



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

October 26, 2010 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2009-55

v.

Barrington School District (Camden)
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint should be dismissed because the Complainant withdrew his complaint via letter to the GRC and the Office of Administrative Law dated September 22, 2010 (via his legal counsel) since the parties have reached a settlement in this matter. 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 26th Day of October, 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: October 28, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**John Paff¹
Complainant**

GRC Complaint No. 2009-55

v.

**Barrington School District (Camden)²
Custodian of Records**

Records Relevant to Complaint:

1. Settlement agreement with plaintiffs “O.H. parent of C.F.” and “L.M. parent of B.E.” in Several Students v. Barrington Board v. Morgenroth, Federal Court Docket 05cv5377.
2. Any court order that seals the settlement agreements listed above or otherwise exempts said agreements from public access.

Request Made: December 31, 2008 and January 21, 2009

Response Made: April 1, 2009

Custodian: Tony Mack³ and Carol Anne Visalli⁴

GRC Complaint Filed: February 23, 2009⁵

Background

February 23, 2010

Government Records Council’s (“Council”) Interim Order. At its February 23, 2010 public meeting, the Council considered the February 16, 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 original Custodian’s failure to respond to the Complainant’s first (1st) OPRA request dated December 31, 2008 in writing 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.

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

² Represented by Ronald W. Sahli, Esq., of Sahli & Padovani (Hammonton, NJ).

³ The Custodian at the time of the Complainant’s first OPRA request dated December 31, 2008.

⁴ The Custodian at the time of the Complainant’s second OPRA request dated January 21, 2009.

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

47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. The current Custodian's failure to respond to the Complainant's second OPRA request dated January 21, 2009 in writing 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 current Custodian unlawfully denied access to the requested settlement agreement because she had knowledge of the litigation and was obligated to obtain the settlement agreement from the insurance fund. However, the Custodian did provide the requested settlement agreements to the Complainant on April 1, 2009 after obtaining said agreements from outside counsel.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), this Denial of Access Complaint did bring about a change in the Custodian's conduct. Specifically, the Custodian obtained the requested settlement agreement from the outside counsel and provided such to the Complainant. Thus, the relief ultimately achieved did have a basis in law because the Custodian was obligated to contact the outside counsel in an attempt to locate the requested settlement agreement. 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.

March 1, 2010

Council's Interim Order distributed to the parties.

June 23, 2010

Complaint transmitted to the Office of Administrative Law.

September 22, 2010

Letter from Complainant's Counsel to the Administrative Law Judge, with a copy to the GRC. Counsel states that the parties have reached a settlement in this complaint and the Barrington School District has fulfilled all of its obligations under said settlement. As such, Counsel states that the Complainant withdraws this Denial of Access Complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant withdrew his complaint via letter to the GRC and the Office of Administrative Law dated September 22, 2010 (via his legal counsel) since the parties have reached a settlement in this matter. Therefore, no further adjudication is required.

Prepared By: Dara Lownie
Communications Manager/Information Specialist

Approved By: Catherine Starghill, Esq.
Executive Director

October 19, 2010



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

INTERIM ORDER

February 23, 2010 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2009-55

v.

Barrington School District (Camden)
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 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 original Custodian’s failure to respond to the Complainant’s first (1st) OPRA request dated December 31, 2008 in writing 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 current Custodian’s failure to respond to the Complainant’s second OPRA request dated January 21, 2009 in writing 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 current Custodian unlawfully denied access to the requested settlement agreement because she had knowledge of the litigation and was obligated to obtain the settlement agreement from the insurance fund. However, the Custodian did provide the requested settlement agreements to the Complainant on April 1, 2009 after obtaining said agreements from outside counsel.



4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), this Denial of Access Complaint did bring about a change in the Custodian's conduct. Specifically, the Custodian obtained the requested settlement agreement from the outside counsel and provided such to the Complainant. Thus, the relief ultimately achieved did have a basis in law because the Custodian was obligated to contact the outside counsel in an attempt to locate the requested settlement agreement. 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 23rd Day of February, 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: March 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2010 Council Meeting**

John Paff¹
Complainant

GRC Complaint No. 2009-55

v.

Barrington School District (Camden)²
Custodian of Records

Records Relevant to Complaint:

1. Settlement agreement with plaintiffs “O.H. parent of C.F.” and “L.M. parent of B.E.” in Several Students v. Barrington Board v. Morgenroth, Federal Court Docket 05cv5377.
2. Any court order that seals the settlement agreements listed above or otherwise exempts said agreements from public access.

Request Made: December 31, 2008 and January 21, 2009

Response Made: April 1, 2009

Custodian: Tony Mack³ and Carol Anne Visalli⁴

GRC Complaint Filed: February 23, 2009⁵

Background

December 31, 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.

January 21, 2009

Complainant re-submits his OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

February 23, 2009

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

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

² Represented by Ronald W. Sahli, Esq., of Sahli & Padovani (Hammonton, NJ).

³ The Custodian at the time of the Complainant’s first OPRA request dated December 31, 2008.

⁴ The Custodian at the time of the Complainant’s second OPRA request dated January 21, 2009.

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

- Complainant's OPRA request dated December 31, 2008, with transmittal e-mail attached.
- Complainant's re-submitted OPRA request dated January 21, 2009, with fax confirmation page attached.

The Complainant states that he submitted his OPRA request on December 31, 2008 via e-mail. The Complainant states that he did not receive any response to said request and thus re-submitted said request via facsimile on January 21, 2009. The Complainant states that he again received no response to his OPRA request. The Complainant states that he left the Custodian a voicemail message on February 4, 2009 and to date has not received any response.

The Complainant states that pursuant to N.J.S.A. 47:1A-5.i., a custodian must respond to an OPRA request as soon as possible but not later than seven (7) business days following receipt of said request. The Complainant states that N.J.S.A. 47:1A-5.i. also provides that a custodian's failure to respond during said time frame results in a "deemed" denial of the OPRA request. The Complainant asserts that because the Custodian failed to provide a written response to his OPRA request within the statutorily mandated seven (7) business days, the Custodian violated OPRA. See Cottrell v. Borough of Glassboro, GRC Complaint No. 2005-247 (April 2006).

Additionally, the Complainant requests that the Council order the Custodian to disclose the requested record to the Complainant and find that 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.

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

March 18, 2009

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

March 25, 2009

Custodian's SOI with the Complainant's OPRA request attached. The Custodian states that she received a telephone call from the Complainant on January 21, 2009, the Custodian's first (1st) day on the job, in which the Complainant indicated that he had submitted an OPRA request to the former Business Administrator via e-mail and had not received a response to said request. The Custodian certifies that she advised the Complainant to re-submit his OPRA request via facsimile. The Custodian certifies that upon receipt of said OPRA request on January 21, 2009, the Custodian forwarded said request to the Interim Superintendent, who began employment on January 5, 2009. The Custodian states that the Interim Superintendent forwarded the Complainant's OPRA request to the Board of Education's ("BOE") Solicitor.

The Custodian certifies that while awaiting advice on how to proceed with this request from the Solicitor, the Custodian searched the BOE's files within the Business Office and Superintendent's Office to locate the requested settlement agreement. The Custodian certifies that she located correspondence referring to the case requested, but

did not locate any judgment or any court order relating to the case. The Custodian certifies that the requested settlement agreement is not maintained by the BOE.

The Custodian also certifies that when she received this Denial of Access Complaint, she realized that the Solicitor had not responded to the OPRA request as the Custodian anticipated. The Custodian certifies that she then decided to contact New Jersey School Boards Association Insurance Group, the BOE's insurance agent. The Custodian certifies that she learned the insurance group had hired counsel to defend the BOE in the case which is the subject of this complaint. The Custodian states that this insurance group may be in possession of the requested settlement agreement, but the Custodian is unsure whether she is obligated to request records from other agencies pursuant to an OPRA request.

Additionally, the Custodian certifies that she did not respond to the Complainant's OPRA request because said request involved minor students and a former teacher and thus, the Custodian forwarded said request to the Solicitor for a response.

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

April 1, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the forty-eighth (48th) business day following receipt of such request. The Custodian states that although the BOE was not in possession of the requested records at the time of the Complainant's OPRA request, the Custodian states that the BOE has since obtained said record from the attorney of record in the federal lawsuit.

The Custodian states that two (2) settlement agreements are enclosed with redactions of the full names of the students and their parents pursuant to N.J.S.A. 47:1A-9.b., 20 U.S.C. Sec. 1232g(a) and (b), 34 C.F.R. Sec. 99.30, N.J.S.A. 18A:36-19 and N.J.A.C. 6:6-6.1 et. seq.

October 9, 2009

The Complainant's response to the Custodian's SOI. The Complainant asserts that a custodian cannot delegate her duties to respond to OPRA requests. The Complainant states that while it appears that the requested record was in the possession of the BOE's outside counsel, the Custodian was obligated to obtain said record from Counsel.

Additionally, the Complainant states that the Custodian provided no explanation why it took four (4) months to obtain the requested record from outside counsel. The Complainant states that the Council held in Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 that records located at the Borough Engineer's office were government records subject to public access because said records related to work the Engineer performed on behalf of the Borough.

The Complainant also states that because the effective date of both settlement agreements is December 17, 2007, prior to the Complainant's OPRA requests, the Custodian cannot claim that said agreements did not exist at the time of the Complainant's OPRA requests. Further, the Complainant asserts that his Denial of Access Complaint was the catalyst for the Custodian to release the requested records and thus, the Complainant should be entitled to an award of prevailing party attorney's fees.

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 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. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record." 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.⁶ 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).

The Complainant stated that he submitted his first OPRA request on December 31, 2008 via e-mail to the original Custodian. The Complainant stated that he received no response to said OPRA request. The Complainant stated that he re-submitted his OPRA request via facsimile to the current Custodian on January 21, 2009. The current Custodian certified that upon receipt of said OPRA request on January 21, 2009, her first (1st) day on the job, the Custodian forwarded said request to the Interim Superintendent, who began employment on January 5, 2009. The Custodian states that the Interim Superintendent forwarded the Complainant’s OPRA request to the BOE’s Solicitor.

Therefore, the original Custodian’s failure to respond to the Complainant’s first (1st) OPRA request dated December 31, 2008 in writing 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 Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), the Council held that “[w]hile seeking legal advice on how to appropriately respond to a records request is reasonable, it is not a lawful reason for delaying a response to an OPRA records request because the Custodian should have obtained a written agreement from the Complainant extending the time period to respond.”

⁶ 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.

Similarly in this instant complaint, the Custodian certified that she forwarded the Complainant's OPRA request dated January 21, 2009 to the Interim Superintendent who in turn forwarded the request to the BOE Solicitor for a response because the Interim Superintendent and Custodian were unsure how to respond since the request was received during the first (1st) month of their employment with the BOE. As the Council held in Paff, supra, seeing legal advice is reasonable, but it is not a lawful basis for delaying a response to an OPRA request.

Therefore, the current Custodian's failure to respond to the Complainant's second OPRA request dated January 21, 2009 in writing 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.

Additionally, the Custodian certified that the BOE was not in possession of the requested settlement agreement. Specifically, the Custodian certified that the requested record was maintained by outside counsel hired by the New Jersey School Board's Insurance Group, ("NJSBAIG") the BOE's insurance agent. The Custodian obtained the requested settlement agreement from the outside counsel and provided such to the Complainant via letter dated April 1, 2009. The Complainant states that the Council has previously held that a government record includes records that may be located in the possession, custody or control of the public agency's employees or contractors. *See Schuler v. Borough of Bloomsbury (Hunterdon)*, GRC Complaint No. 2007-151 (February 2009).

In South Plainfield Republican Organization v. Buttligieri, MID-L-6593-05 (Sup. Ct. Nov. 10, 2005) (letter decision) (Ciccone, P.J.S.C.), rev'd in part, MID-L-6593-05, 2007 WL 1891301 (App. Div. July 3, 2007), the Plaintiff sought a settlement agreement which was in the possession of the Defendant Borough's joint insurance fund. The court ordered the Borough to produce a copy of the settlement agreement from the files of the Borough's joint insurance fund.

The crux of the trial court's decision hinged on whether the requested settlement was a "government record" for the purposes of OPRA or whether said record constituted attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The court concluded that the settlement agreement was a government record subject to public access under OPRA and disclosed it to the Plaintiff. In the Appellate Division's recitation of the facts in Buttligieri, supra, the court stated that:

"[t]he Borough asserted that it was not in possession of the settlement agreement, deposition transcripts, nor any other portion of the litigation file. The Borough did not participate in, authorize, or approve the settlement. The funds for the settlement of the Pinto litigation were paid by the Middlesex County Joint Insurance Fund, an independent body, and not directly by the Borough. The only document relating to the litigation, which was in the possession of the Borough, was the stipulation of dismissal with prejudice filed with the Clerk of the Superior Court."

Thus, in Buttligieri, *supra*, the defendant Borough, while not in possession of the requested settlement agreement, had knowledge that some settlement had been reached because the Borough maintained a copy of the stipulation of dismissal.

The Custodian in the instant complaint certified in her SOI that her search of the BOE's files for the requested settlement agreement turned up only correspondence referring to the case requested, but not any judgment or court order regarding said litigation. Thus, similar to Buttligieri, *supra*, the Custodian had some knowledge of the litigation. The evidence of record indicates that the Custodian delegated her duties to the Interim Superintendent who in turn forwarded the request to the BOE Solicitor for a response because the Interim Superintendent and Custodian were unsure how to respond since the request was received during the first (1st) month of their employment with the BOE. There is no evidence in the record that indicates the Interim Superintendent or the BOE Solicitor conducted any search for the requested settlement agreement. Additionally, there is no evidence in the record that indicates the Custodian, Interim Superintendent or BOE Solicitor expected status updates from the NJSBAIG regarding the litigation, or specifically any settlement agreements. Thus, it is reasonable that the Custodian should have contacted the NJSBAIG in an attempt to locate any records responsive to the Complainant's OPRA request.

Therefore, the Custodian unlawfully denied access to the requested settlement agreement because she had knowledge of the litigation and was obligated to obtain the settlement agreement from the insurance fund. However, the Custodian did provide the requested settlement agreements to the Complainant on April 1, 2009 after obtaining said agreements from outside counsel.

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).”

The Complainant filed this instant Denial of Access Complaint because he received no response to his OPRA requests dated December 31, 2008 and January 21, 2009. The Complainant asserted that the Council should find the Custodian in violation of OPRA for failing to provide a written response to his OPRA requests within the statutorily mandated seven (7) business days thus resulting in a “deemed” denial of said OPRA requests. As stated above, both the original and current Custodians violated OPRA at N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to his OPRA requests within the statutorily mandated seven (7) business days.

Additionally, the Complainant sought an order from the Council directing the Custodian to disclose the requested settlement agreement to the Complainant. Although the Council did not order the Custodian to disclose said record to the Complainant, the Custodian provided said record to the Complainant on April 1, 2009, after the filing of

this Denial of Access Complaint. Additionally, the Council held that the Custodian unlawfully denied access to the requested settlement agreement because she had knowledge of the litigation and was obligated to obtain the settlement agreement from the insurance fund.

Pursuant to Teeters, *supra*, this Denial of Access Complaint did bring about a change in the Custodian's conduct. Specifically, the Custodian obtained the requested settlement agreement from the BOE's outside counsel and provided such to the Complainant. Thus, the relief ultimately achieved did have a basis in law because the Custodian was obligated to contact the outside counsel in an attempt to locate the requested settlement agreement. 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 original Custodian's failure to respond to the Complainant's first (1st) OPRA request dated December 31, 2008 in writing 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 current Custodian's failure to respond to the Complainant's second OPRA request dated January 21, 2009 in writing 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 current Custodian unlawfully denied access to the requested settlement agreement because she had knowledge of the litigation and was obligated to obtain the settlement agreement from the insurance fund. However, the Custodian did provide the requested settlement agreements to the Complainant on April 1, 2009 after obtaining said agreements from outside counsel.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), this Denial of Access Complaint did bring about a change in the Custodian's conduct. Specifically, the Custodian obtained the requested settlement agreement from the outside counsel and provided such to the Complainant. Thus, the relief ultimately achieved did have a basis in law because the Custodian was obligated to contact the outside counsel in an attempt to locate

the requested settlement agreement. 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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Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010