 evidence of record herein indicates that the Custodian never responded to the Complainant’s OPRA request. Specifically, the Custodian acknowledges as much in the SOI. Thus, it is clear that the Custodian violated OPRA by failing to respond in writing in a timely manner.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. 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

²¹ 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.

in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Complainant filed the instant complaint arguing that the Custodian failed to respond to same. The Custodian acknowledged that she failed to do so in the SOI. However, the Custodian also noted that there may have been some confusion because of a similar request seeking approximately ten (10) years of e-mails regarding insurance issues that Mr. Cooper denied as being overly broad.

The GRC has established criteria deemed necessary to specifically identify an e-mail communication in Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). In Elcavage, the Council determined that “[i]n accordance with MAG, *supra*, and its progeny, in order to specifically identify an e-mail the OPRA request must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) identification of the sender and/or the recipient thereof.” *Id.* The OPRA request at issue herein fulfills the necessary criteria and thus is a valid OPRA request for which the Custodian should have provided records and failed to do so.

Therefore, the Custodian failed to bear her burden of proving a lawful denial of access to any responsive records. N.J.S.A. 47:1A-6. **Thus, the Custodian must either disclose the responsive records or, if no records responsive exist, certify to this fact.**

The GRC further notes that the Custodian acknowledged receipt of the Complainant’s OPRA request on February 7, 2011 and requested that the Complainant complete an official OPRA request form. The Complainant responded on February 8, 2011 disputing that he had to complete the form. The GRC further notes that there is no evidence in the record that the Complainant ever completed and submitted his request on the FFD’s official form as requested by the Custodian. However, the GRC notes that the Custodian’s request that the Complainant complete an official Township OPRA request form is an impermissible limitation on access pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant’s letter request clearly invoked OPRA and made clear the nature of the request.

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

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. 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 her burden of proving a lawful denial of access to any responsive records. N.J.S.A. 47:1A-6. **Thus, the Custodian must either disclose the responsive records or, if no records responsive exist, certify to this fact.**
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, if applicable, 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 1:4-4,²² to the Executive Director.²³**
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.

²² "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."

²³ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013