



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

September 27, 2011 Government Records Council Meeting

Walter M. Luers, Esq.
(on behalf of Gwen Franklin)
Complainant

Complaint No. 2009-327

v.

Township of West Orange (Essex)
Custodian of Record

At the September 27, 2011 public meeting, the Government Records Council (“Council”) considered the August 23, 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 The Council, therefore, finds that no further adjudication is necessary because the Complainant has withdrawn the complaint with prejudice.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 27th Day of September, 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: October 3, 2011



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 27, 2011 Council Meeting**

**Walter M. Luers¹
(on behalf of Gwen Franklin)
Complainant**

GRC Complaint No. 2009-327

v.

**Township of West Orange (Essex)²
Custodian of Records**

Records Relevant to Complaint:

- (1) West Orange's Internal Affairs Summary Report Form for the reporting period January 1, 2008 to December 31, 2008;
- (2) West Orange's Internal Affairs Summary Report Form for the reporting period January 1, 2007 to December 31, 2007;
- (3) West Orange's Internal Affairs Summary Report Form for the reporting period January 1, 2006 to December 31, 2006;
- (4) West Orange's Internal Affairs Summary Report Form for the reporting period January 1, 2005 to December 31, 2005;
- (5) West Orange's Internal Affairs Summary Report Form for the reporting period January 1, 2004 to December 31, 2004;
- (6) West Orange's Internal Affairs Summary Report Form for the reporting period January 1, 2003 to December 31, 2003;
- (7) The minutes of each closed session meeting of the West Orange City Council (i.e., each meeting of the Council at which the public was excluded) for the following dates:
 - (i) May 12, 2009
 - (ii) May 26, 2009
 - (iii) June 9, 2009
 - (iv) June 23, 2009
 - (v) July 14, 2009
 - (vi) August 11, 2009
 - (vii) September 15, 2009 and
 - (viii) September 29, 2009;
- (8) The resolutions authorizing the closed sessions for each of the meetings referenced in item 7; and

¹ The Complainant is himself the legal counsel for Gwen Franklin for whom he instituted the OPRA records request which is the subject of this complaint.

² Represented by Kenneth W. Kayser, Esq. (East Hanover, NJ).

- (9) Notices of Tort Claims filed with the Township of West Orange from January 1, 2009 to present.

Request Made: October 26, 2009

Response Made: None

Custodian: Karen J. Carnevale

GRC Complaint Filed: December 21, 2009³

Background

November 30, 2010

Government Records Council's ("Council") Interim Order. At its November 30, 2010 public meeting, the Council considered the November 23, 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. The Custodian's failure to respond in writing to the 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).
2. The Complainant has not objected to any of the records provided or records not provided by the Custodian with the Statement of Information. Further, because the Custodian certified that resolutions for closed sessions and closed session minutes do not exist for the requested dates of June 9, 2009, June 23, 2009, September 15, 2009 and September 29, 2009, the Custodian did not unlawfully deny access to these requested records.
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulting in a "deemed" denial for failure to respond to the Complainant's OPRA request within the statutorily mandated seven (7) day time frame, the Custodian did provide the Complainant with all records responsive to the request that exist with the Statement of Information with few or no redactions on January 5, 2010 without objection from the Complainant. Additionally, the Custodian certifies that apparently due to inattention she neglected to respond to the Complainant's October 26, 2009 OPRA request. The Custodian certifies that she can offer no excuse for that failure and further certifies that it was a mistake and not in any way intentional. 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.

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

4. 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 Complainant’s filing of a Denial of Access Complaint on December 21, 2009 brought to the Custodian’s attention that she had neglected to respond to the Complainant’s October 26, 2009 OPRA request. Thereafter, the Custodian provided the Complainant with all records responsive that exist with few or no redactions with the Custodian’s filing of the Statement of Information with the GRC on January 5, 2010. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because N.J.S.A. 47:1A-5.g. and -5.i. provide that a custodian is obligated to respond to an OPRA request in writing within seven (7) business days of receipt of such request. 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.

December 3, 2010

Council’s Interim Order distributed to the parties.

May 2, 2011

Complaint transmitted to the Office of Administrative Law.

August 4, 2011

Letter from Complainant’s Counsel to the Administrative Law Judge (with copy to the Executive Director). Counsel states that he represents Ms. Franklin in this matter. Counsel further states that he is pleased to report that the parties have amicably settled the issues to be determined by the Court and, in accordance with the terms of that settlement, Ms. Franklin withdraws her complaint with prejudice.

Analysis

No further analysis is necessary.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that no further adjudication is necessary because the Complainant has withdrawn the complaint with prejudice.

Approved By: Catherine Starghill, Esq.
Executive Director

August 23, 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

LORI GRIFA
Commissioner

INTERIM ORDER

November 30, 2010 Government Records Council Meeting

Walter M. Luers
(on behalf of Gwen Franklin)
Complainant

Complaint No. 2009-327

v.

Township of West Orange (Essex)
Custodian of Record

At the November 30, 2010 public meeting, the Government Records Council (“Council”) considered the November 23, 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. The Custodian’s failure to respond in writing to the 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).
2. The Complainant has not objected to any of the records provided or records not provided by the Custodian with the Statement of Information. Further, because the Custodian certified that resolutions for closed sessions and closed session minutes do not exist for the requested dates of June 9, 2009, June 23, 2009, September 15, 2009 and September 29, 2009, the Custodian did not unlawfully deny access to these requested records.
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial for failure to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) day time frame, the Custodian did provide the Complainant with all records responsive to the request that exist with the Statement of Information with few or no redactions on January 5, 2010 without objection from the Complainant. Additionally, the Custodian certifies that apparently due to inattention she neglected to respond to the Complainant’s October 26, 2009 OPRA request. The Custodian certifies that she can offer no excuse for that failure and further certifies that it was a mistake and not in any way intentional. 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.

4. 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 Complainant's filing of a Denial of Access Complaint on December 21, 2009 brought to the Custodian's attention that she had neglected to respond to the Complainant's October 26, 2009 OPRA request. Thereafter, the Custodian provided the Complainant with all records responsive that exist with few or no redactions with the Custodian's filing of the Statement of Information with the GRC on January 5, 2010. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because N.J.S.A. 47:1A-5.g. and -5.i. provide that a custodian is obligated to respond to an OPRA request in writing within seven (7) business days of receipt of such request. 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.

Interim Order Rendered by the
Government Records Council
On The 30th Day of November, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: December 3, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 30, 2010 Council Meeting**

**Walter M. Luers¹
(on behalf of Gwen Franklin)
Complainant**

GRC Complaint No. 2009-327

v.

**Township of West Orange (Essex)²
Custodian of Records**

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- (5) West Orange's Internal Affairs Summary Report Form for the reporting period January 1, 2004 to December 31, 2004;
- (6) West Orange's Internal Affairs Summary Report Form for the reporting period January 1, 2003 to December 31, 2003;
- (7) The minutes of each closed session meeting of the West Orange City Council (i.e., each meeting of the Council at which the public was excluded) for the following dates:
 - (i) May 12, 2009
 - (ii) May 26, 2009
 - (iii) June 9, 2009
 - (iv) June 23, 2009
 - (v) July 14, 2009
 - (vi) August 11, 2009
 - (vii) September 15, 2009 and
 - (viii) September 29, 2009;
- (8) The resolutions authorizing the closed sessions for each of the meetings referenced in item 7; and

¹ The Complainant is himself the legal counsel for Gwen Franklin for whom he instituted the OPRA records request which is the subject of this complaint.

² Represented by Kenneth W. Kayser, Esq. (East Hanover, NJ).

(9) Notices of Tort Claims filed with the Township of West Orange from January 1, 2009 to present.

Request Made: October 26, 2009

Response Made: None

Custodian: Karen J. Carnevale

GRC Complaint Filed: December 21, 2009³

Background

October 26, 2009

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 submitted via facsimile. For request nos. 1-6, the Complainant requests that copies be mailed at a maximum authorized cost of \$50. For request nos. 7-9, the Complainant requests that the responsive documents be faxed at a maximum authorized cost of zero dollars.

October 26, 2009

E-mail from the Custodian to the Township Attorney, Police Chief, Police Director and Police Department Records Unit dated October 26, 2009 (with the Complainant's OPRA request attached). The Custodian requested a response from the e-mail recipients to the attached OPRA request attached. The Custodian informed the e-mail recipients that the response is due back to the Complainant by November 4, 2009 and that a complaint was filed with the GRC for lack of a response in a previous matter.

December 21, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") with the Complainant's OPRA request dated October 26, 2009 attached. The Complainant asserts that he did not receive any response to his OPRA records request nor have any of the requested records been provided. The Complainant further asserts that the Custodian's lack of a response is a "deemed" denial to the request. The Complainant request that the GRC order the Custodian to provide copies of the records requested and award Ms. Franklin a reasonable attorney's fee. The Complainant does not agree to mediate this complaint.

December 28, 2009

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

January 5, 2010

Custodian's SOI with the following attachments⁴:

- Letter from the Township Attorney to Gwen Franklin dated October 16, 2009⁵

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

⁴ The Custodian also submitted records not relevant to the adjudication of this complaint.

⁵ This letter is not relevant to the adjudication of this complaint as it addresses other OPRA requests to the Township of West Orange from Ms. Franklin.

- Complainant's OPRA request dated October 26, 2009
- E-mail from the Custodian to the Township Attorney, Police Chief, Police Director and Police Department Records Unit dated October 26, 2009 (with the Complainant's OPRA request attached)
- Records responsive to the request⁶

The Custodian did not certify as to the last date upon which records that may have been responsive to the 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.

The Custodian certifies that she has been the Municipal Clerk for the Township of West Orange since March 2009 and she is the custodian of government records for the Township. The Custodian also certifies that on October 26, 2009 she received the faxed OPRA records request subject to this complaint from Walter M. Luers, Esq., on behalf of Gwen Franklin and such request was entered in the office OPRA Log as #2009-293 by one of her assistants. The Custodian further certifies that since the request dealt with Internal Affairs reports, closed session minutes and Notices of Tort Claims, she forwarded the request that same day to the law office of the Township Attorney, Police Chief, Police Director, and Police Department Records Unit advising all of them that the response was due back by November 4, 2009. Additionally, the Custodian certifies that she asked all of them for a response as soon as possible and pointed out that the Complainant had previously filed a complaint with the GRC for lack of response in another matter.

The Custodian certifies that while awaiting a reply from the Township Attorney, Police Chief, Police Director, and Police Department Records Unit, her office made copies of the resolutions authorizing the closed sessions which were clearly public records not subject to any exception under OPRA. The Custodian also certifies that at some point she and the Township Attorney conversed by telephone regarding the closed session minutes and it had been the Custodian's understanding that the Township Attorney had prepared these minutes under the regime of the previous Clerk. The Custodian certifies that she assumed the Township Attorney continued to prepare the closed session minutes and the Township Attorney assumed that the Custodian had been preparing the minutes as provided in her duties as Municipal Clerk. Further, the Custodian certifies that upon learning from the Township Attorney that no closed session minutes had been prepared for some period of time, the Custodian began preparing closed session minutes and conversed with other officials present at the closed sessions from March to August to reconstruct those closed session minutes.

The Custodian certifies that apparently due to inattention she neglected to respond to the Complainant's October 26, 2009 OPRA request. The Custodian certifies that she can offer no excuse for that failure and further certifies that it was a mistake and not in any way intentional. The Custodian also certifies that she learned of her failed response upon receiving a letter dated December 21, 2009 from the Complainant to the GRC

⁶ At the time the Statement of Information was provided to the GRC, so were the records responsive to the request were provided to the Complainant for the first time.

transmitting this Denial of Access Complaint. The Custodian further certifies that she promptly forwarded the Complainant's December 21, 2009 letter to the Township Attorney who advised that all of the records requested were disclosable and are provided to the Complainant with this SOI.

The Custodian certifies that Ms. Franklin, both on her own and recently through Mr. Luers, has made many other OPRA requests to the Township of West Orange, including seventeen (17) in the past five (5) months. The Custodian also certifies that she has responded in one fashion or another to all of those requests and many were addressed in a letter dated October 16, 2009 from the Township Attorney (attached to the SOI). Further, the Custodian certifies that she acknowledges and accepts the importance of open and transparent government and her obligations under OPRA to further those goals. The Custodian certifies that in this and the recent Byrne matter (GRC Complaint No. 2009-291) she failed to respond to an OPRA request on a timely basis and it is therefore apparent that she must and shall create a more fail-safe process for logging and responding to such requests going forward on a timely basis.

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.

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 therefore on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5.g.

OPRA further provides:

“Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived. . . . 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.” 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 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 complaint, the Complainant asserts that he submitted an OPRA request for government records on October 26, 2009 but never received a response to said request. Thereafter, the Complainant filed this Denial of Access Complaint on December 21, 2009. The Custodian certifies that she received the Complainant’s OPRA request on October 26, 2009 and forwarded the request that same day to the law office of the Township Attorney, Police Chief, Police Director, and Police Department Records Unit advising all of them that the response was due back by November 4, 2009. The Custodian further certifies that due to inattention, she neglected to respond to the Complainant’s request within the statutorily mandated seven (7) business day response time. In fact, the Custodian did not respond to the Complainant’s OPRA request by providing the records responsive until such time as the Custodian submitted her SOI to the GRC on January 5, 2010 or fifty-seven (57) days after receipt of the OPRA request.

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.

Therefore, the Custodian's failure to respond in writing to the 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).

The Custodian did electronically provide the records responsive to the Complainant's request that exist with her SOI submission on January 5, 2010. Specifically, the Custodian certified in the SOI that the following records are responsive and are included with the SOI:

- (1) West Orange's Internal Affairs Summary Report Form for the reporting period January 1, 2008 to December 31, 2008;
- (2) West Orange's Internal Affairs Summary Report Form for the reporting period January 1, 2007 to December 31, 2007;
- (3) West Orange's Internal Affairs Summary Report Form for the reporting period January 1, 2006 to December 31, 2006;
- (4) West Orange's Internal Affairs Summary Report Form for the reporting period January 1, 2005 to December 31, 2005;
- (5) West Orange's Internal Affairs Summary Report Form for the reporting period January 1, 2004 to December 31, 2004;
- (6) West Orange's Internal Affairs Summary Report Form for the reporting period January 1, 2003 to December 31, 2003;
- (7) The resolutions authorizing the closed sessions and the minutes of each closed session meeting of the West Orange City Council (i.e., each meeting of the Council at which the public was excluded) for the following dates:
 - (i) May 12, 2009
 - (ii) May 26, 2009
 - (iii) July 14, 2009
 - (iv) August 11, 2009
- (8) Seventeen (17) Notices of Tort Claims filed with the Township of West Orange from January 1, 2009 to present redacted only for social security numbers and driver's license number (if redacted at all).

The Custodian certified in the Document Index section of the SOI that resolutions authorizing closed sessions and closed session minutes do not exist for the following requested dates:

- (1) June 9, 2009
- (2) June 23, 2009
- (3) September 15, 2009
- (4) September 29, 2009

The Complainant has not objected to any of the records provided or records not provided by the Custodian with the SOI. Further, because the Custodian certified that resolutions for closed sessions and closed session minutes do not exist for the requested

dates of June 9, 2009, June 23, 2009, September 15, 2009 and September 29, 2009, the Custodian did not unlawfully deny access to these requested records.

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.

The Complainant asserts that he submitted an OPRA request for government records on October 26, 2009 but never received a response to said request. Thereafter, the Complainant filed this Denial of Access Complaint on December 21, 2009. The Custodian certifies that she received the Complainant’s OPRA request on October 26, 2009 and forwarded the request that same day to the law office of the Township Attorney, Police Chief, Police Director, and Police Department Records Unit advising all of them that the response was due back by November 4, 2009. The Custodian further certifies that due to inattention, she neglected to respond to the Complainant’s request within the statutorily mandated seven (7) business day response time. In fact, the Custodian did not provide the records responsive that exist to the Complainant until such time as the Custodian filed her Statement of Information with the GRC on January 5, 2010 or fifty-seven (57) days after receipt of the OPRA request.

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

negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial for failing to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) day time frame, the Custodian did provide the Complainant with all records responsive to the request that exist with the Statement of Information with few or no redactions on January 5, 2010 without objection from the Complainant. Additionally, the Custodian certifies that apparently due to inattention she neglected to respond to the Complainant’s October 26, 2009 OPRA request. The Custodian also certifies that she can offer no excuse for that failure and further certifies that it was a mistake and not in any way intentional. 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 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)). In Buckhannon, the Supreme Court 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 Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

As the New Jersey Supreme Court noted in Mason, Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). "But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes." 196 N.J. at 73 (citations omitted).

The Mason Court then examined the catalyst theory within the context of New Jersey law, stating that:

"New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v.

TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); see also Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel

noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon" *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.⁸ Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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 Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight business days later, or one day beyond the statutory limit. *Id.* at 79. As a result, the Court shifted the burden to Hoboken to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind the City's voluntary disclosure. *Id.* Because Hoboken's February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

The Complainant in this instant matter asserts that he submitted an OPRA request for government records on October 26, 2009 but never received a response to said request. Thereafter, the Complainant filed this Denial of Access Complaint on December 21, 2009. The Custodian certifies that she received the Complainant's OPRA request on October 26, 2009 and forwarded the request that same day to the law office of the Township Attorney, Police Chief, Police Director, and Police Department Records Unit

⁸ The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

advising all of them that the response was due back by November 4, 2009. The Custodian further certifies that due to inattention, she neglected to respond to the Complainant's request within the statutorily mandated seven (7) business day response time. In fact, the Custodian did not provide the records responsive that exist to the Complainant until such time as the Custodian filed her Statement of Information with the GRC on January 5, 2010 or fifty-seven (57) days after receipt of the OPRA request. The Custodian certifies that she can offer no excuse for that failure and further certifies that it was a mistake and not in any way intentional.

The Custodian also certifies that she learned of her failed response upon receiving a letter dated December 21, 2009 from the Complainant to the GRC transmitting this Denial of Access Complaint. The Custodian further certifies that she promptly forwarded the Complainant's December 21, 2009 letter to the Township Attorney who advised that all of the records requested were disclosable and subsequently provided to the Complainant with the Statement of Information on January 5, 2010.

Thus, 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 Complainant's filing of a Denial of Access Complaint on December 21, 2009 brought to the Custodian's attention that she had neglected to respond to the Complainant's October 26, 2009 OPRA request. Thereafter, the Custodian provided the Complainant with all records responsive that exist with few or no redactions with the Custodian's filing of the Statement of Information with the GRC on January 5, 2010. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because N.J.S.A. 47:1A-5.g. and -5.i. provide that a custodian is obligated to respond to an OPRA request in writing within seven (7) business days of receipt of such request. 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. The Custodian's failure to respond in writing to the 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).
2. The Complainant has not objected to any of the records provided or records not provided by the Custodian with the Statement of Information. Further, because the Custodian certified that resolutions for closed sessions and closed session minutes do not exist for the requested dates of June 9, 2009, June 23,

2009, September 15, 2009 and September 29, 2009, the Custodian did not unlawfully deny access to these requested records.

3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial for failure to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) day time frame, the Custodian did provide the Complainant with all records responsive to the request that exist with the Statement of Information with few or no redactions on January 5, 2010 without objection from the Complainant. Additionally, the Custodian certifies that apparently due to inattention she neglected to respond to the Complainant’s October 26, 2009 OPRA request. The Custodian certifies that she can offer no excuse for that failure and further certifies that it was a mistake and not in any way intentional. 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.

4. 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 Complainant’s filing of a Denial of Access Complaint on December 21, 2009 brought to the Custodian’s attention that she had neglected to respond to the Complainant’s October 26, 2009 OPRA request. Thereafter, the Custodian provided the Complainant with all records responsive that exist with few or no redactions with the Custodian’s filing of the Statement of Information with the GRC on January 5, 2010. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because N.J.S.A. 47:1A-5.g. and -5.i. provide that a custodian is obligated to respond to an OPRA request in writing within seven (7) business days of receipt of such request. 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.

Prepared and
Approved By: Catherine Starghill, Esq.
Executive Director

November 23, 2010