



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

June 26, 2012 Government Records Council Meeting

John Paff  
Complainant

Complaint No. 2011-77

v.

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

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

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. See Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010), O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Although the Custodian timely responded (via Counsel) to the Complainant’s January 14, 2011 OPRA request in writing requesting an extension of one (1) week to respond to said request, the Custodian’s failure to grant or deny access to the requested records 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).
3. Although the Custodian properly requested an extension of time to respond to the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011), the Custodian’s failure to grant or deny access to the requested records 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). However, the Custodian provided the requested records to the Complainant on



February 2, 2011. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian reasonably requested an extension of time and provided the requested records to the Complainant on February 2, 2011; her actions did not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances. The Complainant filed the Denial of Access Complaint in this matter on March 24, 2011. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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

Final Decision Rendered by the  
Government Records Council  
On The 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**

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

**John Paff<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2011-77**

v.

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

**Records Relevant to Complaint:** Copies of pages from the book that voters signed at all four (4) firehouses to vote in the 2010 Franklin Fire District No. 1 (“FFD”) election. If the pages were transferred into a database spreadsheet or other list, please provide that list instead of the pages.<sup>3</sup>

**Request Made:** January 14, 2011

**Response Made:** January 20, 2011

**Custodian:** Melissa Kosensky

**GRC Complaint Filed:** March 24, 2011<sup>4</sup>

**Background**

**January 14, 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 pick-up.

**January 16, 2011**

E-mail from the Custodian to the Complainant. The Custodian acknowledges receipt of the Complainant’s OPRA request and states that she will advise when the records are available for pickup.

**January 20, 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 fourth (4<sup>th</sup>) business day following receipt of such request. Mr. Cooper requests an extension of one (1) week to respond to the Complainant’s OPRA request.

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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 Francesco Taddeo, Esq. (Somerville, NJ), who took the place of Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ) as conflict counsel.

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

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

**January 20, 2011**

E-mail from the Complainant to the Custodian and Mr. Cooper. The Complainant states that he needs a better explanation as to why an extension is necessary. The Complainant states that, to his knowledge, the responsive books are kept on file at the FFD's office; thus, there is no reason why the Custodian or Ms. Debi Nelson ("Ms. Nelson"), Administrative Aide, cannot photocopy the relevant pages and provide same to the Complainant within seven (7) business days. The Complainant asks if Mr. Cooper is suggesting that the records need to be redacted.

**January 31, 2011**

E-mail from Mr. Cooper to the Complainant. Mr. Cooper states that the responsive records will be available for disclosure at the FFD's office on February 2, 2011.

**March 24, 2011**

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

- Complainant's OPRA request dated January 14, 2011.
- E-mail from the Custodian to the Complainant dated January 16, 2011.
- E-mail from Mr. Cooper to the Complainant dated January 20, 2011.
- E-mail from the Complainant to the Custodian and Mr. Cooper dated January 20, 2011.
- E-mail from Mr. Cooper to the Complainant dated January 31, 2011.
- Voter roster for the FFD's 2010 election.
- Complainant's legal certification.
- Ms. Nena Belyk's ("Ms. Belyk") legal certification.

The Complainant's Counsel states that the Custodian and Mr. Cooper knowingly and willfully violated OPRA under the totality of the circumstances. Counsel argues that the Custodian requested an extension of time when no extension was warranted and the Complainant did not agree to same. Counsel further argues that the extension benefited the Custodian because the Complainant sought access to voter information in order to effectively campaign for the 2011 FFD election.

Counsel states that the Complainant submitted an OPRA request to the FFD via e-mail on January 13, 2011. Counsel states that the Complainant sought voting records prior to the FFD's election on February 19, 2011 in an effort to target campaign efforts in support of candidates for FFD elected offices. Counsel notes that the Complainant supported the Custodian's opponent in the election. Counsel states that instead of providing access to the responsive records, Mr. Cooper responded on January 20, 2011 seeking an extension of time to respond. Counsel states that the Complainant e-mailed both the Custodian and Mr. Cooper on January 20, 2011 questioning why an extension was necessary and noting that time was of the essence. Counsel states that the Complainant received the records on February 2, 2011 and saw that the records were contained in a book that was readily available at the FFD's office.

Counsel asserts that the Complainant was confused because there was no apparent reason why the Custodian needed an extension of time to respond. Counsel contends that the only reasonable explanation is that the Custodian, with the assistance of Mr. Cooper, intentionally delayed production of the records to prevent the Complainant from contacting specific voters in advance of the FFD's election.

The Complainant certifies that that he is a volunteer firefighter for the FFD, which is governed by five (5) commissioners who serve three (3) year terms: elections for expiring terms are held annually by the citizens that reside in the FFD. The Complainant certifies that the elections are significant because of the extremely low voter turnout. The Complainant certifies that according to election records, 441 voters cast votes in the February 2010 election out of approximately 14,000 registered voters. The Complainant certifies that prior to the 2011 election, the Complainant supported and campaigned for two (2) candidates. The Complainant certifies that as part of his activities, he sought the identities of 375 individuals who voted in person in the 2010 election in order to contact them directly to express support for the two (2) candidates.

The Complainant certifies that he submitted an OPRA request to the FFD on January 14, 2011. The Complainant certifies that the Custodian acknowledged receipt of his request on January 16, 2011, a Sunday. The Complainant certifies that Mr. Cooper responded in writing via e-mail on January 20, 2011 requesting an extension of one (1) week to respond. The Complainant certifies that he immediately contacted Mr. Cooper, copying the Custodian, requesting an explanation as to why an extension was necessary. The Complainant certifies that he further stated that he believed the records were maintained and readily available at the FFD office and that he would not consent to an extension of time.

The Complainant certifies that Mr. Cooper did not respond until January 31, 2011, when he advised the Complainant that the responsive records would be made available on February 2, 2011. The Complainant certifies that he went to the FFD offices on February 2, 2011 accompanied by Ms. Belyk. The Complainant states that he asked the FFD employee in the office about the location of the voter books. The Complainant certifies that the employee went to a filing cabinet, retrieved the book and allowed him and Ms. Belyk to review the book. The Complainant certifies that the total number of pages responsive to his request was 24 pages; however, half of those pages are duplicates to capture additional information at the bottom of the pages that did not fit on the copier.

The Complainant certifies that he should have received the records by January 25, 2011, or the seventh (7<sup>th</sup>) business day after receipt of his request. The Complainant certifies that he did not agree to an extension because the responsive records were easily accessible. The Complainant further certifies that delaying access worked to the Custodian's benefit because the Complainant was not afforded an extra weekend to go door-to-door or telephone voters. The Complainant certifies that based on the evidence, he believes the Custodian intentionally delayed access to give herself an advantage in the election.

Moreover, Ms. Belyk certifies that she accompanied the Complainant to the FFD offices on February 2, 2011 and corroborates the Complainant's certification as to the location of the voter book.

The Complainant's 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], 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.

Counsel requests that the GRC investigate whether the Custodian and Mr. Cooper, who served as *de facto* custodian by responding on the Custodian's behalf, knowingly and willfully violated OPRA by denying access to the responsive voting records within seven (7) business days of his request. Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-107 (Interim Order dated February 25, 2009)(fining a member of Council \$1,000 for failing to respond to a custodian's request for e-mails.) Counsel requests the following:

1. A determination that the Custodian violated OPRA by not providing the responsive records within seven (7) business days and by requesting an extension of time that was not warranted.
2. A determination that the Custodian and Mr. Cooper knowingly and willfully violated OPRA under the totality of the circumstances warranting the imposition of civil penalties pursuant to N.J.S.A. 47:1A-11.
3. A determination that the Complainant is a prevailing party entitled to reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

### **May 17, 2011**

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

### **May 20, 2011**

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

**May 24, 2011**

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

**May 24, 2011**

E-mail from the Complainant's Counsel to the GRC. Counsel states that the Denial of Access Complaint intentionally names the original Custodian and Mr. Cooper because the Complainant asserts no allegations toward the current Custodian or Counsel. Counsel requests that the GRC investigate the original Custodian and Mr. Cooper.

**June 14, 2011**

E-mail from the Custodian's Counsel to the GRC. Counsel states that due to a conflict with his office, the FFD will have to appoint conflict counsel by way of resolution at the FFD's June 27, 2011 meeting. Counsel states that given the circumstances, he believes that it is appropriate to request a reasonable extension of time so that conflict counsel may be retained.

**June 16, 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 OPRA provides that a public agency must bear its burden of proving that a denial of access is authorized by law. N.J.S.A. 47:1A-6. The GRC further states that a custodian must submit a completed SOI form to the Council and the complainant simultaneously. *N.J.A.C.* 5:105-2.4(a). The GRC finally states that a custodian's failure to submit a completed SOI may result in the Council issuing a decision in favor of the complainant. *N.J.A.C.* 5:105-2.4(g).

The GRC states that it has already granted one (1) extension of time that well exceeds its normal practice and thus declines to extend the deadline date further. The GRC states that this complaint will thus proceed to adjudication based only the information contained in the record.

**June 16, 2011**

E-mail from the Custodian's Counsel to the GRC. Counsel states that the GRC's denial of another extension is inequitable based on the rare circumstances presented by the FFD. Counsel states that the FFD is not asking for the matter to be delayed for months. Counsel states that the FFD must follow the law by assigning conflict counsel to this matter. Counsel states that the FFD will move forward and hire conflict counsel at its June 27, 2011 meeting. Counsel further states that the FFD will appeal any GRC decision that does not recognize the FFD's late SOI.

**July 25, 2011**

Custodian's SOI with no attachments.

The Custodian certifies that the records responsive to the request are required to be retained by the FFD in accordance with the Records Destruction Schedule established

and approved by New Jersey Department of State, Division of Archives and Records Management.<sup>5</sup>

The Custodian certifies that she received the Complainant's OPRA request on January 13, 2011. The Custodian certifies that the Complainant was provided with the responsive records on February 2, 2011.

Conflict Counsel submits a letter brief in support of the FFD's position in the matter. Counsel contends that the Custodian's actions were consistent with OPRA, relevant case law and the GRC's Handbook for Records Custodians (Fifth Edition – January 2011).

Counsel states that the Complainant's Counsel also named Mr. Cooper in the Denial of Access Complaint solely because he sent an e-mail to the Complainant on behalf of the Custodian requesting an extension of time. Counsel argues that, notwithstanding the fact that Mr. Cooper is not a custodian and cannot be sued as such, the facts of this complaint would not amount to a violation under OPRA. Counsel further contends that holding accountable an attorney who represents a municipality or municipal entity would make every municipal attorney a target for lawsuits: this is not the intent of OPRA.

Counsel states that OPRA defines a custodian of record as "... in the case of a municipality, the municipal clerk and in the case of any other public agency, the officer *officially designated by formal action of that agency's director or governing body*, as the case may be." (Emphasis added.) N.J.S.A. 47:1A-1.1. Counsel states that the Complainant argues in the Denial of Access Complaint that Mr. Cooper served as *de facto* custodian because he responded on behalf of the Custodian. Counsel contends that the facts indicate that Mr. Cooper sent one (1) e-mail to the Complainant confirming an extension request. Counsel further argues that the FFD never officially designated Mr. Cooper as custodian of record. Counsel argues that notwithstanding the fact that Mr. Cooper was not the custodian of record for the FFD and cannot be found liable as such, there are no provisions in OPRA addressing counsel for custodians. Counsel asserts that the only reason Mr. Cooper is involved in the instant complaint is because he answered for the Custodian seeking an extension of time, as was the Custodian's right.

Counsel contends that there is no possible scenario herein where Mr. Cooper could be liable, even under the argument that he served as *de facto* custodian. Counsel thus requests that this issue be dismissed.

Additionally, Counsel states that the GRC's Handbook for Records Custodians (Fifth Edition – January 2011) specifically states that "[i]t 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." (Emphasis added.) *Id.* at pg. 16. Counsel states that the FFD's request for an extension of time is a valid response under OPRA. Counsel

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<sup>5</sup> The Custodian did not certify to the search undertaken to locate the records responsive as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).  
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contends that the Complainant set forth a myriad of political reasons to prove that the Custodian and Mr. Cooper had motive for delaying access to the responsive records. Counsel asserts that the Complainant instead failed to comprehend that the Custodian, who handles OPRA requests part time at the small FFD, simply requested an extension of time as was her right under OPRA.

Counsel asserts that the Denial of Access Complaint suggests that the Custodian intentionally delayed access to the responsive records so that the Complainant would have less time to contact potential voters. Counsel notes that the responsive records were part of a multi-item OPRA request submitted to the FFD on January 14, 2011. Counsel states that the OPRA request item relevant to this complaint and one (1) other item not relevant to this complaint required additional time to respond while a third (3<sup>rd</sup>) item also not relevant to this complaint was denied; nevertheless, the Complainant appears to claim that the Custodian knew the purpose of the Complainant's OPRA request. Counsel asserts that the Complainant never notified the Custodian of his intended use for the responsive records. Counsel further asserts that the Complainant never indicated at any point that he required the records any sooner because of the upcoming election. Counsel finally contends that the Complainant received the responsive records in a timely manner and there was no harm to his campaign, which was successful. Counsel notes that the Custodian was replaced a short time later.

Counsel argues that no knowing and willful violations of OPRA occurred in the instant complaint. Counsel states that the Complainant's Counsel cited to Johnson, which is inapposite to this matter. Counsel states that in Johnson, a councilperson was fined for knowingly and willfully failing to comply with an OPRA request and subsequent orders rendered by the GRC. Counsel thus contends that the facts here are not comparable to those in Johnson, *supra*.

### Analysis

#### **Whether the Custodian lawfully requested an extension of time to respond to the Complainant's OPRA request?**

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 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 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 unreasonably sought an extension of time to provide a record that was readily available at the FFD office. The Complainant further argued that even though he denied the extension of time, the FFD did not provide the responsive record to him until February 2, 2011.

Thus, the GRC must address whether the Custodian lawfully sought an extension of time to respond to the Complainant’s OPRA request.

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.<sup>6</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Further, 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.

The Complainant herein disputes the FFD's request for an extension of time for two (2) reasons: (1) he believed the responsive records were easily accessible at the FFD office; and (2) he did not agree to an extension of time. In the SOI, the Custodian's Counsel argued that the FFD's request for an extension of time was lawful and supported by the GRC's Handbook for Records Custodians (Fifth Edition – January 2011).

In Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011), the Complainant filed an OPRA request on November 5, 2009. The Custodian responded to the request in writing on the fourth (4<sup>th</sup>) business day following receipt of such request, requesting an extension of time to respond to the request and providing an anticipated deadline date when the requested records would be made available. The Complainant did not agree to the Custodian's request for an extension of time. The Council stated that:

"The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2<sup>nd</sup>) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that "because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. [and] N.J.S.A. 47:1A-5.i."

The Council in Rivera noted that the Custodian provided the Complainant with a written response to his OPRA requests on the fourth (4<sup>th</sup>) business day following receipt

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<sup>6</sup> It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

of said request in which the Custodian requested a two (2) week extension of time to respond to said request, and determined that because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey, supra.

Moreover, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council determined in pertinent part that “because the Custodian provided a written response requesting an extension on the sixth (6<sup>th</sup>) business day following receipt of the Complainant’s OPRA request and providing a date certain, on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian’s request for an extension of time [to a specific date] to respond to the Complainant’s OPRA request was made in writing within the statutorily mandated seven (7) business day response time” the Custodian did not unlawfully deny access to the requested records. *See also* Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010), O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).

In the matter now before the Council, the Custodian responded in writing to the Complainant’s OPRA request on the fourth (4<sup>th</sup>) business day following receipt of such request seeking an extension of one (1) week to respond to the Complainant’s OPRA request.

Therefore, because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. *See* Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010), O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).

The GRC must now address whether the Custodian properly responded to the Complainant’s OPRA request within the extended time period to do so.

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 14, 2011 OPRA request on behalf of the Custodian in a timely manner requesting an extension of one (1) week extension to respond. Thus, the Custodian’s written response granting or denying access to the requested records was due by January 27, 2011. However, the Custodian failed to respond in writing to the Complainant prior to the expiration of the extended deadline. Instead, Mr. Cooper responded on January 31, 2011, two (2) business days after expiration of the extended time frame to respond, advising the Complainant that the records would be ready for pickup on February 2, 2011.

Therefore, although the Custodian timely responded (via Counsel) to the Complainant’s January 14, 2011 OPRA request in writing requesting an extension of one (1) week to respond to said request, the Custodian’s failure to grant or deny access to the requested records 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’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 (Felder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian properly requested an extension of time to respond to the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Rivera, *supra*, the Custodian’s failure to grant or deny access to the requested records 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*. However, Custodian’s Counsel made the requested records available to the Complainant on February 2, 2011. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

**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)."

Although the Complainant herein received the requested records on February 2, 2011, the Complainant filed the Denial of Access Complaint on March 24, 2011, seeking a determination that the Custodian violated OPRA by not providing the responsive records within the statutorily mandated seven (7) business days and by requesting an unwarranted extension of time. The Complainant further sought a determination that the Custodian and Mr. Cooper knowingly and willfully violated OPRA and that the Custodian is a prevailing party entitled to reasonable attorney's fees. However, the GRC determined that the Custodian lawfully requested an extension of time and, although she did not respond within the extended time period to do so, resulting in a "deemed" denial of the Complainant's request, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances. Further,

this complaint did not bring about a change in the conduct of the Custodian; thus, the Complainant is not a prevailing party.

Pursuant to Teeters, *supra*, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason, *supra*, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian reasonably requested an extension of time and provided the requested records to the Complainant on February 2, 2011; her actions did not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances. The Complainant filed the Denial of Access Complaint in this matter on March 24, 2011. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. See Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010), O'Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Although the Custodian timely responded (via Counsel) to the Complainant's January 14, 2011 OPRA request in writing requesting an extension of one (1) week to respond to said request, the Custodian's failure to grant or deny access to the requested records 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).
3. Although the Custodian properly requested an extension of time to respond to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011), the Custodian's failure to grant or deny access to the requested records 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). However, the Custodian provided the

requested records to the Complainant on February 2, 2011. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian reasonably requested an extension of time and provided the requested records to the Complainant on February 2, 2011; her actions did not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances. The Complainant filed the Denial of Access Complaint in this matter on March 24, 2011. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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June 19, 2012