



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

Jesse Wolosky
Complainant

Complaint No. 2008-236

v.

Township of Sparta (Sussex)
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 amended findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian provided two (2) written responses to the Complainant’s OPRA request in which the Custodian indicated that she needed time beyond the statutorily mandated seven (7) business days to fulfill the Complainant’s OPRA request, said responses are inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because they fail to provide an anticipated deadline date upon which the requested records will be provided.
2. Because the Custodian denied access to eight (8) sets of meeting minutes and three (3) memos that do not exist in her written response dated October 2, 2008, the sixth (6th) business day following receipt of the Complainant’s OPRA request, said portion of the Custodian’s October 2, 2008 response was proper pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. Because the Custodian provided the Complainant with a subsequent response on the seventh (7th) business day in which the Custodian provided a date certain as to when she would either make the records available or provide a further response to the Complainant’s OPRA request, even though such extension was initiated by the Complainant’s Counsel, the Custodian’s written response dated October 3, 2008 properly requests an extension of time pursuant to N.J.S.A. 47:1A-5.i. As such, said response negates the Custodian’s prior insufficient responses dated September 24, 2008 and



October 2, 2008 pursuant to O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008) (holding that although the Custodian's initial written response to the Complainant's OPRA request did not make the requested records available in the medium requested, because the Custodian made the requested records available to the Complainant in the medium requested in her subsequent written response to the Complainant, which was within the statutorily mandated seven (7) business day time period to respond pursuant to N.J.S.A. 47:1A-5.i., the Custodian did not violate OPRA).

4. Because the Custodian provided the Complainant with a written response within the extended deadline, and provided the Complainant with another date certain on which the Custodian would make the requested records available to the Complainant, the Custodian's written response dated October 10, 2008 is proper pursuant to N.J.S.A. 47:1A-5.i. Additionally, the Custodian made the requested records available to the Complainant on October 17, 2008, the extended deadline date.
5. Although the Custodian's initial written responses to the Complainant's OPRA request were insufficient because the Custodian failed to provide an anticipated deadline date on which she would make the requested records available to the Complainant, the Custodian ultimately provided such a response on the seventh (7th) business day following receipt of the Complainant's request which negates her prior insufficient responses. Additionally, the Custodian properly provided subsequent responses to the Complainant by responding within the extended deadline dates and either providing another date certain on which she would further respond or ultimately releasing the requested records. Therefore, the Custodian has not unlawfully delayed access to the requested records.
6. Although the Custodian's initial written responses to the Complainant's OPRA request were insufficient, the Custodian ultimately did not violate OPRA and provided the requested records to the Complainant by the extended deadline date of October 17, 2008. Therefore, 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.
7. 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 24, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-236

v.

**Township of Sparta (Sussex)²
Custodian of Records**

Records Relevant to Complaint:

1. Executive session meeting minutes dated:
 - July 10, 2007
 - September 11, 2007
 - November 13, 2007
 - November 30, 2007
 - December 1, 2007
 - December 27, 2007
 - March 11, 2008
 - May 27, 2008
 - June 26, 2008
 - July 15, 2008
 - July 24, 2008
 - August 5, 2008
 - August 21, 2008
 - September 9, 2008
 - September 23, 2008
2. Memos from Henry Underhill to the Township Council dated:
 - August 1, 2008
 - August 8, 2008
 - August 15, 2008
 - August 22, 2008
 - August 29, 2008
 - September 5, 2008
 - September 12, 2008
 - September 19, 2008
 - September 26, 2008³

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Richard Stein, Esq., of Laddey, Clark & Ryan, LLP (Sparta, NJ).

³ The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

Request Made: September 24, 2008

Responses Made: September 24, 2008, October 2, 2008, October 3, 2008, October 10, 2008 and October 17, 2008

Custodian: Miriam Tower

GRC Complaint Filed: October 17, 2008⁴

Background

September 24, 2008

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

September 24, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same business day she receives such request. The Custodian states that she needs more time to comply with the Complainant's request due to the large volume of records requested. The Custodian states that she will notify the Complainant after she meets with the Department heads regarding how much time it will take to fulfill said request.

September 26, 2008

E-mail from Complainant's Counsel to Custodian. The Complainant's Counsel states that while OPRA allows for custodians to request additional time to fulfill a voluminous request, such extension cannot be open-ended. Counsel states that he expects the Custodian to advise the Complainant in writing within seven (7) business days (October 3, 2008) of a date certain by which the records requested will be available.

October 2, 2008

Letter from Custodian to Complainant on the sixth (6th) business day following the Custodian's receipt of said request. The Custodian states that no executive sessions were held on the following dates:

- July 10, 2007
- November 13, 2007
- November 30, 2007
- December 1, 2007
- December 27, 2007
- March 11, 2008
- May 27, 2008
- August 5, 2008

Additionally, the Custodian states that no memos exist from Henry Underhill to the Township Council for the following dates:

- August 22, 2008
- September 5, 2008

⁴The GRC received the Denial of Access Complaint on said date.

- September 19, 2008

Further, the Custodian states that the remaining records are under attorney review for possible redactions. The Custodian states that she will contact the Complainant when the records are available.

October 2, 2008

Letter from Complainant to Custodian. The Complainant states that he is still waiting to receive the following requested records:

- Executive session minutes dated September 11, 2007
- Executive session minutes dated July 15, 2008
- Executive session minutes dated July 24, 2008
- Executive session minutes dated August 15, 2008
- Executive session minutes dated September 9, 2008
- Executive session minutes dated September 23, 2008
- Memos from Henry Underhill to Township Council dated August 1, 2008
- Memos from Henry Underhill to Township Council dated August 8, 2008
- Memos from Henry Underhill to Township Council dated August 15, 2008
- Memos from Henry Underhill to Township Council dated August 29, 2008
- Memos from Henry Underhill to Township Council dated September 12, 2008
- Memos from Henry Underhill to Township Council dated September 26, 2008

October 3, 2008

E-mail from Complainant's Counsel to Custodian. The Complainant's Counsel asserts that OPRA requires custodians to request extensions of time and seek the requestor's consent. Counsel states that the Custodian has not provided a specific date on which she will provide the requested records to the Complainant. Counsel requests that the Custodian provide the records that are being reviewed for potential redactions by the close of business on October 10, 2008.

October 3, 2008

Letter from Custodian to Complainant's Counsel on the seventh (7th) business day following receipt of the Complainant's OPRA request. The Custodian states that the executive session minutes and memos requested must be reviewed by the Township Attorney for potential redactions such as attorney-client privileged information, personnel information, or advisory, consultative or deliberative material. The Custodian states that she is unaware of how long it will take to review and redact said records; however, the Custodian states that if such review has not been completed by October 10, 2008, she will provide the Complainant with a specific date on which the records will be ready.

October 6, 2008

Letter from Complainant to Custodian. The Complainant states that he is still waiting to receive the following requested records:

- Executive session minutes dated September 11, 2007
- Executive session minutes dated July 15, 2008
- Executive session minutes dated July 24, 2008

- Executive session minutes dated August 15, 2008
- Executive session minutes dated September 9, 2008
- Executive session minutes dated September 23, 2008
- Memos from Henry Underhill to Township Council dated August 1, 2008
- Memos from Henry Underhill to Township Council dated August 8, 2008
- Memos from Henry Underhill to Township Council dated August 15, 2008
- Memos from Henry Underhill to Township Council dated August 29, 2008
- Memos from Henry Underhill to Township Council dated September 12, 2008
- Memos from Henry Underhill to Township Council dated September 26, 2008.

October 7, 2008

Letter from Custodian to Complainant. The Custodian states that the Complainant's OPRA request is still under attorney review.

October 10, 2008

Letter from Custodian to Complainant's Counsel on the last day of the Custodian's extended deadline. The Custodian states that the Township Attorney is on vacation and will return on October 14, 2008. The Custodian states that she will try to have the records available by October 17, 2008.

October 17, 2008

Letter from Custodian to Complainant on the last day of the Custodian's extended deadline. The Custodian states that she is faxing the 102 pages responsive to the Complainant's OPRA request, which is now complete.

October 17, 2008

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

- Complainant's OPRA request dated September 24, 2008
- Custodian's response to the Complainant's OPRA request dated September 24, 2008
- E-mail from Complainant's Counsel to Custodian dated September 26, 2008
- Letter from Custodian to Complainant dated October 2, 2008
- Letter from Complainant to Custodian dated October 2, 2008
- E-mail from Complainant's Counsel to Custodian dated October 3, 2008
- Letter from Custodian to Complainant's Counsel dated October 3, 2008
- Letter from Complainant to Custodian dated October 6, 2008
- Letter from Custodian to Complainant's Counsel dated October 10, 2008

The Complainant states that he submitted his OPRA request on September 24, 2008. The Complainant states that the Custodian provided a written response to his request on the same date in which the Custodian stated that she needs more time to fulfill the Complainant's request due to the large volume of records requested. The Complainant states that the Custodian failed to provide a specific date on which she would provide the requested records.

The Complainant states that his attorney e-mailed the Custodian on September 26, 2008 and advised that while OPRA allows custodians to request additional time to fulfill an OPRA request when the request is voluminous, OPRA does not allow open-ended extensions. The Complainant states that his attorney requested a written response from the Custodian within seven (7) business days from the date of the Complainant's OPRA request.

The Complainant also states that the Custodian provided another written response on October 2, 2008 in which she indicated that no executive session minutes existed for eight (8) of the dates requested and that the remaining records were under attorney review for possible redactions. The Complainant states that the Custodian did not request permission for an extension of time, nor did she provide a specific date on which she would provide the requested records.

Additionally, the Complainant states that his attorney contacted the Custodian via e-mail on October 3, 2008 and advised that under OPRA, a custodian is required to set a deadline for extensions of time beyond the statutorily mandated seven (7) business day response time, and without such a deadline, the Complainant requests access to the requested records by October 10, 2008. The Complainant states that the Custodian responded on October 3, 2008 and stated that the records would be available by October 10, 2008 but that if they were not available, she would advise when said records would become available.

Further, the Complainant states that the Custodian contacted the Complainant's Counsel on October 10, 2008 in which the Custodian indicated that the Township Attorney is on vacation and will return on October 14, 2008, and thus the Custodian could not provide the requested records until October 17, 2008. The Complainant states that the Custodian failed to explain why the Township Attorney had not completed the review of the requested records by October 10, 2008 if the Custodian had forwarded said records to the Attorney on October 2, 2008 as she initially indicated to the Complainant. The Complainant states that as of the date of this Denial of Access Complaint, he has not received any of the requested records.

The Complainant contends that OPRA does not contain any vacation or holiday exception. The Complainant states that in Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (June 2008), the Council held that OPRA does not recognize "lack of staff resources, additional responsibilities and awaiting the Borough attorney's advice" as a lawful basis for a denial of access. The Complainant asserts that in his experience, minutes and memoranda are usually one (1) to two (2) pages and that sixteen (16) days is more than enough time to review approximately thirty (30) pages of records for potential redactions.

The Complainant requests the following relief from the Council: a finding that the Custodian violated OPRA by not providing the requested records within the statutorily mandated seven (7) business days (by failing to request the Complainant's permission to extend the timeframe to provide said records, by granting herself unilateral extensions, and by not providing the records within the extended timeframe); determine whether the Custodian actually sent the records for attorney review on October 2, 2008, or instead

delayed sending them, and determining whether such behavior was knowing and willful; determine whether the Custodian should be fined for a knowing and willful violation of OPRA; determine whether the Complainant is a prevailing party in this matter.

Additionally, the Complainant does not agree to mediate this complaint.

October 28, 2008

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

October 30, 2008⁵

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated September 24, 2008
- Custodian’s response to the Complainant’s OPRA request dated September 24, 2008
- E-mail from Complainant’s Counsel to Custodian dated September 26, 2008
- Letter from Custodian to Complainant dated October 2, 2008
- Letter from Complainant to Custodian dated October 2, 2008
- E-mail from Complainant’s Counsel to Custodian dated October 3, 2008
- Letter from Custodian to Complainant’s Counsel dated October 3, 2008
- Letter from Complainant to Custodian dated October 6, 2008
- Letter from Custodian to Complainant dated October 7, 2008
- Letter from Custodian to Complainant’s Counsel dated October 10, 2008
- Letter from Custodian to Complainant dated October 17, 2008
- Records responsive to the Complainant’s OPRA request, with various redactions⁶

The Custodian certifies that she received the Complainant’s OPRA request on September 24, 2008 and provided a written response to the Complainant on said date in which the Custodian informed the Complainant that she would speak to the Department heads to determine how long it would take to provide the requested records. The Custodian asserts that although the Complainant makes it sound like his request only encompassed a few pages, his entire request consisted of 3,826 pages of records.⁷ The Custodian contends that rather than denying the Complainant’s overwhelming request which would have substantially disrupted the operations of her agency, she attempted to reach a reasonable solution to accommodate his request.

The Custodian certifies that she provided the Complainant with another written response on October 2, 2008 and indicated that eight (8) sets of executive session minutes do not exist, three (3) memorandums do not exist, and the remaining records would be reviewed by the Township Attorney for potential redactions.

Additionally, the Custodian certifies that she received an e-mail from the Complainant’s Counsel on October 3, 2008 in which Counsel stated that because the Custodian failed to provide a specific date on which the requested records would be

⁵ The Custodian discusses the circumstances surrounding the Complainant’s additional OPRA requests; however, said requests are not at issue in this Denial of Access Complaint.

⁶ The Custodian attaches additional records which are not relevant to the adjudication of this complaint.

⁷ Some of which are not the subject of this Denial of Access Complaint.

provided after attorney review, the Complainant requests said records by October 10, 2008 or the Complainant may file action either in Superior Court or with the GRC. The Custodian certifies that she provided a response to the Complainant's Counsel on October 3, 2008 and advised that if the records were not available by October 10, 2008, she would advise when they would be ready. The Custodian also certifies that she contacted the Complainant via letter dated October 10, 2008 and advised that the Township Attorney was on vacation until October 14, 2008 and that she would have the records available by October 17, 2008.

Further, the Custodian certifies that she received the redacted records on October 17, 2008 and faxed the 102 pages to the Complainant on said date. The Custodian certifies that the redactions constitute attorney-client privileged material, litigation, contract negotiations and personnel matters pursuant to N.J.S.A. 10:4-12 and N.J.S.A. 47:1A-1.1.

The Custodian also certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM"), executive session minutes must be maintained permanently and memos must be maintained for four (4) years.

Analysis

Whether the Custodian unlawfully delayed access to the requested records?

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.

OPRA also states 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 therefor ..." N.J.S.A. 47:1A-5.g.

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ... failure to respond shall be deemed a denial of the request ... The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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 Custodian certified that she received the Complainant’s OPRA request on September 24, 2008. The Custodian certified that she provided the Complainant with a written response to his request on said date in which the Custodian indicated that she would have to contact various departments to determine how long it would take to fulfill said request. The Custodian did not provide a specific date on which she would further respond to the Complainant’s OPRA request. However, the Custodian also certified that she provided the Complainant with another written response on October 2, 2008 in which the Custodian denied access to the following records on the basis that said records do not exist:

- Executive session minutes dated July 10, 2007
- Executive session minutes dated November 13, 2007
- Executive session minutes dated November 30, 2007
- Executive session minutes dated December 1, 2007
- Executive session minutes dated December 27, 2007
- Executive session minutes dated March 11, 2008
- Executive session minutes dated May 27, 2008
- Executive session minutes dated August 5, 2008
- Memos from Henry Underhill to Township Council dated August 22, 2008
- Memos from Henry Underhill to Township Council dated September 5, 2008
- Memos from Henry Underhill to Township Council dated September 19, 2008

In said response, the Custodian also informed the Complainant that the remaining records were under attorney review for potential redactions and that she would advise the Complainant when the records would be made available.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. Said provision also provides that a custodian shall advise the requestor when a record can be made available. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Additionally, in Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian provided the Complainant with a written response to the Complainant's OPRA request on the seventh (7th) business day following receipt of said request. In said response, the Custodian requested an extension of time to respond to said request but failed to provide an anticipated deadline date upon which the requested records would be provided. The Council held that the Custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5.i.

The facts in Hardwick are similar to the facts in this instant complaint; specifically, that the Custodian provided two (2) written response to the Complainant's request within the statutorily mandated seven (7) business days. In both written responses, the Custodian requested an extension of time but failed to provide an anticipated deadline date upon which the records would be provided.

Therefore, although the Custodian provided two (2) written responses to the Complainant's OPRA request in which the Custodian indicated that she needed time beyond the statutorily mandated seven (7) business days to fulfill the Complainant's OPRA request, said responses are inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick, *supra*, because they fail to provide an anticipated deadline date upon which the requested records will be provided.

However, because the Custodian denied access to eight (8) sets of meeting minutes and three (3) memos that do not exist in her written response dated October 2, 2008, the sixth (6th) business day following receipt of the Complainant's OPRA request, said portion of the Custodian's October 2, 2008 response was proper pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, *supra*.

Additionally, despite the Custodian's failure to provide a specific date on which she would provide the Complainant access to the requested records that do exist, on October 3, 2008, the seventh (7th) business day following the Custodian's receipt of the Complainant's request, the Complainant's Counsel offered an extension of time until

October 10, 2008 in order for the attorney to review said records for any potential redactions. On said date, the Custodian agreed to either provide the records by October 10, 2008 or notify the Complainant of when the records would be made available.

Therefore, because the Custodian provided the Complainant with a subsequent response on the seventh (7th) business day in which the Custodian provided a date certain as to when she would either make the records available or provide a further response to the Complainant's OPRA request, even though such extension was initiated by the Complainant's Counsel, the Custodian's written response dated October 3, 2008 properly requests an extension of time pursuant to N.J.S.A. 47:1A-5.i. As such, said response negates the Custodian's prior insufficient responses dated September 24, 2008 and October 2, 2008 pursuant to O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008) (holding that although the Custodian's initial written response to the Complainant's OPRA request did not make the requested records available in the medium requested, because the Custodian made the requested records available to the Complainant in the medium requested in her subsequent written response to the Complainant, which was within the statutorily mandated seven (7) business day time period to respond pursuant to N.J.S.A. 47:1A-5.i., the Custodian did not violate OPRA).

Further, on October 10, 2008, the Custodian informed the Complainant in writing that the attorney was on vacation and would not return until October 14, 2008. As such, the Custodian requested another extension of time until October 17, 2008 to provide the remaining records. The Custodian certified that she faxed said records to the Complainant on October 17, 2008.

The Complainant states that in Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (June 2008), the Council held that OPRA does not recognize "lack of staff resources, additional responsibilities and awaiting the Borough attorney's advice" as a lawful basis for a denial of access. Specifically, the Council held that:

"OPRA does not recognize these factors as a lawful basis for a denial of access. Further, the GRC has previously ruled that awaiting municipal attorney's advice is not a lawful basis for *failing to respond in writing within the statutorily mandated seven (7) business days* pursuant to N.J.S.A. 47:1A-5.i. and Cottrell v. Borough of Glassboro, GRC Complaint No. 2005-247 (April 2006)." (Emphasis added).

In this instant complaint, the Custodian did provide the Complainant with a written response within the statutorily mandated time frame. In fact, the Custodian provided three (3) written responses to the Complainant during said time frame in which she requested additional time to provide the requested records.

Further, in Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Council held that "while seeking legal advice on how to appropriately respond to a records request is reasonable, it is not a lawful reason for delaying a response to an OPRA records request *because the Custodian should have*

obtained a written agreement from the Complainant extending the time period to respond.” (Emphasis added).

Here, the Custodian sought legal advice regarding potential redactions on the requested records, and the Township Attorney was unavailable for several days because he was on vacation. The Custodian then responded to the Complainant in writing within the extended deadline date to seek an additional extension of time to provide the requested records.

Therefore, because the Custodian provided the Complainant with a written response within the extended deadline, and provided the Complainant with another date certain on which the Custodian would make the requested records available to the Complainant, the Custodian’s written response dated October 10, 2008 is proper pursuant to N.J.S.A. 47:1A-5.i. Additionally, the Custodian made the requested records available to the Complainant on October 17, 2008, the extended deadline date.

In conclusion, although the Custodian’s initial written responses to the Complainant’s OPRA request were insufficient because the Custodian failed to provide an anticipated deadline date on which she would make the requested records available to the Complainant, the Custodian ultimately provided such a response on the seventh (7th) business day following receipt of the Complainant’s request which negates her prior insufficient responses. Additionally, the Custodian properly provided subsequent responses to the Complainant by responding within the extended deadline dates and either providing another date certain on which she would further respond or ultimately releasing the requested records. Therefore, the Custodian has not unlawfully delayed access to the requested records.

Further, it should be noted that while the Complainant wishes for the Council to determine whether the Custodian actually forwarded the requested records to the Township Attorney on October 2, 2008, such information is immaterial to the adjudication of this complaint since the Custodian did not violate OPRA.

Whether the Custodian’s delay in access to the requested records 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.

Although the Custodian’s initial written responses to the Complainant’s OPRA request were insufficient because the Custodian failed to provide an anticipated deadline date on which she would make the requested records available to the Complainant, the Custodian ultimately provided such a response on the seventh (7th) business day following receipt of the Complainant’s request which negates her prior insufficient responses. Additionally, the Custodian properly provided subsequent responses to the Complainant by responding within the extended deadline dates and either providing another date certain on which she would further respond or ultimately releasing the requested records. Therefore, the Custodian has not unlawfully delayed access to the requested records.

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’s initial written responses to the Complainant’s OPRA request were insufficient, the Custodian ultimately did not violate OPRA and provided the requested records to the Complainant by the extended deadline date of October 17, 2008. Therefore, 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 a finding that the Custodian violated OPRA by not providing the requested records within the statutorily mandated seven (7) business days (by failing to request the Complainant’s permission to extend the timeframe to provide said records, by granting herself unilateral extensions, and by not providing the records within the extended timeframe); and a determination whether the

Custodian actually sent the records for attorney review on October 2, 2008 or instead delayed sending them.

However, as stated above, the Custodian did not unlawfully delay access to the requested records despite her first two (2) responses to the Complainant being insufficient. Additionally, the issue of whether the Custodian actually sent the records for attorney review on October 2, 2008 is not relevant to the adjudication of this complaint.

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 provided the Complainant with the requested records on the same date that he filed this complaint.

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. Although the Custodian provided two (2) written responses to the Complainant's OPRA request in which the Custodian indicated that she needed time beyond the statutorily mandated seven (7) business days to fulfill the Complainant's OPRA request, said responses are inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because they fail to provide an anticipated deadline date upon which the requested records will be provided.
2. Because the Custodian denied access to eight (8) sets of meeting minutes and three (3) memos that do not exist in her written response dated October 2, 2008, the sixth (6th) business day following receipt of the Complainant's OPRA request, said portion of the Custodian's October 2, 2008 response was proper pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. Because the Custodian provided the Complainant with a subsequent response on the seventh (7th) business day in which the Custodian provided a date certain as to when she would either make the records available or provide a further response to the Complainant's OPRA request, even though such extension was initiated by the Complainant's Counsel, the Custodian's written response dated October 3, 2008 properly requests an extension of time pursuant to N.J.S.A. 47:1A-5.i. As such, said response negates the Custodian's prior insufficient responses dated September 24, 2008 and

October 2, 2008 pursuant to O’Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008) (holding that although the Custodian’s initial written response to the Complainant’s OPRA request did not make the requested records available in the medium requested, because the Custodian made the requested records available to the Complainant in the medium requested in her subsequent written response to the Complainant, which was within the statutorily mandated seven (7) business day time period to respond pursuant to N.J.S.A. 47:1A-5.i., the Custodian did not violate OPRA).

4. Because the Custodian provided the Complainant with a written response within the extended deadline, and provided the Complainant with another date certain on which the Custodian would make the requested records available to the Complainant, the Custodian’s written response dated October 10, 2008 is proper pursuant to N.J.S.A. 47:1A-5.i. Additionally, the Custodian made the requested records available to the Complainant on October 17, 2008, the extended deadline date.
5. Although the Custodian’s initial written responses to the Complainant’s OPRA request were insufficient because the Custodian failed to provide an anticipated deadline date on which she would make the requested records available to the Complainant, the Custodian ultimately provided such a response on the seventh (7th) business day following receipt of the Complainant’s request which negates her prior insufficient responses. Additionally, the Custodian properly provided subsequent responses to the Complainant by responding within the extended deadline dates and either providing another date certain on which she would further respond or ultimately releasing the requested records. Therefore, the Custodian has not unlawfully delayed access to the requested records.
6. Although the Custodian’s initial written responses to the Complainant’s OPRA request were insufficient, the Custodian ultimately did not violate OPRA and provided the requested records to the Complainant by the extended deadline date of October 17, 2008. Therefore, 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.
7. 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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Approved By: Catherine Starghill, Esq.
Executive Director

November 10, 2009