



**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**

**June 24, 2014 Government Records Council Meeting**

James Kevin Barnes  
Complainant

Complaint No. 2013-187

v.

Trenton Public Schools (Mercer)  
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council (“Council”) considered the June 17, 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 because the Complainant waived his award for reasonable attorney’s fees via email on April 2, 2014, there is no need to conduct an analysis. As such, because there are no matters left in dispute, the case should be dismissed.

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 24<sup>th</sup> Day of June, 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: June 26, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 24, 2014 Council Meeting**

**James Kevin Barnes<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-187**

v.

**Trenton Public Schools (Mercer)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of:

1. Any and all settlement agreements between James Barnes and the Trenton Board of Education from 2009-2013
2. Any and all motions and/or resolutions involving James Barnes from 6/13/2011, 4/4/2011 and various other dates (1/1/2010 thru 7/1/2012).
3. Any and all communications including electronic email regarding James Barnes.
4. Official job description for James K. Barnes.

**Custodian of Record:** Jayne Howard

**Request Received by Custodian:** May 1, 2013; resubmitted June 5, 2013

**Response Made by Custodian:** June 25, 2013

**GRC Complaint Received:** June 25, 2013

**Background**

**March 25, 2014 Council Meeting:**

At its March 25, 2014 public meeting, the Council considered the March 18, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's January 29, 2014 Interim Order because she responded in the prescribed time frame certifying that all responsive documents have been produced for all item requests, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian violated N.J.S.A. 47:1A-5(i), and provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-(g), the Custodian provided the Complainant with all records responsive to the request. Additionally, the

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<sup>1</sup> Represented by William R. Burns, Esq., Destribats Campbell, LLC (Hamilton, NJ).

<sup>2</sup> Represented by Sybil R. Trotta, Esq. on behalf of Trenton Board of Education (Trenton, NJ).

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 do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. 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, 432 (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 did not respond to the Complainant's request until the day the Complainant filed his Denial of Access Complaint. Additionally, the Custodian's response to the Complainant's request was insufficient. 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. N.J.S.A. 47:1A-6. **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 March 26, 2014, the Council distributed its Interim Order to all parties. On Wednesday, April 2, 2014, the Complainant submitted an email to the GRC indicating that he is waiving his award for reasonable attorney's fees.

#### Analysis

No analysis required.

#### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant waived his award for reasonable attorney's fees via email on April 2, 2014, there is no need to conduct an analysis. As such, because there are no matters left in dispute, the case should be dismissed.

Prepared By: Samuel A. Rosado, Esq.  
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.  
Acting Executive Director

June 17, 2014



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

March 25, 2014 Government Records Council Meeting

James Kevin Barnes  
Complainant

Complaint No. 2013-187

v.

Trenton Public Schools (Mercer)  
Custodian of Record

At the March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 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:

1. The Custodian complied with the Council’s January 29, 2014 Interim Order because she responded in the prescribed time frame certifying that all responsive documents have been produced for all item requests, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian violated N.J.S.A. 47:1A-5(i), and provided an insufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-(g), the Custodian provided the Complainant with all records responsive to the request. 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 do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. 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, 432 (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 did not respond to the Complainant’s request until the day the Complainant filed his Denial of Access Complaint. Additionally, the Custodian’s response to the Complainant’s request was insufficient. 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. N.J.S.A. 47:1A-6. **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 25<sup>th</sup> Day of March, 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: March 26, 2014**

 **STATE OF NEW JERSEY**  
**GOVERNMENT RECORDS COUNCIL**

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

**James Kevin Barnes<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2013-187**

v.

**Trenton Public Schools (Mercer)<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:** Copies of:

1. Any and all settlement agreements between James Barnes and the Trenton Board of Education from 2009-2013
2. Any and all motions and/or resolutions involving James Barnes from 6/13/2011, 4/4/2011 and various other dates (1/1/2010 thru 7/1/2012).
3. Any and all communications including electronic email regarding James Barnes.
4. Official job description for James K. Barnes.

**Custodian of Record:** Jayne Howard

**Request Received by Custodian:** May 1, 2013; resubmitted June 5, 2013

**Response Made by Custodian:** June 25, 2013

**GRC Complaint Received:** June 25, 2013

**Background**

**January 28, 2014 Council Meeting:**

At its January 28, 2014 public meeting, the Council considered the January 21, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request after his initial submission on May 1, 2013 and again on June 5, 2013. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

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<sup>1</sup> Represented by William R. Burns, Esq., Destribats Campbell, LLC (Hamilton, NJ).

<sup>2</sup> Represented by Sybil R. Trotta, Esq. on behalf of Trenton Board of Education (Trenton, NJ).

2. The Custodian's response dated June 25, 2013 is insufficient pursuant to N.J.S.A. 47:1A-5(g) because the Custodian failed to specifically deny access to requested Item No. 3. Additionally, the Custodian failed to certify that she produced all responsive documents to the Complainant in her SOI. The Custodian shall produce any responsive documents to requested Item No. 3; if no responsive documents exist, the Custodian must certify to same. In addition, the Custodian shall certify whether she produced all responsive documents to the Complainant.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> to the Executive Director.<sup>4</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On January 29, 2014, the Council distributed its Interim Order to all parties. On February 6, 2014, the Custodian responded to the Council's Interim Order.

#### Analysis

#### Compliance

At its January 28, 2014 meeting, the Council ordered the Custodian to produce any responsive documents to requested Item No. 3 within five business days from receipt of same and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On January 29, 2014, 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 February 6, 2014.

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

<sup>4</sup> Satisfactory compliance requires that the Custodian deliver the record(s) 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.



On February 6, 2014, the fifth (5) business day after receipt of the Council's Order, the Custodian certifies that all responsive documents were produced and delivered to the Complainant on December 6, 2013 and that no other responsive documents exist. The Custodian attached said documents to its certification.

Therefore, the Custodian complied with the Council's January 29, 2014 Interim Order because she responded in the prescribed time frame certifying that all responsive documents have been produced for all item requests, and simultaneously provided certified confirmation of compliance to the Executive Director.

### **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)).

Although the Custodian violated N.J.S.A. 47:1A-5(i), and provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-(g), the Custodian provided the Complainant with all records responsive to the request. 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 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 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, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 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, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 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).

The Court in Mason, further held that:

[R]equestors 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).

Id. at 76.

The complaint was filed on June 25, 2013, after the Complainant twice submitted his OPRA request. That same day, the Custodian responded to the Complainant's request and provided documents responsive to all but requested Item No. 3, which was not mentioned in the Custodian's response. The litigation continued beyond December 6, 2013, when the Custodian produced and delivered documents responsive to Item No. 3 to the Complainant. Accordingly, the Council concluded in its January 28, 2014 Order that the Custodian's June 15, 2013 response was insufficient.

#### Conclusion:

Therefore, the Complainant has 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. Additionally, 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 51. Specifically, the Custodian did not respond to the Complainant's request until the day the Complainant filed his Denial of Access Complaint. Additionally, the Custodian's response to the Complainant's request was insufficient. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. N.J.S.A. 47:1A-6. **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 complied with the Council's January 29, 2014 Interim Order because she responded in the prescribed time frame certifying that all responsive documents have been produced for all item requests, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian violated N.J.S.A. 47:1A-5(i), and provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-(g), the Custodian provided the Complainant with all records responsive to the request. 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 do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. 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, 432 (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 did not respond to the Complainant's request until the day the Complainant filed his Denial of Access Complaint. Additionally, the Custodian's response to the Complainant's request was insufficient. 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. N.J.S.A. 47:1A-6. **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: Samuel A. Rosado, Esq.  
Staff Attorney

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

March 18, 2014



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
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INTERIM ORDER

January 28, 2014 Government Records Council Meeting

James Kevin Barnes  
Complainant

Complaint No. 2013-187

v.

Trenton Public Schools (Mercer)  
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council ("Council") considered the January 21, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request after his initial submission on May 1, 2013 and again on June 5, 2013. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian's response dated June 25, 2013 is insufficient pursuant to N.J.S.A. 47:1A-5(g) because the Custodian failed to specifically deny access to requested Item No. 3. Additionally, the Custodian failed to certify that she produced all responsive documents to the Complainant in her SOI. The Custodian shall produce any responsive documents to requested Item No. 3; if no responsive documents exist, the Custodian must certify to same. In addition, the Custodian shall certify whether she produced all responsive documents to the Complainant.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

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

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) 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

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of January, 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: January 29, 2014**

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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.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 28, 2014 Council Meeting**

**James Kevin Barnes<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-187**

v.

**Trenton Public Schools (Mercer)<sup>2</sup>  
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3. Any and all communications including electronic email regarding James Barnes.
4. Official job description for James K. Barnes.

**Custodian of Record:** Jayne Howard

**Request Received by Custodian:** May 1, 2013; resubmitted June 5, 2013

**Response Made by Custodian:** June 25, 2013

**GRC Complaint Received:** June 25, 2013

**Background<sup>3</sup>**

**Request and Response:**

On May 1, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 5, 2013, after receiving no response from the Custodian, the Complainant re-submitted his OPRA request. That same day, counsel for the Custodian advised Complainant’s counsel that a response was forthcoming. On June 25, 2013, the Complainant filed his denial of access complaint. Also on June 25, 2013 the Custodian responded in writing and produced documents responsive to Item Nos. 1, 2, and 4. The Custodian did not reference Item No. 3.

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<sup>1</sup> Represented by William R. Burns, Esq., Destribats Campbell, LLC (Hamilton, NJ).

<sup>2</sup> Represented by Sybil R. Trotta, Esq. on behalf of Trenton Board of Education (Trenton, NJ).

<sup>3</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.

### Denial of Access Complaint:

On June 25, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that the Custodian failed to respond to his May 1, 2013 OPRA request which forced him to re-submit the request on June 5, 2013. The Complainant states that the Custodian informed him orally that a response would be forthcoming, but that the Custodian did not provide a date certain for said response. Finally, the Complainant states that it was not until he filed his Denial of Access Complaint on June 25, 2013 that the Custodian responded in writing to his OPRA request.

### Statement of Information:

On October 9, 2013, the Custodian filed a Statement of Information (“SOF”). The Custodian certifies that she provided eleven (11) pages of responsive records to the Complainant on June 25, 2013. The Custodian does not specify to which of the requested Items the documents produced were responsive. Moreover, the Custodian did not certify that she produced all responsive documents.

## Analysis

### Timeliness

OPRA mandates that a custodian either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>4</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In this matter, the Custodian, through counsel, does not explain why she did not timely respond to the either Complainant’s May 1, 2013 OPRA request or the Complainant’s resubmission on June 5, 2013.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request after his initial submission on May 1, 2013 and resubmission on June 5, 2013. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in

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<sup>4</sup> A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.



a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC No. 2007-11.

### **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 Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded, stating that there was no record of any telephone calls made to the complainant. The Custodian subsequently certified that no records responsive to the Complainant’s request existed. The Council determined that, because the Custodian certified that no records responsive to the request existed, the Custodian did not unlawfully deny access to the requested records.

Here, the Custodian provided responsive documents to Item Nos. 1, 2, and 4, but the Custodian failed to inform the Complainant in her response whether there were documents responsive to Item No. 3. In her SOI, the Custodian certifies that there were eleven (11) pages of responsive documents, including the email message sent to the Complainant on June 25, 2013, with said documents attached. However, the Custodian does not specify what pages are responsive to each requested item. Furthermore, the Custodian does not certify whether the documents provided encompass all responsive documents to the Complainant’s request.

Therefore, the Custodian’s response dated June 25, 2013 is insufficient pursuant to N.J.S.A. 47:1A-5(g) because the Custodian failed to specifically deny access to requested Item No. 3. Additionally, the Custodian failed to certify that she produced all responsive documents to the Complainant in her SOI. The Custodian shall produce any responsive documents to requested Item No. 3; if no responsive documents exist, the Custodian must certify to same. In addition, the Custodian shall certify whether she produced all responsive documents to the Complainant.

### **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 did not bear her burden of proof that she timely responded to the Complainant's OPRA request after his initial submission on May 1, 2013 and again on June 5, 2013. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian's response dated June 25, 2013 is insufficient pursuant to N.J.S.A. 47:1A-5(g) because the Custodian failed to specifically deny access to requested Item No. 3. Additionally, the Custodian failed to certify that she produced all responsive documents to the Complainant in her SOI. The Custodian shall produce any responsive documents to requested Item No. 3; if no responsive documents exist, the Custodian must certify to same. In addition, the Custodian shall certify whether she produced all responsive documents to the Complainant.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado, Esq.  
Staff Attorney

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

January 21, 2014

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<sup>5</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>6</sup> Satisfactory compliance requires that the Custodian deliver the record(s) 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.