



**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**

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

Jeff Carter  
Complainant

Complaint No. 2011-72

v.

Franklin Fire District # 1 (Somerset)  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed because the Complainant withdrew his complaint via e-mail to the GRC dated October 24, 2012 (via legal counsel) because the parties have reached settlement in this 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 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 20, 2012**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2011-72**

v.

**Franklin Fire District No. 1 (Somerset)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of all executive session minutes for 2008, 2009, 2010 and 2011.

**Request Made:** January 25, 2011

**Response Made:** February 2, 2011

**Custodian:** Melissa Kosensky<sup>3</sup>

**GRC Complaint Filed:** March 22, 2011<sup>4</sup>

**Background**

**June 26, 2012**

Government Records Council's ("Council") Interim Order. At its June 26, 2012 public meeting, the Council considered the June 19, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The current Custodian timely complied with the Council's April 25, 2012 Interim Order by providing access to the requested records to the Complainant via e-mail and providing certified confirmation to the GRC within the prescribed time frame to comply.
2. Although the original Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008) and the original Custodian failed to bear her burden of proving a lawful denial of access to the responsive minutes pursuant to N.J.S.A. 47:1A-6, the current Custodian timely complied with the Council's April 25, 2012 Interim Order. Additionally, the

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

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

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

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

evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the current Custodian provided the Complainant with all responsive minutes in accordance with the Council's April 25, 2012 Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ... justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

#### **June 27, 2012**

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

#### **October 24, 2012**

Letter from the Complainant's Counsel to the GRC. Counsel states that this complaint has been settled and is hereby withdrawn.

#### **Analysis**

No analysis required.

#### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew his complaint via e-mail to the GRC dated October 24, 2012 (via legal counsel) because the parties have reached settlement in this matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

November 20, 2012<sup>5</sup>

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<sup>5</sup> This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to lack of quorum.  
Jeff Carter v. Franklin Fire District No. 1 (Somerset), 2011-72 – Supplemental Findings and Recommendations of the Executive Director 3



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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

June 26, 2012 Government Records Council Meeting

Jeff Carter  
Complainant

Complaint No. 2011-72

v.

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

At the June 26, 2012 public meeting, the Government Records Council (“Council”) considered the June 19, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian timely complied with the Council’s April 25, 2012 Interim Order by providing access to the requested records to the Complainant via e-mail and providing certified confirmation to the GRC within the prescribed time frame to comply.
2. Although the original Custodian’s failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008) and the original Custodian failed to bear her burden of proving a lawful denial of access to the responsive minutes pursuant to N.J.S.A. 47:1A-6, the current Custodian timely complied with the Council’s April 25, 2012 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the current Custodian provided the Complainant with all responsive minutes in accordance with the Council’s April 25, 2012 Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason,

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

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

Steven F. Ritardi, Esq., Acting Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: June 27, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2011-72**

v.

**Franklin Fire District No. 1 (Somerset)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of all executive session minutes for 2008, 2009, 2010 and 2011.

**Request Made:** January 25, 2011

**Response Made:** February 2, 2011

**Custodian:** Melissa Kosensky<sup>3</sup>

**GRC Complaint Filed:** March 22, 2011<sup>4</sup>

**Background**

**April 25, 2012**

Government Records Council's ("Council") Interim Order. At its April 25, 2012 public meeting, the Council considered the April 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. Although the Custodian timely responded (via Counsel) to the Complainant's January 25, 2011 OPRA request in writing requesting an extension of ten (10) to fourteen (14) business days to respond to said request, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009).
2. The Custodian failed to bear her burden of proving a lawful denial of access to the responsive executive session minutes. N.J.S.A. 47:1A-6. Thus, the Custodian must provide all executive session minutes from 2008, 2009, 2010

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

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

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

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

and 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>5</sup> to the Executive Director.<sup>6</sup>**
4. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the current Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the current Custodian's compliance with the Council's Interim Order.

#### **April 27, 2012**

Council's Interim Order distributed to the parties.

#### **May 2, 2012**

E-mail from the Custodian's Counsel to the Complainant's Counsel (with attachments). Counsel states that pursuant to the Council's Interim Order received by the Custodian on April 27, 2012, attached are the responsive records with redactions and a Vaughn index. Counsel states that although the FFD previously provided these records to the Complainant's Counsel on December 21, 2011 via U.S. Mail, the Council's Order required disclosure via e-mail.

#### **May 3, 2012**

Current Custodian's response to the Council's Interim Order with the following attachments:

- Letter from the current Custodian to the Complainant's Counsel dated December 21, 2011.
  - Vaughn Index
  - Public and executive session minutes dated January 7, 2008 (with redactions).
  - Special meeting minutes dated January 28, 2008 (with redactions).
  - Public and executive session minutes dated February 25, 2008 (with redactions).

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<sup>5</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>6</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.



- Public and executive session minutes dated March 19, 2008 (with redactions).
- Public and executive session minutes dated June 23, 2008.
- Public and executive session minutes dated July 28, 2008 (with redactions).
- Budget meeting minutes dated October 27, 2008.
- Executive session minutes dated June 22, 2009.
- Executive session minutes dated August 24, 2009 (with redactions).
- Special meeting minutes dated December 5, 2009.
- Executive session minutes dated December 7, 2009.
- Executive session minutes dated March 19, 2010.
- Executive session minutes dated April 26, 2010 (with redactions).
- Special meeting minutes dated June 24, 2010.
- E-mail from the Custodian’s Counsel to the Complainant’s Counsel dated May 2, 2012 (with attachments).

The Custodian certifies that he received the Council’s Order on April 27, 2012. The Custodian certifies that he provided all responsive minutes to the Complainant through Counsel on December 21, 2011.<sup>7</sup> The Custodian certifies that although he initially provided the responsive minutes to Complainant’s Counsel over four (4) months ago via U.S. Mail, Counsel forwarded the responsive records via the Complainant’s preferred method of delivery, which is e-mail, on May 2, 2012.

### Analysis

#### **Whether the current Custodian complied with the Council’s April 25, 2012 Interim Order?**

At its April 25, 2012 meeting, the Council ordered the Custodian to:

**“... provide all executive session minutes from 2008, 2009, 2010 and 2011 to the Complainant via the preferred method of delivery, which is e-mail ... 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>8</sup> to the Executive Director.”**

The Council disseminated its Interim Order to the parties on April 27, 2012. Thus, the current Custodian’s response was due by close of business on May 4, 2012.

On May 2, 2012, the Custodian’s Counsel e-mailed the Complainant’s Counsel copies of 14 sets of minutes, some with redactions, and a Vaughn Index. Counsel further

<sup>7</sup> The GRC notes that it was not notified that the Custodian provided the responsive records to the Complainant’s Counsel on December 21, 2011 prior to receipt of the Custodian’s certified confirmation of compliance on May 3, 2012.

<sup>8</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."

noted that although the FFD previously provided the same records to the Complainant's Counsel on December 21, 2011 via U.S. Mail, the Council required that the Custodian forward the records via e-mail. Thereafter on May 3, 2012, the current Custodian provided certified confirmation of compliance to the Executive Director that Counsel forwarded the responsive records to the Complainant's Counsel via e-mail on May 2, 2012. The GRC notes that there is no evidence in the record showing that the Complainant disputes any of the redactions made to the responsive minutes.

Therefore, the current Custodian timely complied with the Council's April 25, 2012 Interim Order by providing access to the requested records to the Complainant via e-mail and providing certified confirmation to the GRC within the prescribed time frame to comply.

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

OPRA states that:

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

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)).

Although the original Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008) and the original Custodian failed to bear her burden of proving a lawful denial of access to the responsive minutes pursuant to N.J.S.A. 47:1A-6, the current Custodian timely complied with the Council's April 25, 2012 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

"[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the OPRA, N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services ("DYFS"). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The Court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on

DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

The Mason Court then examined the catalyst theory within the context of New Jersey law, stating that:

"New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also North Bergen Rex Transport v. TLC*, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); see also Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than

federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon ... " *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

The Complainant's Counsel filed this complaint on March 22, 2011 requesting that the GRC order the original Custodian to disclose the responsive executive session minutes to the Complainant. The Council subsequently ordered the original Custodian in its April 25, 2012 Interim Order to provide copies of all responsive minutes to the Complainant via the Complainant's preferred method of delivery, via e-mail. The current Custodian submitted certified confirmation of compliance on May 3, 2012 certifying that the Custodian's Counsel e-mailed the responsive records to the Complainant's Counsel on May 2, 2012. Therefore, the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Pursuant to Teeters, *supra*, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the current Custodian provided the Complainant with all responsive minutes in accordance with the Council's April 25, 2012 Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The current Custodian timely complied with the Council's April 25, 2012 Interim Order by providing access to the requested records to the Complainant via e-mail and providing certified confirmation to the GRC within the prescribed time frame to comply.
2. Although the original Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008) and the original Custodian failed to bear her burden of proving a lawful denial of access to the responsive minutes pursuant to N.J.S.A. 47:1A-6, the current Custodian timely complied with the Council's April 25, 2012 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the current Custodian provided the Complainant with all responsive minutes in accordance with the Council's April 25, 2012 Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this

complaint do not rise to a level of “unusual circumstances ... justify[ing] an upward adjustment of the lodestar[;]” this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

June 19, 2012





State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

INTERIM ORDER

April 25, 2012 Government Records Council Meeting

Jeff Carter  
Complainant

Complaint No. 2011-72

v.

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

At the April 25, 2012 public meeting, the Government Records Council ("Council") considered the April 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, finds that:

1. Although the Custodian timely responded (via Counsel) to the Complainant's January 25, 2011 OPRA request in writing requesting an extension of ten (10) to fourteen (14) business days to respond to said request, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009).
2. The Custodian failed to bear her burden of proving a lawful denial of access to the responsive executive session minutes. N.J.S.A. 47:1A-6. Thus, the Custodian must provide all executive session minutes from 2008, 2009, 2010 and 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 original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the current Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the current Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of April, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: April 27, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2011-72**

v.

**Franklin Fire District No. 1 (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of all executive session minutes for 2008, 2009, 2010 and 2011.

**Request Made:** January 25, 2011

**Response Made:** February 2, 2011

**Custodian:** Melissa Kosensky<sup>3</sup>

**GRC Complaint Filed:** March 22, 2011<sup>4</sup>

**Background**

**January 25, 2011**

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

**January 27, 2011**

E-mail from the Custodian to the Complainant attaching the Franklin Fire District No.1's ("FFD") official OPRA request form. The Custodian acknowledges receipt of the Complainant's OPRA request and requests that the Complainant fill out the attached form.

**January 28, 2011**

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

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

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

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

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

### **February 2, 2011**

Custodian's response to the OPRA request. On behalf of the Custodian, Mr. William T. Cooper, III, Esq. ("Mr. Cooper"), previous FFD Counsel, responds in writing via e-mail to the Complainant's OPRA request on the sixth (6<sup>th</sup>) business day following receipt of such request. Mr. Cooper states that the Custodian forwarded the Complainant's OPRA request to his office for review. Mr. Cooper states that he must review the responsive minutes to ensure that privileged or exempted material is properly redacted. Mr. Cooper further states that his review will require an extension of ten (10) to fourteen (14) business days.

### **February 2, 2011**

E-mail from the Complainant to the Custodian. The Custodian agrees to a fourteen (14) day extension of time until February 16, 2011.<sup>5</sup>

### **March 22, 2011**

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

- Complainant's OPRA request dated January 25, 2011.
- E-mail from the Custodian to the Complainant dated January 27, 2011.
- E-mail from the Complainant to the Custodian dated January 28, 2011.
- E-mail from Mr. Cooper to the Complainant dated February 2, 2011.
- E-mail from the Complainant to the Custodian dated February 2, 2011.

The Complainant's Counsel states that the Complainant submitted an OPRA request to the FFD on January 25, 2011. Counsel states that the Custodian acknowledged receipt of said OPRA request on January 27, 2011 via e-mail. Counsel states that Mr. Cooper e-mailed the Complainant on February 2, 2011 requesting an extension of ten (10) to fourteen (14) business days. Counsel states that the Complainant agreed to an extension until February 16, 2011. Counsel states that to date the Complainant has not received any minutes.

Counsel states that OPRA mandates that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public's right of access." Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006)(citing N.J.S.A. 47:1A-1). Further, Counsel states that "[t]he purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004). Counsel states that in any action under OPRA, the burden of proof rests with the public agency. N.J.S.A. 47:1A-6.

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<sup>5</sup> The Complainant agreed to an extension of time that is the equivalent of ten (10) business days.  
Jeff Carter v. Franklin Fire District No. 1 (Somerset), 2011-72 – Findings and Recommendations of the Executive Director

Counsel states that a custodian must bear the burden of proof in any proceeding under OPRA. N.J.S.A. 47:1A-6 and Paff v. Township of Lawnside (Camden), GRC Complaint No. 2009-155 (October 2010). Counsel contends that there is no doubt that the records requested by the Complainant are government records as defined under OPRA. N.J.S.A. 47:1A-1.1.

Counsel states that the GRC has routinely determined that approved minutes are subject to disclosure under OPRA. Wolosky v. Vernon Township Board of Education (Sussex), GRC Complaint No. 2009-57 (Interim Order dated December 22, 2009) and Taylor v. Township of Downe (Cumberland), GRC Complaint No. 2009-174 (Interim Order dated July 27, 2010). Counsel contends that the GRC should order the FFD to disclose the responsive minutes with redactions if necessary.

Counsel requests the following:

1. A determination ordering that the Custodian disclose the responsive minutes.
2. A determination that the Complainant is a prevailing party entitled to reasonable attorney's fees. N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

#### **April 29, 2011**

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

#### **May 3, 2011**

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

#### **May 4, 2011**

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until May 27, 2011 to submit the SOI for the reasons stated by Counsel.

#### **May 24, 2011**

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

#### **May 24, 2011**

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

extension of time. The GRC states that Counsel must submit the SOI by close of business on May 27, 2011.

**May 24, 2011**

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

**May 28, 2011**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated January 25, 2011.
- E-mail from the Custodian to the Complainant dated January 27, 2011.
- E-mail from the Complainant to the Custodian dated January 28, 2011.
- E-mail from Mr. Cooper to the Complainant dated February 2, 2011.
- E-mail from the Complainant to the Custodian dated February 2, 2011.

The Custodian certifies that her search for the requested records included locating the responsive minutes that consisted of approximately 47 pages and providing such records to Mr. Cooper for review.

The Custodian also certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable.

The Custodian certifies that she received the Complainant's OPRA request on January 25, 2011. The Custodian certifies that she acknowledged receipt of the OPRA request on January 27, 2011. The Custodian certifies that she gathered the responsive records and forwarded the request and records to Mr. Cooper, who responded in writing to the Complainant on February 2, 2011 requesting an extension of time to review the records. The Custodian certifies that the Complainant granted an extension of time until February 16, 2011. The Custodian certifies that she was waiting for Mr. Cooper's response with any redactions and a redaction index. The Custodian certifies that Mr. Cooper never responded to her prior to her departure from the FFD on March 1, 2011. The Custodian certifies that she has no knowledge whether Mr. Cooper ever forwarded the minutes with appropriate redactions to the FFD for disclosure to the Complainant.

The Custodian asserts that there was no legal basis for denying access to the responsive records. The Custodian asserts that it was an inadvertent mistake that the Complainant could have corrected by following up with her or the current Custodian when the composition of the FFD Board changed between February and March 2011. The Custodian certifies that the responsive minutes with appropriate redactions are available for disclosure to the Complainant at this time.

The Custodian certifies that she was an elected official for the FFD on a one (1) year term and did not maintain office hours. The Custodian certifies that as an elected official, she was required to utilize her limited free time in order to respond properly to OPRA requests filed on almost a daily basis. The Custodian further certifies that she did

not have the luxury of a full-time clerk or part-time employee to assist in responding to OPRA requests.

The Custodian certifies that from January 10, 2011 through January 27, 2011, the FFD received 22 OPRA requests for various records, or two (2) OPRA requests per business day. The Custodian notes that prior to this point, the FFD routinely received between three (3) and five (5) OPRA requests on an annual basis. The Custodian certifies that not only was she running for re-election, but the number of requests and breadth of records sought was overwhelming. The Custodian certifies that the subject OPRA request was one of fifteen (15) separate requests the Complainant submitted over a one (1) week period for various records such as agreements, vouchers, invoices, petitions, resolutions and vendor lists over multiple years. The Custodian further certifies that the instant request sought four (4) years of executive session minutes. The Custodian contends that the Complainant's OPRA requests became disruptive given that the FFD is a small office with one part-time employee.

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 Mr. Cooper requested extensions of time to respond.

The Custodian contends that her failure to respond was not intentional but rather a miscommunication between she and Mr. Cooper. The Custodian asserts that based on her reliance on Mr. Cooper for his redaction of the responsive records, her failure to respond to the Complainant does not constitute a knowing and willful violation of OPRA.

### 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* ... If the government record is in storage or archived, the requestor shall be *so advised within seven business days* after the custodian receives the request. The requestor *shall be advised by the custodian when the record*

*can be made available. If the record is not made available by that time, access shall be deemed denied.”* (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA provides that a custodian may request an extension of time to respond to the Complainant’s OPRA request, but that a specific date for when the Custodian will respond must be provided. N.J.S.A. 47:1A-5.i. OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5.i.

In Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5<sup>th</sup>) business day after receipt of the complainant’s March 19, 2007, OPRA request, seeking an extension of time until April 20, 2007 to fulfill the complainant’s OPRA request. However, the custodian responded on April 20, 2007, stating that he would provide the requested records later in the week, and the evidence of record showed that the Custodian provided no records until May 31, 2007. The Council held that:

“[t]he Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. ... however ... [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial of access to the records.” *Id.*

In the matter before the Council, as in Kohn, supra, Mr. Cooper responded in writing to the Complainant’s January 25, 2011 OPRA request on behalf of the Custodian in a timely manner requesting an extension of ten (10) to fourteen (14) business days to respond. The Complainant responded agreeing to an extension of time until February 16, 2011; thus, the Custodian’s written response granting or denying access to the requested minutes was due by that date. However, the Custodian failed to respond in writing to the Complainant prior to the expiration of the extended deadline.

Therefore, although the Custodian timely responded (via Counsel) to the Complainant’s January 25, 2011 OPRA request in writing requesting an extension of ten (10) to fourteen (14) business days to respond to said request, the Custodian’s failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn, supra. *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009).

### **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 access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The records at issue in this complaint are executive session minutes for 2008, 2009, 2010 and 2011. The Custodian certified in her May 28, 2011 SOI that she retrieved 47 pages of records and forwarded these records to Mr. Cooper for his review and redaction if necessary. The Custodian further certified that Mr. Cooper never responded to her prior to her departure from the FFD on March 1, 2011 and that she had no knowledge whether Mr. Cooper ever forwarded the minutes with appropriate redactions to the FFD for disclosure to the Complainant.

Moreover, the Custodian certified that the responsive minutes were available for disclosure at the time of the filing of the SOI, which was seventy-two (72) business days after the expiration of the extended deadline to comply. OPRA requires disclosure of non-exempt government records. N.J.S.A. 47:1A-1. and N.J.S.A. 47:1A-5.i. However, the Custodian never physically provided said records to the Complainant inclusive of a redaction index, if necessary, via e-mail (the Complainant’s preferred method of delivery).

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

The GRC further notes that the Custodian acknowledged receipt of the Complainant's OPRA request on January 27, 2011 and requested that the Complainant complete an official OPRA request form. The Complainant responded on January 28, 2011 disputing that he had to complete the form. The GRC further notes that there is no evidence in the record that the Complainant ever completed and submitted his request on the FFD's official form as requested by the Custodian. However, the GRC notes that the Custodian's request that the Complainant complete an official Township OPRA request form is an impermissible limitation on access pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant's e-mailed OPRA request clearly invoked OPRA and made clear the nature of the request.

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

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian timely responded (via Counsel) to the Complainant's January 25, 2011 OPRA request in writing requesting an extension of ten (10) to fourteen (14) business days to respond to said request, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. The Custodian failed to bear her burden of proving a lawful denial of access to the responsive executive session minutes. N.J.S.A. 47:1A-6. Thus, the Custodian must provide all executive session minutes from 2008, 2009, 2010 and 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 original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the current Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the current Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 18, 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.