



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

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**FINAL DECISION**

**April 25, 2017 Government Records Council Meeting**

John Paff (o/b/o Libertarians for  
Transparent Government)  
Complainant

Complaint No. 2016-94

v.

Town of Kearny (Hudson)  
Custodian of Record

At the April 25, 2017 public meeting, the Government Records Council (“Council”) considered the April 18, 2017 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 complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Moreover, the Complainant’s Counsel confirmed that she had received payment and that the Complainant was therefore withdrawing the complaint. As such, 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 25<sup>th</sup> Day of April, 2017

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: April 27, 2017**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 25, 2017 Council Meeting**

**John Paff (o/b/o Libertarians for  
Transparent Government)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-94**

v.

**Town of Kearny (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of minutes of all Town Council meetings held in April 2015 and October 2015. Include within this request minutes of “caucus,” “regular,” and “closed/executive” meetings.

**Custodian of Record:** Pat Carpenter  
**Request Received by Custodian:** March 4, 2016  
**Response Made by Custodian:** March 24, 2016  
**GRC Complaint Received:** April 1, 2016

**Background**

**February 21, 2017 Council Meeting:**

At its February 21, 2017 public meeting, the Government Records Council (“Council”) considered the February 14, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council’s January 31, 2017 Interim Order because the Custodian timely forwarded certified confirmation of compliance to the Executive Director wherein she stated that she disclosed to the Complainant and to the Complainant’s Counsel all responsive records via e-mail on February 7, 2017.
2. Although the Custodian violated OPRA by: (1) providing an insufficient response by failing to respond in writing to each requested item contained in the request individually and failing to address the Complainant’s preferred method of delivery, and (2) failing to grant or deny access to the requested records within the statutorily mandated time frame, which resulted in a “deemed” denial of the Complainant’s

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<sup>1</sup> Represented by Candida Griffin, Esq., of Pashman Stein, PC (Hackensack, NJ).

<sup>2</sup> Represented by Gregory J. Castano, Esq., of Castano and Quigley LLC (Fairfield, NJ).

request, and (3) assessing a fee to provide records that the Complainant specifically requested be delivered via e-mail, the Custodian did disclose responsive records to the Complainant via e-mail, which was the medium requested by the Complainant, in compliance with the Council's Order. Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's January 31, 2017 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. 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. 51. Specifically, the Complainant's filing of a Denial of Access Complaint on April 1, 2016, brought to the Custodian's attention that she had failed to respond sufficiently to the Complainant's OPRA request, failed to respond to the Complainant's request in a timely manner, failed to disclose the records in the medium requested, and unlawfully assessed a fee to provide records that the Complainant specifically requested be delivered via e-mail. Thereafter, on February 7, 2017, the Custodian delivered to the Complainant at no charge via e-mail the responsive records in compliance with the Council's Interim 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 February 23, 2017, the Council distributed its Interim Order to all parties. On March 13, 2017, the Complainant's Counsel advised that the parties appeared to reach an agreement and that she did not believe submission of a fee application was necessary. On March 17, 2017, the Complainant again confirmed that no final agreement had yet been signed but that the pending deadline to notify the GRC notwithstanding, she reiterated that she did not believe a fee application would be necessary.

On March 23, 2017, the GRC e-mailed the Complainant's Counsel, advising Counsel that this date was the twentieth (20<sup>th</sup>) business day following the decision distribution date and was the final business day to notify the GRC of a settlement. The GRC allowed for an extension of an additional twenty (20) business days, or until April 21, 2017, to allow the parties to confirm with the GRC that a settlement had been reached. On April 18, 2017, the Complainant's Counsel

confirmed via e-mail that a settlement was reached, that she had received payment, and that the Complainant was therefore withdrawing the complaint.

### **Analysis**

#### **Prevailing Party Attorney's Fees**

At its February 21, 2017 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 it of a 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 February 23, 2017, the Council distributed its Interim Order to all parties; thus, the Custodian's response was due by close of business on March 23, 2017. On March 23, 2017, the GRC extended the notification time frame until April 21, 2017, to allow the parties additional time to finalize their agreement. On April 18, 2017, the Complainant's Counsel confirmed via e-mail that a settlement was reached, that she had received payment, and that the Complainant was therefore withdrawing the complaint.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Moreover, the Complainant's Counsel confirmed that she had received payment and that the Complainant was therefore withdrawing the complaint. As such, no further adjudication is required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Moreover, the Complainant's Counsel confirmed that she had received payment and that the Complainant was therefore withdrawing the complaint. As such, no further adjudication is required.

Prepared By: John E. Stewart

April 18, 2017



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**INTERIM ORDER**

**February 21, 2017 Government Records Council Meeting**

John Paff (o/b/o Libertarians for  
Transparent Government)  
Complainant

Complaint No. 2016-94

v.

Town of Kearny (Hudson)  
Custodian of Record

At the February 21, 2017 public meeting, the Government Records Council (“Council”) considered the February 14, 2017 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 31, 2017 Interim Order because the Custodian timely forwarded certified confirmation of compliance to the Executive Director wherein she stated that she disclosed to the Complainant and to the Complainant’s Counsel all responsive records via e-mail on February 7, 2017.
2. Although the Custodian violated OPRA by: (1) providing an insufficient response by failing to respond in writing to each requested item contained in the request individually and failing to address the Complainant’s preferred method of delivery, and (2) failing to grant or deny access to the requested records within the statutorily mandated time frame, which resulted in a “deemed” denial of the Complainant’s request, and (3) assessing a fee to provide records that the Complainant specifically requested be delivered via e-mail, the Custodian did disclose responsive records to the Complainant via e-mail, which was the medium requested by the Complainant, in compliance with the Council’s Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s January 31, 2017 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. 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. 51. Specifically, the Complainant’s filing of a Denial of Access Complaint on April 1, 2016, brought to



the Custodian's attention that she had failed to respond sufficiently to the Complainant's OPRA request, failed to respond to the Complainant's request in a timely manner, failed to disclose the records in the medium requested, and unlawfully assessed a fee to provide records that the Complainant specifically requested be delivered via e-mail. Thereafter, on February 7, 2017, the Custodian delivered to the Complainant at no charge via e-mail the responsive records in compliance with the Council's Interim 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.

Interim Order Rendered by the  
Government Records Council  
On The 21<sup>st</sup> Day of February, 2017

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 23, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
February 21, 2017 Council Meeting**

**John Paff (o/b/o Libertarians for  
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**GRC Complaint No. 2016-94**

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**Custodian of Record:** Pat Carpenter  
**Request Received by Custodian:** March 4, 2016  
**Response Made by Custodian:** March 24, 2016  
**GRC Complaint Received:** April 1, 2016

**Background**

**January 31, 2017 Council Meeting:**

At its January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 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’s response was insufficient because she failed to respond in writing to each requested item contained in the request individually and failed to address the Complainant’s preferred method of delivery. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g). *See also* Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008) and O’Shea v. Twp of Fredon (Sussex), GRC Complaint No. 2007-251 (February 2008).
2. 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-

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<sup>1</sup> Represented by Candida Griffin, Esq., of Pashman Stein, PC (Hackensack, NJ).

<sup>2</sup> Represented by Gregory J. Castano, Esq., of Castano and Quigley LLC (Fairfield, NJ).

John Paff (o/b/o Libertarians for Transparent Government) v. Town of Kearny (Hudson), 2016-94 – Supplemental Findings and Recommendations of the Executive Director

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).

3. Because OPRA provides that electronic records shall be provided free of charge, the Custodian has violated OPRA by assessing a fee to provide records that the Complainant specifically requested be delivered via e-mail. N.J.S.A. 47:1A-5(b).
4. The Custodian failed to disclose the records in the medium requested in violation of N.J.S.A. 47:1A-5(d); therefore the Custodian shall provide copies of the requested records to the Complainant in the requested format, that is, electronically via e-mail.
5. **The Custodian shall comply with paragraph #4 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 Rule 1:4-4, to the Executive Director.**
6. 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.
7. 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 February 2, 2017, the Council distributed its January 31, 2017 Interim Order to all parties. On February 7, 2017, the Custodian responded to the Council's Interim Order by providing certified confirmation of compliance to the Executive Director.

#### Analysis

#### Compliance

On January 31, 2017, the Council ordered the above-referenced compliance. On February 2, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or before February 9, 2017. On February 7, 2017, the third (3<sup>rd</sup>) business day after the Custodian received the Interim Order, she forwarded certified confirmation of compliance to the Executive Director wherein she stated that she transmitted all responsive records to the Complainant and to the Complainant's Counsel by e-mail on February 7, 2017.

Therefore, the Custodian complied with the Council's January 31, 2017 Interim Order because the Custodian timely forwarded certified confirmation of compliance to the Executive Director wherein she stated that she disclosed to the Complainant and to the Complainant's Counsel all responsive records via e-mail on February 7, 2017.



## **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 (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian violated OPRA by: (1) providing an insufficient response by failing to respond in writing to each requested item contained in the request individually and failing to address the Complainant’s preferred method of delivery, and (2) failing to grant or deny access to the requested records within the statutorily mandated time frame, which resulted in a “deemed” denial of the Complainant’s request, and (3) assessing a fee to provide records that the Complainant specifically requested be delivered via e-mail, the Custodian did disclose responsive records to the Complainant via e-mail, which was the medium requested by the Complainant, in compliance with the Council’s Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he 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.

Here the Complainant, through Counsel, filed a Denial of Access Complaint seeking relief because the Custodian allegedly violated OPRA by failing to respond to the request in a timely manner, unlawfully charged copying and postage charges for records requested to be delivered electronically, and failed to produce the records in the medium requested. Following the filing of said complaint, the Council at its January 31, 2017 meeting did find that the Custodian:

- Failed to respond sufficiently to the Complainant’s OPRA request.
- Failed 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, which resulted in a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
- Violated N.J.S.A. 47:1A-5(b) by assessing a fee to provide records that the Complainant specifically requested be delivered via e-mail.
- Failed to disclose the records in the medium requested in violation of N.J.S.A. 47:1A-5(d).

On January 31, 2017, the Council Ordered the Custodian to provide copies of the requested records to the Complainant in the requested format, and the Custodian subsequently complied with the Council’s Order in a timely manner on January 31, 2017.

#### Conclusion:

Therefore, pursuant to the Council’s January 31, 2017 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. 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. 51. Specifically, the Complainant’s filing of a Denial of Access Complaint on April 1, 2016, brought to the Custodian’s attention that she had failed to respond sufficiently to the Complainant’s OPRA request, failed to respond to the Complainant’s

request in a timely manner, failed to disclose the records in the medium requested, and unlawfully assessed a fee to provide records that the Complainant specifically requested be delivered via e-mail. Thereafter, on February 7, 2017, the Custodian delivered to the Complainant at no charge via e-mail the responsive records in compliance with the Council's Interim 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's January 31, 2017 Interim Order because the Custodian timely forwarded certified confirmation of compliance to the Executive Director wherein she stated that she disclosed to the Complainant and to the Complainant's Counsel all responsive records via e-mail on February 7, 2017.
2. Although the Custodian violated OPRA by: (1) providing an insufficient response by failing to respond in writing to each requested item contained in the request individually and failing to address the Complainant's preferred method of delivery, and (2) failing to grant or deny access to the requested records within the statutorily mandated time frame, which resulted in a "deemed" denial of the Complainant's request, and (3) assessing a fee to provide records that the Complainant specifically requested be delivered via e-mail, the Custodian did disclose responsive records to the Complainant via e-mail, which was the medium requested by the Complainant, in compliance with the Council's Order. Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's January 31, 2017 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. 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. 51.* Specifically, the Complainant's filing of a Denial of Access Complaint on April 1, 2016, brought to the Custodian's attention that she had failed to respond sufficiently to the Complainant's OPRA request, failed to respond to the Complainant's request in a timely manner, failed to disclose the records in the medium requested, and unlawfully assessed a fee to provide records that the Complainant specifically requested be

delivered via e-mail. Thereafter, on February 7, 2017, the Custodian delivered to the Complainant at no charge via e-mail the responsive records in compliance with the Council's Interim 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.

Prepared By: John E. Stewart

February 14, 2017



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DEPARTMENT OF COMMUNITY AFFAIRS  
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INTERIM ORDER

January 31, 2017 Government Records Council Meeting

John Paff (o/b/o Libertarians for  
Transparent Government)  
Complainant

Complaint No. 2016-94

v.

Town of Kearny (Hudson)  
Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 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’s response was insufficient because she failed to respond in writing to each requested item contained in the request individually and failed to address the Complainant’s preferred method of delivery. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g). *See also Paff v. Willingboro Bd. of Educ. (Burlington)*, GRC Complaint No. 2007-272 (May 2008) and *O’Shea v. Twp of Fredon (Sussex)*, GRC Complaint No. 2007-251 (February 2008).
2. 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).
3. Because OPRA provides that electronic records shall be provided free of charge, the Custodian has violated OPRA by assessing a fee to provide records that the Complainant specifically requested be delivered via e-mail. N.J.S.A. 47:1A-5(b).
4. The Custodian failed to disclose the records in the medium requested in violation of N.J.S.A. 47:1A-5(d); therefore the Custodian shall provide copies of the requested records to the Complainant in the requested format, that is, electronically via e-mail.
5. **The Custodian shall comply with paragraph #4 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 Rule 1:4-4,<sup>1</sup>  
to the Executive Director.<sup>2</sup>**

6. 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.
7. 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 31<sup>st</sup> Day of January, 2017

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 2, 2017**

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<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 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 31, 2017 Council Meeting**

**John Paff (o/b/o Libertarians for  
Transparent Government)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-94**

v.

**Town of Kearny (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of minutes of all Town Council meetings held in April 2015 and October 2015. Include within this request minutes of “caucus,” “regular,” and “closed/executive” meetings.

**Custodian of Record:** Pat Carpenter  
**Request Received by Custodian:** March 4, 2016  
**Response Made by Custodian:** March 24, 2016  
**GRC Complaint Received:** April 1, 2016

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

**Request and Response:**

On March 4, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 4, 2016, the municipality sent an automated reply to the Complainant, informing him that the municipality had received the request. On March 4, 2016, the municipality also sent the Complainant an auto-generated notice to inform him that he was registered with the Kearny OPRA Center and could log in to the Center to track the progress of his request.

On March 24, 2016, the fourteenth (14<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing via e-mail through employee Lyla De Castro, informing the Complainant that:

[R]ecords responsive to your OPRA request are available for retrieval and the total cost of duplication is \$5.56 (\$2.60 copies/\$2.96 postage/mailing) payable via

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<sup>1</sup> Represented by Candida Griffin, Esq., of Pashman Stein, PC (Hackensack, NJ).

<sup>2</sup> Represented by Gregory J. Castano, Esq., of Castano and Quigley LLC (Fairfield, 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.

John Paff (o/b/o Libertarians for Transparent Government) v. Town of Kearny (Hudson), 2016-94 – Findings and Recommendations of the Executive Director



check in the mail to the Office of the Town Clerk, 402 Kearny Avenue, Kearny, New Jersey 07032. Upon receipt of the required fee, records will be mailed to the address you provided in your records request. If a mailing address was not provided in your OPRA, please provide your address for mailing of the records requested. Additionally, please note the Clerk's Office requires additional time through April 15<sup>th</sup> to review and process your request with regard to "closed/executive" meetings.

### Denial of Access Complaint:

On April 1, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). Through Counsel, the Complainant asserts that the request for the records relevant to the complaint was e-mailed to the Custodian on March 4, 2016. Counsel states that on that same date the municipality sent the Complainant two (2) e-mails: the former confirming the request was received; the latter providing a log-in and password for the Kearny OPRA Center.

Counsel asserts that the Custodian responded to the Complainant on March 24, 2016, informing him that the requested records were available at a cost of \$5.56 for postage and copying charges. Counsel states that because the Complainant wanted the records delivered to him via e-mail, he logged on to the Kearny OPRA Center to check on the status of the request and learned that the Custodian has a policy of providing electronic copies only if the records do not exceed two (2) pages.

Counsel states that the Kearny has routinely posted electronic versions of their minutes, agenda, and other matters on its website; therefore, the Custodian cannot argue that the requested records are not maintained in electronic format.

Counsel argues that the Custodian violated OPRA by not responding to the request in the statutorily mandated time period. Counsel further argues that the Custodian violated OPRA by failing to grant access to the Complainant in the medium requested, as required under N.J.S.A. 47:1A-5(d), and charging more than the actual cost of producing the record electronically under N.J.S.A. 47:1A-5(b).

Counsel asks the GRC to enforce the Complainant's statutory rights by:

- Finding the Custodian in violation of OPRA for failing to respond to the request in a timely manner.
- Determining the Custodian unlawfully charged copying and postage charges.
- Finding that the Custodian failed to produce the records in the medium requested.
- Ordering the Custodian to withdraw her request for copying and postage charges.
- Ordering the Custodian to produce the requested records electronically via e-mail without any charges.
- Ordering the Custodian to produce the closed/executive session minutes.

- Awarding the Complainant prevailing party attorney fees and costs.

#### Statement of Information:

On May 3, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 4, 2016, and responded in writing on March 24, 2016. The Custodian certifies that the records responsive to the request are the minutes of all caucus, regular, and closed session council meetings held in April 2015 and October 2015. The Custodian further certifies that the minutes of all caucus and regular council meetings held in April 2015 and October 2015 were provided to the Complainant.<sup>4</sup>

The Custodian certifies that the April 2015 and October 2015 meeting minutes were not available in the requested form prior to March 24, 2016 because the meetings are recorded and the minutes are subsequently transcribed from the recordings; however, “[b]ecause of budgetary constraints, the Clerk’s office has been woefully understaffed . . . .” The Custodian certifies that, as a result of understaffing, the minutes were not readily accessible. The Custodian also certifies that the closed session minutes had not been created at the time of the request and therefore could not be disclosed. The Custodian further certifies that the records responsive to the request should have been provided without cost and that the assessment of copying and postage charges was due to a clerical error.

#### Additional Submissions:

On May 9, 2016, the Complainant’s Counsel e-mailed the GRC to allege that the Custodian’s SOI was defective in several respects. Counsel asserts that Item 9(C) requires the Custodian to list all records that were provided to the Complainant, along with the date the records were provided. Counsel asserts that the Custodian listed neither the individual records nor the date they were provided. Counsel states that four sets of minutes were disclosed on May 3, 2016. Counsel further asserts that the responses to Items 9(E) and 9(F) are inaccurate because the Custodian did not list which records she is still withholding from the Complainant and the reason why she is withholding them.

Counsel also contends that the Custodian’s response in Item 12 is very misleading. Counsel states that the Custodian asserted that the minutes of the April 2015 and October 2015 council meetings were not available for release prior to March 24, 2016, in the form requested by the Complainant because the council meetings are recorded and require transcription and final approval before disclosure. Counsel contends, however, that the four sets of minutes that were disclosed on May 3, 2016, reveal that they were printed before the date of the Complainant’s request. Counsel states that the bottom right corner shows that two sets were printed in April 2015, one set was printed in October 2015, and one set was printed in December 2015.

The Complainant’s Counsel further asserts that the Custodian stated that the minutes for the council meetings in April 2015 and October 2015 were “made available to the complainant” on March 24, 2016. Counsel contends, however, that the Custodian admitted an error required

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<sup>4</sup> The Custodian failed to state the date on which the records were provided.  
John Paff (o/b/o Libertarians for Transparent Government) v. Town of Kearny (Hudson), 2016-94 – Findings and Recommendations of the Executive Director

the Complainant to pay a fee before he could receive the records and that the records were not therefore made available to the Complainant.

On December 15, 2016, following prompting by the GRC, the Custodian replied to Counsel's May 9, 2016 e-mail in the form of a certification titled, "Substituted Custodian Statement of Information." The Custodian certifies she disclosed to the Complainant unredacted council meeting minutes for April 14, 2015, April 28, 2015, October 13, 2015, and October 27, 2015. The Custodian also certifies that she disclosed to the Complainant closed session minutes for the same meeting dates, except for October 13, 2015, because there was no closed session on that date. The Custodian certifies that the requested records were installed on discs that were being mailed to the Complainant on December 15, 2016. As the legal explanation for denial of access the Custodian stated, "we were woefully understaffed by reason of Local Government Services' (LGS) rules."<sup>5</sup>

## Analysis

### Sufficiency of Response

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). In Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that "[t]he Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g)."

Further, in O'Shea v. Twp of Fredon (Sussex), GRC Complaint No. 2007-251 (February 2008), the Council held that according to the language of N.J.S.A. 47:1A-5(g), the custodian's response was insufficient because she failed to address specifically the complainant's preference for receipt of records.

Here, the Custodian responded to the Complainant's request by stating merely that the records responsive to the request are available. The records were not identified by description or request item number. The Custodian also failed to address the Complainant's preferred method of delivery in the response.<sup>6</sup>

Therefore, the Custodian's response was insufficient because she failed to respond in writing to each requested item contained in the request individually and failed to address the Complainant's preferred method of delivery. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g). *See also* Paff, GRC 2007-272 and O'Shea, GRC 2007-251.

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<sup>5</sup> The Custodian appears to blame the denial of access to the requested records from March 4, 2016, until December 15, 2016, on the State of New Jersey, Department of Community Affairs, Division of Local Government Services.

<sup>6</sup> The records were identified in an online document at the Kearny OPRA Center. The preferred method of delivery, "Electronic by Email," was also listed in this document. Although the Custodian in the SOI certified that the online document was the response to the OPRA request, the evidence of record proves it was not.

John Paff (o/b/o Libertarians for Transparent Government) v. Town of Kearny (Hudson), 2016-94 – Findings and Recommendations of the Executive Director

## **Timeliness**

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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>7</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).

Here, the Custodian certified that she received the Complainant's OPRA request on March 4, 2016, and responded in writing on March 24, 2016, which was the fourteenth (14<sup>th</sup>) business day following receipt of said request

Therefore, 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.

## **Cost of Duplicating the Record**

OPRA provides that "[a]ccess to electronic records and non-printed materials shall be provided free of charge . . ." N.J.S.A. 47:1A-5(b).

Here, the Custodian demanded \$5.56 in copying and postage charges for records that were specifically requested to be sent via e-mail. The Custodian offered no explanation or justification for assessing the charges. In the SOI the Custodian certified that the records should have been provided without cost and that the charges were due to a clerical error. Based on the Custodian's own admission, the charge was unlawful.

Accordingly, because OPRA provides that electronic records shall be provided free of charge, the Custodian has violated OPRA by assessing a fee to provide records that the Complainant specifically requested be delivered via e-mail. N.J.S.A. 47:1A-5(b).

## **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

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<sup>7</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.

John Paff (o/b/o Libertarians for Transparent Government) v. Town of Kearny (Hudson), 2016-94 – Findings and Recommendations of the Executive Director

“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.

OPRA also provides that “[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall . . . convert the record to the medium requested . . .” N.J.S.A. 47:1A-5(d).

Here, the Complainant made it abundantly clear, both in the request and in the complaint, that the records were to be delivered electronically via e-mail. The Custodian acknowledged that point by attaching to the SOI an online document from the Kearny OPRA Center, which listed the Complainant’s preferred method of delivery as “Electronic by Email.” However, despite this acknowledgement, on December 15, 2016, the Custodian disclosed the requested records to the Complainant via regular mail on discs. By doing so, the Custodian violated N.J.S.A. 47:1A-5(d).

The Custodian is required under the law to provide a copy of the requested records in the medium requested, which in this case is electronically via e-mail. The Custodian failed to disclose the records in the medium requested in violation of N.J.S.A. 47:1A-5(d); therefore the Custodian shall provide copies of the requested records to the Complainant in the requested format, that is, electronically via e-mail.

### **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’s response was insufficient because she failed to respond in writing to each requested item contained in the request individually and failed to address the Complainant’s preferred method of delivery. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g). *See also Paff v. Willingboro Bd. of Educ. (Burlington)*, GRC Complaint No. 2007-272 (May 2008) and *O’Shea v. Twp of Fredon (Sussex)*, GRC Complaint No. 2007-251 (February 2008).
2. 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).

3. Because OPRA provides that electronic records shall be provided free of charge, the Custodian has violated OPRA by assessing a fee to provide records that the Complainant specifically requested be delivered via e-mail. N.J.S.A. 47:1A-5(b).
4. The Custodian failed to disclose the records in the medium requested in violation of N.J.S.A. 47:1A-5(d); therefore the Custodian shall provide copies of the requested records to the Complainant in the requested format, that is, electronically via e-mail.
5. **The Custodian shall comply with paragraph #4 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 Rule 1:4-4,<sup>8</sup> to the Executive Director.<sup>9</sup>**
6. 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.
7. 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: John E. Stewart

January 24, 2017

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<sup>8</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>9</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.

John Paff (o/b/o Libertarians for Transparent Government) v. Town of Kearny (Hudson), 2016-94 – Findings and Recommendations of the Executive Director