



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

February 25, 2014 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2012-245

v.

City of Bayonne (Hudson)
Custodian of Record

At the February 25, 2014 public meeting, the Government Records Council (“Council”) considered the February 18, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint should be dismissed because the Complainant (via Counsel) withdrew same in an e-mail on February 11, 2014. Therefore, no further adjudication is required.

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

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

Robin Berg Tabakin, Esq., Chair
Government Records Council



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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**John Paff¹
Complainant**

GRC Complaint No. 2012-245

v.

**City of Bayonne (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

March 22, 2012 OPRA request: Electronic copies via e-mail or facsimile of the trial judge's orders dated April 1, 2010, April 23, 2010 and April 7, 2011 as well as "Letter Opinions" dated October 22, 2010 and April 7, 2011 in Mark's Towing v. Bayonne, Docket No. HUD-L-864-10.

July 31, 2012 OPRA request: Electronic copies via e-mail or facsimile of the following regarding Kabrt, et al v. Bayonne Police, et al, Docket No. 2011-CV-02849, settled on or about May 1, 2012:

1. The most recently amended civil complaint filed in the case (or the original complaint is same was never amended).
2. The settlement agreement, i.e. the agreement setting forth the terms and amount of settlement.

Custodian of Record: Robert F. Sloan

Request Received by Custodian: March 22, 2012 and July 31, 2012

Response Made by Custodian: March 28, 2012 and July 31, 2012

GRC Complaint Received: August 24, 2012

Background

September 24, 2013 Council Meeting:

At its September 24, 2013 public meeting, the Council considered the September 17, 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 Previously represented by Dorothy L. Argyros, Esq. (Neptune, NJ). Currently represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ). On April 30, 2013, Mr. Luers entered his appearance in this complaint.

² Represented by Peter Cecinini, Esq. (Bayonne, NJ).

1. The Custodian failed to fully comply with the Council's July 23, 2013 Interim Order because he failed to respond within the prescribed time frame. However, Counsel responded on behalf of the Custodian providing access to the responsive records and submitting certified confirmation of compliance to the Executive Director thereafter.
2. The Custodian unlawfully denied access to the responsive records and failed to fully comply with the Council's July 23, 2013 Interim Order. However, the Custodian's Counsel provided records to the Complainant's Counsel on August 12 and 13, 2013, and further submitted certified confirmation of compliance to the Executive Director thereafter. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's July 23, 2013 Interim Order, 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), 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 v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian's Counsel disclosed the responsive records pursuant to the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. 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 September 25, 2013, the Council distributed its Interim Order to all parties. On October 23, 2013, the Complainant's Counsel submitted a fee application. On November 6, 2013, the Custodian's Counsel advised the GRC that City has agreed to pay Complainant's Counsel's requested fee amount. On December 5, 2013, the GRC sought an update on the City's fee payment. On December 6, 2013, the Custodian's Counsel advised that upon approval by the City Council, the payment would be sent to the Complainant's Counsel.

On December 27, 2013, the GRC sought another update. On January 21, 2014, the Custodian's Counsel confirmed that payment was sent to the Complainant's Counsel. On February 11, 2014, the GRC confirmed that the Complainant's Counsel received payment. On the same day, Complainant's Counsel withdrew this complaint from consideration.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant (via Counsel) withdrew same in an e-mail on February 11, 2014. Therefore, no further adjudication is required.

Prepared and

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

February 18, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

September 24, 2013 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2012-245

v.

City of Bayonne (Hudson)
Custodian of Record

At the September 24, 2013 public meeting, the Government Records Council (“Council”) considered the September 17, 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 Custodian failed to fully comply with the Council’s July 23, 2013 Interim Order because he failed to respond within the prescribed time frame. However, Counsel responded on behalf of the Custodian providing access to the responsive records and submitting certified confirmation of compliance to the Executive Director thereafter.
2. The Custodian unlawfully denied access to the responsive records and failed to fully comply with the Council’s July 23, 2013 Interim Order. However, the Custodian’s Counsel provided records to the Complainant’s Counsel on August 12 and 13, 2013, and further submitted certified confirmation of compliance to the Executive Director thereafter. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s July 23, 2013 Interim Order, 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), 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 v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian’s Counsel disclosed the responsive records pursuant to the Council’s Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. 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 24th Day of September, 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: September 25, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 24, 2013 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2012-245

v.

**City of Bayonne (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

March 22, 2012 OPRA request: Electronic copies via e-mail or facsimile of the trial judge's orders dated April 1, 2010, April 23, 2010 and April 7, 2011 as well as "Letter Opinions" dated October 22, 2010 and April 7, 2011 in Mark's Towing v. Bayonne, Docket No. HUD-L-864-10.

July 31, 2012 OPRA request: Electronic copies via e-mail or facsimile of the following regarding Kabrt, et al v. Bayonne Police, et al, Docket No. 2011-CV-02849, settled on or about May 1, 2012:

1. The most recently amended civil complaint filed in the case (or the original complaint is same was never amended).
2. The settlement agreement, i.e. the agreement setting forth the terms and amount of settlement.

Custodian of Record: Robert F. Sloan

Request Received by Custodian: March 22, 2012 and July 31, 2012

Response Made by Custodian: March 28, 2012 and July 31, 2012

GRC Complaint Received: August 24, 2012

Background

July 23, 2013 Council Meeting:

At its July 23, 2013 public meeting, the Council considered the July 16, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

¹ Previously represented by Dorothy L. Argyros, Esq. (Neptune, NJ). Currently represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ). On April 30, 2013, Mr. Luers entered his appearance in this complaint.

² Represented by Peter Cecinini, Esq. (Bayonne, NJ).

1. The Custodian unlawfully denied access to the responsive records because he has an obligation to obtain them from outside counsel and provide same. N.J.S.A. 47:1A-6; Paff v. Barrington School District (Camden), GRC Complaint No. 2009-55 (Interim Order dated February 23, 2010). Thus, the Custodian must obtain and disclose same to the Complainant, if they exist. If certain records do not exist, the Custodian must certify to this fact.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On July 24, 2013, the Council distributed its Interim Order to all parties. On August 5, 2013, the Custodian's Counsel sought an extension of time to comply with the Council's Order to allow outside counsel to locate and forward the responsive records to him for disclosure. On August 6, 2013, the GRC granted an extension of time until August 14, 2013. On August 12, 2013, Counsel disclosed the records responsive to the Complainant's March 22, 2012 OPRA request, which were obtained from outside counsel. On August 13, 2013, Counsel disclosed the records responsive to the Complainant's July 31, 2012 OPRA request, which were also obtained from outside counsel.

On August 14, 2013, Counsel sought an extension until August 16, 2013 to submit certified confirmation of compliance, which the GRC granted. On August 16, 2013, Counsel certified that he sought the responsive records from outside counsel and provided same to the Complainant's Counsel via e-mail on August 12, 2013 and August 13, 2013. Counsel certifies that the records provided represent all records that exist in possession of outside counsel.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁴ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Analysis

Compliance

At its July 23, 2013 meeting, the Council ordered the Custodian to disclose the records responsive to the Complainant's two (2) OPRA requests "... **within five (5) business days from receipt of the Council's Interim Order ... and simultaneously provide certified confirmation of compliance ... to the Executive Director.**" On July 24, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 31, 2013.

On August 5, 2013, three (3) business days after expiration of the time frame to comply, the Custodian's Counsel sought an extension of time and was granted same until August 14, 2013. He subsequently provided records to the Complainant's Counsel on August 12, 2013 and August 13, 2013. Following another extension until August 16, 2013, Counsel provided certified confirmation of compliance to the Executive Director because he was the person directly involved in obtaining and providing the records at issue herein.

Therefore, the Custodian failed to fully comply with the Council's July 23, 2013 Interim Order because he failed to respond within the prescribed time frame. However, Counsel responded on behalf of the Custodian providing access to the responsive records and submitted certified confirmation of compliance to the Executive Director thereafter.

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions

must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

The Custodian unlawfully denied access to the responsive records and failed to fully comply with the Council's July 23, 2013 Interim Order. However, the Custodian's Counsel provided records to the Complainant's Counsel on August 12 and 13, 2013, and further submitted certified confirmation of compliance to the Executive Director thereafter. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees:

OPRA provides that:

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

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

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

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

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

rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties,” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

Mason at 73-76 (2008)(footnote omitted).

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 Council ordered disclosure of the records responsive to the Complainant’s two (2) OPRA requests. The Custodian’s Counsel disclosed said records on August 12 and 13, 2013. Thus, the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

Therefore, pursuant to the Council’s July 23, 2013 Interim Order, 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’s Counsel disclosed the responsive records pursuant to the Council’s Order. Further, the relief ultimately achieved had a

basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. 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 Custodian failed to fully comply with the Council's July 23, 2013 Interim Order because he failed to respond within the prescribed time frame. However, Counsel responded on behalf of the Custodian providing access to the responsive records and submitting certified confirmation of compliance to the Executive Director thereafter.
2. The Custodian unlawfully denied access to the responsive records and failed to fully comply with the Council's July 23, 2013 Interim Order. However, the Custodian's Counsel provided records to the Complainant's Counsel on August 12 and 13, 2013, and further submitted certified confirmation of compliance to the Executive Director thereafter. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's July 23, 2013 Interim Order, 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), 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 v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian's Counsel disclosed the responsive records pursuant to the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Prepared By: Frank F. Caruso
Senior Case Manager
September 17, 2013

Approved By: Brandon D. Minde, Esq
Executive Director



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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RICHARD E. CONSTABLE, III
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INTERIM ORDER

July 23, 2013 Government Records Council Meeting

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Complainant

Complaint No. 2012-245

v.

City of Bayonne (Hudson)
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian unlawfully denied access to the responsive records because he has an obligation to obtain them from outside counsel and provide same. N.J.S.A. 47:1A-6; Paff v. Barrington School District (Camden), GRC Complaint No. 2009-55 (Interim Order dated February 23, 2010). Thus, the Custodian must obtain and disclose same to the Complainant, if they exist. If certain records do not exist, the Custodian must certify to this fact.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

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

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

Interim Order Rendered by the
Government Records Council
On The 23rd Day of July, 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: July 24, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting**

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Complainant**

GRC Complaint No. 2012-245

v.

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1. The most recently amended civil complaint filed in the case (or the original complaint is same was never amended).
2. The settlement agreement, i.e. the agreement setting forth the terms and amount of settlement.

Request Made: March 22, 2012 and July 31, 2012

Response Made: March 28, 2012 and July 31, 2012

GRC Complaint Filed: August 24, 2012³

Background⁴

Request and Response:

On March 22, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request seeking the above-listed records. On March 28, 2012, the fourth (4th) business day

¹ Previously represented by Dorothy L. Argyros, Esq. (Neptune, NJ). Currently represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ). On April 30, 2013, Mr. Luers entered his appearance in this complaint.

² Robert F. Sloan, Custodian of Records. Represented by Peter Cecinini, Esq. (Bayonne, NJ).

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

⁴ 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.

following receipt of said request, the Custodian responded in writing stating that he forwarded the Complainant's OPRA request to Corporation Counsel's office because the responsive records are located there and the City of Bayonne's ("City") attorney has been designated as Deputy Records Custodian. The Custodian noted that the Complainant may also access the responsive orders and opinions online through the State Judiciary website. On April 5, 2012, the Complainant sought a date certain on which the City would respond. On the same day, Ann Nowak, City Law Department, advised that the Complainant's OPRA request was forwarded to the Law Department. On April 11, 2012, the Custodian's Counsel advised the Complainant that all court records are public records that may be obtained at the Superior Court of Hudson County.

On July 31, 2012, the Complainant submitted a second (2nd) OPRA request seeking the above-listed records. On the same day, the Custodian responded in writing stating that the City's policy requires a requestor to submit an OPRA request on the City's official OPRA request form. The Custodian noted that he attached the form for the Complainant's use. The Complainant responded disputing the City's policy based on the Appellate Division's decision in Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). The Custodian responded that the City relies on the form for records retention and tracking purposes; however, he will forward the Complainant's OPRA request to Mary Beth Golden ("Ms. Golden"), Secretary to the Custodian. On August 8, 2012, the Complainant requested that the City discontinue its form policy and further noted that the City's official OPRA request is not compliant with OPRA. O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (Interim Order dated May 28, 2008). On August 9, 2012, Ms. Golden forwarded the OPRA request to the Custodian's Counsel stating that she received it on this day and that the request needed to be expedited.

On August 10, 2012, the eighth (8th) business day after receipt of the request, the Custodian's Counsel responded to the Complainant stating that one of the reasons for the City's policy of receiving OPRA requests via mail, facsimile or hand-delivery is that its e-mail system has lately been prone to technical difficulties. Counsel stated that the records responsive to the OPRA request are available at the Superior Court, who regularly provide court records to the public and are set up to expedite such requests. On the same day, the Complainant advised Counsel that his requests to the courts under R. 1:38 often go ignored and the court's rules and directives do not provide for a time limit to respond. The Complainant stated that he preferred to obtain the records under OPRA because it imposes a time frame to respond and holds public agencies liable for prevailing party attorney's fees if the OPRA requests go unanswered.

Denial of Access Complaint:

On August 24, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputes the City's response directing him to the Superior Court to obtain the responsive records. The Complainant contends that nothing in OPRA provides for a denial of access because the requested records are available at another public agency. The Complainant argues that if the City maintains the responsive records, they are obligated to provide same.

The Complainant further disputes the City's internal policy of requiring a requestor to fill out the City's OPRA request form. The Complainant asserts that this policy is a clear violation of Renna, supra, which holds that any written request must be honored so long as it contains the information required by N.J.S.A. 47:1A-5(f). The Complainant contends that his July 31, 2012 OPRA request contained sufficient information for the Custodian to determine the records sought and was thus proper. Ciampi v. Township of Union Public School District, Docket No. WL-1141651 (Law Div. 2012). The Complainant also contends that the City's official OPRA request form is not compliant with OPRA. O'Shea, supra.

The Complainant requests that the Council: (1) determine that the City violated OPRA by failing to provide responsive records to the Complainant; (2) order disclosure of the records; (3) determine that the City's internal policy violates OPRA; (4) determine that the City violated OPRA by having a non-compliant official request form; and (5) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Statement of Information:⁵

On February 4, 2013, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies he received both requests on their submission dates and responded within seven (7) business days accordingly.

The Custodian contends that he did not unlawfully deny access to the responsive records because they are not in the possession of the City and thus not readily available. The Custodian asserts that referring the Complainant to the Hudson County Superior Court keeps with OPRA's intent of maximizing "public knowledge" because the records are readily available for disclosure there. The Custodian asserts that the City never argued that the records were exempt from disclosure; rather, the necessary steps to obtain these records would substantially disrupt the City's operations. N.J.S.A. 47:1A-5(g); Spectraserv, Inc. v. Middlesex County Utilities Authority, 416 N.J. Super. 565 (App. Div. 2010); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007). The Custodian argues that the City would have to contact outside counsel and pay legal fees for outside counsel to locate the responsive records. The Custodian further asserts that the City attorney would then be required to review the records for possible redactions. The Custodian asserts that given the near record number of tax appeals in 2012 and diminished resources including those in the Law Division, it is unreasonable to ask taxpayers to pay for unnecessary labor on behalf of a private citizen.

The Custodian contends that directing the Complainant to the courts represented a reasonable accommodation benefiting both the interests of the Complainant and Custodian. Spectraserv, supra, at 576-577; NJ Builders, supra, at 181-183. The Custodian asserts that the records available at the court require no review or legal analysis because the court has already redacted them. The Custodian asserts that the City has repeatedly attempted to reach a reasonable accommodation with the Complainant and even agreed to mediate this complaint.

⁵ On September 11, 2012, this complaint was referred to mediation. On December 26, 2012, the complaint was referred back to the GRC for adjudication. On January 22, 2013, the Custodian's Counsel advised the GRC that the Complainant did not wish to amend his complaint.

The Custodian further contends that the City responded to the Complainant's July 31, 2012 OPRA request notwithstanding the fact that the Complainant did not submit same on the City's official OPRA request. The Custodian asserts that he advised the Complainant of the City's internal policy, but never denied the Complainant's OPRA request because it was not on the form.

The Custodian further argues that the Complainant's dispute of the City's official OPRA request form has no standing to challenge same. Campus Associates, LLC v. Zoning Board of Adjustment of Township of Hillsborough, 413 N.J. Super. 527, 533 (App. Div. 2010)(quoting In re Baby T., 160 N.J. 332 (1999)); In re Issuance of Access Conforming Lot Permit No. A-17-N-N040-2007, 417 N.J. Super. 115, 126 (App. Div. 2010)(quoting In re Camden County, 170 N.J. 439, 449 (2002)). The Custodian contends that unlike the complainant in O'Shea, *supra*, the Complainant here did not utilize the form and thus has no standing to challenge the form used by the City at the time of his two (2) OPRA requests. The Custodian contends that it cannot be said that the Complainant has "a substantial likelihood that [he] will suffer harm in the event of an unfavorable decision" and a "real adverseness with respect to the subject matter" (citation omitted). The Custodian further asserts that the Complainant did not allege that the City's form caused him any harm.

Additional Information:

On February 15, 2013, the Custodian's Counsel e-mailed the GRC stating that the City adopted a new official OPRA request form for use beginning on this day. Counsel notes that the old form is still posted to the City's website and that it might take some time to post the new form online. Counsel further notes that the City will accept OPRA requests submitted on the old form.

Analysis⁶

Unlawful Denial of Access

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.

In Paff v. Barrington School District (Camden), GRC Complaint No. 2009-55 (Interim Order dated February 23, 2010), the custodian certified in the SOI that the School District was not in possession of the responsive record but that the record was maintained by the District's insurance agent. Although the custodian obtained and provided the record subsequent to the filing of the complaint, the Council held that "... the Custodian unlawfully denied access to the requested settlement agreement because she had knowledge of the litigation and was obligated to obtain the settlement agreement from the insurance fund." *Id.* at 7. *See also* Burnett v. County of

⁶ 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.

Gloucester, 415 N.J. Super. 506 (App. Div. 2010); Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012) at 9-10.

Here, the facts are similar to those in Paff, *supra*. Specifically, although Counsel referred the Complainant to the courts to obtain the responsive records, the Custodian certified in the SOI that this response was an attempt to accommodate the Complainant because obtaining the records from outside counsel would have substantially disrupted agency operations. The GRC is not convinced that obtaining the records from outside counsel would have adversely affected the City.

Therefore, the Custodian unlawfully denied access to the responsive records because he has an obligation to obtain them from outside counsel and provide same. N.J.S.A. 47:1A-6; Paff, *supra*. Thus, the Custodian must obtain and disclose same to the Complainant, if they exist. If certain records do not exist, the Custodian must certify to this fact.

The GRC further notes that the Custodian acknowledged receipt of the Complainant's July 31, 2012 OPRA request on the same day and requested that the Complainant complete an official OPRA request form. The Complainant disputed the requirement that he complete the form but did not complete and submit his request on the City's official form. However, the Custodian's request that the Complainant complete an official City OPRA request form is an impermissible limitation on access under OPRA pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant's e-mailed OPRA request clearly invoked OPRA and made clear the nature of the request.

Finally, the Complainant contended that the City's official OPRA request form violated OPRA. O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (Interim Order dated May 28, 2008). The Custodian's Counsel subsequently advised the GRC on February 15, 2013 that the City adopted a new OPRA request form that appears to mirror the GRC's model request form. As a result of this change, the GRC declines to order the City to take any action since the City has amended their form.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the responsive records because he has an obligation to obtain them from outside counsel and provide same. N.J.S.A. 47:1A-6; Paff v. Barrington School District (Camden), GRC Complaint No. 2009-55 (Interim Order dated February 23, 2010). Thus, the Custodian must obtain and disclose same to the Complainant, if they exist. If certain records do not exist, the Custodian must certify to this fact.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁷ to the Executive Director.⁸**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

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

July 16, 2013

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.