



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

July 27, 2010 Government Records Council Meeting

Veronica Silkes
Complainant

Complaint No. 2009-60

v.

Town of Dover (Morris)
Custodian of Record

At the July 27, 2010 public meeting, the Government Records Council (“Council”) considered the July 20, 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, renders a final decision dismissing this complaint because the Complainant voluntarily withdrew the complaint in writing to the GRC on June 21, 2010.

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 July, 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: July 30, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 27, 2010 Council Meeting**

**Veronica Silkes¹
Complainant**

GRC Complaint No. 2009-60

v.

**Town of Dover (Morris)²
Custodian of Records**

Records Relevant to Complaint: E-mailed or faxed copy of the contract the Town of Dover entered into with the Borough of Mount Arlington for shared court services, which should be the same contract the Town of Dover entered into with the Boroughs of Wharton, Mine Hill Township and Rockaway Township; however, if there is a separate contract for each of these municipalities then provide a copy of each separate contract.

Request Made: January, 14 2009

Response Made: January 28, 2009

Custodian: Margaret Verga, Municipal Clerk

GRC Complaint Filed: March 2, 2009³

Background

April 28, 2010

At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 21, 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, found that:

1. Because the Custodian failed and refused to disclose to the Complainant all records responsive to the Complainant’s January 14, 2009 OPRA request via the Complainant’s preferred delivery method within five (5) business days from receipt of the Council’s Interim Order and failed and refused to forward certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days from receipt of the Council’s Interim Order, the Custodian, Margaret Verga, has not complied with the terms of the Council’s February 23, 2010 Interim Order and is in contempt of said Order.

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

² Represented by David Pennella, Esq. (Dover, NJ).

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

2. Because the Custodian denied the Complainant access to the records relevant to the complaint via the Complainant's preferred delivery method and failed and refused to comply with the terms of the Council's Interim Order dated February 23, 2010 within the time period provided and continues to fail and refuse to comply with the terms of said Order, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional.
3. Although this Denial of Access Complaint did not bring about a change in the Custodian's conduct because the Custodian continues and refuses to comply with the terms of the Council's Interim Order dated February 23, 2010, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant was successful in obtaining an Order by the Council stating that access was improperly denied. Further, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Complainant was able to demonstrate a factual causal nexus between filing of the Denial of Access Complaint and the relief ultimately achieved, as well as show that said relief did have a basis in law because the Custodian is obligated to disclose all records responsive to the Complainant's January 14, 2009 OPRA request via the Complainant's preferred delivery method. 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).
4. This complaint is referred to the Office of Administrative Law for determination of (a) whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and (b) for the determination of reasonable prevailing party attorney's fees.

April 30, 2010

Council's Interim Order distributed to the parties.

June 21, 2010

E-mail from the Complainant's Counsel to the GRC. The Complainant's Counsel informs the GRC that the Complainant has voluntarily withdrawn her complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council render a final decision dismissing this complaint because the Complainant voluntarily withdrew the complaint in writing to the GRC on June 21, 2010.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

July 20, 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

April 28, 2010 Government Records Council Meeting

Veronica Silkes
Complainant

Complaint No. 2009-60

v.

Town of Dover (Morris)
Custodian of Record

At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 21, 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:

1. Because the Custodian failed and refused to disclose to the Complainant all records responsive to the Complainant’s January 14, 2009 OPRA request via the Complainant’s preferred delivery method within five (5) business days from receipt of the Council’s Interim Order and failed and refused to forward certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days from receipt of the Council’s Interim Order, the Custodian, Margaret Verga, has not complied with the terms of the Council’s February 23, 2010 Interim Order and is in contempt of said Order.
2. Because the Custodian denied the Complainant access to the records relevant to the complaint via the Complainant’s preferred delivery method and failed and refused to comply with the terms of the Council’s Interim Order dated February 23, 2010 within the time period provided and continues to fail and refuse to comply with the terms of said Order, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional.
3. Although this Denial of Access Complaint did not bring about a change in the Custodian’s conduct because the Custodian continues and refuses to comply with the terms of the Council’s Interim Order dated February 23, 2010, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant was successful in obtaining an Order by the Council stating that



access was improperly denied. Further, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Complainant was able to demonstrate a factual causal nexus between filing of the Denial of Access Complaint and the relief ultimately achieved, as well as show that said relief did have a basis in law because the Custodian is obligated to disclose all records responsive to the Complainant's January 14, 2009 OPRA request via the Complainant's preferred delivery method. 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).

4. This complaint is referred to the Office of Administrative Law for determination of (a) whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and (b) for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 28th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: April 30, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 28, 2010 Council Meeting**

**Veronica Silkes¹
Complainant**

GRC Complaint No. 2009-60

v.

**Town of Dover (Morris)²
Custodian of Records**

Records Relevant to Complaint: E-mailed or faxed copy of the contract the Town of Dover entered into with the Borough of Mount Arlington for shared court services, which should be the same contract the Town of Dover entered into with the Boroughs of Wharton, Mine Hill Township and Rockaway Township; however, if there is a separate contract for each of these municipalities then provide a copy of each separate contract.

Request Made: January, 14 2009

Response Made: January 28, 2009

Custodian: Margaret Verga, Municipal Clerk

GRC Complaint Filed: March 2, 2009³

Background

February 23, 2010

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, found that:

1. The Custodian did not unlawfully fail to respond to the Complainant’s OPRA request dated January 14, 2009 in a timely manner because there is no proof the Custodian actually received the facsimile request on January 15, 2009, and when the Custodian certified that she did receive the request, on January 28, 2009, she responded that same day in compliance with N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-5.i.
2. The Custodian’s response is insufficient because she failed to specifically address the Complainant’s preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g., O’Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (February 2008)

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

² Represented by David Pennella, Esq. (Dover, NJ).

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

and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008).

3. Because the Custodian had the proper means to deliver the requested paper record via facsimile, the Custodian has violated N.J.S.A. 47:1A-5.d. by failing to deliver the record to the Complainant via that means.
4. The Custodian shall disclose all records responsive to the Complainant's January 14, 2009 OPRA request via the Complainant's preferred delivery method.
5. **The Custodian shall comply with paragraph 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

March 1, 2010

Council's Interim Order distributed to the parties.

Analysis

Whether the Custodian complied with the Council's February 23, 2010 Interim Order?

At its February 23, 2010 public meeting, the Council found that the Custodian's response to the Complainant's OPRA request dated January 14, 2009 was insufficient because the Custodian failed to specifically address the Complainant's preference for receipt of records. Accordingly, the Council ordered the Custodian within five (5) business days from receipt of the Council's Interim Order to disclose to the Complainant all records responsive to the Complainant's January 14, 2009 OPRA request via the Complainant's preferred delivery method and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

The Custodian failed and refused to certify that she complied with the terms of the Council's Interim Order. The Custodian previously certified that she never provided the requested records to the Complainant because the Complainant insisted that the Custodian fax or e-mail the records to her. The records requested are shared services

agreements, which are immediate access records pursuant to N.J.S.A. 47:1A-5.e. Therefore, the Custodian did not disclose to the Complainant all records responsive to the Complainant's January 14, 2009 OPRA request via the Complainant's preferred delivery method within five (5) business days from receipt of the Council's Interim Order. Further, the Custodian did not simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

Accordingly, because the Custodian failed and refused to disclose to the Complainant all records responsive to the Complainant's January 14, 2009 OPRA request via the Complainant's preferred delivery method within five (5) business days from receipt of the Council's Interim Order and failed and refused to forward certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days from receipt of the Council's Interim Order, the Custodian has not complied with the terms of the Council's February 23, 2010 Interim Order and is in contempt of said Order.

Whether the Custodian's denial of access to the requested records via the Complainant's preferred delivery method 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.

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).

Here, the Custodian denied the Complainant access to the records relevant to the complaint via the Complainant's preferred delivery method. Thereafter, the Council by Interim Order dated February 23, 2010 directed the Custodian to disclose all records responsive to the Complainant's January 14, 2009 OPRA request via the Complainant's preferred delivery method and forward certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days from receipt of said Order. The Custodian failed and refused to comply with the terms of the Council's Interim Order within the time period provided and continues to fail and refuse to comply with the terms of the Order

Because the Custodian denied the Complainant access to the records relevant to the complaint via the Complainant's preferred delivery method and failed and refused to comply with the terms of the Council's Interim Order dated February 23, 2010 within the time period provided and continues to fail and refuse to comply with the terms of said Order, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Thus, this complaint should be referred to the Office of Administrative Law for the determination of whether the custodian's actions amount to 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).”

The Complainant filed the instant complaint because she asserted that she was denied access to the requested records in the medium requested. The complaint sought relief by requesting a finding that the Custodian violated OPRA by not providing the records in the medium requested and an order that the Custodian provide the records in the medium in which they were requested.

Although this Denial of Access Complaint did not bring about a change in the Custodian’s conduct because the Custodian continues and refuses to comply with the terms of the Council’s Interim Order dated February 23, 2010, pursuant to Teeters, *supra*, the Complainant was successful in obtaining an Order by the Council stating that access was improperly denied. Further, pursuant to Mason, *supra*, the Complainant was able to demonstrate a factual causal nexus between filing of the Denial of Access Complaint and the relief ultimately achieved, as well as show that said relief did have a basis in law because the Custodian was ordered and is obligated to disclose all records responsive to the Complainant’s January 14, 2009 OPRA request via the Complainant’s preferred delivery method. 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 failed and refused to disclose to the Complainant all records responsive to the Complainant's January 14, 2009 OPRA request via the Complainant's preferred delivery method within five (5) business days from receipt of the Council's Interim Order and failed and refused to forward certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days from receipt of the Council's Interim Order, the Custodian, Margaret Verga, has not complied with the terms of the Council's February 23, 2010 Interim Order and is in contempt of said Order.
2. Because the Custodian denied the Complainant access to the records relevant to the complaint via the Complainant's preferred delivery method and failed and refused to comply with the terms of the Council's Interim Order dated February 23, 2010 within the time period provided and continues to fail and refuse to comply with the terms of said Order, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional.
3. Although this Denial of Access Complaint did not bring about a change in the Custodian's conduct because the Custodian continues and refuses to comply with the terms of the Council's Interim Order dated February 23, 2010, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant was successful in obtaining an Order by the Council stating that access was improperly denied. Further, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Complainant was able to demonstrate a factual causal nexus between filing of the Denial of Access Complaint and the relief ultimately achieved, as well as show that said relief did have a basis in law because the Custodian is obligated to disclose all records responsive to the Complainant's January 14, 2009 OPRA request via the Complainant's preferred delivery method. 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).
4. This complaint is referred to the Office of Administrative Law for determination of (a) whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and (b) for the determination of reasonable prevailing party attorney's fees.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

April 21, 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

Veronica Silkes
Complainant

Complaint No. 2009-60

v.

Town of Dover (Morris)
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 Custodian did not unlawfully fail to respond to the Complainant's OPRA request dated January 14, 2009 in a timely manner because there is no proof the Custodian actually received the facsimile request on January 15, 2009, and when the Custodian certified that she did receive the request, on January 28, 2009, she responded that same day in compliance with N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-5.i.
2. The Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g., O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (February 2008) and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008).
3. Because the Custodian had the proper means to deliver the requested paper record via facsimile, the Custodian has violated N.J.S.A. 47:1A-5.d. by failing to deliver the record to the Complainant via that means.
4. The Custodian shall disclose all records responsive to the Complainant's January 14, 2009 OPRA request via the Complainant's preferred delivery method.



5. **The Custodian shall comply with paragraph 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Veronica Silkes¹
Complainant**

GRC Complaint No. 2009-60

v.

**Town of Dover (Morris)²
Custodian of Records**

Records Relevant to Complaint: E-mailed or faxed copy of the contract the Town of Dover entered into with the Borough of Mount Arlington for shared court services, which should be the same contract the Town of Dover entered into with Borough of Wharton, Mine Hill Township and Rockaway Township; however, if there is a separate contract for each of these municipalities then provide a copy of each separate contract.

Request Made: January, 14 2009

Response Made: January 28, 2009

Custodian: Margaret Verga, Municipal Clerk

GRC Complaint Filed: March 2, 2009³

Background

January 14, 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.⁴

January 26, 2009

E-mail from the Complainant to the Custodian. The Complainant asks the Custodian for the status of her OPRA request.

January 26, 2009

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that the Custodian did not receive an OPRA request from the Complainant and asks the Complainant to resend the request.

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

² Represented by David Pennella, Esq. (Dover, NJ).

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

⁴ The Complainant provided both her e-mail address and her facsimile number on the request form.
Veronica Silkes v. Town of Dover (Morris), 2009-60 – Findings and Recommendations of the Executive Director

January 27, 2009

E-mail from the Complainant to the Custodian. The Complainant sends the Custodian a copy of the OPRA request and a facsimile transmission report showing a January 15, 2009 facsimile transmission to the Custodian.⁵

January 28, 2009

Custodian's Response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the same date she receives such request. The Custodian informs the Complainant that she has no explanation why her office did not receive the OPRA request when it was faxed by the Complainant. The Custodian also informs the Complainant that the requested records are ready for pickup and the copying cost is \$4.50. The Custodian further informs the Complainant that the Custodian can mail the copies of the records to the Complainant upon receipt of the Complainant's payment of \$5.26, which reflects the copying cost plus postage.

January 28, 2009

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian that the Complainant requested delivery of the records via facsimile or e-mail. The Complainant again provides her e-mail address and facsimile number to the Custodian and renews her request to have the records faxed or e-mailed to her.

January 28, 2009

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that the first page of the OPRA request form asked the Complainant whether she preferred delivery by pickup, mail or onsite inspection. The Custodian further informs the Complainant that records can be delivered in specific formats for a reasonable cost.

March 2, 2009

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

- Complainant's OPRA request dated January 14, 2009
- E-mail from the Complainant to the Custodian dated January 26, 2009
- E-mail from the Custodian to the Complainant dated January 26, 2009
- Facsimile transmission report dated January 27, 2009
- E-mail from the Complainant to the Custodian dated January 27, 2009
- Custodian's Response to the OPRA request dated January 28, 2009
- E-mail from the Complainant to the Custodian dated January 28, 2009
- E-mail from the Custodian to the Complainant dated January 28, 2009

The Complainant's Counsel asserts that the Complainant has been denied access to the requested records because the Custodian refused to deliver the records via the Complainant's preferred delivery method of either e-mail or facsimile as requested by the

⁵ The transmission report confirms that a two (2) page facsimile was successfully transmitted to 973-328-6524 from 212-261-9886 on January 15, 2009 at 11:02 a.m. The former number is the facsimile number for the Custodian and the latter number is the facsimile number for the Complainant.

Complainant in her January 14, 2009 OPRA request, even though the Custodian had the means to do so.

The Complainant's Counsel asserts that on January 15, 2008, the Complainant faxed an OPRA request dated January 14, 2009 to the Custodian on the agency's official OPRA request form. Counsel further asserts that the Custodian e-mailed the Complainant a response on January 28, 2009, informing her that the copies of the requested records were ready for pickup upon payment of the copying charges or that they could be mailed to the Complainant at an additional charge. Counsel states that the Complainant subsequently e-mailed the Custodian to inform her that the Complainant requested delivery of the records via facsimile or e-mail, but that the Custodian by reply e-mail informed the Complainant that the OPRA request form provided for only three (3) delivery options and that the Complainant had to use one of those three (3) methods.

Counsel cites O'Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008) and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008) as precedent which the GRC should follow in investigating this complaint because Counsel argues that the Custodian has not sufficiently addressed the Complainant's preference by stating that the records would be available by mail or pickup only. Counsel argues that such a response is insufficient to sustain the Custodian's burden that it would be impossible for the Custodian to scan and e-mail or fax the records.

The Complainant requests:

1. A finding that the Custodian violated OPRA by denying the Complainant access to the requested records.
2. A finding that the Custodian violated OPRA by not providing the records in the medium requested.
3. An order that the Custodian provide the records in the medium in which they were requested.
4. A determination that the Complainant was the prevailing party and therefore award a reasonable attorney's fee.

The Complainant did not agree to mediate this complaint.

March 10, 2009

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

March 11, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated January 14, 2009
- E-mail from the Complainant to the Custodian dated January 26, 2009
- E-mail from the Custodian to the Complainant dated January 26, 2009
- E-mail from the Complainant to the Custodian dated January 27, 2009
- Custodian's Response to the OPRA request dated January 28, 2009
- E-mail from the Complainant to the Custodian dated January 28, 2009

- E-mail from the Custodian to the Complainant dated January 28, 2009

The Custodian certifies that her search for the requested records involved retrieval of the records which were readily available. The Custodian also certifies that the date upon which records responsive to the request may be destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is six (6) years after completion of the contract.

The Custodian certifies that she received the Complainant's OPRA request on January 28, 2009. The Custodian also certifies that she determined the record responsive to the request was an eleven (11) page shared services agreement for Dover, Wharton, Minehill (sic) Township, Rockaway Borough and the Borough of Mount Arlington. The Custodian avers that she made double-sided copies of the record and responded to the Complainant on the same date she received the request via e-mail, informing the Complainant that the requested records were available. The Custodian further avers that there was an exchange of e-mails between the Custodian and the Complainant in which the Complainant insisted that the Custodian deliver the requested records to the Complainant via e-mail or facsimile transmission. The Custodian certifies that she did not provide the record to the Complainant. The Custodian further certifies there is no legal basis for denying the Complainant access to the requested records.

Analysis

Whether the Custodian received the Complainant's faxed OPRA request?

OPRA provides that:

“[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, *contracts*, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also provides:

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

The Complainant contends that her OPRA request was provided to the Custodian on January 15, 2009. The Complainant's method of delivery was via facsimile transmission to a specific telephone facsimile number. The evidence of record reveals the Complainant successfully transmitted her OPRA request via that facsimile number on

January 15, 2009 at 11:02 a.m. The Custodian, however, certifies that she did not receive the records request until January 28, 2009.

In Bellan-Boyer v. NJ Department of Community Affairs, GRC Complaint No. 2007-114 (October 2007), the complainant stated that he submitted an OPRA request to the custodian and received confirmation of a successful facsimile transmittal. In this matter, there was a change of custodians and the complainant stated in his complaint that the original custodian informed him that the agency never received the complainant's OPRA request. The replacement custodian certified that, upon a diligent search of agency files, he found no record of the complainant's OPRA request. The Council found that the original custodian did not unlawfully deny access to the complainant's OPRA request because *there was no proof that the custodian actually received the request*. (Emphasis added.)

In the instant complaint, as in Bellan-Boyer, *supra*, there is no evidence that the Custodian actually received the request. The Complainant's facsimile report only serves as proof that the request was successfully transmitted to the receiving machine, not that the Custodian received it. There are a number of reasons why a request may not have been printed, or if printed, may not have been received by the intended recipient.

The Superior Court articulated several disadvantages in using a facsimile transmission as the sole means for document delivery in Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W. L.L.C., 368 N.J. Super. 382 (App. Div. 2004). In that matter, the court said:

“[d]espite the prevalent use of fax machines for business purposes...[f]axes...do not provide a means to determine the actual recipient of the fax...the recipient of a fax is always a machine, not an individual. Without further personal verification, the sender has no way of knowing that the fax was ever removed from the machine and no knowledge of which individual actually received it.” *Id* at 393.

Based on the evidence of record, the Custodian did not unlawfully fail to respond to the Complainant's OPRA request dated January 14, 2009 in a timely manner because there is no proof the Custodian actually received the facsimile request on January 15, 2009, and when the Custodian certified she did receive the request on January 28, 2009, she responded that same day in compliance with N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-5.i.

Whether the Custodian unlawfully denied access to the requested record?

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 states that:

“[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency *does not maintain* the record in the medium requested, the custodian *shall either convert* the record to the medium requested or *provide a copy in some other meaningful medium*. (Emphasis added.) N.J.S.A. 47:1A-5.d.

OPRA also states:

“A request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically or otherwise conveyed to the appropriate custodian...[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 places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“... [t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Custodian certified that she made double-sided copies of the requested record and responded to the Complainant on the same date she received the request via e-mail, January 28, 2009, informing the Complainant that the requested records were available. The Custodian further certified that there was an exchange of e-mails between the Custodian and the Complainant in which the Complainant insisted that the Custodian deliver the requested records to the Complainant via e-mail or facsimile transmission. The Custodian certified that she e-mailed the Complainant in reply and informed the

Complainant that the Complainant's OPRA request may be delivered in person, by mail or electronically. The Custodian further certified that her e-mail informed the Complainant that the first page of the agency's request form asked the Complainant to specify her preferred delivery by pickup, mail or onsite inspection. The Custodian certified that the Complainant insisted that the record be faxed or e-mailed to her and the Custodian certified that she did not provide the record to the Complainant.

The Complainant's Counsel argued that, by stating that the record would be available by mail or pickup only, the Custodian failed to sufficiently address the Complainant's preference and thereby unlawfully denied the Complainant access to the requested record. Counsel also alleged that the Custodian refused to deliver the records via either e-mail or facsimile, even though the Custodian had the proper means to deliver the requested paper record via facsimile.⁶ The Complainant's Counsel cited O'Shea, supra, and Paff, supra, in support of the Complainant's position.

The Custodian misconstrues OPRA. The Custodian stated that the Complainant's OPRA request may be delivered in person, by mail or electronically. The section of OPRA the Custodian referred to is N.J.S.A. 47:1A-5.g., which also goes on to state that the request may be "otherwise conveyed" to the Custodian. Further, OPRA provides for a request form, but nowhere in OPRA does it state that the form may specify and/or restrict the means of record delivery from the Custodian to the Complainant. Conversely, OPRA provides that "...any limitations on the right of access...shall be construed in favor of the public's right of access..." N.J.S.A. 47:1A-1.

The GRC examined agency-imposed restrictions upon the right of access to government records in Dittrich v. City of Hoboken, GRC Complaint No. 2007-73 (October 2007). In Dittrich, the custodian made the requested records responsive to the complainant's OPRA request available for inspection to the Complainant but denied access to copies of the requested records because the Complainant did not follow Hoboken's policy by refusing to sign a receipt for records provided. The Council, in finding that access was unlawfully denied, held that "... agency policy does not supersede access to government records required in OPRA."

In O'Shea, supra, the complainant contended that the custodian's response to his OPRA request was insufficient because it did not address his preference for e-mailed records over paper copies via regular mail. The Council held that "[a]ccording to [the] language of N.J.S.A. 47:1A-5.g., the Custodian was given two ways to comply and should have, therefore, responded acknowledging the Complainant's preferences with a sufficient response for each."⁷ The Council further held that "the Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records." In Paff, supra, the complainant requested that the records be provided by e-mail or facsimile, and the custodian failed to address the method of delivery. In Paff, despite the fact the custodian responded in writing granting access to

⁶ The evidence of record supports the allegation of the Complainant's Counsel.

⁷ The Council noted that N.J.S.A. 47:1A-5.g. states that if a Custodian is "unable to comply with a request for access, then the Custodian shall indicate the specific basis" for noncompliance. In O'Shea, supra, the Complainant elaborated in his request that a preference of e-mailing the requested records over having to pay copying costs would be ideal.

the requested record in a timely manner, the Council determined that the “Custodian’s response [was] insufficient because she failed to specifically address the Complainant’s preference for receipt of the records...[t]herefore, the Custodian...violated OPRA...”

Accordingly, in the instant complaint the Custodian’s response is insufficient because she failed to specifically address the Complainant’s preference for receipt of the record. As such, the Custodian has violated N.J.S.A. 47:1A-5.g. and the Council’s decisions in O’Shea, supra and Paff, supra.

Of further significance in Paff, supra, the Complainant, as in the instant matter, requested the records be provided by e-mail or facsimile. The Council held that “while the Custodian may not have had the ability to scan and e-mail the requested record at the time of the request, the Custodian still had the ability to transmit documents via facsimile. ***Because the Custodian had the proper means to produce the requested paper record via facsimile, the Custodian has violated N.J.S.A. 47:1A-5.d.***”

In this complaint, however, it is unnecessary to address the issue of whether the Custodian had the ability to convert the records to an electronic medium in order to scan and e-mail the requested record at the time of the request because it is undisputed that the Custodian had the ability to transmit documents via facsimile.

Therefore, because the Custodian had the proper means to deliver the requested paper record via facsimile, the Custodian has violated N.J.S.A. 47:1A-5.d. by failing to deliver the record to the Complainant via that means.

Whether the Custodian’s delay in access to the requested record rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not unlawfully fail to respond to the Complainant’s OPRA request dated January 14, 2009 in a timely manner because there is no proof the Custodian actually received the facsimile request on January 15, 2009, and when the Custodian certified that she did receive the request, on January 28,

2009, she responded that same day in compliance with N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-5.i.

2. The Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g., O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (February 2008) and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008).
3. Because the Custodian had the proper means to deliver the requested paper record via facsimile, the Custodian has violated N.J.S.A. 47:1A-5.d. by failing to deliver the record to the Complainant via that means.
4. The Custodian shall disclose all records responsive to the Complainant's January 14, 2009 OPRA request via the Complainant's preferred delivery method.
5. **The Custodian shall comply with paragraph 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁸, to the Executive Director.**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
Veronica Silkes v. Town of Dover (Morris), 2009-60 – Findings and Recommendations of the Executive Director