



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 28, 2018 Government Records Council Meeting

William R. Juliana
Complainant

Complaint No. 2016-106,
2016-111 and 2016-112

v.

Township of Washington (Gloucester)
Custodian of Record

At the August 28, 2018 public meeting, the Government Records Council (“Council”) considered the August 21, 2018 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 the Council should dismiss the complaints because the parties have agreed to dismiss the matter, thereby negating the need for the GRC to address the prevailing party fees in accordance with N.J.A.C. 5:105-2.13. 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 28th Day of August, 2018

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 30, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Council Staff
August 28, 2018 Council Meeting**

**William R. Juliana¹
Complainant**

**GRC Complaint No. 2016-106,
2016-111, & 2016-112²**

v.

**Township of Washington (Gloucester)³
Custodial Agency**

Records Relevant to Complaint:

September 24, 2014 OPRA request:⁴ Hard copies of: “A copy of the letter or documentation of written notification from Township zoning officer to the resident of 59 Sherry Road regarding dead tree on property causing safety issues and advisement. If possible, please include a copy or documentation of resident’s response to this notification.”

November 9, 2015 OPRA request:⁵ Electronic copies of:

1. All records of any citations or summonses issued by the Township of Washington (“Township”) for a violation of Code 179-7 from January 1, 2012 to November 1, 2015.
2. All records of investigations, notes, surveys, photographs, diagrams, electronically stored data, or any other notes or communications relating to each citation or summonses responsive to item No. 1.
3. All records of the disposition of each citation or summons for a violation of Code 179-7 from January 1, 2012 to November 1, 2015.
4. Any standard operating procedure, manual, memorandum, directive, or other document (hardcopy or electronic) used to determine whether a tree is dead, a danger, or a safety hazard.

November 18, 2015 OPRA request:⁶ Electronic copies of:

1. All records of any citations or summonses issued by the Township of Washington (“Township”) to 57 or 59 Sherry Road for a violation of Code 179-7 from January 1, 2012 to November 1, 2015.

¹ Represented by Tal B. Kramer, Jr., Esq., of Freidel & Kramer, PC (Turnersville, NJ).

² The GRC consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Joe Alacqua, Esq. (Township of Washington, NJ).

⁴ This OPRA request is the subject of GRC Complaint No. 2016-106.

⁵ This OPRA request is the subject of GRC Complaint No. 2016-111.

⁶ This OPRA request is the subject of GRC Complaint No. 2016-112.

2. All records of investigations, notes, surveys, photographs, diagrams, electronically stored data, or any other notes or communications relating to each citation or summonses responsive to item No. 1.
3. All e-mails, letters, or other forms of communication between any residents of 57 or 59 Sherry Road and any employee of the Township involving trees or citations related to trees on either property.
4. All records of the disposition of each citation or summons to 57 or 59 Sherry Road for a violation of Code 179-7 from January 1, 2012 to November 1, 2015.

Custodian of Record: Jill S. McCrea

Requests Received by Custodian: September 24, 2014; November 9, 2015; November 18, 2015

Responses Made by Custodian: October 8, 2014; November 16, 2015; November 25, 2015

GRC Complaints Received: April 18, 2016

Background

June 26, 2018 Council Meeting:

At its June 26, 2018 public meeting, the Council considered the Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The current Custodian failed to fully comply with the Council's March 27, 2018 Interim Order. Specifically, although the Custodian ultimately provided all responsive records to the Complainant along with an accompanying certification, he failed to seek an extension of time to respond to the Interim Order within the initial five (5) business days.
2. The Custodian unlawfully denied access to the requested records, and the current Custodian failed to fully comply with the Council's March 27, 2018 Interim Order. However, the current Custodian ultimately provided the requested records to the Complainant in accordance with the Interim Order. Additionally, the evidence of record does not indicate that neither the former nor the current Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the actions of both Custodians do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's March 27, 2018 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, 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 disclosed responsive records to the Complainant in accordance with 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, 387 N.J. Super. 432,

and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On June 28, 2018 the Council distributed its Interim Order to all parties. On August 2, 2018, the Council notified the parties that the deadline to provide a fee agreement had passed, and therefore the Complainant’s Counsel had to until August 30, 2018 to provide a fee application.

On August 2, 2018, the Custodian’s Counsel notified the GRC via telephone that the parties had reached an agreement on the matter and a formal agreement would be delivered shortly. On August 6, 2018, the Complainant’s Counsel provided the GRC via e-mail a Stipulation of Dismissal signed by Counsels of both parties.

Analysis

Prevailing Party Attorney’s Fees

At its June 26, 2018 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney’s fees. The Council thus ordered that the “parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days.” The Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant’s Counsel would be required to “submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.”

On June 28, 2018, the Council distributed its Interim Order to all parties; thus, the parties’ response was due by close of business on July 27, 2018. After notifying the parties that the deadline had passed, Custodian’s Counsel indicated that the parties had reached an agreement. On August 6, 2018, the GRC received a written Stipulation of Dismissal signed by the Counsels of both parties.

Accordingly, the Council should dismiss the complaints because the parties have agreed to dismiss the matter, thereby negating the need for the GRC to address the prevailing party fees in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Council Staff respectfully recommends that the Council should dismiss the complaints because the parties have agreed to dismiss the matter, thereby negating the need for the GRC to address the prevailing party fees in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

August 28, 2018



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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 26, 2018 Government Records Council Meeting

William R. Juliana
Complainant

Complaint No. 2016-106, 2016-111 & 2016-112

v.

Township of Washington (Gloucester)
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the June 19, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian failed to fully comply with the Council’s March 27, 2018 Interim Order, Specifically, although the Custodian ultimately provided all responsive records to the Complainant along with an accompanying certification, he failed to seek an extension of time to respond to the Interim Order within the initial five (5) business days.
2. The Custodian unlawfully denied access to the requested records, and the current Custodian failed to fully comply with the Council’s March 27, 2018 Interim Order. However, the current Custodian ultimately provided the requested records to the Complainant in accordance with the Interim Order. Additionally, the evidence of record does not indicate that neither the former nor current Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the actions of both Custodians do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s March 27, 2018 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, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant filing Denial of Access Complaints and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the current Custodian disclosed responsive records to the Complainant in accordance with 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, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is**



reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 2018

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 28, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting**

**William R. Juliana¹
Complainant**

**GRC Complaint No. 2016-106,
2016-111, & 2016-112²**

v.

**Township of Washington (Gloucester)³
Custodial Agency**

Records Relevant to Complaint:

September 24, 2014 OPRA request:⁴ Hard copies of “the letter or documentation of written notification from [Township of Washington (“Township”)] zoning officer to the resident of 59 Sherry Road regarding dead tree on property causing safety issues and advisement. If possible, please include a copy or documentation of resident’s response to this notification.”

November 9, 2015 OPRA request:⁵ Electronic copies of:

1. All records of any citations or summonses issued by the Township for a violation of Code 179-7 from January 1, 2012 to November 1, 2015.
2. All records of investigations, notes, surveys, photographs, diagrams, electronically stored data, or any other notes or communications relating to each citation or summonses responsive to item No. 1.
3. All records of the disposition of each citation or summons for a violation of Code 179-7 from January 1, 2012 to November 1, 2015.
4. Any standard operating procedure, manual, memorandum, directive, or other document (hardcopy or electronic) used to determine whether a tree is dead, a danger, or a safety hazard.

November 18, 2015 OPRA request:⁶ Electronic copies of:

1. All records of any citations or summonses issued by the Township to 57 or 59 Sherry Road for a violation of Code 179-7 from January 1, 2012 to November 1, 2015.

¹ Represented by Talbot B. Kramer, Jr., Esq., of Freidel & Kramer, PC (Turnersville, NJ).

² The GRC consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Joe Alacqua, Esq. (Township of Washington, NJ).

⁴ This OPRA request is the subject of GRC Complaint No. 2016-106.

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⁶ This OPRA request is the subject of GRC Complaint No. 2016-112.

2. All records of investigations, notes, surveys, photographs, diagrams, electronically stored data, or any other notes or communications relating to each citation or summonses responsive to item No. 1.
3. All e-mails, letters, or other forms of communication between any residents of 57 or 59 Sherry Road and any employee of the Township involving trees or citations related to trees on either property.
4. All records of the disposition of each citation or summons to 57 or 59 Sherry Road for a violation of Code 179-7 from January 1, 2012 to November 1, 2015.

Custodian of Record: Jill S. McCrea⁷

Requests Received by Custodian: September 24, 2014; November 9, 2015; November 18, 2015

Responses Made by Custodian: October 8, 2014; November 16, 2015; November 25, 2015

GRC Complaints Received: April 18, 2016

Background

March 27, 2018 Council Meeting:

At its March 27, 2018 public meeting, the Council considered the March 20, 2018 Findings and Recommendations of the Council Staff 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 September 24, 2014 OPRA request. 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 dated October 31, 2007).
2. The Custodian may have unlawfully denied access to the Complainant's September 24, 2014, November 9, 2015, and November 18, 2015 OPRA requests. N.J.S.A. 47:1A-6. The Custodian shall conduct a search for any additional responsive records to the Complainant's OPRA requests, and certify as to the results. Should the Custodian locate any additional responsive records, the Custodian shall provide them to the Complainant, indicating to which records are responsive to which OPRA request.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide**

⁷ The current Records Custodian and respondent to the Interim Order is Leo F. Selb, Jr. William R. Juliana v. Township of Washington (Gloucester), 2016-106, 2016-111, & 2016-112 – Supplemental Findings and Recommendations of the Council Staff

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Council Staff.⁹

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 March 28, 2018, the Council distributed its Interim Order to all parties. On April 6, 2018, the current Custodian requested an extension of time to respond until April 27, 2018. The GRC responded and granted the extension request. Thereafter, on April 25, 2017, the Custodian responded to the Council's Interim Order certifying his compliance with the Council's Interim Order and providing the Complainant with the requested records.

Analysis

Compliance

At its March 27, 2018 meeting, the Council ordered the Custodian to provide responsive records to the Complainant and to submit certified confirmation of compliance to the Council Staff. On March 28, 2018, 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 April 5, 2018, accounting for the holiday break.

On April 6, 2018, one (1) business day after the end of the initial deadline, the current Custodian sought an extension of time to respond to the Council's Interim Order. The GRC granted the extension to until April 27, 2018. On April 25, 2018, the Custodian provided the Council Staff with evidence demonstrating he provided the Complainant with the requested records, as well as a certified confirmation of compliance.

Therefore, the current Custodian failed to fully comply with the Council's March 27, 2018 Interim Order, Specifically, although the Custodian ultimately provided all responsive records to the Complainant along with an accompanying certification, he failed to seek an extension of time to respond to the Interim Order within the initial five (5) business days.

⁸ "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."

⁹ Satisfactory compliance requires that the Custodian deliver any 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.
William R. Juliana v. Township of Washington (Gloucester), 2016-106, 2016-111, & 2016-112 – Supplemental Findings and Recommendations of the Council Staff

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 requested records, and the current Custodian failed to fully comply with the Council’s March 27, 2018 Interim Order. However, the current Custodian ultimately provided the requested records to the Complainant in accordance with the Interim Order. Additionally, the evidence of record does not indicate that neither the former nor current Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the actions of both Custodians 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 (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. Further, the Supreme Court expressed 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 Complainant filed the instant complaints to request that the GRC order the Custodian to provide a complete response to his OPRA requests and to disclose responsive records. The Custodian argued that she fully responded to the requests and that no other responsive records existed. In its March 27, 2018 Interim Order, the Council ordered the Custodian to conduct a more thorough search for responsive records. Thereafter, the current Custodian disclosed additional responsive records to the Complainant, with an accompanying certification. Thus, the evidence of record supports that the Complainant is a prevailing party entitled to an award of attorney's fees.

Therefore, pursuant to the Council's March 27, 2018 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, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant filing Denial of Access Complaints and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the current Custodian disclosed responsive records to the Complainant in accordance with 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, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The current Custodian failed to fully comply with the Council's March 27, 2018 Interim Order, Specifically, although the Custodian ultimately provided all responsive records to the Complainant along with an accompanying certification, he failed to seek an extension of time to respond to the Interim Order within the initial five (5) business days.
2. The Custodian unlawfully denied access to the requested records, and the current Custodian failed to fully comply with the Council's March 27, 2018 Interim Order. However, the current Custodian ultimately provided the requested records to the Complainant in accordance with the Interim Order. Additionally, the evidence of record does not indicate that neither the former nor current Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore,

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

3. Pursuant to the Council's March 27, 2018 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, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant filing Denial of Access Complaints and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the current Custodian disclosed responsive records to the Complainant in accordance with 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, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado
Staff Attorney

June 26, 2018



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INTERIM ORDER

March 27, 2018 Government Records Council Meeting

William R. Juliana
Complainant

Complaint No. 2016-106, 2016-111 and 2016-112

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Township of Washington
(Gloucester)
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council (“Council”) considered the March 20, 2018 Findings and Recommendations of the Council Staff 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 September 24, 2014 OPRA request. 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 dated October 31, 2007).
2. The Custodian may have unlawfully denied access to the Complainant’s September 24, 2014, November 9, 2015, and November 18, 2015 OPRA requests. N.J.S.A. 47:1A-6. The Custodian shall conduct a search for any additional responsive records to the Complainant’s OPRA requests, and certify as to the results. Should the Custodian locate any additional responsive records, the Custodian shall provide them to the Complainant, indicating to which records are responsive to which OPRA request.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹ to the Council Staff.²**

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 any 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 27th Day of March, 2018

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 28, 2018

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 Council Staff
March 27, 2018 Council Meeting**

**William R. Juliana¹
Complainant**

**GRC Complaint No. 2016-106,
2016-111, & 2016-112²**

v.

**Township of Washington (Gloucester)³
Custodial Agency**

Records Relevant to Complaint:

September 24, 2014 OPRA request:⁴ Hard copies of “the letter or documentation of written notification from [Township of Washington (“Township”)] zoning officer to the resident of 59 Sherry Road regarding dead tree on property causing safety issues and advisement. If possible, please include a copy or documentation of resident’s response to this notification.”

November 9, 2015 OPRA request:⁵ Electronic copies of:

1. All records of any citations or summonses issued by the Township for a violation of Code 179-7 from January 1, 2012 to November 1, 2015.
2. All records of investigations, notes, surveys, photographs, diagrams, electronically stored data, or any other notes or communications relating to each citation or summonses responsive to item No. 1.
3. All records of the disposition of each citation or summons for a violation of Code 179-7 from January 1, 2012 to November 1, 2015.
4. Any standard operating procedure, manual, memorandum, directive, or other document (hardcopy or electronic) used to determine whether a tree is dead, a danger, or a safety hazard.

November 18, 2015 OPRA request:⁶ Electronic copies of:

1. All records of any citations or summonses issued by the Township to 57 or 59 Sherry Road for a violation of Code 179-7 from January 1, 2012 to November 1, 2015.

¹ Represented by Talbot B. Kramer, Jr., Esq., of Freidel & Kramer, PC (Turnersville, NJ).

² The GRC consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Joe Alacqua, Esq. (Township of Washington, NJ).

⁴ This OPRA request is the subject of GRC Complaint No. 2016-106.

⁵ This OPRA request is the subject of GRC Complaint No. 2016-111.

⁶ This OPRA request is the subject of GRC Complaint No. 2016-112.

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2. All records of investigations, notes, surveys, photographs, diagrams, electronically stored data, or any other notes or communications relating to each citation or summonses responsive to item No. 1.
3. All e-mails, letters, or other forms of communication between any residents of 57 or 59 Sherry Road and any employee of the Township involving trees or citations related to trees on either property.
4. All records of the disposition of each citation or summons to 57 or 59 Sherry Road for a violation of Code 179-7 from January 1, 2012 to November 1, 2015.

Custodian of Record: Jill S. McCrea

Requests Received by Custodian: September 24, 2014; November 9, 2015; November 18, 2015

Responses Made by Custodian: October 8, 2014; November 16, 2015; November 25, 2015

GRC Complaints Received: April 18, 2016

Background⁷

Requests and Responses:

September 24, 2014 OPRA request

On September 24, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 8, 2014, the tenth (10th) business day after receipt of the OPRA request, the Complainant inquired about his OPRA request in person. A Township employee provided the Complainant with a letter dated September 29, 2014, related to the parties and issues related to the OPRA request, but not directly responsive.

November 9, 2015 OPRA request

On November 9, 2015, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On November 16, 2015, the Custodian responded in writing stating that no responsive records existed.

November 18, 2015 OPRA request

On November 18, 2015, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On November 25, 2015, the Custodian responded in writing providing a number of records to the Complainant via e-mail.

⁷ 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.
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Denial of Access Complaints:

September 24, 2014 OPRA request

On April 18, 2015, the Complainant filed a Denial of Access Complaint relevant to GRC Complaint No. 2016-106 with the Government Records Council (“GRC”). The Complainant asserted that he hand-delivered the OPRA request on September 24, 2014, during the morning hours. Ten (10) business days later, the Complainant returned to the municipal building to inquire on the status of his OPRA request, alleging that he did not receive a response from the Custodian at that point.

The Complainant stated that an employee at the municipal building was unable to locate a complete copy of the OPRA request. Additionally, the employee provided the Complainant with a letter that was not specifically responsive to the Complainant’s OPRA request, but involved the residence and subject matter noted in the request. The letter was dated September 29, 2014, several days after the date of the OPRA request. The Complainant stated that he did not receive any communication as to why there were no responsive records to request.

The Complainant alleged that the Custodian negligently or intentionally withheld access to responsive records, that the response was untimely and insufficient, and that the letter provided to him was created on October 8, 2014 and back-dated to September 29, 2014. Additionally, the Complainant claimed that the response to his November 18, 2015 OPRA request proved the existence of responsive records to this request at the time of this request, but were omitted from production.

November 9, 2015 OPRA request

On April 18, 2015, the Complainant filed a Denial of Access Complaint relevant to GRC Complaint No. 2016-111 with the GRC. The Complainant stated that he received a timely response from the Custodian stating that no responsive records exist. The Complainant stated that the Custodian failed to explain why no responsive records exist. Additionally, the Complainant alleged that subsequent OPRA requests made on November 18, 2015 and February 26, 2016 proved that responsive records did exist at the time, but were not provided.

Like the 2016-106 complaint, the Complainant alleged that the Custodian negligently or intentionally withheld responsive records.

November 18, 2015 OPRA request

On April 18, 2015, the Complainant filed a Denial of Access Complaint relevant to GRC Complaint No. 2016-112 with the GRC. The Complainant stated that he received a timely response from the Custodian, producing responsive records. However, the Complainant claimed that the Custodian’s response was incomplete for each requested item. The Complainant alleged that the that the Custodian’s response to an unrelated February 26, 2016 OPRA request was evidence that responsive records existed at the time, but were not provided.

Similar to the above-mentioned complaints, the Complainant alleged that the Custodian negligently or intentionally withheld responsive records.

Statements of Information:

September 24, 2014 OPRA Request

On June 2, 2016, the Custodian filed a Statement of Information (“SOI”) relevant to GRC 2016-106. The Custodian certified that she received the Complainant’s OPRA request on September 24, 2015. The Custodian certified that she could not personally attest to the details of the OPRA request. The Custodian stated that a former employee of the Township handled the request. The Custodian certified that no responsive records existed, but on October 8, 2015, the employee provided a letter dated September 29, 2015, believed to be closely related to the Complainant’s request.

November 9, 2015 OPRA Request

On June 2, 2016, the Custodian filed a SOI relevant to GRC 2016-111. The Custodian certified that she received the Complainant’s OPRA request on November 9, 2015. The Custodian certified that she responded to the Complainant on November 16, 2015 that no responsive records exist.

November 18, 2015 OPRA Request

On June 2, 2016, the Custodian filed a SOI relevant to GRC 2016-112. The Custodian certified that she received the Complainant’s OPRA request on November 18, 2015. The Custodian certified that she responded to the Complainant’s request on November 25, 2015, providing responsive records to the Complainant.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). 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).⁸ 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 dated October 31, 2007).

⁸ 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.
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September 24, 2014 OPRA Request

The Complainant asserted that he did not receive a response to this request until upon arriving at the agency in person on October 8, 2014 and requesting an update. The Custodian asserted that to the best of her memory, she responded on September 29, 2014, but also conceded that she did not have personal knowledge of the transaction. Whereas the Complainant provided a more expansive account of what transpired when he was given the letter dated September 29, 2014. Additionally, there is no evidence in the record that the Custodian or any other employee requested an extension of time to respond to the Complainant's request.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA September 24, 2014 request. 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, GRC 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.

The Complainant's September 24, 2014 OPRA request sought a letter between the Township and a resident at 59 Sherry Rd., Turnersville, NJ ("neighbor"). The subject of the correspondence was in reference to a dead tree ordinance. The Custodian certified that no responsive records exist, but provided a letter that, although appearing responsive, was dated after the Complainant submitted his OPRA request. The Complainant argued that the Custodian's response to the November 18, 2015 OPRA request included records that would have been responsive to this request.

A review of the record did not appear to support the Complainant's contention. Based on the responsive records the Complainant included in the complaint for his November 18, 2015 request, there are no records of a letter between the Township and the Complainant's neighbor pertaining to a tree and related ordinance dated prior to September 24, 2014. Nevertheless, the GRC has concerns about the searches conducted for all OPRA requests at issue in this matter, which shall be discussed below.

Regarding the Complainant's November 9, 2015 OPRA request, Item nos. 1-3 were not limited to a particular address or addresses, but sought records of any citation or summons (as well as additional records relating to same) issued by the Township between January 1, 2012 through November 1, 2015 regarding a dead tree ordinance. The Custodian responded by stating that no responsive records exist for any of the listed items in the November 9, 2015 request. However, the evidence in the record contradicts the Custodian's response.

The Complainant's November 18, 2015 request was substantially similar to the November 9, 2015 request, with Item nos. 1-3 of the November 9, 2015 request corresponding with Item nos. 1, 2, and 4 of the November 18, 2015 request, respectively. The notable difference was that for the November 18, 2015 request, the Complainant sought records specifically pertaining to the Complainant and his neighbor. Additionally, the Complainant sought all e-mail communications between the Township, himself, and the neighbor pertaining to trees or citations related to trees.

Unlike the November 9, 2015 request, the Complainant provided responsive records to the Complainant's November 18, 2015 OPRA request, which included copies of notices to the Complainant and the neighbor regarding violations of the ordinance identified in the November 9, 2015 OPRA request. This contradiction, in addition to the limited information provided by the Custodian, lends doubt as to the thoroughness of the searches conducted for each OPRA request.

Therefore, the Custodian may have unlawfully denied access to the Complainant's September 24, 2014, November 9, 2015, and November 18, 2015 OPRA requests. N.J.S.A. 47:1A-6. The Custodian shall conduct a search for any additional responsive records to the Complainant's OPRA requests, and certify as to the results. Should the Custodian locate any additional responsive records, the Custodian shall provide them to the Complainant, indicating to which records are responsive to which OPRA request.

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 Council Staff respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's September 24, 2014 OPRA request. 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 dated October 31, 2007).

2. The Custodian may have unlawfully denied access to the Complainant's September 24, 2014, November 9, 2015, and November 18, 2015 OPRA requests. N.J.S.A. 47:1A-6. The Custodian shall conduct a search for any additional responsive records to the Complainant's OPRA requests, and certify as to the results. Should the Custodian locate any additional responsive records, the Custodian shall provide them to the Complainant, indicating to which records are responsive to which OPRA request.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Council Staff.¹⁰**
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
Staff Attorney

March 20, 2018

⁹ "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."

¹⁰ Satisfactory compliance requires that the Custodian deliver any 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.

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