



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

May 27, 2010 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2008-225

v.

Township of Little Falls (Passaic)
Custodian of Record

At the May 27, 2010 public meeting, the Government Records Council ("Council") considered the May 20, 2010 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, accepts the Administrative Law Judge's Initial Decision dated April 13, 2010 in which the Judge approved the Stipulation of Settlement signed by the parties or their representatives and ordered the parties to comply with the settlement terms and determined that these proceedings be concluded.

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 27th Day of May, 2010

Robin Berg Tabakin, Chair
Government Records Council



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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 2, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 27, 2010 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2008-225

v.

**Township of Little Falls (Passaic)²
Custodian of Records**

Records Relevant to Complaint: All use of force reports on file with the Township of Little Falls and/or its Police Department pertaining to use of force incidents during 2007 and to the date of request.

Request Made: August 22, 2008

Response Made: September 8, 2008

Custodian: William Wilk

GRC Complaint Filed: October 6, 2008³

Background

December 22, 2009

Government Records Council's ("Council") Interim Order. At its December 22, 2009 public meeting, the Council considered the December 9, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian forwarded the requested records to the Complainant via e-mail as required by the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's November 18, 2009 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.g. by failing to specifically address the reason why the records responsive to the Complainant's OPRA request could not be provided by the preferred method of delivery, because the Custodian complied with the Council's

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

² Represented by Jeffrey J. Trapanese, Esq., of the Law Offices of Trapanese & Trapanese (Little Falls, NJ).

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

Interim Order dated November 18, 2009, 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. However, the Custodian's insufficient response appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. 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 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). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

December 29, 2009

Council's Interim Order distributed to the parties.

December 30, 2009

Complaint transmitted to the Office of Administrative Law.

April 13, 2010

Administrative Law Judge's ("ALJ") Initial Decision. The ALJ **FINDS** that:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with law.

As such, the ALJ **CONCLUDES** that "the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**."

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Administrative Law Judge's Initial Decision dated April 13, 2010 in which the Judge approved the Stipulation of Settlement signed by the parties or their representatives and ordered the parties to comply with the settlement terms and determined that these proceedings be concluded.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 20, 2010



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

INTERIM ORDER

December 22, 2009 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2008-225

v.

Township of Little Falls (Passaic)
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council ("Council") considered the December 9, 2009 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 Custodian forwarded the requested records to the Complainant via e-mail as required by the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's November 18, 2009 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.g. by failing to specifically address the reason why the records responsive to the Complainant's OPRA request could not be provided by the preferred method of delivery, because the Custodian complied with the Council's Interim Order dated November 18, 2009, 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. However, the Custodian's insufficient response appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual



causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. 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 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). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 22nd Day of December, 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: December 29, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 22, 2009 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2008-225

v.

**Township of Little Falls (Passaic)²
Custodian of Records**

Records Relevant to Complaint: All use of force reports on file with the Township of Little Falls and/or its Police Department pertaining to use of force incidents during 2007 and to the date of request.

Request Made: August 22, 2008

Response Made: September 8, 2008

Custodian: William Wilk

GRC Complaint Filed: October 6, 2008³

Background

November 18, 2009

Government Records Council's ("Council") Interim Order. At its November 18, 2009 public meeting, the 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, found that:

1. Because the Custodian failed to specifically address the reason why the records responsive to the Complainant's OPRA request could not be provided by the preferred method of delivery, even though the Custodian had the means to do so, the Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251(February 2008).
2. The Custodian shall disclose the requested records as e-mail attachments per the Complainant's preferred method of delivery.

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

² Represented by Jeffrey J. Trapanese, Esq., of the Law Offices of Trapanese & Trapanese (Little Falls, NJ).

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

3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁴, to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

November 20, 2009

Council's Interim Order distributed to the parties.

November 23, 2009

E-mail from the Custodian to the Complainant attaching the requested records. The Custodian states that pursuant to the Council's November 18, 2009 Interim Order, attached are the requested records.

November 24, 2009

Custodian's response to the Council's Interim Order. The Custodian certifies that pursuant to the Council's November 18, 2009 Interim Order, he sent the requested records to the Complainant via e-mail on November 23, 2009.

Analysis

Whether the Custodian complied with the Council's November 18, 2009 Interim Order?

The Council's November 18, 2009 Interim Order specifically directed the Custodian to disclose the requested records as e-mail attachments per the Complainant's preferred method of delivery. Said Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of said Order.

On November 23, 2009, the Custodian e-mailed the Complainant the requested records. The Custodian certified on November 24, 2009, or the second (2nd) business day following receipt of said Order, that the requested records were sent to the Complainant via e-mail.

Therefore, because the Custodian forwarded the requested records to the Complainant via e-mail as required by the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
Martin O'Shea v. Township of Little Falls (Passaic), 2008-225 – Supplemental Findings and Recommendations of the Executive Director 2

4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's November 18, 2009 Interim Order.

Whether the Custodian's insufficient response rises 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.

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

Although the Custodian violated N.J.S.A. 47:1A-5.g. by failing to specifically address the reason why the records responsive to the Complainant's OPRA request could not be provided by the preferred method of delivery, because the Custodian complied with the Council's Interim Orders dated November 18, 2009, 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. However, the Custodian's insufficient response appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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 the Open Public Records Act (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 the instant complaint, the Complainant requested that the records responsive to his August 22, 2008 OPRA request be provided via e-mail. The Custodian stated in subsequent e-mails that the records were not maintained electronically but existed only in hard copy and would be provided after the Complainant paid the copying costs. The Custodian then offered to send the requested records via facsimile; however, the Custodian did not advise the Complainant whether the records could be scanned. The Complainant filed a Denial of Access Complaint on October 6, 2008. In the Denial of Access Complaint, the Complainant’s Counsel requested that the GRC order the Custodian to either provide the requested records in the medium requested or to specifically address the Complainant’s preference for delivery of the requested records as e-mail attachments.

In its November 18, 2009 Interim Order, the GRC determined that the Custodian’s response was insufficient because it failed to specifically address the reason why the requested records could not be provided to the Complainant via e-mail. Further, the GRC ordered the Custodian to disclose the requested records as e-mail attachments per the Complainant’s preferred method of delivery. The Custodian provided the records to the Complainant via e-mail on November 23, 2009 and subsequently provided certified confirmation in compliance with the Council’s November 18, 2009 Interim Order on November 24, 2009.

Therefore, pursuant to Teeters, *supra*, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. 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 pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian forwarded the requested records to the Complainant via e-mail as required by the Council’s Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5)

business days of receiving the Council's Interim Order, the Custodian has complied with the Council's November 18, 2009 Interim Order.

2. Although the Custodian violated N.J.S.A. 47:1A-5.g. by failing to specifically address the reason why the records responsive to the Complainant's OPRA request could not be provided by the preferred method of delivery, because the Custodian complied with the Council's Interim Order dated November 18, 2009, 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. However, the Custodian's insufficient response appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. 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 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). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 9, 2009



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

INTERIM ORDER

November 18, 2009 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2008-225

v.

Township of Little Falls (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 the Custodian failed to specifically address the reason why the records responsive to the Complainant's OPRA request could not be provided by the preferred method of delivery, even though the Custodian had the means to do so, the Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251(February 2008).
2. The Custodian shall disclose the requested records as e-mail attachments per the Complainant's preferred method of delivery.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 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 20, 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. 2008-225

v.

**Township of Little Falls (Passaic)²
Custodian of Records**

Records Relevant to Complaint: All use of force reports on file with the Township of Little Falls and/or its Police Department pertaining to use of force incidents during 2007 and to the date of request.

Request Made: August 22, 2008

Response Made: September 8, 2008

Custodian: William Wilk

GRC Complaint Filed: October 6, 2008³

Background

August 22, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA and specifies that he prefers to receive the records responsive as an attachment to e-mail.⁴

September 2, 2008

Mr. Robert Scalera's ("Mr. Scalera"), Township of Little Falls Police Department Records Clerk, response to the OPRA request. Mr. Scalera, on behalf of the Custodian, responds in writing on the sixth (6th) business day after receipt of the Complainant's OPRA request, stating that the Complainant's OPRA request for copies of the requested reports has been completed and that the cost therefor is \$17.75.

September 8, 2008

E-mail from the Custodian to the Complainant. The Custodian states that the requested records are not maintained in electronic format but are maintained in hard copy. The Custodian states that he has made copies of the requested records and that the cost of such copies is \$17.75. The Custodian further states that copies of the requested records will be made available to the Complainant upon payment of the copying fees.

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

² Represented by Jeffrey J. Trapanese, Esq., of the Law Offices of Trapanese & Trapanese (Little Falls, NJ).

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

⁴ This letter was attached to an official Township of Little Falls OPRA request form.

September 8, 2008

E-mail from the Complainant to the Custodian. The Complainant asks whether the Custodian is unable or unwilling to scan the requested records and attach them to an e-mail. The Complainant states that if that is the case, he would be willing to accept the requested records via facsimile as an alternative.

September 8, 2008

E-mail from the Custodian to the Complainant. The Custodian states that he is willing to fax the requested records to the Complainant upon payment of the copying fee.

September 8, 2008

E-mail from the Complainant to the Custodian. The Complainant reiterates his preference to receive the requested records via e-mail and again asks whether the Custodian is unable or unwilling to scan the requested records and attach them to an e-mail.

September 8, 2008

E-mail from the Custodian to the Complainant. The Custodian confirms that he will not scan and attach the requested records to an e-mail. The Custodian reiterates that he will fax the requested records to the Complainant upon receipt of the copying fees because copies of the records responsive have already been made.

September 8, 2008

E-mail from the Complainant to the Custodian. The Complainant asks if the Custodian has scanning capability.⁵

October 6, 2008

Denial of Access Complaint filed with the GRC with the following attachments:

- Complainant's OPRA request dated August 22, 2008.
- Six (6) e-mails between the Complainant and the Custodian dated September 8, 2008.

The Complainant states that he submitted an OPRA request via fax to the Custodian on August 22, 2008. The Complainant further states that sometime during the week of August 31, 2008, the Custodian telephoned the Complainant and informed him that copies of the requested records were available for pick-up. The Complainant also states that during the conversation, the Complainant reminded the Custodian that the preferred method of delivery of the requested records was by e-mail attachment. The Complainant states that the Custodian informed the Complainant that research would be needed to determine if it was possible to provide the records via e-mail attachment.

The Complainant states that he received an e-mail from the Custodian on September 8, 2008 in which the Custodian indicated that the requested records were not available by e-mail attachments, that hard copies had been made and were available upon payment of copying fees of \$17.75. The Complainant further states that he responded to

⁵The Custodian did not respond to the Complainant's e-mail.
Martin O'Shea v. Township of Little Falls (Passaic), 2008-225 – Findings and Recommendations of the Executive Director

the Custodian on the same day, stating that because the Custodian could not provide the records as an e-mail attachment, the Complainant would accept them by fax. The Complainant also states that the Custodian replied by e-mail on September 8, 2008, indicating that when payment of the copying fees is received the Custodian will provide the requested records by fax. The Complainant further states that he e-mailed the Custodian on the same day, asking the Custodian to confirm his refusal to scan and attach the requested records to an e-mail. The Complainant also states that the Custodian responded, confirming that the Custodian would not scan and e-mail the requested records and reiterating that hard copies had already been made and would be provided via fax upon payment of the copying fees. The Complainant finally states that he responded via e-mail to the Custodian asking whether the Custodian had the capability to scan documents, but that the Custodian did not respond.

The Complainant asserts in legal argument that the Custodian specifically failed to address the Complainant's preference for receiving the requested records via e-mail and that the Custodian's response was therefore insufficient pursuant to N.J.S.A. 47:1A-5.g. and the Council's decision in O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (February 2008). The Complainant also contends that the Custodian failed to respond to the Complainant's inquiry regarding scanning capability.

The Complainant also contends that the Custodian took it upon himself to make hard copies of the requested records and to assess a copying charge of \$17.75. The Complainant further contends that the Custodian failed to calculate the appropriate costs of faxing the requested records. The Complainant asserts that his OPRA request did not contemplate the receipt of hard copies of the requested records and, furthermore, that the Complainant had not agreed to accept the requested records in hard copy. The Complainant contends that the Custodian has therefore violated N.J.S.A. 47:1A-5.b.

The Complainant requests the following relief:

1. A determination that the Custodian violated OPRA by failing to specifically address the Complainant's delivery preference and that the Custodian's response was therefore insufficient pursuant to N.J.S.A. 47:1A-5.g. and the Council's decision in O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (February 2008);
2. A determination ordering the Custodian to either provide the requested records in the medium requested or to specifically address the Complainant's preference for delivery of the requested records as e-mail attachments;
3. A determination that the Custodian violated OPRA by failing to properly calculate the costs of providing the requested records via fax and failing to advise the Complainant of such costs pursuant to N.J.S.A. 47:1A-5.b.;
4. A determination ordering the Custodian to calculate the costs of providing the requested records via fax and to advise the Complainant of those costs; and
5. A determination finding that the Complainant is a prevailing party in this matter and is entitled to prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6.

Finally, the Complainant's Counsel states that the Complainant declines mediation.

October 22, 2008

Letter from the Custodian's Counsel to the Complainant's Counsel. The Custodian's Counsel confirms a telephone conversation of the same day in which the Complainant rejected the Custodian's offer to supply the requested records without charge via facsimile or US mail.

October 28, 2008

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

November 3, 2008

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated August 22, 2008 (with attachments).
- Letter from Mr. Scalera, Township of Little Falls Police Department Records Clerk, to the Complainant dated September 2, 2008.
- Letter from Custodian's Counsel to Complainant's Counsel dated October 22, 2008.

The Custodian certifies that his search for the requested records included the compilation of the requested records by the Police Department Records Clerk on September 2, 2008. The Custodian further certifies that the requested records were duplicated and made available to the Complainant on September 2, 2008. The Custodian also certifies that the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM") is not applicable to the records requested in this complaint. However, the Custodian certifies that Use of Force Reports are required to be maintained for a period of five (5) years

In a legal argument attached to the SOI, the Custodian's Counsel restates the facts of the instant matter. Counsel avers that the Complainant submitted an OPRA request to the Custodian via fax on August 22, 2008; the Complainant indicated his preference that the records be produced as an e-mail attachment. Counsel further avers that because all of the Use of Force Reports were maintained in the Township of Little Falls Police Department, the Complainant's OPRA request was forwarded to Mr. Scalera for investigation and response. Counsel states that Mr. Scalera advised the Custodian that the requested records were available but were not maintained in electronic format. Counsel states that Mr. Scalera reviewed each Little Falls Police Department Incident File in order to compile the requested records. Counsel further states that Mr. Scalera notified the Complainant in writing on September 2, 2008 that the records responsive to the Complainant's OPRA request have been prepared for a copying cost of \$17.75.

Counsel states that the Custodian sent an e-mail to the Complainant dated September 8, 2008, indicating that the requested records were not maintained electronically but were maintain in hard, i.e., paper, form. Further, Counsel states that the Complainant responded via e-mail on the same day, agreeing to accept the requested records via facsimile. Counsel states that the Custodian responded by e-mail later that day indicating that the requested records would be sent via fax upon receipt of payment of the copying costs. Counsel contends that the Complainant did not thereafter respond

to the Custodian's request for payment of the copying fees.⁶ Counsel asserts that the Complainant then began to demand that the records be scanned and attached to an e-mail. Counsel further asserts that no further communications were received from the Complainant until the filing of the Denial of Access complaint in this matter.

Counsel argues that the Custodian clearly informed the Complainant that the requested records were not maintained in the preferred medium, i.e., electronic. Counsel contends that the Custodian agreed to supply the requested records in another "meaningful medium"; i.e., fax. Counsel asserts that although the Complainant originally agreed to accept the requested records via facsimile, the Complainant failed to pay the requisite copying cost as prescribed and calculated pursuant to N.J.S.A. 47:1A-5.b.

Counsel contends that the copying costs were incurred because the requested records were maintained in hard paper format throughout the various incident files maintained by the Little Falls Police Department. Counsel argues that in order to compile those records into a cohesive set of records that could be faxed to the Complainant, it was necessary to duplicate the requested Use of Force forms from each of the incident files. Counsel further argues that the Custodian did not seek to impose a special service charge as authorized by N.J.S.A. 47:1A-5.d.; instead, the Custodian merely requested copying fees in accordance with N.J.S.A. 47:1A-5.b.

Counsel asserts that the Complainant's reliance on N.J.S.A. 47:1A-5.g. is misplaced because the Custodian was able to comply with the request for access. Counsel notes that pursuant to the e-mail exchange between the Complainant and the Custodian dated September 8, 2008, the Complainant agreed to accept the records via facsimile; however, because the Complainant subsequently refused to pay the copying costs, the requested records were never provided.

Counsel also asserts that the Custodian subsequently offered on October 22, 2008 to provide the requested records to the Complainant without charge via facsimile or U.S. mail, which the Complainant rejected.

Counsel asserts that the Complainant's reliance upon O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (February 2008) is misplaced because in that matter, the complainant identified two (2) acceptable methods of delivery and requested the custodian to utilize whichever method cost less. Counsel asserts that the GRC held that the Custodian was not required to convert the requested records to one of the two media in order to respond to the request, but was required to explain why one of the two methods requested was not available.

Counsel distinguishes the GRC's holding in Fredon, *supra*, from the instant matter, wherein the Complainant merely indicated that he "preferred" to receive the requested records as an attachment to an e-mail. Counsel contends that this was a preference, not a requirement. Counsel noted that in the e-mail communications between the Complainant and the Custodian on September 8, 2008, the Custodian clearly stated that the requested records were not maintained in electronic format. Counsel further

⁶ Counsel notes that the Complainant never challenged or objected to the amount of the copying fees, nor did the Complainant otherwise indicate that payment would not be forthcoming.
Martin O'Shea v. Township of Little Falls (Passaic), 2008-225 – Findings and Recommendations of the Executive Director

notes that the Complainant agreed to accept the requested records via facsimile. Counsel asserts that it is only because the Complainant refused to pay the requisite copying fees that the Complainant has not yet received the requested records.

Counsel contends that the Custodian did not violate OPRA because the requested records were duplicated and made available to the Complainant in a meaningful medium as permitted by N.J.S.A. 47:1A-5.d. and, moreover, in a medium in which the Complainant agreed to accept delivery of the requested records. Counsel maintains that the fact that the Complainant has not received the requested records is due to his own failure and/or refusal to comply with OPRA by paying the requisite copying costs in accordance with N.J.S.A. 47:1A-5.b. Counsel requests that the Denial of Access Complaint be dismissed with prejudice.

Additionally, Counsel argues that copying costs were appropriately charged in the instant matter. Counsel asserts that the records comprising the response to the Complainant's OPRA request encompassed forty-one (41) pages. Counsel further asserts that the cost of copying such records was calculated in accordance with N.J.S.A. 47:1A-5.b. as follows:

Pages 1-10 @ \$0.75	=	\$7.50
Pages 11-20 @ \$0.50	=	\$5.00
Pages 21-41 @ \$0.25	=	<u>\$5.25</u>
Total		\$17.75

Counsel contends that the need for the Custodian to have the requested records copied was clearly articulated in writing on September 8, 2008: the records are not maintained in electronic format but are instead maintained in hard copy format, and they are contained within individual incident files maintained by the Little Falls Police Department. Counsel further contends that in order to compile those records into a cohesive set of records that could be faxed to the Complainant it was necessary to duplicate the requested records from each of the incident files. Counsel asserts that the Custodian did not seek to impose a special charge pursuant to N.J.S.A. 47:1A-5.d.; instead, the custodian merely requested copying fees calculated in accordance with N.J.S.A. 47:1A-5.b. Counsel contends that the Custodian did not violate OPRA in so doing and requests that the Denial of Access Complaint be dismissed with prejudice.

November 10, 2008

The Complainant Counsel's response to the Custodian's SOI. Counsel asserts that the Custodian's denial of access is unlawful because the Custodian unilaterally decided to provide the Complainant with hard copies of the requested records in spite of the Complainant's express request for the records in another medium.

Counsel contends that Mr. Scalera, acting on behalf of the Custodian, informed the Complainant by letter dated September 2, 2008 that copies of the requested records had been made and that the cost of those copies was \$17.75. Counsel notes that Complainant's preference for the records to be provided as e-mail attachments is not addressed in Mr. Scalera's letter. Counsel contends that the Custodian did not address the issue of method of delivery until he spoke with the Complainant via telephone on

August 31, 2008. Counsel argues that only after said conversation did the Custodian, on October 8, 2008, offer the explanation that the records were not available as an e-mail attachment. Further, Counsel argues that the Custodian's reliance on the e-mail exchange is misplaced because the Complainant's request for method of delivery should have been addressed in the initial response pursuant to N.J.S.A. 47:1A-5.g. and Fredon, *supra*.

Counsel argues that the Custodian would never have addressed the issue of method of delivery if the Complainant had not raised the issue with the Custodian after receiving Mr. Scalera's letter dated September 2, 2008. Counsel argues that the subsequent exchange of e-mails on October 8, 2008 shows the Custodian's failure to provide an adequate response to the Complainant's inquiries regarding method of delivery and should be deemed invalid by the Council.

Additionally, Counsel asserts that the Custodian puts forth several arguments which are irrelevant to the instant complaint. Counsel contends that the Custodian's assertions regarding preference versus requirement is a matter of semantics and should be rejected by the Council. Further, Counsel argues that the Custodian's assertion that he complied with OPRA pursuant to N.J.S.A. 47:1A-5.g. is erroneous. Counsel asserts that the Custodian did not comply with the Complainant's request to have the records sent via e-mail, rather the Custodian unilaterally made copies and assessed a copying cost to the Complainant without any other options. Counsel asserts that the Complainant has still not received an answer as to whether the Custodian had scanning capability. Counsel asserts that based on the above, the Custodian has failed to fulfill his obligation under N.J.S.A. 47:1A-5.g.

Counsel contends that the Custodian notes in the SOI that the requested records were offered to the Complainant at no cost; an offer the Complainant rejected because he was apparently no longer interested in obtaining the records responsive. Counsel contends that the Complainant is indeed interested in receiving the records, however, the Custodian's offer of the records at no charge was made as an offer of settlement in response to the Denial of Access Complaint. Counsel asserts that the Complainant rejected the offer in order to reject the Custodian's position that his responsibilities under OPRA are flexible enough to meet the convenience of the Custodian.

Counsel avers that the Complainant in the instant matter did agree to accept the records responsive via fax; however, the Custodian insisted that the Complainant pay \$17.75 prior to the records being faxed to the Complainant. Counsel contends that this fee, which the Custodian now alleges was levied for duplication costs needed to compile the records because they were stored individually, coincides with the fee presented to the Complainant in Mr. Scalera's letter dated September 2, 2008. Counsel argues that it is obvious that the Custodian's reasoning for charging a copy cost for compiling records prior to sending via facsimile was a product of the filing of the instant complaint.

Counsel asserts that even assuming the Custodian's argument is accurate, the charge to prepare the records would not fall under N.J.S.A. 47:1A-5.b. (which governs actual cost) but under N.J.S.A. 47:1A-5.d. authorizing a special service charge for requests "requiring a substantial amount of manipulation." Counsel contends that the

Custodian has failed to offer any lawful basis for a special service charge and further failed to provide a basis for the costs entailed to provide records via facsimile.

Finally, Counsel asserts that the Custodian has failed to perform his duties within the provisions set forth in OPRA.⁷

October 16, 2009

E-mail from the GRC to the Custodian. The GRC states that after reviewing the evidence of record, the GRC has additional questions. The GRC requests that the Custodian certify to the following:

1. Whether your office has the capability of scanning documents?
2. Whether Mr. Scalera was responding on your behalf in a letter to the Complainant dated September 2, 2008?

The GRC requests that the Custodian provide the requested legal certification by close of business on October 20, 2009.

October 20, 2009

Custodian's legal certification. The Custodian certifies that the Township has the capability to scan documents electronically; however, the Custodian did not scan the records because the Complainant agreed to accept the requested records via facsimile.

Additionally, the Custodian certifies that the information requested by the Complainant is maintained by the Township of Little Falls Division of Police. The Custodian certifies that he forwarded the OPRA request to Mr. Scalera, who responded in writing on the Custodian's behalf via letter dated September 2, 2008.

Analysis

Whether the Custodian's response was insufficient under OPRA?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

⁷ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
Martin O'Shea v. Township of Little Falls (Passaic), 2008-225 – Findings and Recommendations of the Executive Director

OPRA also provides that:

“[i]f 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. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” 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.

N.J.S.A. 47:1A-5.g. states that if a Custodian is “unable to comply with a request for access, then the Custodian shall indicate the specific basis” for noncompliance.

As explained in O’Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251(February 2008):

“N.J.S.A. 47:1A-5.g. states that if a Custodian is “unable to comply with a request for access, then the Custodian shall indicate the specific basis” for noncompliance. In this complaint, the Complainant elaborated in his request that a preference of e-mailing the requested records over having to pay copying costs would be ideal. According to language of N.J.S.A. 47:1A-5.g., the Custodian was given two ways to comply and should have, therefore, responded acknowledging the Complainant’s preferences with a sufficient response for each.”

In the instant complaint, the Complainant specified that the requested records be provided via e-mail. Mr. Scalera responded in writing on behalf of the Custodian on September 2, 2008 stating that the records responsive would be provided at a copying cost of \$17.75, but did not address why the records would not be provided via e-mail.

However, in a series of e-mails on September 8, 2008, the Custodian stated that the records were not maintained electronically, but existed only in hard copy and would be provided after the Complainant paid the copying costs. The Custodian then offered to send the requested records via facsimile, but only after the Complainant paid the copying costs. The Complainant asked whether the Custodian was unable to scan the requested records and suggested sending the records via facsimile as an alternate means. The Custodian in turn agreed to send the records via facsimile upon payment of the copying

costs and advised that the records would not be scanned. The Complainant reiterated his preference for the records to be e-mailed and asked whether the Custodian could scan the records, but the Custodian failed to respond.

Subsequent to the GRC's October 16, 2009 request for a Custodian certification, the Custodian legally certified on October 22, 2009 that the Township has the ability to scan the records but did not do so because the Complainant agreed to receive said records via facsimile.

The Council's decision in Fredon, *supra*, applies to the facts of the instant complaint. Mr. Scalera's initial response dated September 2, 2008 did not address the Complainant's preferred method of delivery. Further, the Custodian's initial responses did not expressly state whether the Township had the ability to scan the records and provide them via the Complainant's preferred method of delivery. The Complainant agreed to receive the records via facsimile only in the event that scanning was not feasible; however, the Custodian failed to provide an explicit reason as to why the records would not be scanned. Both Mr. Scalera's and the Custodian's responses in this complaint mirror the Custodian's response in Fredon, *supra*, because their responses failed to specifically address why the records could not be produced by the preferred method of delivery.

Therefore, because the Custodian failed to specifically address the reason why the records responsive to the Complainant's OPRA request could not be provided by the preferred method of delivery, even though the Custodian had the means to do so, the Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Fredon, *supra*. The Custodian shall disclose the requested records as e-mail attachments per the Complainant's preferred method of delivery.

Further, the GRC declines to order the Custodian to calculate the actual cost of providing records via facsimile because the Custodian has the means to provide the requested records via e-mail which presents no cost to the Custodian.

Finally, the Custodian's Counsel argued in the SOI that the Custodian had explained to the Complainant that the records were not maintained in the medium requested. Counsel contended that the Custodian attempted to provide the requested records in "another meaningful medium." N.J.S.A. 47:1A-5.d.

It is evident that based on the Complainant's request to receive the records via e-mail, the records requested must be maintained in a medium which allows for the preferred method of delivery, *i.e.*, records must be maintained or converted to electronic format to be e-mailed.⁸ Since N.J.S.A. 47:1A-5.d. further states that if the custodian does not maintain the records in the medium requested, the custodian must convert the records to said medium, it is inherent that the records requested must be maintained or converted to a medium which allows for the preferred method of delivery. Thus, in this complaint, since the Custodian did not maintain any of the records responsive in an electronic medium, he is required to convert the records in order to provide them

⁸ Custodial agencies must have scanning capabilities to convert records maintained only in paper format to deliver them electronically via e-mail.

electronically via e-mail. Therefore, the Custodian must use his scanning capabilities to convert the records to an electronic format for e-mail transmission to the Complainant.

Whether the Custodian's insufficient response rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to specifically address the reason why the records responsive to the Complainant's OPRA request could not be provided by the preferred method of delivery, even though the Custodian had the means to do so, the Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251(February 2008).
2. The Custodian shall disclose the requested records as e-mail attachments per the Complainant's preferred method of delivery.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁹, to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
Martin O'Shea v. Township of Little Falls (Passaic), 2008-225 – Findings and Recommendations of the Executive Director

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 10, 2009