



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

September 30, 2009 Government Records Council Meeting

Henry Knaust
Complainant

Complaint No. 2008-256

v.

Township of Frankford (Sussex)
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 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. Although the Custodian responded in writing granting access to the Complainant’s OPRA request in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response is insufficient because she failed to specifically address the Complainant’s preference for receipt of records. Therefore, the Custodian has violated OPRA 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. Although the Custodian’s failure to address the Complainant’s preferred method of delivery in her response to the OPRA request resulted in a violation of N.J.S.A. 47:1A-5.g., because the Custodian provided access to all records responsive via facsimile on November 6, 2008, as requested by the Complainant, 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 unlawful “deemed” denial of access appears negligent and heedless since she 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) and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Complainant is not a “prevailing party” entitled to an award of



reasonable attorney's fees. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct. Specifically, the Custodian provided access to all records responsive in one of the Complainant's preferred methods of delivery prior to the filing of this complaint. Additionally, using the catalyst theory, there is no factual causal nexus between the filing of the Complainant's Denial of Access Complaint and the Custodian's technical violation of OPRA and subsequent Statement of Information certification.

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 30th Day of September, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: October 7, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**Henry Knaust¹
Complainant**

GRC Complaint No. 2008-256

v.

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

Records Relevant to Complaint:

1. Copies of 2007 and 2008 financial disclosure forms for the following:
 - a. Robert McDowell, Mayor.
 - b. Paul Sutphen, Deputy Mayor.
 - c. William Hahn, Committeeman.
 - d. Louanne Cular, Township Administrator/Municipal Clerk.
 - e. Kevin Benbrook, Esq., Township Attorney.
2. Copies of fully executed professional services agreement between Frankford Township and Kevin Benbrook, Esq., Township Attorney, for 2007 and 2008.
3. Copies of Township Committee regular meeting minutes:
 - a. February 28, 2008.
 - b. March 27, 2008.
 - c. April 24, 2008.
 - d. May 22, 2008.
 - e. June 26, 2008.
 - f. July 24, 2008.
 - g. August 28, 2008.
4. Copies of Township Committee work session minutes:
 - a. March 18, 2008.
 - b. April 15, 2008.
 - c. May 6, 2008.
 - d. May 20, 2008.
 - e. June 17, 2008.
 - f. July 2008.
 - g. August 2008.

Request Made: September 25, 2008

Response Made: September 25, 2008

Custodian: Louanne Cular

GRC Complaint Filed: November 12, 2008³

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

² Represented by Kevin P. Benbrook, Esq., of Benbrook & Benbrook, LLC (Clinton, NJ).

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

Background

September 25, 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. The Complainant states that his preferred method of delivery is via e-mail or facsimile.

September 25, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same business day as receipt of such request.

The Custodian states that access to request Item No. 1 for copies of the 2007 and 2008 financial disclosure forms for all five (5) persons identified is granted. The Custodian states that Ken Benbrook, Esq. ("Mr. Benbrook") was not the Township's attorney for the year 2007, so no financial disclosure form exists for Mr. Benbrook for that year.

The Custodian states that access to request Item No. 2 (a copy of Mr. Benbrook's fully executed professional services agreement with the Township) is granted. The Custodian states that because Mr. Benbrook was not the Township's attorney in the year 2007, no record responsive exists.

The Custodian states that access to request Item No. 3 (copies of all Township Committee regular meeting minutes for the specific meeting dates) is granted with two (2) exceptions. The Custodian states that no meeting was held on May 22, 2008. Additionally, the Custodian states that the meeting minutes for August 28, 2008 are not yet complete and that the Complainant will be advised once the minutes become available.

The Custodian states that access to request Item No. 4 (copies of all Township Committee work session minutes for the specific meeting dates) is granted with three (3) exceptions. The Custodian states that no meetings were held on May 6, 2008 or in July or August 2008.

The Custodian states that the copy cost for the records responsive to the Complainant's September 25, 2008 OPRA request is \$58.25.

October 2, 2008

Letter from the Custodian to the Complainant. The Custodian states that she has contacted Counsel regarding the Complainant's preference of receiving records via facsimile. The Custodian states that, contrary to the Complainant's assertion that the GRC advised that the Custodian must provide the requested records via facsimile, Counsel has advised that no GRC ruling exists that would substantiate having to provide the records via facsimile.

The Custodian requests that the Complainant provide a payment of \$58.25 for copying cost and requests that the Complainant advise as to whether he would like to retrieve the records or have them provided via US mail.

October 9, 2008

Letter from the Complainant to the Custodian. The Complainant states that he is in receipt of the Custodian's October 2, 2008 response. The Complainant states that he indicated on his September 25, 2008 OPRA request that the preferred method of delivery was by e-mail or facsimile. The Complainant states that he reiterated this preference to the Custodian in person on October 2, 2008.

The Complainant requests that the Custodian adhere to the Complainant's request to receive the records either by e-mail or facsimile and advise whether there will be a charge.

November 5, 2008

E-mail from the Complainant to the Custodian. The Complainant states that he has not received any records via e-mail or facsimile pursuant to his OPRA request. The Complainant requests that the Custodian advise whether she is knowingly and willfully denying access to the request.

November 6, 2008

E-mail from the Custodian to the Complainant. The Custodian states that she is not knowingly and willfully denying access to any records. The Custodian states that the Complainant viewed over 200 pages of records on October 2, 2008 and refused to accept copies. The Custodian states that she is also in receipt of the Complainant's letter dated October 9, 2008 and has been in constant contact with the Complainant regarding this request.

The Custodian states that she has already advised the Complainant that the requested records are not available to be e-mailed, nor does the Custodian want to put the records in the fax machine for fear that they may be damaged. The Custodian states that the Complainant has refused both explanations.

The Custodian states that she is not in the office due to a personal matter but has been stopping in to handle any pressing matters such as this. The Custodian states that she will have a staff member provide the records via facsimile so as to avoid further disruption from the Complainant.

November 12, 2008

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

- Complainant's OPRA request dated September 25, 2008.
- Letter from the Custodian to the Complainant dated October 2, 2008.
- Letter from the Complainant to the Custodian dated October 9, 2008.
- E-mail from the Complainant to the Custodian dated November 5, 2008.
- E-mail from the Custodian to the Complainant dated November 6, 2008.

The Complainant's Counsel states that the Complainant submitted an OPRA request to the Custodian on September 25, 2008 in which the Complainant advised that he preferred the records be provided via e-mail or facsimile. The Complainant's Counsel states that the Custodian responded in writing on October 2, 2008, refusing to provide the records in the Complainant's preferred method. The Complainant's Counsel states that the Complainant reiterated his preference for receipt of the requested records in a letter to the Custodian on October 9, 2008. The Complainant's Counsel states that the Complainant contacted the Custodian via e-mail on November 5, 2008 regarding the Custodian's failure to provide the requested records in the preferred method. The Complainant's Counsel states that the Custodian advised on November 6, 2008 that she would have a staff member fax the records to the Complainant.

The Complainant's Counsel states that the core of this Denial of Access Complaint is the Custodian's refusal to provide the requested records in the Complainant's preferred method of delivery. The Complainant's Counsel contends that the Custodian refused to acknowledge the Complainant's method of delivery pursuant to O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (February 2008) and has not provided the records responsive to the Complainant's OPRA request via e-mail or facsimile, although the Custodian had the proper means to do so. Paff v. Borough of Sussex (Sussex), GRC Complaint No. 2008-38 (July 2008). The Complainant's Counsel contends that the Custodian has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.d. for failing to provide the records responsive in the Complainant's preferred method of delivery.

The Complainant's Counsel contends that the Custodian has failed to sufficiently address the Complainant's preferred method of delivery by providing a vague denial of why the records could not be provided via facsimile and altogether failed to address delivery via e-mail. The Complainant's Counsel requests the following relief:

1. A determination that the Township of Frankford violated OPRA by denying access to the requested records.
2. A determination that the Township of Frankford violated OPRA by failing to address the Complainant's preferred method of delivery.
3. A determination that the Township of Frankford violated OPRA by not providing the requested records in the Complainant's preferred method of delivery within seven (7) business days after receipt of the Complainant's September 25, 2008 OPRA request.
4. A determination that the Custodian knowingly and willfully violated OPRA.
5. A determination that the Complainant is a prevailing party in this matter and is entitled to prevailing party attorney's fees.

The Complainant does not agree to mediate this complaint.

November 18, 2008

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

November 24, 2008

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until December 2, 2008 to submit the SOI.

November 24, 2008

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension of time until December 2, 2008 to submit the SOI.

December 1, 2008

Telephone call from the Custodian's Counsel to the GRC. Counsel requests a second (2nd) extension of time until December 9, 2008 to submit the SOI.

December 1, 2008

E-mail from the GRC to the Custodian's Counsel. The GRC grants a second (2nd) extension of time until December 9, 2008 to submit the SOI.

December 9, 2008

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 25, 2008.
- Letter from the Custodian to the Complainant dated September 25, 2008 (with attachments).
- Letter from the Custodian to the Complainant dated October 2, 2008.
- Letter from the Complainant to the Custodian dated October 9, 2008.
- E-mail from the Complainant to the Custodian dated November 5, 2008.
- E-mail from the Custodian to the Complainant dated November 6, 2008.
- Facsimile Confirmation Sheet dated November 6, 2008.

The Custodian certifies none of the records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

The Custodian certifies that she received the Complainant's OPRA request on September 25, 2008 and responded immediately by providing access to all existing records responsive at a cost of \$58.25 for copies. The Custodian states that the Complainant reviewed over 200 pages of information on October 2, 2008.

The Custodian contends that the Complainant refused to accept the requested records in paper copy and refused the Custodian's explanations for why the records could not be provided via e-mail or facsimile. The Custodian certifies that all existing records responsive to the Complainant's OPRA request were faxed to the Complainant on November 6, 2008.

The Custodian's Counsel contends that the issue is not the Custodian's refusal to provide the requested records to the Complainant but whether OPRA mandates that the Custodian provide the records according to the Complainant's preferred method of delivery.

The Custodian's Counsel states that N.J.S.A. 47:1A-5 establishes the statutory requirements regarding inspection, examination and copying of government records. The Custodian's Counsel states that OPRA provides that a custodian shall "permit access to a government record and provide a copy thereof in the medium requested *if the public agency maintains the records in that medium.*" (Emphasis added.) N.J.S.A. 47:1A-5.d. The Custodian's Counsel states that a member of the public has the right to access a government record in whatever medium such record is maintained by a government agency. The Custodian's Counsel avers that, as an example, if a requestor seeks access to microfilm, the government agency must provide microfilm, and that providing photocopies would not be an acceptable response.

The Custodian's Counsel argues that OPRA is silent with respect to any requirement of a records custodian concerning the method of delivery of a document. The Custodian's Counsel argues that there is no statutory obligation to comply with a request to fax or e-mail records; further, a facsimile is not a medium for maintaining a record, but a mechanism for delivering a record. The Custodian's Counsel contends that to this extent a public agency does not maintain records in the medium of facsimile. The Custodian's Counsel further contends that an e-mail can be maintained in paper or electronic form; however, e-mailing a record is also a mechanism of delivery and not a medium.

Additionally, the Custodian's Counsel asserts that OPRA does not provide cost recovery that could be associated with method of delivery. The Custodian's Counsel asserts that sending records via facsimile implicates, at a minimum, telephone charges. The Custodian's Counsel further argues that there is also no way to confirm receipt for any records provided via facsimile or e-mail.

Finally, the Custodian's Counsel states that he is in receipt of the Complainant Counsel's letter brief contained within the Denial of Access Complaint and respectfully suggests that O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (February 2008) is in error and contrary to the expressed statutory provisions of OPRA. Further, the Custodian's Counsel advises that to the extent that compliance with a requested method of delivery is the GRC's current legal interpretation of the responsibilities of a custodian of record under OPRA, such interpretation is contrary to the advice given by the Custodian's Counsel to the Custodian; therefore, she did not knowingly and willfully violate OPRA.⁴

Analysis

Whether the Custodian unlawfully denied 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.

⁴ 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.
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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 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 further 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 ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*” (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.

In the matter before the Council, the Complainant’s Counsel contends that the Custodian’s response to the Complainant’s OPRA request was insufficient because it does not address the Complainant’s preference for e-mailed or faxed records and cites to O’Shea, supra.

Conversely, the Custodian’s Counsel argues in the SOI that OPRA is silent as to whether a custodian must address a requestor’s preferred method of delivery. Further, the Custodian’s Counsel argues that providing access to records via facsimile or e-mail is

not a question of medium conversion because each is a mechanism of delivery and not a medium. The Custodian's Counsel suggests that O'Shea, *supra*, is in error and contrary to the statutory language of OPRA.

As explained in O'Shea, *supra*,

“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, although the Custodian's Counsel asserts that OPRA is silent as to the preferred method of delivery, there is a direct correlation between a requestor's advising of the method of delivery and a custodian responding to said concerns as part of the requestor's right to public access afforded under OPRA. By failing to address such request for the method of delivery, the Custodian in the instant complaint has not complied with N.J.S.A. 47:1A-5.g. pursuant to the Council's holding in O'Shea, *supra*.

Therefore, although the Custodian responded in writing granting access to the Complainant's OPRA request in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and O'Shea, *supra*.

Additionally, there is no need to order disclosure of the requested records because the Custodian certified in the SOI that all records responsive were provided via facsimile, as requested by the Complainant, on November 6, 2008.⁵

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:

⁵ The GRC declines to address the issue of copying costs as there is no evidence that the Custodian required payment of same before providing the records requested via facsimile nor is there any evidence that such copying costs were actually paid by the Complainant.

“... 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’s failure to address the Complainant’s preferred method of delivery in her response to the OPRA request resulted in a violation of N.J.S.A. 47:1A-5.g., because the Custodian provided access to all records responsive via facsimile on November 6, 2008, as requested by the Complainant, 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 unlawful “deemed” denial of access appears negligent and heedless since she 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 Henry Knaust v. Township of Frankford (Sussex), 2008-256 – Findings and Recommendations of the Executive Director

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 matter before the Council, the Complainant requested that the GRC find that the Custodian's failure to address the Complainant's preferred method of delivery resulted in a violation of OPRA. While the GRC finds that the Custodian's failure to address the Complainant's preferred method of delivery was an insufficient response and a violation of N.J.S.A. 47:1A-5.g. pursuant to O'Shea, supra, the GRC declines to order the Custodian to provide the requested records because the Custodian certified in the SOI that all records responsive were provided to the Complainant via facsimile on November 6, 2008, as requested by the Complainant, six (6) days prior to the filing of the instant complaint.

Therefore, pursuant to Teeters, supra and Mason, supra, the Complainant is not a “prevailing party” entitled to an award of reasonable attorney’s fees. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian’s conduct. Specifically, the Custodian provided access to all records responsive in one of the Complainant’s preferred methods prior to the filing of this complaint. Additionally, using the catalyst theory, there is no factual causal nexus between the filing of the Complainant’s Denial of Access Complaint and the Custodian’s technical violation of OPRA and subsequent SOI certification.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing granting access to the Complainant’s OPRA request in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response is insufficient because she failed to specifically address the Complainant’s preference for receipt of records. Therefore, the Custodian has violated OPRA 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. Although the Custodian’s failure to address the Complainant’s preferred method of delivery in her response to the OPRA request resulted in a violation of N.J.S.A. 47:1A-5.g., because the Custodian provided access to all records responsive via facsimile on November 6, 2008, as requested by the Complainant, 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 unlawful “deemed” denial of access appears negligent and heedless since she 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) and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Complainant is not a “prevailing party” entitled to an award of reasonable attorney’s fees. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian’s conduct. Specifically, the Custodian provided access to all records responsive in one of the Complainant’s preferred methods of delivery prior to the filing of this complaint. Additionally, using the catalyst theory, there is no factual causal nexus between the filing of the Complainant’s Denial of Access Complaint and the Custodian’s technical violation of OPRA and subsequent Statement of Information certification.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009