



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

November 12, 2019 Government Records Council Meeting

New Jersey Foundation for Open Government, Inc.
Complainant

Complaint No. 2018-263

v.

Pompton Lakes Board of Education (Passaic)
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 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. 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 12th Day of November 2019

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: November 15, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**New Jersey Foundation for Open Government, Inc.¹
Complainant**

GRC Complaint No. 2018-263

v.

**Pompton Lakes Board of Education (Passaic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “[a]ll invoices and billing records submitted by the Board of Education Solicitor that reflect time spent on Board of Education matters for the period 3/1/18 through 6/30/18. Also being requested are the relevant purchase orders for the invoices and billing records.”³

Custodian of Record: Renee Taveniere
Request Received by Custodian: July 30, 2018⁴
Response Made by Custodian: August 2, 2018
GRC Complaint Received: November 13, 2018

Background

September 24, 2019 Council Meeting:

At its September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 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’s failure to submit a completed SOI to the GRC, despite repeated requests, results in a violation of N.J.A.C. 5:105-2.4(a). Additionally, the Custodian’s failure to respond obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b). See Alterman, Esq. v. Sussex Cnty. Sheriff’s Office, GRC Complaint No. 2013-353 (September 2014). See also Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-

¹ Represented by Anthony H. Ogozalek, Jr., Esq. (Cinnaminson, NJ).

² Represented by Cherie L. Adams, Esq. (Newark, NJ).

³ There were other records requested that are not relevant to this complaint.

⁴ The OPRA request was transmitted via e-mail on Sunday, July 29, 2019.

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196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

2. The Custodian's August 2, 2018 written response is insufficient because the Custodian failed to provide a specific legal basis for denying access to the redacted material. N.J.S.A. 47:1A-5(g). See also Morris v. Trenton Police Dep't, GRC Complaint No. 2007-160 (May 2008) and Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008).
3. Because the Custodian disclosed the records relevant to the complaint with certain material redacted and did not provide a legal explanation and statutory citation for the redactions, the Custodian failed to bear her burden of proving a lawful denial of access to the redacted material. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the requested records because the evidence of record reveals that the Custodian's Counsel disclosed said records in unredacted form on August 5, 2019.
4. Although the Custodian failed to submit a completed SOI to the GRC thereby violating N.J.A.C. 5:105-2.4(a), and provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-(g), the Custodian, through Counsel, provided the Complainant with unredacted copies of the requested records on August 5, 2019. Additionally, it does not appear that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.
5. 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, after the complaint was filed, the Custodian disclosed unredacted copies of the records relevant to the complaint to the Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is 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 September 26, 2019, the Council distributed its September 24, 2019 Interim Order to all parties. On October 28, 2019, the Government Records Council ("GRC") advised the parties that the fee agreement time frame expired. The GRC further advised that the Complainant's Counsel had twenty (20) business days to submit a fee application.

On October 28, 2019, the Custodian’s Counsel advised the GRC in writing that the parties reached a settlement on the fee. Also on the same day, the Complainant’s Counsel informed the GRC in writing that there was no need for a fee application. The Complainant’s Counsel confirmed that the prevailing party fee award issue was resolved and there are no outstanding issues regarding the complaint.

Analysis

Prevailing Party Attorney’s Fees

At its September 24, 2019 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 shall notify the GRC in writing if a fee agreement is reached. 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 September 26, 2019, the Council distributed its Interim Order to all parties; thus, the parties’ response was due by October 25, 2019. On October 28, 2019, the GRC advised the parties that the fee agreement time frame expired without receiving a response from the parties. The GRC thus stated that Complainant’s Counsel was required to submit a fee application within twenty (20) business days in accordance with N.J.A.C. 5:105-2.13. On the same day, the Custodian’s Counsel advised the GRC in writing that the parties had reached a settlement on the fee. Also on the same day, the Complainant’s Counsel informed the GRC in writing that there was no need for a fee application. The Complainant’s Counsel confirmed that the prevailing party fee award issue was resolved and there are no outstanding issues regarding 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. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends 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. Therefore, no further adjudication is required.

Prepared By: John E. Stewart

October 30, 2019



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

INTERIM ORDER

September 24, 2019 Government Records Council Meeting

NJ Foundation for Open Government, Inc.
Complainant

Complaint No. 2018-263

v.

Pompton Lakes Board of Education (Passaic)
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 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’s failure to submit a completed SOI to the GRC, despite repeated requests, results in a violation of N.J.A.C. 5:105-2.4(a). Additionally, the Custodian’s failure to respond obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b). See Alterman, Esq. v. Sussex Cnty. Sheriff’s Office, GRC Complaint No. 2013-353 (September 2014). See also Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).
2. The Custodian’s August 2, 2018 written response is insufficient because the Custodian failed to provide a specific legal basis for denying access to the redacted material. N.J.S.A. 47:1A-5(g). See also Morris v. Trenton Police Dep’t, GRC Complaint No. 2007-160 (May 2008) and Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008).
3. Because the Custodian disclosed the records relevant to the complaint with certain material redacted and did not provide a legal explanation and statutory citation for the redactions, the Custodian failed to bear her burden of proving a lawful denial of access to the redacted material. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the requested records because the evidence of record reveals that the Custodian’s Counsel disclosed said records in unredacted form on August 5, 2019.
4. Although the Custodian failed to submit a completed SOI to the GRC thereby violating N.J.A.C. 5:105-2.4(a), and provided an insufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-(g), the Custodian, through Counsel, provided the Complainant with unredacted copies of the requested records on August 5, 2019.

Additionally, it does not appear that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

5. 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, after the complaint was filed, the Custodian disclosed unredacted copies of the records relevant to the complaint to the Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is 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 24th Day of September 2019

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: September 26, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 24, 2019 Council Meeting**

**New Jersey Foundation for Open Government, Inc.¹
Complainant**

GRC Complaint No. 2018-263

v.

**Pompton Lakes Board of Education (Passaic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “[a]ll invoices and billing records submitted by the Board of Education Solicitor that reflect time spent on Board of Education matters for the period 3/1/18 through 6/30/18. Also being requested are the relevant purchase orders for the invoices and billing records.”³

Custodian of Record: Renee Taveniere
Request Received by Custodian: July 30, 2018⁴
Response Made by Custodian: August 2, 2018
GRC Complaint Received: November 13, 2018

Background⁵

Request and Response:

On July 30, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 2, 2018, the third (3rd) business day following receipt of said request, Marilyn Jacondin, on behalf of the Custodian, responded in writing informing the Complainant that “[i]n response to your above request of Pompton Lakes Public Schools, please see the attached.” Ms. Jacondin attached several records that were purportedly responsive to the Complainant’s request items.

Denial of Access Complaint:

On November 13, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that all records responsive to

¹ Represented by Anthony H. Ogozalek, Jr., Esq. (Cinnaminson, NJ).

² Represented by Cherie L. Adams, Esq. (Newark, NJ).

³ There were other records requested that are not relevant to this complaint.

⁴ The OPRA request was transmitted via e-mail on Sunday, July 29, 2019.

⁵ 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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request item numbers 1 through 5, as well as request item number 7 were satisfactory; however, request item number 6, set forth above as the “Records Relevant to Complaint” was not satisfactory. The Complainant asserted that several pages of invoices contained unexplained and apparently improper redactions of the initials of the attorney or paralegal listed on the records. The Complainant further stated that a redaction index did not accompany the redacted material. As such, the Complainant asserted that the denial of access was not justified. The Complainant attached to the complaint several pages of attorney invoices revealing the described redacted material.

The Complainant asked the GRC to require the Custodian to disclose unredacted versions of the requested invoices to the Complainant. The Complainant also asked the GRC to award prevailing party attorney fees.

Statement of Information:

On November 26, 2018, the GRC sent Marilyn Jacondin, acting on behalf of the Custodian, a request for the Statement of Information (“SOI”). Ms. Jacondin failed to submit the SOI on behalf of the Custodian, or otherwise facilitate return of the completed SOI to the GRC.

On July 17, 2019, the GRC sent Marilyn Jacondin, acting on behalf of the Custodian, a letter advising her that if the GRC did not receive the SOI within three (3) business days, the complaint would proceed to adjudication based only upon the information contained within the complaint. Ms. Jacondin failed to submit the SOI on behalf of the Custodian, or otherwise facilitate return of the completed SOI to the GRC.

Additional Submissions:

On July 31, 2019, in an effort to obtain the completed SOI, the GRC telephoned Ms. Jacondin. Ms. Jacondin denied receiving any e-mail communications from the GRC. Ms. Jacondin stated that she double-checked her e-mail inbox, as well as incoming e-mail that may have been blocked, but could not locate communications from the GRC. The GRC informed Ms. Jacondin that it would send a copy of the GRC’s entire case file to her via UPS overnight delivery service and stressed the importance of returning the completed SOI without delay.

On July 31, 2019, the GRC sent a letter to Ms. Jacondin via UPS overnight delivery service confirming the earlier telephone conversation, together with a copy of the GRC’s entire case file. In addition to confirming the telephone conversation, the GRC asked Ms. Jacondin to provide the GRC with the name and contact information for the Custodian if Ms. Jacondin was not the designated Custodian for the Pompton Lakes Board of Education (“Board”). The GRC also informed Ms. Jacondin that it would send all future communications to the Board via e-mail and that she should arrange to have any e-mail transmitted from the GRC unblocked. Finally, the GRC again emphasized the importance of returning the completed SOI within five (5) business days from receipt of the GRC’s letter.⁶

⁶ The letter was received by Ms. Jacondin on August 1, 2019 at 9:48 a.m.
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On August 1, 2019, Ms. Jacondin e-mailed the GRC, confirming that she received the GRC's overnight delivery. Ms. Jacondin stated that Business Administrator Renee Taveniere is the designated Custodian for the Board. Ms. Jacondin stated that she attached to the e-mail a copy of a resolution designating Ms. Taveniere as the Custodian and a copy of an "OPRA Request" signed by Ms. Taveniere. Ms. Jacondin further stated that the Complainant's request was fulfilled on August 2, 2019 upon advice of the Board's attorneys, and therefore she is unsure "what more is needed in the way of a [SOI]."⁷ Ms. Jacondin asked for an explanation from the GRC.

On August 2, 2019, the GRC e-mailed Ms. Jacondin and advised her that there were no attachments accompanying her August 1, 2019 e-mail; however, the GRC acknowledged that Business Administrator Renee Taveniere was the Custodian for the Board and that the GRC would reflect same on its contact sheet. The GRC also provided Ms. Jacondin with the explanation she requested. The GRC informed Ms. Jacondin that the Board did not fulfill the Complainant's request according to the allegations in the Denial of Access Complaint. Specifically, the GRC stated that there was an alleged denial of one or more request items. The GRC informed Ms. Jacondin as follows:

The Statement of Information provides you an opportunity to respond to the complaint and to provide the GRC with any information and documentation you want the GRC to consider in adjudicating this complaint. **Failure to return a completed Statement of Information may result in the GRC adjudicating the matter based only on information submitted in the Denial of Access Complaint by the requestor of the records.**" (Emphasis in original).

The GRC asked Ms. Jacondin to please forward a copy of the GRC's August 2, 2019 e-mail, together with all of the documents that were sent via UPS overnight delivery, to Business Administrator Renee Taveniere.

On August 2, 2019, the GRC replied to an e-mail from Ms. Jacondin dated August 1, 2019, wherein she stated that the Board forwarded the complaint to their attorney for review. The GRC informed Ms. Jacondin that it is the policy of the GRC to communicate exclusively with the Custodian until the GRC receives a letter of representation from their attorney. The GRC also asked Ms. Jacondin to notify the Custodian that the GRC would need additional contact information from her; specifically, her direct telephone number, fax number and e-mail address.

By e-mail dated August 5, 2019, Cherie Adams of Adams Gutierrez & Lattiboudere, LLC, notified the GRC that she was representing the Board in this matter. Counsel stated that she could be contacted at her Newark address. Counsel also stated that she would get back to the GRC as soon as possible.

On August 5, 2019, the GRC was copied on an e-mail that the Custodian's Counsel sent to the Complainant's Counsel. The Custodian's Counsel stated that her e-mail was urgent "in light of the district not receiving the prior correspondence from the GRC until last week." Counsel attached copies of legal invoices which she stated that she previously provided to the Board so that

⁷ The evidence of record reveals that the Custodian's response disclosing the records was dated August 2, 2018. *New Jersey Foundation for Open Government, Inc. v. Pompton Lakes Board of Education (Passaic)*, 2018-263 – Findings and Recommendations of the Executive Director

the Custodian could respond to the Complainant's OPRA request. Counsel stated that she provided the bills to the Board in unredacted form and was uncertain why the disclosed copies contained marks over the initials of some of the legal staff members. Counsel further stated that the Custodian does not recall making any redactions. The Custodian's Counsel stated that there was no intent to deny access to any of the information contained on the records and that she surmised that the records were highlighted or marked in some way that translated into apparent redactions. Counsel asked the Complainant's Counsel to withdraw the complaint now that the Complainant is in possession of the unredacted records.

On August 9, 2019, the GRC e-mailed the Complainant's Counsel. The GRC asked Counsel if the Complainant intended to withdraw the complaint as requested by the Custodian's Counsel. On August 19, 2019, the Complainant's Counsel acknowledged that the Complainant's request was fulfilled on August 5, 2019; however, he stated that the issue of prevailing party attorney fees has not been resolved. The Complainant's Counsel requested a "10 or 20[-]day period" to negotiate fees, and informed the GRC that if the matter is not settled within that period of time he wanted the GRC to adjudicate the complaint. On August 19, 2019, the GRC e-mailed the Complainant's Counsel to inform him that the GRC would suspend further adjudication of the complaint for twenty (20) business days to allow the parties to negotiate the attorney fee issue. The GRC asked Counsel to inform the GRC of the status of the negotiations on or before September 17, 2019.⁸

Analysis

Failure to Submit SOI

OPRA provides that "Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]" N.J.A.C. 5:105-2.4(a).

OPRA also provides that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(f).]

Furthermore, OPRA provides that "[a] custodian's failure to submit a completed and signed SOI . . . may result in the Council issuing a decision in favor of the complainant." N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff's Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian's failure to adhere to N.J.A.C. 5:105-2.4(a). See

⁸ The GRC received no further communications from either the Complainant's Counsel or the Custodian's Counsel. New Jersey Foundation for Open Government, Inc. v. Pompton Lakes Board of Education (Passaic), 2018-263 – Findings and Recommendations of the Executive Director

also Kovacs v. Irvington Police Dep't (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

Here, the GRC sent Marilyn Jacondin, acting on behalf of the Custodian, a request for the SOI on November 26, 2018; however, neither Ms. Jacondin nor the Custodian complied with the GRC's initial request for an SOI. Following the expiration of the five (5) business day deadline, the GRC again attempted to obtain a completed SOI from the Custodian by sending a "No Defense" letter and requesting a completed SOI within three (3) business days of receipt; however, the Custodian still did not submit a completed SOI. Thereafter, on July 31, 2019, in an effort to obtain the completed SOI, the GRC telephoned Ms. Jacondin. The GRC confirmed its telephone call with an e-mail on the same date. On August 1, 2019, Ms. Jacondin e-mailed the GRC. Ms. Jacondin stated that Business Administrator Renee Taveniere is the Board's designated Custodian. On August 2, 2019, the GRC e-mailed Ms. Jacondin and acknowledged that Ms. Taveniere is the designated Custodian. The GRC asked Ms. Jacondin to forward a copy of the GRC's August 2, 2019 e-mail, along with all complaint documentation, to Ms. Taveniere. The GRC in its August 2, 2019 e-mail had emphasized the importance of the Custodian submitting a completed SOI to the GRC. The Custodian never submitted a completed SOI to the GRC.

Accordingly, the Custodian's failure to submit a completed SOI to the GRC, despite repeated requests, results in a violation of N.J.A.C. 5:105-2.4(a). Additionally, the Custodian's failure to respond obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b). Alterman, Esq., GRC 2013-353. See also Kovacs, GRC 2014-196; Howell, GRC 2015-249.

Sufficiency of Response

In Morris v. Trenton Police Dep't, GRC Complaint No. 2007-160 (May 2008), the complainant requested several records. The custodian, without further elaboration, stated that access to the requested records was denied. The Council, in finding that the custodian violated OPRA, stated ". . . the Custodian's failure to supply the requester with a detailed lawful basis for denial violates N.J.S.A. 47:1A-5(g)." Subsequently, in Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008), the Council, upon finding that the custodian's written response was insufficient, noted that, ". . . N.J.S.A. 47:1A-5(g) provides that if a custodian is 'unable to comply with a request for access, then the custodian shall indicate the specific basis' for noncompliance."

Here, the Custodian responded to the Complainant's request item number 6, which consists of the records relevant to the complaint, by disclosing the responsive records in redacted form; however, the Custodian did not include a redaction index or otherwise provide a reason for denying access to the redacted material. Although there is some question as to why the material was redacted, or why it appeared to be redacted, the GRC does not have a certification from the Custodian explaining the circumstances because the Custodian did not submit the SOI.

Therefore, the Custodian's August 2, 2018 written response is insufficient because the Custodian failed to provide a specific legal basis for denying access to the redacted material. N.J.S.A. 47:1A-5(g). See also Morris, GRC 2007-160 and Rader, GRC 2007-239.

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 filed the Denial of Access Complaint alleging that several items in the records responsive to request item number 6, set forth above as the "Records Relevant to Complaint," were redacted. The Complainant further asserted that the redactions were unexplained and apparently improper because a redaction index did not accompany the redacted material. As such, the Complainant asserted that the denial of access was not justified.

There is a question as to whether the material was intentionally redacted or mistakenly made to appear redacted, perhaps by use of a highlighter that, when copied, would appear as a redaction. The Custodian's Counsel stated that the Custodian ". . . does not recall making any redactions." However, the GRC does not have a certified explanation from the Custodian because the Custodian failed to submit the SOI. There is some evidence militating toward intentional redaction of the material, however, because during her review of the records prior to disclosure the Custodian would or should have seen that certain content appeared as redacted material. The Custodian should have then corrected the records prior to disclosure or prepared a redaction index to accompany the disclosed records. The evidence of record reveals that the Custodian did neither.

Accordingly, because the Custodian disclosed the records relevant to the complaint with certain material redacted and did not provide a legal explanation and statutory citation for the redactions, the Custodian failed to bear her burden of proving a lawful denial of access to the redacted material. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the requested records because the evidence of record reveals that the Custodian's Counsel disclosed said records in unredacted form on August 5, 2019.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]. . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian failed to submit a completed SOI to the GRC thereby violating N.J.A.C. 5:105-2.4(a), and provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-(g), the Custodian, through Counsel, provided the Complainant with unredacted copies of the requested records on August 5, 2019. Additionally, it does not appear that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an 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. The Supreme Court also 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.]

Here, the Complainant filed the instant complaint to request that the Council order the Custodian to disclose to the Complainant the records relevant to the complaint in unredacted form. Thereafter, on August 5, 2019, in excess of eight (8) months following the Complainant’s filing of the Denial of Access Complaint, the Custodian, through Counsel, disclosed unredacted copies

of the requested records to the Complainant. Thus, the evidence of record supports that the Complainant is a prevailing party, who is entitled to an award of attorney's fees.

Therefore, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 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, after the complaint was filed, the Custodian disclosed unredacted copies of the records relevant to the complaint to the Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is 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's failure to submit a completed SOI to the GRC, despite repeated requests, results in a violation of N.J.A.C. 5:105-2.4(a). Additionally, the Custodian's failure to respond obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b). See Alterman, Esq. v. Sussex Cnty. Sheriff's Office, GRC Complaint No. 2013-353 (September 2014). See also Kovacs v. Irvington Police Dep't (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).
2. The Custodian's August 2, 2018 written response is insufficient because the Custodian failed to provide a specific legal basis for denying access to the redacted material. N.J.S.A. 47:1A-5(g). See also Morris v. Trenton Police Dep't, GRC Complaint No. 2007-160 (May 2008) and Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008).
3. Because the Custodian disclosed the records relevant to the complaint with certain material redacted and did not provide a legal explanation and statutory citation for the redactions, the Custodian failed to bear her burden of proving a lawful denial of access to the redacted material. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the requested records because the evidence of record reveals that the Custodian's Counsel disclosed said records in unredacted form on August 5, 2019.
4. Although the Custodian failed to submit a completed SOI to the GRC thereby violating N.J.A.C. 5:105-2.4(a), and provided an insufficient response to the Complainant's

request pursuant to N.J.S.A. 47:1A-(g), the Custodian, through Counsel, provided the Complainant with unredacted copies of the requested records on August 5, 2019. Additionally, it does not appear that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

5. 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, after the complaint was filed, the Custodian disclosed unredacted copies of the records relevant to the complaint to the Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is 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.**

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September 17, 2019