



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

March 29, 2022 Government Records Council Meeting

Elie C. Jones
Complainant

Complaint No. 2019-2

v.

Township of Teaneck (Bergen)
Custodian of Record

At the March 29, 2022 public meeting, the Government Records Council (“Council”) considered the March 22, 2022 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. Because the parties failed to reach a fee agreement, and because the Complainant’s Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney’s fees to which the Complainant is entitled.
2. The Council finds that 13.0 hours at \$450.00 per hour is reasonable for the work performed in the instant matter. Also, the Council finds that the paralegal’s time of 0.1 hours at \$100.00 per hour and the reimbursement of \$0.20 for expenses is reasonable. **Accordingly, the Executive Director recommends that the Council award fees to Complainant’s Counsel in the amount of \$5,860.20, representing 13.0 hours of service at \$450.00 per hour, 0.1 hours of paralegal service at \$100.00 per hour, and \$0.20 for reimbursement of expenses.**

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 29th Day of March 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: March 31, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
March 29, 2022 Council Meeting**

**Elie C. Jones¹
Complainant**

GRC Complaint No. 2019-2

v.

**Township of Teaneck (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

OPRA Request A: “Copy of all legal invoices submitted by all law firms representing [the Township of Teaneck (“Township”)] for any legal matters pending from 10/1/2018 to 12/21/2018. If OPRA extended – legal invoices till the date fulfilled by all law firms billing the Township of Teaneck from 10/1/2018 – 12/21/18.

1. Chasan Lamparello
2. Winnie Banta and all others”

OPRA Request B:

1. “Copy of employment contract for Dean K as of 11/1/18 – 12/1/18 new contract as Interim Manager.”
2. “Copy of salary of Dean L. as of 12/21/18.”
3. “Copy of severance agreement with William Broughton and copy of last 2 paychecks of William Broughton upon exit from Township.”
4. “Copy of cost/invoices from Teaneck Glenpointe Marriot for party for William Broughton and copy of Township check to Glenpointe.”

OPRA Request C:

1. “All e-mails of Dean Kazinci, John Fagello, Issa Abbasi, Mohamed Hammueeddin (sic), James Tighe, and Ken B. (sic) Health Officer from 10/1/18 to 12/21/18.”
2. “Copy of all notice of claims submitted to Teaneck from 9/1/18 to 12/21/18 – if OPRA extended notices of claim until 2/1/19.”
3. “Copy of all settlements the [Township] has entered into from 8/1/18 to 12/24/18, if extended – settlements until 2/1/19”

OPRA Request D:

“All signed legal contracts between Galantucci and Patuto law firm and Teaneck for

¹ Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP (Saddle Brook, N.J.).

² Represented by John L. Shahdanian, II, Esq. of McCusker, Anselmi, Rosen & Carvelli, P.C. (Florham Park, N.J.). Previously represented by William F. Rupp, Esq. of Chasan, Lamparello, Mallon & Cappuzzo, P.C. (Secaucus, N.J.).

representation of Michael Chaloub – Teaneck Police Officer for summonses issued by Elie Jones.”

OPRA Request E:

1. “Copy of all correspondence between [the Township] and Billboard company from 8/1/18 to 12/21/18 and from 12/22/18 to 1/2/19 including civil complaints, settlements, letters from Billboard companies, attorneys, letters, notice of claims, and requests and notices, acceptance of proposals.”
2. “Copy of all [Township] correspondence sent to the billboard co from [Township], [Township] attorneys, from [Township] Managers and Clerk.”

OPRA Request F:

1. “Copy of bill paid lists for the months of 8/1/18, 9/1/18, 10/1/18, 11/1/18, 12/1/18, 1/2/19, 2/1/19.”
2. “Copy of William Broughton e-mails from 11/1/18 to 12/21/2018. Copy of correspondence from William Broughton to Council and Mayor from 10/1/18 to 12/21/18.”

Custodian of Record: Issa Abbasi³

Request Received by Custodian: December 21, 2018

Response Made by Custodian: January 2, 2019

GRC Complaint Received: January 3, 2019

Background

January 26, 2021 Council Meeting:

At its January 26, 2021 public meeting, the Council considered the January 19, 2021 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. With respect to the non-immediate access portions of the Complainant’s December 21, 2018 OPRA requests, although the Custodian’s extension was reasonable and warranted given the exigent and extenuating circumstances, he failed to respond within the extended period, resulting in a “deemed” denial of access. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(i). See Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). However, the GRC declines to order disclosure for request item Nos. C2, C3, E1, and E2 as the Custodian certified that he provided responsive records to the Complainant on November 27, 2019 and December 2, 2019. Additionally, the GRC declines to order disclosure for request item Nos. C1 and F2, as the Custodian certified that the items were voluntarily withdrawn on August 15, 2019.

³ The current Custodian of Record is Doug Ruccione.

2. The Custodian did not bear his burden of proof that he timely responded to the Complainant's December 21, 2018 OPRA request item Nos. A1, A2, B1, B2, B3, B4, D, and F1 seeking various budgets, contracts, and salary records. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time immediately, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), and Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013). However, the GRC declines to order disclosure of the requested items since the Custodian certified that responsive records were provided on November 20, 2020, November 27, 2020, January 16, 2020, and February 24, 2020.
3. The Custodian failed to timely respond to the Complainant's OPRA requests. N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). However, the Custodian demonstrated that responsive records were ultimately provided to the Complainant during the pendency of this complaint. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to the Custodian's disclosure after the filing of the instant complaint, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant was able to obtain access to a portion of the requested items at issue as a direct result of this complaint filing. 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 January 27, 2021, the Council distributed its Interim Order to all parties. On February 25, 2021, Complainant's Counsel requested an additional twenty (20) business days to resolve the issue of counsel fees. That same day, the Government Records Council ("GRC") granted the extension request until March 26, 2021.

On March 26, 2021, the Complainant's Counsel submitted a fee application, stating that the parties were not able to settle counsel fees. The Government Records Council ("GRC") received no further correspondence from the parties. The fee application and Certification of Services ("Certification") set forth the following:

- 1) The complaint name and number: Jones v. Twp. of Teaneck (Bergen), GRC Complaint No. 2019-2
- 2) Complainant Counsel's law firm affiliation: Counsel is a partner of Cohn Lifland Pearlman Herrmann & Knopf, LLP.
- 3) A statement of client representation: Counsel certified to his services, including communications with the Complainant, Custodian's Counsel, and Mr. John Stewart of the GRC; discussing submissions with the Complainant; reviewing e-mail correspondence to and/or from the GRC; and preparing the fee application.
- 4) The hourly rate of all attorneys and support staff involved in the complaint: Counsel certified that he charged \$450.00 per hour. Counsel further certified that his paralegal's hourly rate was \$100.00.
- 5) Copies of time sheets for each professional involved in the complaint: Counsel supplied a copy of his time sheet from April 22, 2019 through March 26, 2021 (the "Fee Period"). During the Fee Period, Counsel billed a total of 13.0 hours for a total fee of \$5,860.20. The total fee includes 0.1 hours billed for the paralegal's time at \$10.00, and costs of \$0.20.
- 6) Evidence that the rates charged are in accordance with prevailing rates in the relevant community, including years of experience, skill level and reputation: Counsel certified that he charges "\$450 per hour for work in OPRA matters." Certification at ¶ 3(3). Counsel certified to his education, years of legal experience and representation of clients in OPRA cases before the GRC and in Superior Court. See i.e. Paff v. Galloway Twp., 229 N.J. 340 (2017); North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285 (2017). Counsel further noted that he was "counsel of record" in several OPRA matters before both courts that resulted in published opinions. See i.e. Scheeler v. Atlantic Cnty. Mun. Joint Ins. Fund, 454 N.J. Super. 621 (App. Div. 2018); L.R. v. Camden City Public Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017), aff'd, 238 N.J. 547 (2019) (*per curiam*). Counsel also certified to his educational and teaching experience, as well as his time as President of the New Jersey Foundation for Open Government and extensive activities with the New Jersey State Bar Foundation. Certification at ¶ 3(7). Counsel averred that the requested fee is reasonable and the same as or lower than other attorneys representing clients, such as Richard Gutman, Esq., and C.J. Griffin, Esq. at Pashman Stein. Certification at ¶ 12-13. Counsel also certified that his hourly rate of \$450.00 was within the \$400.00-\$500.00 average range for an attorney with twenty (20) years of experience based upon survey results from the Community Legal Services of Philadelphia. Certification at ¶ 14.

- 7) Detailed documentation of expenses: Counsel sought reimbursement of \$0.20 for a scanning fee.

The GRC did not receive an opposition to Counsel's fee application.

Analysis

Compliance

At its January 26, 2021 meeting, the Council ordered the parties to “confer in an effort to decide the amount of reasonable attorney’s fees” and notify the GRC of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant’s Counsel “shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13.” On January 27, 2021, the Council distributed its Interim Order to all parties, providing the parties twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by February 25, 2021.

On February 25, 2021, Complainant’s Counsel requested an additional twenty (20) business days to allow the Custodian to review his fee demand. The GRC granted Counsel’s request that same day, moving the deadline for the parties to notify the GRC of a settlement to March 26, 2021. On March 26, 2021, the last day of the extended deadline, Counsel submitted his fee application in accordance with N.J.A.C. 5:105-2.13, stating that the parties were not able to settle the issue of counsel fees.

Therefore, because the parties failed to reach a fee agreement, and because the Complainant’s Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney’s fees to which the Complainant is entitled.

Prevailing Party Attorney Fee Award

“Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney’s fee from the loser.” Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted). However, this principle is not without exception. New Jerseyans for a Death Penalty Moratorium v. N.J. Dep’t of Corrections, (“NJMDP”) 185 N.J. 137, 152 (2005). Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.’” Id. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

OPRA provides that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” Id. at 152 (citing N.J.S.A. 47:1A-1). OPRA further 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. See generally NJDPM, 185 N.J. at 137 (“By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” Id. at 153. (quoting Courier News v. Hunterdon Cnty. Prosecutor’s Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the [C]ustodian’s conduct.” Teeters, 387 N.J. Super. at 432. Further, the Council found a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 73. Accordingly, the Council ruled that the Complainant was a prevailing party, who is entitled to an award of a reasonable attorney’s fee, and ordered the parties to cooperate in an effort to reach an agreement on fees. Absent the parties’ ability to reach an agreement, the Council provided the Complainant’s Counsel an opportunity to file an application for fees.

A. Standards for Fee Award

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” Rendine, 141 N.J. at 324 (quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting Rendine, 141 N.J. at 337). However, the fee-shifting statutes do not contemplate payment for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing Council Entm’t, Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Additionally, the NJDPM Court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar” but further cautioned that “[o]rdinarily[] the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157. OPRA neither mandates nor prohibits enhancements. NJDPM, 185 N.J. at 157. However, “[b]ecause enhancements are not preordained . . . [they] should not be made as a matter of course.” Ibid. The lodestar enhancement may be adjusted, either upward or downward, depending on the degree of success achieved. Id. at 153-55. “[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a

reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (*quoting Szczepanski v. Newcomb Med. Ctr.*, 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (*quoting Hensley*, 461 U.S. at 435).

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. For instance, in Rivera v. Bergen Cnty. Prosecutor’s Office, 2012 N.J. Super. Unpub. LEXIS 2752 (December 11, 2012) (*citing Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 21-22 (2004)), the trial court stated that:

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

[Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at 11 (*applying R.P.C. 1.5(a)*).]

In addition, N.J.A.C. 5:105-2.13 sets forth the information that counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by its regulations permits the Council to analyze the reasonableness of the requested fee.

Finally, the Court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate . . . that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (*quoting Furey v. Cnty. of Ocean*, 287 N.J. Super. 42, 46 (App. Div. 1996)).

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter, Counsel is seeking a total fee award of \$5,860.20. This total represents in part 13.0 hours at \$450.00 per hour. In support of this hourly rate, Counsel certified to his extensive OPRA experience in Superior Court, the Appellate Division, and the Supreme Court. Counsel also included comparative rates for Mr. Gutman and Ms. Griffin, as well as other attorneys with the same or similar experience. Certification at ¶ 13.

In previous matters, Counsel has requested and has been awarded hourly rates of \$350.00

by the Council. See Rodriguez v. Kean Univ., GRC Complaint No. 2016-86 (January 2022). However, Counsel's experience has grown exponentially and especially as it relates to representing parties before the Judiciary on OPRA matters. Thus, the GRC does agree that an increase to a more reasonable rate requested by Counsel is support. This position is further supported when comparing Ms. Griffin's award of \$515.00 per hour in 2019 while having less experience than Counsel at the time of the fee application. See Gannett Satellite Info. Network, LLC v. Twp. of Neptune, Docket No. L.-2616-17 (May 13, 2019).⁴

Based on the foregoing, the rate of \$450.00 is reasonable for a practitioner with Counsel's experience and skill level in this geographical area.

b. Time Expended

In support of his request for fees, Counsel submitted a log of his time. For the period from April 22, 2019 through March 26, 2021, Counsel billed a total of 13.0 hours for work on the file. This included reviewing and responding to e-mails, reviewing party submissions, traveling to Teaneck to meet with opposing counsel and officials, reviewing the GRC's decision, and preparing the fee application.

In accordance with the mandates of N.J.A.C. 105-2.13(b), Counsel's time sheet provided detailed descriptions of the exact work performed in the required tenths of an hour. N.J.A.C. 105-2.13(b)(5). The entries identify with specificity the work performed, with whom Counsel communicated, and the documents he or his paralegal reviewed and prepared.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with enough detailed information from which to conduct its analysis.

The GRC finds that the accounting of charges is reasonable and should thus remain unaltered. The GRC finds each entry to be reasonable grounded in the work conducted for those entries. This includes the 4.5 hours required to travel to Teaneck and meet with opposing counsel and officials. Furthermore, the 2.0 hours expended to review the file with the client appears reasonable given the file's size at the time, along with the 1.9 hours to prepare and file the fee application. Lastly, Counsel's assessment of 0.1 hours for the paralegal to review an e-mail scheduling a mediation conference call was reasonable.

Accordingly, the Council finds that 13.0 hours at \$450.00 per hour is reasonable for the work performed in the instant matter. Also, the Council finds that the paralegal's time of 0.1 hours at \$100.00 per hour and the reimbursement of \$0.20 for expenses is reasonable. **Accordingly, the Executive Director recommends that the Council award fees to Complainant's Counsel in the amount of \$5,860.20, representing 13.0 hours of service at \$450.00 per hour, 0.1 hours of paralegal service at \$100.00 per hour, and \$0.20 for reimbursement of expenses.**

⁴ The Appellate Division recently reversed the trial court's award of fees because plaintiff prevailed only under the common law right of access. Gannett Satellite Info. Network, LLC v. Tp. of Neptune, 467 N.J. Super. 385, 412 (App. Div. 2021)

2. Enhancement Analysis

Counsel declined a lodestar adjustment; thus, no enhancement should be awarded.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the parties failed to reach a fee agreement, and because the Complainant's Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney's fees to which the Complainant is entitled.
2. The Council finds that 13.0 hours at \$450.00 per hour is reasonable for the work performed in the instant matter. Also, the Council finds that the paralegal's time of 0.1 hours at \$100.00 per hour and the reimbursement of \$0.20 for expenses is reasonable. **Accordingly, the Executive Director recommends that the Council award fees to Complainant's Counsel in the amount of \$5,860.20, representing 13.0 hours of service at \$450.00 per hour, 0.1 hours of paralegal service at \$100.00 per hour, and \$0.20 for reimbursement of expenses.**

Prepared By: Samuel A. Rosado
Staff Attorney

March 22, 2022



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

January 26, 2021 Government Records Council Meeting

Elie C. Jones
Complainant

Complaint No. 2019-02

v.

Township of Teaneck (Bergen)
Custodian of Record

At the January 26, 2021 public meeting, the Government Records Council (“Council”) considered the January 19, 2021 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. With respect to the non-immediate access portions of the Complainant’s December 21, 2018 OPRA requests, although the Custodian’s extension was reasonable and warranted given the exigent and extenuating circumstances, he failed to respond within the extended period, resulting in a “deemed” denial of access. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(i). See Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). However, the GRC declines to order disclosure for request item Nos. C2, C3, E1, and E2 as the Custodian certified that he provided responsive records to the Complainant on November 27, 2019 and December 2, 2019. Additionally, the GRC declines to order disclosure for request item Nos. C1 and F2, as the Custodian certified that the items were voluntarily withdrawn on August 15, 2019.
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s December 21, 2018 OPRA request item Nos. A1, A2, B1, B2, B3, B4, D, and F1 seeking various budgets, contracts, and salary records. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), and Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013). However, the GRC declines to order disclosure of the requested items since the Custodian certified that responsive records were provided on November 20, 2020, November 27, 2020, January 16, 2020, and February 24, 2020.

3. The Custodian failed to timely respond to the Complainant's OPRA requests. N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). However, the Custodian demonstrated that responsive records were ultimately provided to the Complainant during the pendency of this complaint. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. Pursuant to the Custodian's disclosure after the filing of the instant complaint, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant was able to obtain access to a portion of the requested items at issue as a direct result of this complaint filing. 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 26th Day of January 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 27, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 26, 2021 Council Meeting**

**Elie C. Jones¹
Complainant**

GRC Complaint No. 2019-2

v.

**Township of Teaneck (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

OPRA Request A: “Copy of all legal invoices submitted by all law firms representing [the Township of Teaneck (“Township”)] for any legal matters pending from 10/1/2018 to 12/21/2018. If OPRA extended – legal invoices till the date fulfilled by all law firms billing the Township of Teaneck from 10/1/2018 – 12/21/18.

1. Chasan Lamparello
2. Winnie Banta and all others”

OPRA Request B:

1. “Copy of employment contract for Dean K as of 11/1/18 – 12/1/18 new contract as Interim Manager.”
2. “Copy of salary of Dean L. as of 12/21/18.”
3. “Copy of severance agreement with William Broughton and copy of last 2 paychecks of William Broughton upon exit from Township.”
4. “Copy of cost/invoices from Teaneck Glenpointe Marriot for party for William Broughton and copy of Township check to Glenpointe.”

OPRA Request C:

1. “All e-mails of Dean Kazinci, John Fagello, Issa Abbasi, Mohamed Hammueeddin (sic), James Tighe, and Ken B. (sic) Health Officer from 10/1/18 to 12/21/18.”
2. “Copy of all notice of claims submitted to Teaneck from 9/1/18 to 12/21/18 – if OPRA extended notices of claim until 2/1/19.”
3. “Copy of all settlements the [Township] has entered into from 8/1/18 to 12/24/18, if extended – settlements until 2/1/19”

OPRA Request D:

“All signed legal contracts between Galantucci and Patuto law firm and Teaneck for representation of Michael Chaloub – Teaneck Police Officer for summonses issued by Elie

¹ Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP (Saddle Brook, N.J.).

² Represented by John L. Shahdanian, II, Esq. of McCusker, Anselmi, Rosen & Carvelli, P.C. (Florham Park, N.J.). Previously represented by William F. Rupp, Esq. of Chasan, Lamparello, Mallon & Cappuzzo, P.C. (Secaucus, N.J.).

Jones.”

OPRA Request E:

1. “Copy of all correspondence between [the Township] and Billboard company from 8/1/18 to 12/21/18 and from 12/22/18 to 1/2/19 including civil complaints, settlements, letters from Billboard companies, attorneys, letters, notice of claims, and requests and notices, acceptance of proposals.”
2. “Copy of all [Township] correspondence sent to the billboard co from [Township], [Township] attorneys, from [Township] Managers and Clerk.”

OPRA Request F:

1. “Copy of bill paid lists for the months of 8/1/18, 9/1/18, 10/1/18, 11/1/18, 12/1/18, 1/2/19, 2/1/19.”
2. “Copy of William Broughton e-mails from 11/1/18 to 12/21/2018. Copy of correspondence from William Broughton to Council and Mayor from 10/1/18 to 12/21/18.”

Custodian of Record: Issa Abbasi³

Request Received by Custodian: December 21, 2018

Response Made by Custodian: January 2, 2019

GRC Complaint Received: January 3, 2019

Background⁴

Request and Response:

On December 21, 2018, the Complainant submitted six (6) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On January 2, 2019, the fifth (5th) business day after receipt of the OPRA request, the Custodian responded in writing stating that the Township required 120 business days to respond to all six (6) requests, with an anticipated response date of on or before the end of business June 26, 2019.

The Custodian stated that the extension was needed due to the extraordinarily high volume of OPRA requests submitted by the Complainant, resulting in a backlog. The Custodian stated that the Complainant had 300 requests pending with the Township, with many containing multiple parts and require extraordinary expenditures of time and personnel resources to provide a response. The Custodian stated that the Complainant’s requests have substantially disrupted the Township’s operations and hindered its ability to provide a timely response. The Custodian stated that as a result the Township would respond to the Complainant’s request in the order received and noted that submitting additional OPRA requests would lengthen the process. The Custodian also stated that additional extensions may be needed for the aforementioned reasons.

³ The current Custodian of Record is Doug Ruccione.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On January 3, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the extension of time was excessive and made in “bad faith.”

Statement of Information:⁵

On August 18, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA requests on December 21, 2018. The Custodian certified that he responded in writing on January 2, 2019, requesting an extension of time to June 26, 2019. As part of the SOI’s Item No. 9 Index, the Custodian certified that responsive records were ultimately provided to the Complainant on various dates, either in direct response to the requests at issue, or in response to subsequent OPRA requests that sought the same request items.

The Custodian certified that responsive records for OPRA request item Nos. A1 and A2 were provided on February 24, 2020.

The Custodian certified that records responsive to item Nos. B1 and B2 were provided on November 20, 2019, in response to an OPRA request submitted on November 12, 2019. The Custodian also certified that records responsive to item No. B3 was provided on November 27, 2019, in response to an OPRA request submitted on October 31, 2019, and that no responsive records exist for item No. B4.

The Custodian certified that records responsive to item Nos. C2 and C3 were provided on November 27, 2019. For OPRA request D, the Custodian certified that responsive records were provided on January 16, 2020.

For OPRA request item No. E1, the Custodian certified that responsive records were provided on December 2, 2019. Regarding item No. E2, the Custodian certified that responsive records were provided on December 2, 2019, in response to an OPRA request submitted on October 31, 2019.

For OPRA request item No. F1, the Custodian certified that responsive records were provided on November 27, 2019.

Additionally, the Custodian certified that the OPRA request item Nos. C1 and F2 were voluntarily withdrawn by the Complainant’s Counsel on August 15, 2019.

The Custodian certified that as the Township’s Municipal Clerk, he engaged in a vast array of duties, which includes serving as the custodian of record under OPRA. N.J.S.A. 47:1A-1.1. The Custodian noted that he also served as the Township’s *de facto* Deputy Chief Financial Officer. The Custodian certified that at the time he received the instant OPRA requests, the Township had

⁵ The complaint was referred to mediation on April 24, 2019. The complaint was referred back from mediation on July 13, 2020.

approximately 326 outstanding OPRA requests, of which 294 were submitted by the Complainant. The Custodian affirmed that between November 16, 2016 through January 24, 2019, the Complainant submitted a total of 660 OPRA requests. The Custodian asserted that many of the OPRA requests contained multiple items and were duplicates or triplicates of previously submitted OPRA requests, sought records exempt from access under OPRA, or sought information rather than specific government records.

The Custodian argued that the Complainant's inundation of OPRA requests has rendered the Township OPRA process impossible. The Custodian asserted that the Township has been consumed by the Complainant's OPRA requests, noting that between December 21, 2018 and February 6, 2019, he submitted an additional thirty (30) OPRA requests. The Custodian argued that this complaint illustrated the Complainant's "nefarious, damaging use" of OPRA to "harm a municipality by clogging up its Clerk's Office with a multitude of OPRA requests." The Custodian contended that the Complainant substantially disrupted the Township's operations through his abusive requesting patterns. The Custodian argued that the Complainant's actions have also adversely affected the Township's ability to respond to the general public's OPRA requests.

The Custodian asserted that despite the number of submitted requests, he attempted to reach a reasonable solution with the Complainant by seeking the extension of time to respond in accordance with N.J.S.A. 47:1A-5(g). The Custodian argued that the Complainant's voluminous submissions have disrupted the Township's operations, including responding to requests submitted by others, and that the courts have recognized the inherent power to protect public officials and prevent the abuse of OPRA. See MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005).

The Custodian further argued that the Complainant's submissions and actions were similar to the complainant's in Caggiano v. Borough of Stanhope (Sussex), GRC Complaint Nos. 2007-20, 2007-21, 2007-22, & 2007-23 (September 2007), asserting that the complainant submitted 480 OPRA requests with the Borough of Stanhope in 2006 and another forty-one (41) in early 2007. The Custodian argued that the Council dismissed the complaints as "frivolous" under N.J.S.A. 47:1A-7(e) based upon the volume and frequency of the complainant's submissions

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ 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

⁶ 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.

complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

OPRA provides that a custodian may request an extension of time to respond to the complainant's OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to respond by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant's request on the fourth (4th) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not consent to the custodian's request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. N.J. Dep't of Transp., GRC Complaint Nos. 2007-315, 2007-316, and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that "because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i).

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant's OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian's request for an extension of time [to a specific date] to respond to the Complainant's OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant's OPRA request. The Council concluded that because the custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the custodian properly requested the extension pursuant to OPRA. See also Rivera, GRC 2009-317; Criscione, GRC 2010-68; and Starkey, GRC 2007-315, *et seq.*

Although extensions are rooted in well-settled case law, the Council need not find valid every request for an extension containing a clear deadline. In Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014), the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a “deemed” denial of access, the Council looked to what is “reasonably necessary.”

Furthermore, in Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant’s March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

[Id.]

In the instant matter, the Custodian sought one (1) extension of 120 business days, or June 26, 2019, to respond. As noted above, a requestor’s approval is not required for a valid extension. However, it should be noted that the Complainant did not object to any extension prior to filing this complaint.

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. Ciccarone, GRC 2013-280. The GRC must next consider the amount of time the custodian already had to respond to the request. Id. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian’s ability to respond effectively to the request.⁷ Id.

Regarding, the request, the Complainant’s OPRA requests sought employment and legal contracts, invoices, bills, employee salary and payroll information, settlements, e-mail correspondence, and notices over a period spanning between several months to approximately one (1) year.

⁷ “Extenuating circumstances” could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency’s need to reallocate resources to a higher priority due to *force majeure*.

In the SOI, the Custodian explained his reasoning for extending the response time frame until June 26, 2019. Those reasons included the number of duties and obligations of the Custodian, as well as the Township's limited resources. Notably, the Custodian stated that the Township was addressing 326 OPRA requests, with 294 submitted by the Complainant, at the time the subject OPRA request was filed. Additionally, the Custodian stated that those requests had multiple individual request items like the requests at issue. The Custodian argued that instead of denying the OPRA request outright, he chose to extend the deadline as an absolute necessity.

From the Custodian's receipt of the Complainant's OPRA request, he sought 120 business days to respond. Thus, the Custodian sought, in addition to the original seven (7) business days, an extension of six (6) full months of business days.

In determining whether the extension before the Council was substantiated, the GRC must look to the court's discussion in Twp. of Teaneck v. Jones, 2017 N.J. Super. Unpub. LEXIS 584 (March 9, 2017) for instruction. The GRC notes that although unpublished, the court's decision provides insightful language impacting the extension issue here. There, the court opined at length on the number of options available to a custodian when facing a problematic requestor:

The Township is not powerless when faced with abusive, unreasonable, coercive, OPRA requests. It can deny such requests. In response, the requestor may abandon his requests, or may seek relief before the GRC or in court. The requestor may abandon or withdraw some requests, and press on as to others, as defendant herein has done. Served with suit papers in this case, the Defendant, through counsel, abandoned two-hundred ninety (290) of his 380 OPRA requests, leaving ninety (90) to be addressed by the Township, strong evidence of an acknowledgement of the unreasonableness of the defendant's mass-filing of OPRA requests.

In response to requestor-initiated litigation, the custodian retains the defense that, faced with requests that would "substantially disrupt agency operations", it attempted "to reach a reasonable solution that accommodates the requestor and the agency", but requestor refused reasonable solutions and it therefore properly denied the requests. N.J.S.A. 47:1A-5(g). In addition, a custodian may, in defense of any such requestor-initiated action, demonstrate that it fashioned a reasonable "special service charge" which Defendant refused to tender. N.J.S.A. 47:1A-5(c).

[Teaneck, slip op. at 13-14.]

Here, the Custodian was clearly faced with a situation like the one explored in Teaneck. In addition to the OPRA request at issue here, the Custodian certified in the SOI that he was tasked with addressing 326 OPRA requests, a vast majority of which were filed by the Complainant. Based on this, and as provided by the court, the Custodian reached the conclusion that he would attempt to accommodate the request as an alternative to denying it. This set up the potential for the Custodian to deny the subject OPRA request on the basis that it would substantially disrupt agency operations N.J.S.A. 47:1A-5(g). Notwithstanding, it is of no coincidence that the Custodian chose to extend the time frame based on his knowledge of the court's decision in Teaneck. Thus, the GRC is persuaded that a time extension to respond to the subject OPRA request is warranted here.

As to the reasonableness of the length of the time extension, the GRC finds that the evidence before it supports same. This is not to say that the sheer volume of requests alone justifies a considerable extension of time to respond to an individual OPRA request. Many public agencies in the State have a high volume of pending OPRA requests but the agencies appear to have been given sufficient resources to facilitate faster response times to records requests. However, it is clear here that the Complainant engaged in a campaign against the Township utilizing OPRA. Without assuming the Complainant's intent, this campaign is well-documented in the record before the Council, as well as in the record on review in the Teaneck appeal. It is within this notable set of facts that the GRC agrees that an aggressive extension was reasonable and necessary here.

However, while the GRC acknowledges that the 120-business day extension was warranted and reasonable, the Custodian certified in the SOI that no records were provided within the extended period. Although the extended deadline was June 26, 2019, the evidence in the record indicates that the earliest production date for responsive records was November 20, 2019. Therefore, in accordance with Kohn, 2007-124, there was a deemed denial of access.

Therefore, with respect to the non-immediate access portions of the Complainant's December 21, 2018 OPRA requests, although the Custodian's extension was reasonable and warranted given the exigent and extenuating circumstances, he failed to respond within the extended period, resulting in a "deemed" denial of access. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(i). See Kohn, GRC 2007-124, and Kelly, GRC 2007-11. However, the GRC declines to order disclosure for request item Nos. C2, C3, E1, and E2 as the Custodian certified that he provided responsive records to the Complainant on November 27, 2019 and December 2, 2019. Additionally, the GRC declines to order disclosure for request item Nos. C1 and F2, as the Custodian certified that the items were voluntarily withdrawn on August 15, 2019.

Immediate Access Records

Additionally, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁸

In Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that "immediate access language of OPRA (N.J.S.A. 47:1A-5(e)) suggests that the Custodian was still obligated to immediately notify the Complainant . . ." Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request. Additionally, if immediate access items are contained within a larger OPRA request containing a combination of records requiring a response within seven (7) business days and immediate access

⁸ OPRA lists immediate access records as "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

records requiring an immediate response, a custodian still has an obligation to respond to immediate access items immediately. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013).

In the current matter, a review of the Complainant's OPRA requests reveal that immediate access records were sought in OPRA request item Nos. A1, A2, B1, B2, B3, B4, D, and F1. Those items sought invoices, employment contracts, salary and payroll information, legal contracts, and bills, which are considered "immediate access" under N.J.S.A. 47:1A-5(e). The Custodian asserted that a substantial extension of time was needed considering the volume of the requests already submitted by the Complainant, and without such an extension fulfilling the request would substantially disrupt agency operations. N.J.S.A. 47:1A-5(g). However, the Custodian's request for an extension was sent on the sixth (6th) business day after receipt of the OPRA requests. In accordance with Herron, the Custodian had "an obligation to immediately" respond to the Complainant granting access, denying access, seeking clarification, or requesting an extension of time, but failed to do so. See also Kohn, GRC 2011-330, and Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011- 237 (Interim Order dated December 18, 2012).

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's December 21, 2018 OPRA request item Nos. A1, A2, B1, B2, B3, B4, D, and F1 seeking various budgets, contracts, and salary records. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time immediately, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Herron, GRC 2006-178, and Kohn, GRC 2011-330. However, the GRC declines to order disclosure of the requested items since the Custodian certified that responsive records were provided on November 20, 2020, November 27, 2020, January 16, 2020, and February 24, 2020.

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)).

In the matter before the Council, the Custodian failed to timely respond to the Complainant's OPRA requests. N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). However, the Custodian demonstrated that responsive records were ultimately provided to the Complainant during the pendency of this complaint. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Appellate Division 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, 71 (2008), the 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" (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 held that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." *Id.* at 603 (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . ." *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the

Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

[196 N.J. at 73-76.]

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, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

In the matter before the Council, the Complainant alleged that the Custodian's extension of time to respond to his OPRA requests was improper and made in “bad faith.” The Custodian asserted that the extension was necessary based upon the complex and voluminous number of outstanding requests submitted by the Complainant. The Custodian argued that but for the extension, the requests would have been denied outright, as processing them would cause a substantial disruption of agency operations.

In weighing whether the Complainant is a prevailing party entitled to an attorney's fee, the GRC is satisfied that the evidence of records supports a conclusion in the affirmative. The Custodian's disclosure of responsive records after the Complainant filed the instant complaint

represents a voluntary change in his pre-complaint condition. Teeters, 387 N.J. Super. 432. Additionally, although the GRC concluded that the extension was reasonable and warranted given the circumstances, the Custodian failed to respond to the Complainant's OPRA requests within the extended period. Furthermore, the Custodian certified that records provided to the Complainant for item Nos. A1, A2, C2, C3, D, E1, and F1 were in direct response to the OPRA requests at issue here rather than in response to subsequent requests. Based on this, there exists a causal nexus between this complaint and change in the Custodian's conduct. Mason, 196 N.J. 51. Thus, the Complainant is a prevailing party entitled to attorney's fees.

Accordingly, pursuant to the Custodian's disclosure after the filing of the instant complaint, 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 was able to obtain access to a portion of the requested items at issue as a direct result of this complaint filing. 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. With respect to the non-immediate access portions of the Complainant's December 21, 2018 OPRA requests, although the Custodian's extension was reasonable and warranted given the exigent and extenuating circumstances, he failed to respond within the extended period, resulting in a "deemed" denial of access. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(i). See Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). However, the GRC declines to order disclosure for request item Nos. C2, C3, E1, and E2 as the Custodian certified that he provided responsive records to the Complainant on November 27, 2019 and December 2, 2019. Additionally, the GRC declines to order disclosure for request item Nos. C1 and F2, as the Custodian certified that the items were voluntarily withdrawn on August 15, 2019.
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant's December 21, 2018 OPRA request item Nos. A1, A2, B1, B2, B3, B4, D, and F1 seeking various budgets, contracts, and salary records. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension

of time immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), and Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013). However, the GRC declines to order disclosure of the requested items since the Custodian certified that responsive records were provided on November 20, 2020, November 27, 2020, January 16, 2020, and February 24, 2020.

3. The Custodian failed to timely respond to the Complainant’s OPRA requests. N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). However, the Custodian demonstrated that responsive records were ultimately provided to the Complainant during the pendency of this complaint. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. Pursuant to the Custodian’s disclosure after the filing of the instant complaint, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant was able to obtain access to a portion of the requested items at issue as a direct result of this complaint filing. 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: Samuel A. Rosado
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