



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

August 27, 2013 Government Records Council Meeting

John Paff  
Complainant

Complaint No. 2012-158

v.

Bordentown Fire District No. 2 (Burlington)  
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council (“Council”) considered the August 20, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel’s fee application conforms with the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. The Council finds that 2.3 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Luers, Counsel to the Complainant, for the full amount of \$690.00, representing 2.3 hours of service at \$300 per hour.**
2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

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



Final Decision Rendered by the  
Government Records Council  
On The 27th Day of August, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: August 29, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2012-158**

**v.**

**Bordentown Fire District No. 2 (Burlington)  
Custodial Agency<sup>2</sup>**

**Records Relevant to Complaint:**

- April 21, 2012 OPRA Request: Copies, sent via e-mail or fax, of closed session meeting minutes dated January 5, 2012 and February 2, 2012.
  
- May 11, 2012 OPRA Request: Copies sent via e-mail or fax of:
  1. Closed session minutes dated January 5, 2012.
  2. The resolution that authorized the closed session held on January 5, 2012 in accordance with N.J.S.A. 10:4-13.
  3. Closed session minutes dated February 2, 2012.
  4. The resolution that authorized the closed session held on February 2, 2012 in accordance with N.J.S.A. 10:4-13.
  5. Public session meeting minutes dated March 1, 2012 and April 5, 2012.
  6. Closed session meeting minutes dated March 1, 2012 and April 5, 2012.
  7. The resolution or other writing that most recently designated an offer or employee to serve as the District's Public Agency Compliance Officer responsible for coordinating the reporting procedure from contractors and to generally supervise the compliance procedures regarding the Affirmative Action laws and regulations.

**Custodian of Record:** Andrew Watson

**Request Received by Custodian:** April 21, 2012 and May 11, 2012

**Response Made by Custodian:** May 2, 2012 and May 16, 2012

**GRC Complaint Received:** May 29, 2012

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

<sup>2</sup> Represented by Robert Gaskill, Esq., of Begley & Gaskill (Moorestown, NJ).

## Background

### May 28, 2013 Council Meeting:

At its May 28, 2013 public meeting, the Council considered the May 21, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The original Custodian improperly required the Complainant to complete an official OPRA request form pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant's e-mailed and faxed non-form OPRA requests clearly invoked OPRA and made clear the nature of the request. However, the Council declines to order disclosure of the requested records because the current Custodian granted access to the existing records and denied access to the remaining records, which do not exist, on June 13, 2012.
2. The Fire District's policy not to accept electronic transmissions of OPRA requests does not impose an unreasonable obstacle to the transmission of a request for a government record because the Fire District accepts requests hand-delivered, mailed, or faxed. *See* Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009).
3. The original Custodian improperly required the Complainant to complete an official OPRA request form pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant's e-mailed and faxed non-form OPRA requests clearly invoked OPRA and made clear the nature of the request. However, the Fire District's policy not to accept electronic transmissions of OPRA requests does not impose an unreasonable obstacle to the transmission of a request for a government record because the District accepts requests hand-delivered, mailed, or faxed. *See* Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009). Additionally, the evidence of record does not indicate that the original Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, 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.
4. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian improperly refused to accept the Complainant's non-form OPRA requests until after the filing of this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law.

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

#### Procedural History:

On May 31, 2013, the Council distributed its May 28, 2013 Interim Order ("Interim Order") to all parties.

#### Compliance:

On June 25, 2012, Walter M. Luers, Esq., Counsel for the Complainant ("Counsel") filed his fee application in accordance with N.J.A.C. 5:105.2.13(b)<sup>3</sup>. The fee application and Certification of Services ("Certification") of counsel set forth the following:

- (1) The complaint name and number: John Paff v. Bordentown Fire District No. 2 (Burlington), GRC Complaint No. 2012-158.
- (2) Counsel's law firm affiliation: Law Offices of Walter M Luers, Jr., LLC.
- (3) A statement of client representation: Counsel certified to his services, including preparing documents for filing with the GRC; reviewing of e-mail correspondence to and/or from the GRC, the records custodian and Mr. Gaskill; reviewing of interim decision and order; and preparing fee application.
- (4) The hourly rate of all attorneys and support staff involved in the complaint: Mr. Luers, the sole professional who worked on the file, certified that he charged \$300 per hour.
- (5) Copies of time sheets for each professional involved in the complaint: Counsel supplied a copy of his time sheets from May 26, 2012 through June 17, 2013 (the "Fee Period"). During the Fee Period counsel billed a total of 2.3 hours for a total fee of \$690.00.
- (6) Evidence that the rates charged are in accordance with prevailing rates in the relevant community, including years of experience, skill level and reputation: Counsel certified that he charges "\$300 per hour to clients for work in OPRA matters." Certification of Walter M. Luers, Esq., (hereinafter, "Luers Certif.") at ¶ 3. Counsel

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

certified his education, years of legal experience and representation of clients in OPRA cases before the New Jersey Supreme and Superior Courts, as well as before the GRC where he represents clients in “approximately 30 cases.” Finally, Mr. Luers certifies to OPRA cases where counsel for the prevailing party were awarded fees in excess of \$300 per hour. Citing, O’Boyle v. Borough of Longport, ATL-L-002294-09 (approving an hourly rate of \$325) and Pat Doe v. Rutgers, MID-L-488-11 (finding \$325 is a reasonable fee in an OPRA matter).

- (7) Detailed documentation of expenses: Counsel is not seeking reimbursements for expenses.

Accordingly, Complainant’s Counsel filed a timely fee application with the Government Records Council (“GRC”). The Custodian did not submit an objection to Complainant’s application for fees.

### **Analysis**

In its May 28, 2013 Interim Order, the Council found the Complainant was a prevailing party and thus was entitled to submit an application for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). Counsel for Complainant timely filed and served<sup>4</sup> his Certification of Services, seeking a fee award of \$690.00, in the time period provided for pursuant to the Court’s Interim Order.

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

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

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

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

New Jersey public policy, as codified in OPRA, is that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” NJDPM, 185 N.J. at 153 (citing, N.J.S.A. 47:1A-1). OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court ...; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council ... A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6. See generally, NJDPM, 185 N.J. 137. “By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” Id. at 153. (quoting, Courier News v. Hunterdon Cty. Prosec. Off., 378 N.J. Super. 539, 546 (App. Div.2005)).

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

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

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

Once the reasonable number of hours has been ascertained, the court should adjust the lodestar in light of the success of the prevailing party in relation to the relief sought. Walker, 415 N.J. Super. at 606 (citing, Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004)). The lodestar amount may be adjusted, either upward or downward, depending on the degree of success achieved. See NJDPM, 185 N.J. at 153-55. OPRA neither mandates nor prohibits enhancements. Rivera v. Office of the Cty. Prosec., 2012 N.J. Super. Unpub. LEXIS 2752 \*1,

\* 10 (Law Div. Dec. 2012) (citing, NJDPM, 185 N.J. at 157 (applying, Rendine, 141 N.J. 292 (1995) to OPRA)). However, “[b]ecause enhancements are not preordained . . . enhancements should not be made as a matter of course.” NJDPM, 185 N.J. at 157.

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

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

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

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

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



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

### **1. Lodestar Analysis**

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

In the instant matter Counsel is seeking a fee award of \$690.00, representing 2.3 hours at \$300 per hour. In support of this hourly rate, Counsel submits legal precedent of comparable rates for attorneys, that were ruled as reasonable. Citing, O'Boyle v. Borough of Longport, ATL-L-002294-09 (approving an hourly rate of \$325) and Pat Doe v. Rutgers, MID-L-488-11 (finding \$325 is a reasonable fee in an OPRA matter).

With respect to Counsel's request for a \$300 hourly rate, he cites to his experience representing clients in OPRA matters at the Supreme and Superior Courts of New Jersey as well as before the GRC. Luers Certif. at ¶ 9. The Council also takes notice of the thirty plus published and unpublished decisions of the Supreme Court, Appellate and Law Divisions as well as the numerous GRC cases wherein Mr. Luers appeared.

The rate of \$300 is reasonable for a practitioner with experience and skill level of Mr. Luers in this geographical area.

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

In support of his request for fees, Counsel submitted a log of his time. For the year period from "May 26, 2012 to June 17, 2012" Counsel billed a total of 2.3 hours for work on the file. This included prepar[ing] documents for filing, all communication, reviewing the order and preparing the fee application.

Further in accordance with the mandates of N.J.A.C. 105-2.13(b), Counsel's time-sheets provide detailed descriptions, of the exact work performed and when, in the required tenths of an hour, N.J.A.C. 105-2.13(b)(5). Most entries are broken into time increments of one or two tenths of an hour, with an accompanying description of the work performed. All exchanges identify the entity or individual with whom Mr. Luers communicated.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application, conforms with the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. The Council finds that 2.3 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Luers, Counsel to the Complainant, for the full amount of \$690.00, representing 2.3 hours of service at \$300 per hour.**

## 2. Enhancement Analysis

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application conforms with the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. The Council finds that 2.3 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Luers, Counsel to the Complainant, for the full amount of \$690.00, representing 2.3 hours of service at \$300 per hour.**
2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

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

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

August 20, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
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RICHARD E. CONSTABLE, III  
Commissioner

**INTERIM ORDER**

**May 28, 2013 Government Records Council Meeting**

John Paff  
Complainant

Complaint No. 2012-158

v.

Bordentown Fire District No. 2 (Burlington)  
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The original Custodian improperly required the Complainant to complete an official OPRA request form pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant’s e-mailed and faxed non-form OPRA requests clearly invoked OPRA and made clear the nature of the request. However, the Council declines to order disclosure of the requested records because the current Custodian granted access to the existing records and denied access to the remaining records, which do not exist, on June 13, 2012.
2. The Fire District’s policy not to accept electronic transmissions of OPRA requests does not impose an unreasonable obstacle to the transmission of a request for a government record because the Fire District accepts requests hand-delivered, mailed, or faxed. *See* Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009).
3. The original Custodian improperly required the Complainant to complete an official OPRA request form pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant’s e-mailed and faxed non-form OPRA requests clearly invoked OPRA and made clear the nature of the request. However, the Fire District’s policy not to accept electronic transmissions of OPRA requests does not impose an unreasonable obstacle to the transmission of a request for a government record because the District accepts requests hand-delivered, mailed, or faxed. *See* Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009). Additionally, the evidence of record does not indicate that the original Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, 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.



4. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian improperly refused to accept the Complainant’s non-form OPRA requests until after the filing of this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney’s fees to object to the attorney’s fees requested. N.J.A.C. 5:105-2.13(d).**

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

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 31, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2012-158**

v.

**Bordentown Fire District No. 2 (Burlington)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

- April 21, 2012 OPRA Request: Copies, sent via e-mail or fax, of closed session meeting minutes dated January 5, 2012 and February 2, 2012.
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  1. Closed session minutes dated January 5, 2012.
  2. The resolution that authorized the closed session held on January 5, 2012 in accordance with N.J.S.A. 10:4-13.
  3. Closed session minutes dated February 2, 2012.
  4. The resolution that authorized the closed session held on February 2, 2012 in accordance with N.J.S.A. 10:4-13.
  5. Public session meeting minutes dated March 1, 2012 and April 5, 2012.
  6. Closed session meeting minutes dated March 1, 2012 and April 5, 2012.
  7. The resolution or other writing that most recently designated an offer or employee to serve as the District's Public Agency Compliance Officer responsible for coordinating the reporting procedure from contractors and to generally supervise the compliance procedures regarding the Affirmative Action laws and regulations.

**Request Made:** April 21, 2012 and May 11, 2012

**Response Made:** May 2, 2012 and May 16, 2012

**GRC Complaint Filed:** May 29, 2012<sup>3</sup>

**Background**<sup>4</sup>

**Requests and Responses:**

On April 21, 2012, the Complainant submitted an e-mail referencing the Open Public Records Act ("OPRA") seeking the above-listed records. On April 26, 2012, the third (3<sup>rd</sup>)

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

<sup>2</sup> Sal Schiano, original Custodian of Records. Andrew Watson, current Custodian of Records. Represented by Robert Gaskill, Esq., of Begley & Gaskill (Moorestown, NJ).

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

<sup>4</sup> The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

business day following receipt of said request, the original Custodian sought the Complainant's mailing address, via e-mail, in order to correspond regarding this request. The Complainant complied on the same date. On May 2, 2012, the seventh (7<sup>th</sup>) business day following receipt of the request, the original Custodian sent a letter to the Complainant requesting he resubmit his OPRA request on the Fire District's OPRA Request Form, which clearly states, "[n]o electronic submissions will be accepted." On May 11, 2012, the Complainant submitted a fax referencing OPRA seeking the above-listed records. On May 16, 2012, one (1) day after the original Custodian received the request, the Custodian denied the Complainant's request on the basis that it does not appear on the agency's official OPRA request form. The original Custodian encloses a copy of the agency's OPRA request form.

#### Denial of Access Complaint:

On May 29, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that the Fire District's policy not to accept electronic transmissions of OPRA requests likely originates from Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009), which held that it was not unreasonable for the City of East Orange to "prohibit[] submission of OPRA requests by fax, but allow[] submission by mail or electronically." *Id.* at 229. The Complainant states that the Appellate Division understood that requestors could still submit requests "electronically" (i.e. via e-mail) to East Orange in addition to hand delivering them or sending them through the mail. Thus, the Complainant requests that the Council clarify whether it is reasonable for a custodian to ban all "electronic" methods of submitting a request, thus leaving requestors with hand-delivery or U.S. mail as their only options, which the Complainant contends is burdensome to the requestor.

Additionally, the Complainant asserts that the Custodian was not justified in requiring him to complete the Fire District's official OPRA request form since the court in Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), held that any written request must be honored as long as the request contains the information required by N.J.S.A. 47:1A-5(f). The Complainant contends that his request was proper because it "contained sufficient information to allow the records custodian to determine what record was requested." *See Ciampi v. Township of Union Public School Distirct*, 2012 WL 1141651 (Law Div. April 3, 2012).

Finally, the Complainant seeks prevailing party attorney's fees in the event he prevails in this complaint.

#### Statement of Information:

On February 20, 2013, the current Custodian filed an unsigned Statement of Information ("SOI").<sup>5</sup> On May 2, 2013, the current Custodian submitted a signed SOI. The Custodian certifies that the Fire District received the Complainant's OPRA requests on April 21, 2012, via e-mail, and on May 15, 2012, via fax. The Custodian asserts that the Fire District did not deny the Complainant's OPRA request, but rather indicated that the original Custodian would fulfill

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<sup>5</sup> The Custodian states that he mailed a copy of the SOI on June 26, 2012 via Priority Mail Delivery Confirmation No. 0312 0090 0000 3979 7624. However, the GRC is not in receipt of said mailing.

the request once the Complainant submitted a request on the Fire District's OPRA request form. The Custodian certifies that it was the Fire District's understanding that a person making an OPRA request must complete an official OPRA request form. Additionally, the Custodian certifies that it was the Fire District's understanding that it could refuse electronic transmission of a request when a requestor was not using the official OPRA request form. The Custodian asserts that to the extent there may have been any violation of OPRA, the violation was inadvertent. However, the Custodian certifies that once he determined that electronic submission was acceptable and that a requestor was not required to utilize the Fire District's official OPRA request form, he provided the requested records to the Complainant on June 13, 2012, via fax transmission. The Custodian certified that he denied access to request item nos. 1, 3 and 6 pursuant to the attorney-client privilege; advisory, consultative or deliberative material; information generated by or on behalf of public employers or public employees in connection with any grievance; and ongoing investigations of non-law enforcement agencies; however, the Custodian also certifies that no closed session minutes exist. The Custodian also certifies that he denied access to request item nos. 2, 4 and 7 because no records responsive exist. Additionally, the Custodian certifies that he granted access to the records responsive to request item no. 5.

Additional Information:

On May 16, 2013, the Custodian submitted a certification to the GRC to clarify whether the requested closed session meeting minutes exist. The Custodian certifies that to the best of his knowledge and belief, there are no, and has never been, any closed session minutes dated January 5, 2012, February 2, 2012, March 1, 2012 or April 5, 2012.

Analysis<sup>6</sup>

Valid OPRA Request

OPRA provides that:

“[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

- 1) specific directions and procedures for requesting a record;
- 2) a statement as to whether prepayment of fees or a deposit is required;
- 3) the time period within which the public agency is required by [OPRA], to make the record available;
- 4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;

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<sup>6</sup> There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

- 5) space for the custodian to list reasons if a request is denied in whole or in part;
- 6) space for the requestor to sign and date the form;
- 7) space for the custodian to sign and date the form if the request is fulfilled or denied.” N.J.S.A. 47:1A-5(f).

Furthermore, OPRA states that “a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.” N.J.S.A. 47:1A-5(g).

In Renna v. County of Union, 407 N.J.Super. 230 (App. Div. 2009), the Appellate Division held that although requestors shall continue to use public agencies’ OPRA request forms when making requests, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in the section of OPRA requiring custodians to adopt a form. *Id.* In effect, this permits requesters to write their own correspondence that requests records from a custodian, as long as the request properly invokes OPRA.

Additionally, in Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009)<sup>7</sup>, the court stated that “N.J.S.A. 47:1A-5(f)(1) expressly delegates authority to each custodian of government records to adopt a form for use in making OPRA requests that includes ‘specific directions and procedures for requesting a record.’” The court went on to state that “...the procedures adopted by a custodian of government records for transmittal of OPRA requests, like any other action by a public official or agency, must be reasonable. See N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 181-84 (App. Div. 2007). Consequently, a custodian may not exercise his authority under N.J.S.A. 47:1A-7(f)(1) in a manner that would impose an unreasonable obstacle to the transmission of a request for a governmental record, such as, for example, by requiring any OPRA request to be hand-delivered.”

Here, the original Custodian refused to accept the Complainant’s April 21, 2012 OPRA request via e-mail because the request: 1) was not submitted on the official OPRA request form; and 2) was submitted electronically, which is prohibited according to the Fire District’s official OPRA request form. Further, the original Custodian refused to accept the Complainant’s May 11, 2012 non-form OPRA request because the request was not submitted on the Fire District’s official OPRA request form.

#### Use of Official Form

The Complainant’s April 21, 2012 request contains the following statement, “[p]lease accept this e-mail/fax as my request for government records in accordance with the Open Public Records Act (OPRA)...” The original Custodian’s response dated May 2, 2012, states, “[t]he email appears to be a request, under OPRA, for certain documents of this Fire District.” The original Custodian’s response makes it clear that he understood the Complainant’s e-mail to be an OPRA request for records. The Complainant’s May 11, 2012 request also contains the following statement, “[p]lease accept this as my request for government records in accordance

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<sup>7</sup> On appeal from Paff v. City of East Orange, GRC Complaint No. 2007-297 (March 2008).



with the Open Public Records Act (OPRA)...” The original Custodian, in his response dated May 16, 2012, confirms receipt of the Complainant’s request entitled “OPRA Request.” Thus, the original Custodian’s response makes it clear that he understood the Complainant’s fax to be an OPRA request for records.

Accordingly, the original Custodian improperly required the Complainant to complete an official OPRA request form pursuant to Renna, *supra*, because the Complainant’s e-mailed and faxed non-form OPRA requests clearly invoked OPRA and made clear the nature of the request. However, the Council declines to order disclosure of the requested records because the current Custodian granted access to the existing records and denied access to the remaining records, which do not exist, on June 13, 2012.

### Electronic Submissions

The Complainant requests that the Council clarify whether it is reasonable for a custodian to ban all “electronic” methods of submitting a request, thus leaving requestors with hand-delivery or U.S. mail as their only options, which the Complainant contends is burdensome to the requestor.

The original Custodian refused to accept the Complainant’s April 21, 2012 e-mail as an OPRA request because the Fire District’s official OPRA request form indicates that “no electronic transmissions will be accepted.” However, the Custodian did not refuse to accept the Complainant’s May 11, 2012 faxed request on the basis that it was submitted electronically. Rather, the Custodian’s sole basis for denying the request was that the Complainant did not use the Fire District’s official OPRA request form. Further, upon reviewing the Fire District’s official OPRA request form, the form provides the Fire District’s mailing address, telephone number, and fax number as contact information. The form does not include an e-mail address, but rather indicates that “[n]o electronic submissions will be accepted.”

Based on the evidence of record, the original Custodian did not refuse to accept all types of electronic submissions. The evidence provides that the original Custodian refused to accept only e-mailed submissions. The original Custodian specifically refused to accept the Complainant’s e-mailed OPRA request as an “electronic submission” but did not refuse the faxed request as an “electronic submission.” More importantly, the Fire District includes its own fax number on its official OPRA request form, but fails to include an e-mail address. This evidence supports the finding that the Fire District will not accept e-mailed requests, but will accept requests hand-delivered, mailed, or faxed.

Therefore, the Fire District’s policy not to accept electronic transmissions of OPRA requests does not impose an unreasonable obstacle to the transmission of a request for a government record because the Fire District accepts requests hand-delivered, mailed, or faxed. *See Paff*, *supra*.

## **Knowing & Willful**

OPRA states that:

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

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

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably 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).

Here, the original Custodian improperly required the Complainant to complete an official OPRA request form pursuant to Renna, *supra*, because the Complainant’s e-mailed and faxed non-form OPRA requests clearly invoked OPRA and made clear the nature of the request. However, the Fire District’s policy not to accept electronic transmissions of OPRA requests does not impose an unreasonable obstacle to the transmission of a request for a government record because the District accepts requests hand-delivered, mailed, or faxed. *See Paff*, *supra*. Additionally, the evidence of record does not indicate that the original Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, 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.

## **Prevailing Party Attorney’s Fees**

OPRA provides that:

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

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (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.

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

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

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

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

Here, the Complainant filed a Denial of Access Complaint on May 29, 2012 challenging the Custodian’s denial of his OPRA requests dated April 21, 2012 and May 11, 2012 because said requests were not submitted on the Fire District’s official OPRA request form. On June 13, 2012, after the filing of this complaint, the current Custodian reversed the Fire District’s position regarding the use of the official OPRA request form, accepted the Complainant’s OPRA requests, and provided a response granting access to the records that exist, and denying access to the records that do not exist. As previously stated, the original Custodian improperly required the Complainant to complete an official OPRA request form pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant’s e-mailed and faxed non-form OPRA requests clearly invoked OPRA and made clear the nature of the request.

Therefore, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, *supra*, at 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, *supra*. Specifically, the Custodian improperly refused to accept the Complainant’s non-form OPRA requests until after the filing of this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. *See* N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney’s fees to object to the attorney’s fees requested. N.J.A.C. 5:105-2.13(d).**

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The original Custodian improperly required the Complainant to complete an official OPRA request form pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant's e-mailed and faxed non-form OPRA requests clearly invoked OPRA and made clear the nature of the request. However, the Council declines to order disclosure of the requested records because the current Custodian granted access to the existing records and denied access to the remaining records, which do not exist, on June 13, 2012.
2. The Fire District's policy not to accept electronic transmissions of OPRA requests does not impose an unreasonable obstacle to the transmission of a request for a government record because the Fire District accepts requests hand-delivered, mailed, or faxed. *See* Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009).
3. The original Custodian improperly required the Complainant to complete an official OPRA request form pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant's e-mailed and faxed non-form OPRA requests clearly invoked OPRA and made clear the nature of the request. However, the Fire District's policy not to accept electronic transmissions of OPRA requests does not impose an unreasonable obstacle to the transmission of a request for a government record because the District accepts requests hand-delivered, mailed, or faxed. *See* Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009). Additionally, the evidence of record does not indicate that the original Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, 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.
4. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian improperly refused to accept the Complainant's non-form OPRA requests until after the filing of this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

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May 21, 2013