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

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 25, 2012 Government Records Council Meeting

Richard Rivera
Complainant
v.
City of Plainfield (Union)
Custodian of Record

Complaint No. 2010-112

At the September 25, 2012 public meeting, the Government Records Council ("Council") considered the September 18, 2012 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 be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law via letter from his legal counsel dated September 4, 2012. 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 25th Day of September, 2012

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: September 27, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
September 25, 2012 Council Meeting

Richard Rivera[1] **GRC Complaint No. 2010-112**
Complainant

v.

City of Plainfield (Union)[2]
Custodian of Records

Records Relevant to Complaint: Internal Affairs Annual Summary Reports for the years 2004, 2005 and 2006 in pdf format.[3]

Request Made: January 12, 2010
Response Made: January 29, 2010
Custodian: Abubakar Jalloh, Deputy City Clerk
GRC Complaint Filed: May 25, 2010[4]

Background

April 25, 2012

At the April 25, 2012 public meeting, the Government Records Council ("Council") considered the April 18, 2012 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 disclosed a record to the Complainant that was not responsive to the Complainant's request and thereafter, despite notification that the disclosed record was not responsive, failed to cure his mistake until almost four (4) months had lapsed from the date of notification, the Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g., Bart v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), and Riley v. City of West Orange, GRC Complaint No. 2008-27 (April 2009), and constitutes an unlawful denial of access pursuant to N.J.S.A. 47:1A-6.

[1] Represented by Walter M. Luers, Esq., (Clinton, NJ).
[2] Represented by David L. Minchello, Esq., Antonelli Minchello, P.C. (Union, NJ).
[3] There were other records requested that are not relevant to this complaint.
[4] The GRC received the Denial of Access Complaint on said date.

2. Although the Custodian violated N.J.S.A. 47:1A-5.g. by not providing access to the specific records responsive to the Complainant's OPRA request, and although the Custodian unlawfully denied the Complainant access to the requested records pursuant to N.J.S.A. 47:1A-6., the Custodian did disclose the correct requested records to the Complainant on July 9, 2010. Furthermore, the evidence of record does not reveal that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. 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. 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. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, by e-mail dated March 15, 2010, the Complainant notified the Custodian that he disclosed to the Complainant records that were not responsive to the Complainant's request and asked the Custodian to disclose the requested records. The Custodian failed to respond to the Complainant's written notification and the Complainant filed a Denial of Access Complaint on May 25, 2010, which resulted in the Custodian disclosing the requested records to the Complainant on July 9, 2010. Further, the relief ultimately achieved had a basis in law. 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. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

April 27, 2012

Council's Interim Order distributed to the parties.

May 1, 2012

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

September 4, 2012

Letter from Complainant's Counsel to the Administrative Law Judge and the GRC. Counsel states that this matter has been resolved and the Complainant withdraws this complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law via letter from his legal counsel dated September 4, 2012. Therefore, no further adjudication is required.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

September 18, 2012

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

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

April 25, 2012 Government Records Council Meeting

Richard Rivera
Complainant
v.
City of Plainfield (Union)
Custodian of Record

Complaint No. 2010-112

At the April 25, 2012 public meeting, the Government Records Council ("Council") considered the April 18, 2012 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 disclosed a record to the Complainant that was not responsive to the Complainant's request and thereafter, despite notification that the disclosed record was not responsive, failed to cure his mistake until almost four (4) months had lapsed from the date of notification, the Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g., Bart v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), and Riley v. City of West Orange, GRC Complaint No. 2008-27 (April 2009), and constitutes an unlawful denial of access pursuant to N.J.S.A. 47:1A-6.

2. Although the Custodian violated N.J.S.A. 47:1A-5.g. by not providing access to the specific records responsive to the Complainant's OPRA request, and although the Custodian unlawfully denied the Complainant access to the requested records pursuant to N.J.S.A. 47:1A-6., the Custodian did disclose the correct requested records to the Complainant on July 9, 2010. Furthermore, the evidence of record does not reveal that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. 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. 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. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, by e-mail dated March 15, 2010, the Complainant notified the Custodian that he disclosed to the Complainant records that were not responsive to the Complainant's

request and asked the Custodian to disclose the requested records. The Custodian failed to respond to the Complainant's written notification and the Complainant filed a Denial of Access Complaint on May 25, 2010, which resulted in the Custodian disclosing the requested records to the Complainant on July 9, 2010. Further, the relief ultimately achieved had a basis in law. 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. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 25th Day of April, 2012

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: April 27, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
April 25, 2012 Council Meeting

Richard Rivera[1] **GRC Complaint No. 2010-112**
Complainant

v.

City of Plainfield (Union)[2]
Custodian of Records

Records Relevant to Complaint: Internal Affairs Annual Summary Reports for the years 2004, 2005 and 2006 in pdf format.[3]

Request Made: January 12, 2010
Response Made: January 29, 2010
Custodian: Abubakar Jalloh, Deputy City Clerk
GRC Complaint Filed: May 25, 2010[4]

Background

January 12, 2010

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 22, 2010

E-mail from the Complainant to the Custodian. The Complainant asks the Custodian to confirm receipt of the Complainant's OPRA request dated January 12, 2010.

January 22, 2010

E-mail from the Custodian to the Complainant. The Custodian confirms receipt of the Complainant's OPRA request dated January 12, 2010.

January 29, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the fifth (5th) business day following

[1] Represented by Walter M. Luers, Esq., (Clinton, NJ).
[2] Represented by David L. Minchello, Esq., Antonelli Minchello, P.C. (Union, NJ).
[3] There were other records requested that are not relevant to this complaint.
[4] The GRC received the Denial of Access Complaint on said date.

receipt of such request.[5] The Custodian informs the Complainant that he tried to telephone him without success and that the Custodian expects that the Plainfield Police Division will deliver the requested records to the Custodian on February 2, 2010, at which time the Custodian will disclose said records to the Complainant.

February 1, 2010

E-mail from the Complainant to the Custodian. The Complainant acknowledges receipt of the Custodian's e-mail dated January 29, 2010 and asks the Custodian to tell him if the Custodian expects any delay in the February 2, 2010 disclosure date.

February 2, 2010

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that the Custodian has received the requested records from the Plainfield Police Division and that copying charges are $44.75, which the Complainant must pay before the Custodian will disclose the requested records to the Complainant.[6]

February 2, 2010

E-mail from the Complainant to the Custodian. The Complainant asks the Custodian for a list of the records responsive to the Complainant's request, as well as a total page count.

February 3, 2010

E-mail from the Custodian to the Complainant. The Custodian describes the records responsive to the Complainant's request and provides the Complainant with a total page count.

February 11, 2010

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian that he will send the Custodian a check for copying charges during the following week.

March 4, 2010

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that the Custodian received the Complainant's payment of the copying charges and asks the Complainant how he wants the Custodian to deliver the records to him.

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[5] The Complainant stated that "the request was provided to the Custodian" on January 12, 2010, which is the same date that the Complainant prepared the request. The Custodian certified in the SOI that he received the Complainant's OPRA request on January 22, 2010. The GRC notes that on January 22, 2010, the Complainant e-mailed the Custodian to ask the Custodian to confirm receipt of the Complainant's OPRA request and the Custodian replied via e-mail that same date informing the Complainant that he received the request. Accordingly, in view of the Custodian's certification in the Statement of Information, as well as the fact that the Custodian confirmed in writing on January 22, 2010 that he was in receipt of the Complainant's request, the GRC considers January 22, 2010 as the date the Custodian received the Complainant's OPRA request.

[6] The amount for copying charges includes charges for other records requested that are not relevant to this complaint.

March 4, 2010

E-mail from the Complainant to the Custodian. The Complainant tells the Custodian to mail the requested records to the Complainant.

March 15, 2010

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian that the records provided are incorrect because they are from the Elizabeth Police Department. The Complainant informs the Custodian that he is returning the Elizabeth records and asks the Custodian to replace them with the requested records.

March 16, 2010

E-mail from Captain Steven Soltys of the Police Division to the Custodian, referencing "Richard Rivera." Captain Soltys informs the Custodian that the matter cannot be resolved until the following week because a police lieutenant is on vacation.[7]

May 25, 2010

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

- Complainant's OPRA request dated January 12, 2010
- E-mail from the Complainant to the Custodian dated January 22, 2010
- E-mail from the Custodian to the Complainant dated January 22, 2010
- Custodian's response to the OPRA request dated January 29, 2010
- E-mail from the Complainant to the Custodian dated February 1, 2010
- E-mail from the Custodian to the Complainant dated February 2, 2010
- E-mail from the Complainant to the Custodian dated February 2, 2010
- E-mail from the Custodian to the Complainant dated February 3, 2010
- E-mail from the Complainant to the Custodian dated February 11, 2010
- E-mail from the Custodian to the Complainant dated March 4, 2010
- E-mail from the Complainant to the Custodian dated March 4, 2010
- E-mail from the Complainant to the Custodian dated March 15, 2010

The Complainant's Counsel states that the Complainant filed his OPRA request on January 12, 2010 and subsequently paid for the records he requested; however, when the Complainant reviewed the records he received from the Custodian he noticed that they were records from the City of Elizabeth instead of Plainfield. The Complainant's Counsel further states that on March 15, 2010, the Complainant brought the error to the Custodian's attention and requested that the Custodian disclose the requested records; however, the Custodian did not reply to the Complainant.

[7]This e-mail contains no reference to the Complainant's OPRA request; it merely refers to the Complainant by name. The Complainant had more than one (1) OPRA request pending with the City of Plainfield on the date of this e-mail. The underlying e-mail string appears to have been deleted from this e-mail submission; therefore the GRC was unable to see this e-mail in context.

The Complainant's Counsel states that the requested records are government records subject to disclosure and asks the Council to order the Custodian to disclose the requested records and determine that the Complainant is the prevailing party and entitled to reasonable attorney fees.

The Complainant does not agree to mediate this complaint.

June 22, 2010

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

July 9, 2010

E-mail from the Custodian's Counsel to the Complainant's Counsel, attaching the requested records. The Custodian's Counsel asks the Complainant's Counsel to review the records with the Complainant and thereafter confirm that the Complainant will withdraw the complaint.

July 30, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC informs the Custodian's Counsel that it has been over a month since the Custodian received the request for the SOI and, because it appears that the Complainant is not withdrawing the complaint, the Custodian must complete and submit the SOI to the GRC by August 6, 2010.

July 30, 2010

E-mail from the Complainant's Counsel to the GRC. Counsel informs the GRC that he has received certain records from the Custodian's Counsel and is in the process of evaluating whether the Complainant's request has been satisfied.

July 30, 2010

E-mail from the GRC to the Complainant's Counsel. The GRC informs the Complainant's Counsel that because he is evaluating the records he received from the Custodian's Counsel, the GRC is granting the Custodian an extension of time until August 13, 2010 to prepare and submit the SOI.[8]

August 13, 2010

Custodian's incomplete SOI submitted to the GRC.[9]

August 13, 2010

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian stating that although the SOI was received by the GRC on August 13, 2010, the SOI is incomplete. The GRC states that the Custodian failed to sign the SOI or explain in detail why the requested records were available on February 2, 2010 but not delivered to the Complainant until July 9, 2010. The GRC further informs the Custodian that the SOI is

[8] The Custodian's Counsel was copied on this e-mail.
[9] The Custodian submits the SOI to the GRC but it is incomplete and unsigned.

being returned to the Custodian for completion. The GRC informs the Custodian that the SOI must be completed and returned to the GRC by August 18, 2010.

August 18, 2010

Custodian's SOI with the following attachments:

- Copies of Plainfield Internal Affairs Annual Summary Reports for the years 2004, 2005 and 2006
- Complainant's OPRA request dated January 12, 2010
- Custodian's response to the OPRA request dated January 29, 2010
- E-mail from the Custodian to the Complainant dated February 2, 2010
- E-mail from the Complainant to the Custodian dated March 15, 2010
- E-mail from Captain Steven Soltys of the Police Division to the Custodian dated March 16, 2010
- E-mail from the Custodian's Counsel to the Complainant's Counsel dated July 9, 2010

The Custodian certifies that his search for the requested records involved requesting the records responsive to the complaint from the Plainfield Police Division. The Custodian further certifies that he has personal knowledge that the Plainfield Police Division did not have the records responsive to the complaint on file, so the Plainfield Police Division asked the Union County Prosecutor's Office for the records and the Union County Prosecutor's Office forwarded the requested records to the Custodian. The Custodian certifies that 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 is not applicable to this complaint.

The Custodian certifies that he received the Complainant's OPRA request on January 22, 2010 and that he responded to said request in writing on January 29, 2010. The Custodian further certifies that the records relevant to the complaint were disclosed to the Complainant on July 9, 2010. The Custodian certifies that this occurred later than the date he disclosed the other records responsive to the Complainant's request because he mistakenly received records from another municipality to disclose to the Complainant.[10]

The Custodian certifies that the complaint should be dismissed and attorney fees should not be awarded to the Complainant because all of the records responsive to the Complainant's request have been disclosed to the Complainant. The Custodian further certifies that the Complainant has not met the requirements for prevailing party attorney fees pursuant to *N.J.A.C.* 5:105-2.13(a); therefore attorney fees should not be awarded to the Complainant.

[10] The Custodian is making reference to records that the Complainant requested but that are not relevant to this Complaint for the very reason that they were disclosed to the Complainant. The Custodian addressed in the SOI all of the records the Complainant listed in his OPRA request notwithstanding the fact that most of them were not relevant to this complaint.

August 27, 2010

E-mail from the GRC to the Complainant's Counsel. The GRC requests that Counsel obtain a certification from the Complainant wherein the Complainant certifies either that he has received all records responsive to the request from the Custodian or that he has not received all records responsive to the request from the Custodian, and if the latter, that the Complainant certify which records responsive to the request the Custodian has failed to disclose to the Complainant.

September 13, 2010

E-mail from the Complainant's Counsel to the GRC. Counsel forwards to the GRC a certification prepared by the Complainant wherein the Complainant certifies that he filed an OPRA request for Plainfield's Internal Affairs Annual Summary Reports for the years 2004, 2005 and 2006. The Complainant further certifies that instead of receiving the Plainfield records from the Custodian, the Custodian sent to him the Internal Affairs Annual Summary Reports for the City of Elizabeth. The Complainant certifies that after he filed a complaint, the Custodian's Counsel forwarded copies of the City of Plainfield's Internal Affairs Annual Summary Reports for the years 2004, 2005 and 2006, which are the records responsive to his request.

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 …" N.J.S.A. 47:1A-5.g.

OPRA further provides that:

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

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

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

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

Here, the Complainant asserted that the Custodian unlawfully denied him access to the requested records because, after the Complainant paid the copying charges to the Custodian for duplicating the records, the Custodian disclosed to the Complainant the City of Elizabeth's Internal Affairs Annual Summary Reports for the years 2004, 2005 and 2006.[11] Upon receipt of the records, the Complainant realized the Custodian sent him copies of the wrong records because the Complainant had requested the City of Plainfield's Internal Affairs Annual Summary Reports for the years 2004, 2005 and 2006. The Complainant further asserted that in an e-mail dated March 15, 2010, he notified the Custodian that the Custodian had disclosed to him copies of the wrong records; however, the Custodian never responded to the Complainant's e-mail. The Complainant's Counsel stated that the Complainant filed the Denial of Access Complaint because the Complainant could no longer expect the Custodian to comply voluntarily with the Complainant's request.

The Custodian in the SOI certified that the correct records were disclosed to the Complainant on July 9, 2010. The Custodian certified that the requested records were not disclosed to the Complainant until that date because, initially, records from another municipality were mistakenly provided to the Complainant. The Custodian certified that the GRC should dismiss the Complainant's complaint because the Complainant has received the correct records.

[11] Although the Complainant in his OPRA request asked for a pdf of the records which generally entails electronic delivery, the Complainant in an e-mail to the Custodian dated March 4, 2010, told the Custodian to mail the records to him, which contemplates paper copies.

The Council has held that a custodian's disclosure of the wrong records to a complainant constitutes an insufficient response to an OPRA request.

In Bart v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), on the seventh (7th) business day following the custodian's receipt of the complainant's OPRA request, the complainant received a response from the custodian granting access to records that were not responsive to the complainant's request. Because the custodian provided records that were not responsive to the complainant's request, the GRC found that the custodian's written response to the complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g.

The Council made a similar determination in Riley v. City of West Orange, GRC Complaint No. 2008-27 (April 2009). In Riley, the complainant requested a veteran's property tax deduction claim form from 1976. In response, the custodian provided a veteran's property tax deduction claim form from an incorrect year. Although the Council recognized that the custodian's provision of the incorrect record was a mistake, the Council held that the custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5.g. because she failed to grant access to the record specifically requested by the complainant.

As in Bart and Riley, *supra*, the Custodian in the instant complaint made a timely response to the OPRA request granting access to records requested, but inadvertently provided records which were not responsive to the request.[12] Therefore, pursuant to N.J.S.A. 47:1A-5.g., the Custodian's response is insufficient because he failed to provide access to the records specifically requested by the Complainant.

However, in a recently decided matter, the Council, under facts similar to Bart and Riley, *supra*, determined that, notwithstanding the finding that the Custodian's response was insufficient because the Custodian failed to provide access to the records specifically requested by the Complainant, the Custodian did not unlawfully deny access to the requested records. In Wolosky v. Township of Rockaway (Morris), GRC Complaint No. 2010-242 (February 2012), the complainant requested several copies of filed OPRA requests but instead was provided with a copy of a resolution. Because the disclosed record did not mirror the request, the complainant immediately filed a complaint with the GRC. Upon receipt of the complaint the custodian, only then realizing her mistake, promptly disclosed copies of the correct records to the complainant. The Council found that although the custodian's response to the complainant's OPRA request was insufficient, she did not unlawfully deny access to the requested records under OPRA; therefore the complainant was not a prevailing party entitled to attorney's fees. In reaching its decision, the Council weighed heavily the evidence that the complainant did not attempt to inform the custodian of her error prior to

[12] The Complainant does not agree that the Custodian responded to the Complainant's OPRA response within the statutorily-mandated time frame; however, this issue was discussed *supra*, and the GRC found that the Custodian did respond in a timely manner. Subsequent to the Custodian's response, the parties agreed to enlarge the time for disclosure of the records relevant to this complaint.

filing a complaint and that once the custodian did become aware of her mistake she immediately sought to cure it by disclosing to the complainant the correct records.

The instant complaint, however, can be distinguished from Wolosky, *supra*, because here the Complainant notified the Custodian that the Custodian erred by disclosing the wrong records, explained what was wrong with the disclosed records, and asked for the correct records. The Custodian, rather than attempting to cure his mistake as the custodian did in Wolosky, *supra*, chose to ignore the Complainant's notification.

It is clear from the evidence of record that the Custodian received the Complainant's March 15, 2010 e-mail in which the Complainant notified the Custodian of his mistake because the Custodian attached a copy of said e-mail to the SOI. Moreover, the Custodian's statement in his certification that "documents from another municipality were mistakenly provided to [him]" is without merit because under OPRA the Custodian has the burden of proving that the denial of access is authorized by law. The Custodian therefore had an obligation to examine the records provided to him by the third party provider to make certain they were responsive to the Complainant's request before disclosing those records to the Complainant.

Therefore, because the Custodian disclosed records to the Complainant that were not responsive to the Complainant's request and thereafter, despite notification that the disclosed records were not responsive, failed to cure his mistake until almost four (4) months had lapsed from the date of notification, the Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g., Bart, *supra*, and Riley, *supra*, and constitutes an unlawful denial of access pursuant to N.J.S.A. 47:1A-6.

Whether the Custodian's actions rise 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, although the Custodian violated N.J.S.A. 47:1A-5.g. by not providing access to the specific records responsive to the Complainant's OPRA request, and although the Custodian unlawfully denied the Complainant access to the requested records pursuant to N.J.S.A. 47:1A-6., the Custodian did disclose the correct requested records to the Complainant on July 9, 2010. Furthermore, the evidence of record does not reveal that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. 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. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) 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 the instant complaint, the Custodian disclosed the putative requested records to the Complainant on or about March 15, 2010. Upon receipt of the records, the Complainant notified the Custodian that the Custodian inadvertently provided records which were not responsive to the Complainant's request and asked the Custodian to disclose the records responsive to his request. Thereafter, the Custodian failed to disclose

the records responsive to the Complainant's request and the Complainant filed a Denial of Access Complainant demanding the requested records on May 25, 2010. The Custodian subsequently disclosed the records that were responsive to the Complainant's request on July 9, 2010.

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. 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. Specifically, by e-mail dated March 15, 2010, the Complainant notified the Custodian that he disclosed to the Complainant records that were not responsive to the Complainant's request and asked the Custodian to disclose the requested records. The Custodian failed to respond to the Complainant's written notification and the Complainant filed a Denial of Access Complaint on May 25, 2010, which resulted in the Custodian disclosing the requested records to the Complainant on July 9, 2010. Further, the relief ultimately achieved had a basis in law. 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. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian disclosed a record to the Complainant that was not responsive to the Complainant's request and thereafter, despite notification that the disclosed record was not responsive, failed to cure his mistake until almost four (4) months had lapsed from the date of notification, the Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g., Bart v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), and Riley v. City of West Orange, GRC Complaint No. 2008-27 (April 2009), and constitutes an unlawful denial of access pursuant to N.J.S.A. 47:1A-6.

2. Although the Custodian violated N.J.S.A. 47:1A-5.g. by not providing access to the specific records responsive to the Complainant's OPRA request, and although the Custodian unlawfully denied the Complainant access to the

requested records pursuant to N.J.S.A. 47:1A-6., the Custodian did disclose the correct requested records to the Complainant on July 9, 2010. Furthermore, the evidence of record does not reveal that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. 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. 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. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, by e-mail dated March 15, 2010, the Complainant notified the Custodian that he disclosed to the Complainant records that were not responsive to the Complainant's request and asked the Custodian to disclose the requested records. The Custodian failed to respond to the Complainant's written notification and the Complainant filed a Denial of Access Complaint on May 25, 2010, which resulted in the Custodian disclosing the requested records to the Complainant on July 9, 2010. Further, the relief ultimately achieved had a basis in law. 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. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

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Executive Director

April 18, 2012