



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
Commissioner

FINAL DECISION

June 28, 2011 Government Records Council Meeting

Tina Renna
(on behalf of the Union County Watchdog Association)
Complainant

Complaint No. 2009-28

v.

Union County Improvement Authority
Custodian of Record

At the June 28, 2011 public meeting, the Government Records Council ("Council") considered the June 21, 2011 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 this complaint should be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law in a letter from her legal counsel to the Administrative Law Judge dated May 31, 2011. Therefore, no further adjudication is required.

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 28th Day of June, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: July 12, 2011



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 28, 2011 Council Meeting**

Tina Renna **GRC Complaint No. 2009-28**
(on behalf of the Union County Watchdog Association)¹
Complainant

v.

Union County Improvement Authority²
Custodian of Records

Records Relevant to Complaint:

1. November 5, 2008 agenda & paid bill list.
2. October 1, 2008 meeting minutes & paid bill list.
3. Paid bill list for the year 2003.

Request Made: November 3, 2008 and December 1, 2008³

Response Made: January 20, 2009

Custodian: Mark W. Brink⁴

GRC Complaint Filed: January 15, 2009⁵

Background

January 26, 2010

Government Records Council's ("Council") Interim Order. At its January 26, 2010 public meeting, the Council considered the January 19, 2010 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 certified that he has no record of receiving the Complainant's OPRA request dated November 3, 2008 until the Complainant re-submitted said request on December 1, 2008 and the Complainant has not provided any evidence to contradict the Custodian's certification, the Custodian has not unlawfully denied access to the Complainant's OPRA request dated November 3, 2008.

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

² Represented by Gina A. Bilangi, Esq., of DeCotiis, FitzPatrick, Cole & Wisler, LLP (Teaneck, NJ).

³ The Complainant re-submitted her OPRA request dated November 3, 2008 on December 1, 2008.

⁴ For the purposes of this Denial of Access Complaint, the Custodian is Mark W. Brink, Project Director, authorized by Charlotte DeFilippo, Executive Director.

⁵ The GRC received the Denial of Access Complaint on said date.

2. The Custodian's failure to respond in writing to the Complainant's re-submitted OPRA request dated December 1, 2008 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).
3. The Custodian's written response dated January 26, 2009 is insufficient pursuant to N.J.S.A. 47:1A-5.g. because the Custodian failed to specifically deny access to the requested records that do not exist. Additionally, because the Custodian certified that there are no records responsive to the Complainant's request for the October 1, 2008 meeting minutes and corresponding paid bill list, as well as the paid bill list for the year 2003, the Custodian would have carried his burden of proving a lawful denial of access, had he provided such response to the Complainant within the statutorily mandated seven (7) business days pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian's failure to provide a written response to the Complainant's December 1, 2008 OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, and the Custodian's response to said request was insufficient because he failed to notify the Complainant that there are no records responsive to the Complainant's request for the October 1, 2008 meeting minutes and corresponding paid bill list, as well as the paid bill list for the year 2003, the Custodian did not unlawfully deny access to the Complainant's OPRA request dated November 3, 2008 because the Custodian certified that he has no record of receiving said request and the Complainant has not provided any evidence to contradict the Custodian's certification. Additionally, there is no evidence in the record that suggests the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness. 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.
5. 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. Specifically, the Custodian provided a response to the Complainant's OPRA request. 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 because the Custodian failed to provide any response to the Complainant's OPRA request until six (6) business days after the Complainant filed this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law because the Custodian should have

provided the Complainant with a written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days. 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.

January 28, 2010

Council's Interim Order distributed to the parties.

June 23, 2010

Complaint transmitted to the Office of Administrative Law ("OAL").

May 31, 2011

Letter from Complainant's Counsel to Administrative Law Judge ("ALJ"). The Complainant's Counsel states that this matter has been settled and all of the terms of the settlement have been fulfilled. As such, Counsel states that the Complainant withdraws this complaint.

Analysis

No analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law in a letter from her legal counsel to the Administrative Law Judge dated May 31, 2011. Therefore, no further adjudication is required.

Prepared By: Dara Lownie
Communications Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 21, 2011



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

INTERIM ORDER

January 26, 2010 Government Records Council Meeting

Tina Renna
(on behalf of the Union County Watchdog Association)
Complainant

Complaint No. 2009-28

v.

Union County Improvement Authority
Custodian of Record

At the January 26, 2010 public meeting, the Government Records Council (“Council”) considered the January 19, 2010 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 certified that he has no record of receiving the Complainant’s OPRA request dated November 3, 2008 until the Complainant re-submitted said request on December 1, 2008 and the Complainant has not provided any evidence to contradict the Custodian’s certification, the Custodian has not unlawfully denied access to the Complainant’s OPRA request dated November 3, 2008.
2. The Custodian’s failure to respond in writing to the Complainant’s re-submitted OPRA request dated December 1, 2008 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).
3. The Custodian’s written response dated January 26, 2009 is insufficient pursuant to N.J.S.A. 47:1A-5.g. because the Custodian failed to specifically deny access to the requested records that do not exist. Additionally, because the Custodian certified that there are no records responsive to the Complainant’s request for the October 1, 2008 meeting minutes and corresponding paid bill list, as well as the paid bill list for the year 2003, the Custodian would have carried his burden of proving a lawful denial of access, had he provided such response to the Complainant within the statutorily mandated seven (7) business days pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).



4. Although the Custodian's failure to provide a written response to the Complainant's December 1, 2008 OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, and the Custodian's response to said request was insufficient because he failed to notify the Complainant that there are no records responsive to the Complainant's request for the October 1, 2008 meeting minutes and corresponding paid bill list, as well as the paid bill list for the year 2003, the Custodian did not unlawfully deny access to the Complainant's OPRA request dated November 3, 2008 because the Custodian certified that he has no record of receiving said request and the Complainant has not provided any evidence to contradict the Custodian's certification. Additionally, there is no evidence in the record that suggests the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness. 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.

5. 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. Specifically, the Custodian provided a response to the Complainant's OPRA request. 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 because the Custodian failed to provide any response to the Complainant's OPRA request until six (6) business days after the Complainant filed this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law because the Custodian should have provided the Complainant with a written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days. 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 26th Day of January, 2010

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: January 28, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 26, 2010 Council Meeting**

Tina Renna **GRC Complaint No. 2009-28**
(on behalf of the Union County Watchdog Association)¹
Complainant

v.

Union County Improvement Authority²
Custodian of Records

Records Relevant to Complaint:

1. November 5, 2008 agenda & paid bill list.
2. October 1, 2008 meeting minutes & paid bill list.
3. Paid bill list for the year 2003.

Request Made: November 3, 2008 and December 1, 2008³

Response Made: January 20, 2009

Custodian: Mark W. Brink⁴

GRC Complaint Filed: January 15, 2009⁵

Background

November 3, 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.

December 1, 2008

E-mail from Complainant to Custodian. The Complainant seeks the status of her OPRA request dated November 3, 2008 and attaches a copy of said request.

December 1, 2008

E-mail from Custodian to Custodian's Counsel. The Custodian forwards the Complainant's OPRA request to Counsel and asks whether his office needs to respond or if Counsel will respond to said request.

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

² Represented by Gina A. Bilangi, Esq., of DeCotiis, FitzPatrick, Cole & Wisler, LLP (Teaneck, NJ).

³ The Complainant re-submitted her OPRA request dated November 3, 2008 on December 1, 2008.

⁴ For the purposes of this Denial of Access Complaint, the Custodian is Mark W. Brink, Project Director, authorized by Charlotte DeFilippo, Executive Director.

⁵ The GRC received the Denial of Access Complaint on said date.

January 15, 2009

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

- Complainant’s OPRA request dated November 3, 2008
- E-mail from the Complainant to the Custodian dated December 1, 2008

The Complainant states that she submitted her OPRA request on November 3, 2008. The Complainant states that she received no response from the Custodian during the statutorily mandated seven (7) business day response time frame. As such, the Complainant states that she sent the Complainant an e-mail dated December 1, 2008 seeking the status of her OPRA request. The Complainant states that she spoke to Ed Salerno on December 3, 2008 who informed the Complainant that her OPRA request had been received and “forwarded to the lawyers.”

Because the Custodian failed to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, the Complainant asserts that her request is “deemed” denied pursuant to N.J.S.A. 47:1A-5.i. The Complainant asks the GRC to investigate whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. The Complainant states that the Custodian failed to respond to her request even after she reminded the Custodian on December 1, 2008 that the request was still outstanding. As such, the Complainant contends that the Custodian’s actions appear to be greater than negligence and would appear to rise to the level of a knowing and willful violation.

The Complainant requests the following relief from the Council:

1. A finding that the Custodian violated OPRA by denying access to the requested records;
2. An order compelling the Custodian to disclose the requested records to the Complainant;
3. A finding that the Complainant is a prevailing party and entitled to an award of a prevailing party attorney’s fee pursuant to N.J.S.A. 47:1A-6; and
4. A determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

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

January 16, 2009

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

January 26, 2009

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request approximately thirty-seven (37) business days following receipt of such request on December 1, 2008. The Custodian states that he has enclosed copies of the agenda and bill list from the November 5, 2008 meeting.

January 26, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated November 3, 2008
- E-mail from the Complainant to the Custodian dated December 1, 2008
- E-mail from the Custodian to the Custodian's Counsel dated December 1, 2008
- Custodian's response to the Complainant's OPRA request dated January 26, 2009

The Custodian states that the Complainant's Denial of Access Complaint identifies Ed Salerno as the Union County Improvement Authority's ("UCIA") Records Custodian. The Custodian certifies that no such person is employed by the UCIA. However, the Custodian certifies that towards the end of 2008 while the UCIA was undergoing an employee transition, Mr. Evilio Salerno had been answering telephones. The Custodian certifies that Mr. Salerno is not an employee of the UCIA and is not the Records Custodian.

Additionally, the Custodian certifies that although the Complainant attached an OPRA request dated November 3, 2008 to her Denial of Access Complaint, the UCIA has no record of receiving said request until December 1, 2008. The Custodian certifies the UCIA only became aware of the Complainant's OPRA request on December 1, 2008 when the Complainant sought the status of the OPRA request she asserts she submitted on November 3, 2008. The Custodian questions whether the Complainant actually submitted her OPRA request on November 3, 2008 because the Complainant requested an agenda and bill list for a meeting dated November 5, 2008 which had not yet taken place at the time of the Complainant's request.

The Custodian certifies that at the direction of the UCIA's Executive Director, he provided the Complainant with a response to her OPRA request via e-mail on January 26, 2009. The Custodian certifies that he provided the requested records to the Complainant with the exception of the October 1, 2008 meeting minutes and paid bills list since no meeting was held on October 1, 2008. The Custodian also certifies that he did not provide the Complainant with the paid bills list for the year 2003 because no such record exists.

Further, the Custodian certifies that due to a staffing transition at the UCIA at the time of the Complainant's December 1, 2008 OPRA request, said request was inadvertently unaddressed. The Custodian contends that there was no willful intent by the UCIA to deny the Complainant access to government records or to violate OPRA. The Custodian asserts that this accidental oversight should not warrant the assessment of fines against the UCIA or the award of prevailing party attorney's fees.

The Custodian also certifies that the records requested are required to be maintained permanently and that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM"), no records responsive to the Complainant's OPRA request have been destroyed.

January 27, 2009

The Complainant Counsel's response to the Custodian's SOI. The Complainant's Counsel states that if it is the Custodian's position that the UCIA did not receive the Complainant's OPRA request until December 1, 2008, the Custodian should have responded to said request within seven (7) business days from said date.

Additionally, Counsel states that while the Custodian asserts that the Complainant's OPRA request was unintentionally unaddressed, said action appears to be at least negligent and heedless. Further, Counsel contends that the Custodian's explanation for his failure to respond to the Complainant's OPRA request is contradicted by his e-mail dated December 1, 2008 to the Custodian's Counsel in which the Custodian asked Counsel who should respond to the Complainant's OPRA request. The Complainant's Counsel asserts that the Custodian was in possession of the Complainant's OPRA request on December 1, 2008 and failed to provide any response until after the filing of this Denial of Access Complaint.

Counsel requests that the Council determine that the Complainant is a prevailing party and refer this matter to the Office of Administrative Law for a determination of reasonable prevailing party attorney's fees since the Custodian certifies that all of the existing records responsive have been provided to the Complainant and the objective of this complaint has been achieved.

February 2, 2009

Letter from Custodian's Counsel to GRC. The Custodian's Counsel contends that the Complainant should not prevail on her request for an award of prevailing party attorney's fees in this matter. Counsel states that reasonable attorney's fees are to be awarded where "...the requested records are disclosed *pursuant to a determination of the Council or voluntary settlement agreement between the parties.*" (Emphasis added) *N.J.A.C. 5:105-2.13(a)*. Counsel states that neither event has occurred in this matter. Counsel asserts that the Custodian provided the records responsive to the Complainant's request after the filing of her Denial of Access Complaint to satisfy the Custodian's obligations under OPRA and to correct an inadvertent oversight. Counsel asks the Council to deny the Complainant's request for attorney's fees.⁶

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.

⁶ The Custodian's Counsel made additional statements/legal arguments that have either been previously submitted to the Council or are not relevant to the adjudication of this complaint.

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...* (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.

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. 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.⁷ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA

⁷ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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).

In this instant complaint, the Complainant asserts that she submitted her OPRA request to the UCIA on November 3, 2008 and received no response from the Records Custodian. The Custodian certified that the UCIA has no record of receiving the Complainant’s OPRA request on November 3, 2008. The Custodian certified that he did not receive said request until the Complainant re-submitted it on December 1, 2008. Additionally, the Complainant has not provided any supplemental evidence to support her assertion that she submitted her OPRA request to the UCIA on November 3, 2008.

Therefore, because the Custodian certified that he has no record of receiving the Complainant’s OPRA request dated November 3, 2008 until the Complainant re-submitted said request on December 1, 2008 and the Complainant has not provided any evidence to contradict the Custodian’s certification, the Custodian has not unlawfully denied access to the Complainant’s OPRA request dated November 3, 2008.

However, the Custodian certified that he did receive the Complainant’s re-submission of her OPRA request on December 1, 2008 and forwarded said request to legal counsel to determine who should provide a response to said request. The Custodian certified that due to a staffing transition at the UCIA at the time of the Complainant’s December 1, 2008 OPRA request, said request was inadvertently unaddressed. However, it should be noted that pursuant to the Custodian’s e-mail to legal counsel dated December 1, 2008 which the Custodian included in his SOI, the two (2) employees with knowledge of the Complainant’s OPRA request were the Custodian and the Custodian’s Counsel, both of whom are still employed by the UCIA. The Custodian ultimately provided the Complainant with a written response to her request on January 26, 2009, approximately thirty-seven (37) business days following receipt of said request on December 1, 2008.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s re-submitted OPRA request dated December 1, 2008 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, supra.

Further, in the Custodian’s written response to the Complainant dated January 26, 2009, the Custodian provided access to the requested agenda and paid bill list for the November 5, 2008 meeting. However, the Custodian failed to notify the Complainant in said response that the other records requested do not exist. The Custodian certified in his SOI dated January 23, 2009 that the requested October 1, 2008 meeting minutes and corresponding paid bill list, as well as the paid bill list for the year 2003, do not exist.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a

call made to him from the New Jersey Department of Education. The Custodian responded, stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The Council determined that, because the Custodian certified that no records responsive to the request existed, the Custodian did not unlawfully deny access to the requested records.

However, in this instant complaint, the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days that there are no records responsive to her request for the October 1, 2008 meeting minutes and corresponding paid bill list, as well as the paid bill list for the year 2003.

Therefore, the Custodian's written response dated January 26, 2009 is insufficient pursuant to N.J.S.A. 47:1A-5.g. because the Custodian failed to specifically deny access to the requested records that do not exist. Additionally, because the Custodian certified that there are no records responsive to the Complainant's request for the October 1, 2008 meeting minutes and corresponding paid bill list, as well as the paid bill list for the year 2003, the Custodian would have carried his burden of proving a lawful denial of access, had he provided such response to the Complainant within the statutorily mandated seven (7) business days pursuant to Pusterhofer, supra.

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.

As previously stated, because the Custodian certified that he has no record of receiving the Complainant's OPRA request dated November 3, 2008 until the Complainant re-submitted said request on December 1, 2008 and the Complainant has not provided any supplemental evidence to contradict the Custodian's certification, the Custodian has not unlawfully denied access to the Complainant's OPRA request dated November 3, 2008.

However, the Custodian re-submitted her OPRA request on December 1, 2008 and the Custodian did not provide a response to said request until January 26, 2009, approximately thirty-seven (37) business days following receipt of said request. As such, the Custodian violated OPRA at N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Further, the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days that there are no records responsive to her request for the October 1, 2008 meeting minutes and corresponding paid bill list, as well as the paid bill list for the year 2003. As such, the Custodian violated N.J.S.A. 47:1A-5.g. Despite said violation of OPRA, the Custodian certified that there are no records responsive to the Complainant's request for the October 1, 2008 meeting minutes and corresponding paid bill list, as well as the paid bill list for the year 2003.

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 provide a written response to the Complainant's December 1, 2008 OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, and the Custodian's response to said request was insufficient because he failed to notify the Complainant that there are no records responsive to the Complainant's request for the October 1, 2008 meeting minutes and corresponding paid bill list, as well as the paid bill list for the year 2003, the Custodian did not unlawfully deny access to the Complainant's OPRA request dated November 3, 2008 because the Custodian certified that he has no record of receiving said request and the Complainant has not provided any supplemental evidence to contradict the Custodian's certification. Additionally, there is no evidence in the record that suggests the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness. 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 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 complaint, the Custodian’s Counsel contends that reasonable attorney’s fees are to be awarded where “...the requested records are disclosed *pursuant to a determination of the Council or voluntary settlement agreement between the parties.*” (Emphasis added) *N.J.A.C. 5:105-2.13(a)*. However, a full review of said regulation reveals that the citation reads as follows:

“[r]easonable attorney’s fees shall be awarded when the requestor is successful (or partially successful) in obtaining access to government record after a denial of access complaint filed with the Council, access was improperly denied and the requested records are disclosed pursuant to a determination of the Council or voluntary settlement agreement between the parties.” *N.J.A.C. 5:105-2.13(a)*.

The Custodian’s Counsel incorrectly asserted that there are only two (2) scenarios for a requestor to receive prevailing party attorney’s fees when, pursuant to the above cited regulation, there are actually three (3), the first one being when the requestor is successful (or partially successful) in obtaining access to government record after a denial of access complaint is filed with the Council. In fact, this exact scenario is evident in this particular Denial of Access Complaint based on the evidence of record.

Specifically, the Complainant filed her Denial of Access Complaint on the basis that she did not receive any response to her OPRA request dated November 3, 2008 or follow up request on December 1, 2008. Although the Custodian certified that the UCIA has no record of receiving the Complainant’s OPRA request dated November 3, 2008, the Custodian certified that he did receive the Complainant’s OPRA request on December 1, 2008. However, the Custodian failed to provide the Complainant with any response to said request until January 26, 2009, six (6) business days after the Complainant filed this Denial of Access Complaint. Thus, the evidence of record indicates that the filing of this complaint was the impetus for the Custodian providing a response to the Complainant’s OPRA request.

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. Specifically, the Custodian provided a response to the Complainant’s OPRA request. 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 because the Custodian failed to provide any response to the Complainant’s OPRA request until six (6) business days after the Complainant filed this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law because the Custodian should have provided the Complainant with a written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days. 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 certified that he has no record of receiving the Complainant's OPRA request dated November 3, 2008 until the Complainant re-submitted said request on December 1, 2008 and the Complainant has not provided any evidence to contradict the Custodian's certification, the Custodian has not unlawfully denied access to the Complainant's OPRA request dated November 3, 2008.
2. The Custodian's failure to respond in writing to the Complainant's re-submitted OPRA request dated December 1, 2008 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).
3. The Custodian's written response dated January 26, 2009 is insufficient pursuant to N.J.S.A. 47:1A-5.g. because the Custodian failed to specifically deny access to the requested records that do not exist. Additionally, because the Custodian certified that there are no records responsive to the Complainant's request for the October 1, 2008 meeting minutes and corresponding paid bill list, as well as the paid bill list for the year 2003, the Custodian would have carried his burden of proving a lawful denial of access, had he provided such response to the Complainant within the statutorily mandated seven (7) business days pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian's failure to provide a written response to the Complainant's December 1, 2008 OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, and the Custodian's response to said request was insufficient because he failed to notify the Complainant that there are no records responsive to the Complainant's request for the October 1, 2008 meeting minutes and corresponding paid bill list, as well as the paid bill list for the year 2003, the Custodian did not unlawfully deny access to the Complainant's OPRA request dated November 3, 2008 because the Custodian certified that he has no record of receiving said request and the Complainant has not provided any evidence to contradict the Custodian's certification. Additionally, there is no evidence in the record that suggests the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness. 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.

5. 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. Specifically, the Custodian provided a response to the Complainant’s OPRA request. 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 because the Custodian failed to provide any response to the Complainant’s OPRA request until six (6) business days after the Complainant filed this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law because the Custodian should have provided the Complainant with a written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days. 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.

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Executive Director

January 19, 2010