



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

November 18, 2009 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2008-224

v.

Township of West Milford (Passaic)
Custodian of Record

At the November 18, 2009 public meeting, the Government Records Council ("Council") considered the November 10, 2009 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 Items no. 2-3 of the Complainant's OPRA request do not identify with reasonable clarity the records sought, and because a custodian is not required to conduct research in response to an OPRA request, said items of the Complainant's OPRA request are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), and Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
2. Because Items no. 2-3 of the Complainant's OPRA request require research to fulfill and the Custodian chose to conduct such research, the approximate 6½ hours between the time the Complainant submitted his OPRA request and the time the Custodian provided a written response to said request, an hour and a half of which the Custodian was at lunch, is not unreasonable, nor is such time a violation of N.J.S.A. 47:1A-5.e.
3. Because the Custodian provided the Complainant with a written response in which the Custodian indicated that the only record responsive to the Complainant's OPRA request had been provided to him earlier in the day and that there are no other records responsive to his OPRA request, the Custodian



properly responded to said request pursuant to N.J.S.A. 47:1A-5.g., even though said response was not on the OPRA request form.

4. Because the Custodian did not violate OPRA at N.J.S.A. 47:1A-5.e. or N.J.S.A. 47:1A-5.g. and properly responded to the Complainant's OPRA request, it is concluded that 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.
5. Because the Custodian's behavior did not change as a result of this Denial of Access Complaint, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

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 18th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: November 23, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 18, 2009 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2008-224

v.

**Township of West Milford (Passaic)²
Custodian of Records**

Records Relevant to Complaint: Inspection of the following:

1. Contracts between the Township and Fred Knapp, Esq., that are referenced in Township resolutions 2008-033, 2008-056, 2008-129 and 2008-308.
2. Any contract between the Township and Fred Knapp, Esq., that authorized Knapp to defend the Township in the Passaic County Superior Court lawsuit with the docket number L-1843-08.
3. Any proposal to the Township from Fred Knapp, Esq., that included his regular hourly rate in contrast to his discounted municipal hourly rate.

Request Made: September 12, 2008

Response Made: September 12, 2008

Custodian: Antoinette Battaglia

GRC Complaint Filed: October 6, 2008³

Background

September 12, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter attached to an official OPRA request form.

September 12, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same business day as receipt of such request. The Custodian states that staff provided the Complainant with a copy of the contract between the Township and Fred Knapp, Esq., earlier today. The Custodian states that said contract constitutes the 2008 contract referenced in resolution 2008-033 and is the only contract executed with Fred Knapp, Esq., in 2008. The Custodian also states that resolutions no. 2008-056, 2008-129 and 2008-308 authorize and outline amendments to that contract. Further, the Custodian states that the Township does not maintain any proposals on file from Fred Knapp, Esq.

¹ Represented by Eric Taylor, Esq., of Taylor & Mitchell, LLC (Audubon, NJ).

² Represented by Fred Semrau, Esq., of Dorsey & Semrau (Boonton, NJ).

³ The GRC received the Denial of Access Complaint on said date.

September 14, 2008

Letter from Complainant to Custodian. The Complainant states that the Custodian indicated in her response to the Complainant's request dated September 12, 2008 that the contract provided to the Complainant constitutes the contract referenced in Resolution No. 2008-033. The Complainant contends that this is incorrect because:

- The contract provided to the Complainant is dated January 9, 2008 and Resolution 2008-033 was adopted by the Council seven (7) days earlier on January 2, 2008;
- Resolution 2008-033 included a not-to-exceed payment to Knapp of \$7,500 but the contract provided to the Complainant includes a not-to-exceed payment to Knapp of \$12,500;
- The contract provided to the Complainant was signed by the Custodian on January 24, 2008 and witnessed by Catherine Shanahan on said date; and
- The date the Custodian signed the contract (January 24, 2008) is consistent with the Council's adoption of Resolution 2008-056 on January 23, 2008.

Additionally, the Complainant contends that the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide immediate access to the requested records or a written response as to why the Custodian could not fulfill said request while the Complainant was in the Custodian's office instead of sending word via another employee that the Custodian was processing the request. Further, the Complainant asserts that the Custodian's e-mail dated September 12, 2008 does not satisfy the written response requirement of N.J.S.A. 47:1A-5.g.

October 6, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated September 12, 2008
- Custodian's response to the Complainant's OPRA request dated September 12, 2008
- Letter from Complainant to Custodian dated September 14, 2008 with fax cover sheet dated September 15, 2008

The Complainant states that on September 12, 2008 he hand delivered his OPRA request to the Deputy Clerk. The Complainant states that the Deputy Clerk located a requested contract and provided a copy of same. The Complainant states that the Deputy Clerk verbally informed the Complainant that he would have to wait for the Custodian to return from lunch at any minute to fulfill the remaining portions of the Complainant's OPRA request. The Complainant states that he waited one (1) hour and ten (10) minutes for the Custodian to return from lunch. The Complainant states that the Custodian refused to speak to him upon her return from lunch and relayed a message to him through another Township employee that the Custodian would process the rest of his OPRA request. The Complainant states that on September 12, 2008 at 6:07 PM the Custodian sent him an e-mail in which the Custodian indicated that staff in the Clerk's office provided the Complainant with a copy of Mr. Knapp's contract earlier that day, and that said contract constitutes the 2008 contract referenced in resolution 2008-033 and is the only contract executed with Mr. Knapp in 2008. The Custodian stated that resolutions

2008-056, 2008-129 and 2008-308 authorize and outline amendments to said contract. Additionally, the Custodian stated that the Township does not maintain any proposal from Fred Knapp, Esq.

The Complainant states that N.J.S.A. 47:1A-5.e. provides for immediate access to contracts. The Complainant asserts that the Custodian failed to provide immediate access to his request for contracts and instead sent a message through another employee that she would process the Complainant's OPRA request.

Additionally, the Complainant states that pursuant to N.J.S.A. 47:1A-5.g., if a custodian is unable to fulfill an OPRA request, the custodian must indicate such on the request form and provide such to the requestor. The Complainant contends that the Custodian failed to provide him with notice of non-compliance as required by N.J.S.A. 47:1A-5.g. but rather sent an e-mail with a letter attached.

The Complainant seeks the following relief from the Council: a declaration that the Custodian violated OPRA by failing to provide immediate access to the requested records pursuant to N.J.S.A. 47:1A-5.e.; a declaration that the Custodian violated OPRA by failing to provide notice of non-compliance pursuant to N.J.S.A. 47:1A-5.g.; a determination of whether the Custodian's handling of this OPRA request constitutes a knowing and willful violation of OPRA; if the Custodian is not found to have knowingly and willfully violated OPRA, a warning that future violations could result in such a penalty; and an award of prevailing party attorney's fees.

The Complainant does not agree to mediate this complaint.

October 28, 2008

Request for the Statement of Information ("SOI") sent to the Custodian.

November 4, 2008

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 12, 2008
- Custodian's response to the Complainant's OPRA request dated September 12, 2008
- Agreement between Township of West Milford and Fred Knapp, Esq.
- Records the Custodian asserts were provided to the Complainant on September 12, 2008

The Custodian certifies that she received the Complainant's OPRA request on September 12, 2008. The Custodian certifies that she provided the Complainant with a written response to his request on September 12, 2008. The Custodian certifies that the following records were provided to the Complainant on September 12, 2008:

- Agreement between Township of West Milford and Fred Knapp, Esq. dated January 9, 2008
- Resumes from the firm of Laufer, Knapp, Torzewski & Dalena, LLC

- Letter dated December 7, 2007 from Fred Knapp, Esq., to Township providing the following:
 - Disciplinary Authorization & Release
 - Business Entity Disclosure Certification
 - Certificate of Compliance with the Campaign Law
 - Certificate of Liability Insurance
 - Business Registration Certificate
 - Certificate of Employee Information Report

The Custodian certifies that the one (1) contract that exists was immediately provided to the Complainant. The Custodian also certifies that no records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

November 11, 2008

Complainant's Certification in response to the Custodian's SOI. The Complainant certifies that he has reviewed Item 9(c) of the Custodian's SOI in which the Custodian listed records allegedly provided to the Complainant in their entirety. The Complainant certifies that he did receive the agreement between the Township of West Milford and Fred Knapp, Esq. The Complainant certifies that he has attached a copy of the receipt he received from the Custodian's office on September 12, 2008 for payment of copying costs for the three (3) pages of said agreement. The Complainant certifies that he also received the Custodian's written response to his request dated September 12, 2008 via e-mail.

However, the Complainant certifies that he has not received the following records listed in Item 9(c) of the Custodian's SOI:

- Resumes from the firm of Laufer, Knapp, Torzewski & Dalena, LLC (5 pages)
- Letter dated December 7, 2007 from Fred Knapp, Esq., to Township providing the following:
 - Disciplinary Authorization & Release
 - Business Entity Disclosure Certification
 - Certificate of Compliance with the Campaign Law
 - Certificate of Liability Insurance
 - Business Registration Certificate
 - Certificate of Employee Information Report (17 pages total)

November 14, 2008

Letter from Complainant's Counsel to GRC. The Complainant's Counsel states that the Complainant maintains a receipt for three (3) pages of records provided to him in response to his OPRA request. Counsel states that the Complainant is not in possession of any receipt for the 27 additional pages the Custodian contends were also provided to the Complainant. Counsel states that in the Custodian's written response to the Complainant's OPRA request, she indicated that Mr. Knapp's contract was the only record responsive and does not mention any additional records to be provided to the Complainant. Additionally, Counsel states that in the Complainant's letter to the

Custodian dated September 14, 2008, the Complainant only acknowledged receipt of three (3) pages responsive to his OPRA request. Counsel contends that the Custodian's false certification contained in her SOI is further support of a knowing and willful violation of OPRA subject to civil penalties.

Additionally, Counsel contends that the Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide written notification of non-compliance with the Complainant's OPRA request because page three (3) of the Complainant's OPRA request form, attached to the Custodian's SOI and entitled "Public Records Request Response," has been left blank.

December 12, 2008

Custodian's Certification. The Custodian certifies that the Complainant hand delivered his OPRA request to the Clerk's Office on September 12, 2008 and the Custodian was unavailable at that time. The Custodian certifies that she confirmed with the Deputy Clerk that the Complainant was provided with a file that contained the following records:

- Agreement between the Township of West Milford and Fred Knapp, Esq. (3 pages)
- Resumes from the firm of Laufer, Knapp, Torzewski & Dalena, LLC (5 pages)
- Letter dated December 7, 2007 from Fred Knapp, Esq., to Township providing the following:
 - Disciplinary Authorization & Release
 - Business Entity Disclosure Certification
 - Certificate of Compliance with the Campaign Law
 - Certificate of Liability Insurance
 - Business Registration Certificate
 - Certificate of Employee Information Report (17 pages total)

The Custodian certifies that the Complainant chose to purchase the agreement between the Township of West Milford and Fred Knapp, Esq., and not the other records contained in the file. Additionally, the Custodian certifies that the one record that was not in the file provided to the Complainant was any contract between the Township and Fred Knapp, Esq., that authorized Knapp to defend the Township in the Passaic County Superior Court lawsuit with docket number L-1843-08, because no such record exists. The Custodian certifies that she could not have provided immediate access to said contract pursuant to N.J.S.A. 47:1A-5.e. because no contract exists. The Custodian certifies that she informed the Complainant that no contract existed in her letter dated September 12, 2008 and that this was confirmed by the Complainant in his letter dated September 14, 2008.

December 12, 2008

Deputy Clerk's Certification. The Deputy Clerk certifies that she received the Complainant's OPRA request via hand delivery on September 12, 2008. The Deputy Clerk certifies that she assisted the Complainant since the Custodian was at lunch. The Deputy Clerk certifies that she presented the Complainant with a file that contained the following records:

- Agreement between the Township of West Milford and Fred Knapp, Esq. (3 pages)
- Resumes from the firm of Laufer, Knapp, Torzewski & Dalena, LLC (5 pages)
- Letter dated December 7, 2007 from Fred Knapp, Esq., to Township providing the following:
 - Disciplinary Authorization & Release
 - Business Entity Disclosure Certification
 - Certificate of Compliance with the Campaign Law
 - Certificate of Liability Insurance
 - Business Registration Certificate
 - Certificate of Employee Information Report (17 pages total)

The Deputy Clerk certifies that the Complainant reviewed the file and only asked for a copy of the agreement between the Township of West Milford and Fred Knapp, Esq. The Deputy Clerk certifies that she provided the Complainant with a receipt for said copy.

January 14, 2009

Complainant's Certification. The Complainant certifies that he has reviewed both the Custodian and Deputy Clerk's certifications dated December 12, 2008. The Complainant certifies that he denies having been presented with the following records when he submitted his OPRA request on September 12, 2008:

- Resumes from the firm of Laufer, Knapp, Torzewski & Dalena, LLC (5 pages)
- Letter dated December 7, 2007 from Fred Knapp, Esq., to Township providing the following:
 - Disciplinary Authorization & Release
 - Business Entity Disclosure Certification
 - Certificate of Compliance with the Campaign Law
 - Certificate of Liability Insurance
 - Business Registration Certificate
 - Certificate of Employee Information Report (17 pages total)

January 21, 2009⁴

Letter from Complainant's Counsel to GRC. The Complainant's Counsel contends that the majority of the Custodian's certification dated December 12, 2008 deals with events that she was not present for and thus is of limited value as a sworn factual statement. Additionally, Counsel asserts that the records the Custodian asserts were presented or provided to the Complainant are not responsive to the Complainant's OPRA request.

⁴ Additional correspondence submitted by the parties; however, said correspondence is either not relevant to the adjudication of this complaint, or restates the facts/arguments already presented to the Council.
 Martin O'Shea v. Township of West Milford (Passaic), 2008-224 – Findings and Recommendations of the Executive Director

Analysis

Whether the Custodian properly responded to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-5.g.?

OPRA mandates that:

“[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added). N.J.S.A. 47:1A-5.e.

OPRA provides that:

“...If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5.g.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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 Deputy Clerk certified that she received the Complainant's OPRA request via hand delivery on September 12, 2008. The Complainant stated that he submitted his request at approximately 11:45 AM on said date. The Deputy Clerk certified that she immediately provided the Complainant with a copy of the agreement between the Township and Fred Knapp, Esq. However, the Complainant stated that he waited in the Clerk's office for over one (1) hour for the Custodian to return from lunch since the Deputy Clerk informed the Complainant that the Custodian would have to fulfill the remainder of the Complainant's OPRA request. The Complainant contends that upon the Custodian's return from lunch, she refused to speak to him and informed him through another Township employee that the Custodian was processing his request. The Custodian certified that she provided the Complainant with a written response via e-mail to his request on September 12, 2008, the same day the Complainant submitted his OPRA request. The Complainant stated that the time stamp on said e-mail was 6:07 PM.

OPRA mandates that immediate access ordinarily shall be granted to contracts pursuant to N.J.S.A. 47:1A-5.e. The Complainant asserts that the Custodian failed to

provide immediate access to his request for contracts and instead sent a message through another employee that she would process the Complainant's OPRA request.

Dictionary.com defines "immediate" as "occurring or accomplished without delay."⁵ However, OPRA's immediate access provision expressly states that immediate access shall *ordinarily* be granted to budgets. N.J.S.A. 47:1A-5.e. The use of the word "ordinarily" suggests that the legislature acknowledged that there would be certain circumstances in which budgets (as well as other immediate access records) could not be released immediately.

In order for the GRC to determine whether the Custodian properly responded to the Complainant's OPRA request under the immediate access provision, the GRC must closely examine the Complainant's OPRA request. Specifically, the Complainant sought access to:

- Contracts between the Township and Fred Knapp, Esq., that are referenced in Township resolutions 2008-033, 2008-056, 2008-129 and 2008-308.
- Any contract between the Township and Fred Knapp, Esq., that authorized Knapp to defend the Township in the Passaic County Superior Court lawsuit with the docket number L-1843-08.
- Any proposal to the Township from Fred Knapp, Esq., that included his regular hourly rate in contrast to his discounted municipal hourly rate.

The New Jersey Superior Court has ruled on the level of specificity required when submitting an OPRA request. Specifically, the New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.*" (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁶ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁷

⁵ Immediate. (n.d.). *Dictionary.com Unabridged*. Retrieved October 02, 2009, from Dictionary.com website: <http://dictionary.reference.com/browse/immediate>.

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁷ As stated in Bent, *supra*.

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)."

Moreover, in Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG, a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The Complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The Custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

"[p]ursuant to MAG, the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as 'to go or look through carefully in order to find something missing or lost.'^{18]} The word *research*, on the other hand, means 'a close and careful study to find new facts or information.'^{19]}"

In this instant complaint, the Complainant's request for contracts between the Township and Fred Knapp, Esq., that are referenced in Township resolutions 2008-033, 2008-056, 2008-129 and 2008-308 requires the Custodian to locate each resolution identified by the Complainant, determine which contract is referenced in each resolution, and then locate said contract(s). While the Council has not held that similar requests are invalid (see Paff v. Township of Springfield (Union), GRC Complaint No. 2008-77 (August 2009) in which the Council ordered the Custodian to disclose the letter proposal referred to by Resolution No. 2007-49), responding to said request does take time because of the many steps involved to locate the requested records.

However, regarding the Complainant's requests for any contract between the Township and Fred Knapp, Esq., that authorized Knapp to defend the Township in the Passaic County Superior Court lawsuit with the docket number L-1843-08, and any proposal to the Township from Fred Knapp, Esq., that included his regular hourly rate in contrast to his discounted municipal hourly rate, the records responsive are not easily

⁸ "Search." Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006.

⁹ "Research." Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd. Martin O'Shea v. Township of West Milford (Passaic), 2008-224 – Findings and Recommendations of the Executive Director

identifiable. In order to satisfy these requests, the Custodian would have to research each contract the Township had on file with Fred Knapp, Esq., and read the content of each contract to determine if said record is responsive to the Complainant's OPRA request. Such research is not required by a custodian in response to an OPRA request. However, the Custodian in this instant complaint chose to conduct said research and responded in writing to the Complainant's OPRA request on the same date she received said request.

Therefore, because Items no. 2-3 of the Complainant's OPRA request do not identify with reasonable clarity the records sought, and because a custodian is not required to conduct research in response to an OPRA request, said items of the Complainant's OPRA request are invalid pursuant to MAG, supra, Bent, supra, NJ Builders, supra, Schuler, supra, and Donato, supra. Additionally, because Items no. 2-3 of the Complainant's OPRA request required research to fulfill and the Custodian chose to conduct such research, the approximate 6½ hours between the time the Complainant submitted his OPRA request and the time the Custodian provided a written response to said request, an hour and a half of which the Custodian was at lunch, is not unreasonable, nor is such time a violation of N.J.S.A. 47:1A-5.e.

Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁰ The Complainant contends that the Custodian failed to provide him with notice of non-compliance as required by N.J.S.A. 47:1A-5.g., but rather sent an e-mail with a letter attached. The Complainant's Counsel contends that the Custodian failed to respond to the Complainant's OPRA request using the OPRA request form. In the Custodian's response letter, the Custodian indicated that the contract the Deputy Clerk provided to the Complainant was the only contract responsive to the Complainant's OPRA request and that no proposal exists responsive to the Complainant's request.

Therefore, because the Custodian provided the Complainant with a written response in which the Custodian indicated that the only record responsive to the Complainant's OPRA request had been provided to him earlier in the day and that there are no other records responsive to his OPRA request, the Custodian properly responded to said request pursuant to N.J.S.A. 47:1A-5.g., even though said response was not on the OPRA request form.

It should be noted that the Complainant and the Custodian dispute whether certain records were made available to the Complainant on September 12, 2008. Such dispute is not relevant to the adjudication of this Denial of Access Complaint because the records in said dispute were not specifically requested by the Complainant nor are they responsive to the Complainant's OPRA request.

¹⁰ It is the GRC's position that 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.

Whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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.

The Custodian in this complaint was not in the office at the time the Complainant submitted his OPRA request. According to the Complainant, the Custodian returned to the office approximately an hour and ten minutes later. Approximately six (6) hours after the Complainant submitted his OPRA request, the Custodian provided the Complainant with a written response in which the Custodian indicated that the only record responsive to the Complainant’s OPRA request had been provided to him earlier in the day and that no other records exist which are responsive to his OPRA request. The Custodian’s written response was proper pursuant to N.J.S.A. 47:1A-5.g. and not in violation of OPRA’s immediate access provision at N.J.S.A. 47:1A-5.e. because Items 2-3 of the Complainant’s OPRA request required research which the Custodian was not obligated to conduct, yet which the Custodian chose to do. Additionally, the Complainant’s Counsel contends that the Custodian’s false certification is support of a knowing and willful violation of OPRA; however, the records in dispute in the Custodian’s certification are not relevant to the adjudication of this complaint.

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

Therefore, because the Custodian did not violate OPRA at N.J.S.A. 47:1A-5.e. or N.J.S.A. 47:1A-5.g. and properly responded to the Complainant's OPRA request, it is concluded that 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.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable 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/she 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.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under OPRA, N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

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 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, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon 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 court in Mason, *supra*, at 76, held that “requestors 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).”

In this instant complaint, the Complainant sought the following relief from the Council: a declaration that the Custodian violated OPRA by failing to provide immediate access to the requested records pursuant to N.J.S.A. 47:1A-5.e.; a declaration that the Custodian violated OPRA by failing to provide notice of non-compliance pursuant to N.J.S.A. 47:1A-5.g.; a determination of whether the Custodian’s handling of this OPRA request constitutes a knowing and willful violation of OPRA; if the Custodian is not found to have knowingly and willfully violated OPRA, a warning that future violations could result in such a penalty; and an award of prevailing party attorney’s fees.

As previously stated, the Custodian did not violate OPRA by failing to provide immediate access to the requested records pursuant to N.J.S.A. 47:1A-5.e. Also, the Custodian did not violate OPRA by failing to provide notice of non-compliance pursuant to N.J.S.A. 47:1A-5.g. Further, the Custodian did not knowingly and willfully violate OPRA.

In Teeters, *supra*, the court held that the Complainant was a prevailing party because she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. In this instant complaint, the Custodian did not alter her behavior because of the filing of this Denial of Access Complaint. The Custodian certified that the Deputy Clerk provided the Complainant with the only contract responsive on the date the Complainant submitted his OPRA request. The Custodian also certified that on said date she provided the Complainant with a written response indicating that there are no additional records responsive to the Complainant’s OPRA request.

Therefore, because the Custodian’s behavior did not change as a result of this Denial of Access Complaint, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because Items no. 2-3 of the Complainant's OPRA request do not identify with reasonable clarity the records sought, and because a custodian is not required to conduct research in response to an OPRA request, said items of the Complainant's OPRA request are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), and Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
2. Because Items no. 2-3 of the Complainant's OPRA request require research to fulfill and the Custodian chose to conduct such research, the approximate 6½ hours between the time the Complainant submitted his OPRA request and the time the Custodian provided a written response to said request, an hour and a half of which the Custodian was at lunch, is not unreasonable, nor is such time a violation of N.J.S.A. 47:1A-5.e.
3. Because the Custodian provided the Complainant with a written response in which the Custodian indicated that the only record responsive to the Complainant's OPRA request had been provided to him earlier in the day and that there are no other records responsive to his OPRA request, the Custodian properly responded to said request pursuant to N.J.S.A. 47:1A-5.g., even though said response was not on the OPRA request form.
4. Because the Custodian did not violate OPRA at N.J.S.A. 47:1A-5.e. or N.J.S.A. 47:1A-5.g. and properly responded to the Complainant's OPRA request, it is concluded that 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.
5. Because the Custodian's behavior did not change as a result of this Denial of Access Complaint, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

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Executive Director

November 10, 2009