



State of New Jersey  
GOVERNMENT RECORDS COUNCIL  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**FINAL DECISION**

**September 27, 2011 Government Records Council Meeting**

John Paff  
Complainant

Complaint No. 2010-126

v.

New Jersey Department of Law & Public Safety,  
New Jersey State Police  
Custodian of Record

At the September 27, 2011 public meeting, the Government Records Council (“Council”) considered the August 23, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).
2. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing within the statutorily required time frame resulting in a “deemed” denial, the Custodian has not unlawfully denied access to the records requested in the Complainant’s OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian has not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), 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. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was 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 an unreasonable denial of access under the totality of the circumstances.



4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not 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 (2008), no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian prepared a response on June 3, 2010, but the response was not forwarded to the Complainant until June 28, 2010 due to a mistake. Further, the Custodian faxed his prepared response dated June 3, 2010 to the Complainant prior to receiving the instant Denial of Access Complaint. Therefore, the Complainant is not 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).

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 27<sup>th</sup> Day of September, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: October 3, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**John Paff<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2010-126**

v.

**New Jersey Department of Law & Public Safety,  
New Jersey State Police<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Regarding a May 25, 2010 news article about the Bordentown City Mayor's daughter being approached by gunmen two (2) weeks earlier:

1. Information required to be disclosed pursuant to N.J.S.A. 47:1A-3.b. such as the type of crime, time, location and type of weapon, if any, if no arrests were made in connection with the incident. If arrests were made, any records disclosing "information as to the name, address and age of any victims ... the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party."
2. If one or more complaints (*i.e.* a CDR-1, CDR-2 or other form of complaint) has been issued in connection with the incident, a copy of any such complaint.

**Request Made:** May 25, 2010

**Response Made:** June 28, 2010

**Custodian:** Christopher Nunziato

**GRC Complaint Filed:** June 23, 2010<sup>3</sup>

**Background**

**May 25, 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. The Complainant states that the preferred method of delivery is via e-mail or facsimile.

**June 13, 2010**

E-mail from the Complainant to the Citizen's Services Unit, New Jersey State Police ("NJSP"). The Complainant states that he submitted an OPRA request to the NJSP on May 25, 2010. The Complainant states that to date, he has not received a

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<sup>1</sup> Represented by Walter M. Luers, Esq., of The Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by DAG Mary Beth Wood, on behalf of the NJ Attorney General.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

response. The Complainant states that he left a voicemail message for the Custodian at the number on the NJSP's OPRA request form on this date and is sending this e-mail in an attempt to obtain the status of his OPRA request.

**June 23, 2010**

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

- Complainant's OPRA request dated May 25, 2010.
- E-mail from the Complainant to Citizens Services dated June 13, 2010.

The Complainant's Counsel states that on May 25, 2010, the Complainant submitted an OPRA request to the NJSP via the internet seeking records regarding an incident that happened in early May 2010 and that according to a newspaper article was being investigated by the NJSP and local prosecutors. Counsel states that the Complainant's OPRA request was assigned the number W50821.

Counsel states that the Complainant did not receive a response within the required seven (7) business days. Counsel states that on June 13, 2010 the Complainant left a voicemail message for the Custodian and e-mailed the Citizen's Services Unit inquiring about the status of his OPRA request. Counsel states that to date, the Complainant has received no response.

Counsel asserts that because the Custodian failed to respond in writing within the statutorily mandated seven (7) business days, the Complainant's OPRA request is "deemed" denied. Counsel thus requests the following relief:

1. A determination ordering the NJSP to provide the Complainant with the records requested via the preferred method of delivery.
2. A determination that the Complainant is a prevailing party entitled to reasonable attorney's fees. N.J.S.A. 47:1A-6.

The Complainant agrees to mediate this complaint.

**June 28, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the twenty-third (23<sup>rd</sup>) business day following receipt of such request. The Custodian states that he is receipt of the Complainant's June 13, 2010 inquiry on this date. The Custodian states that the Complainant's OPRA request was processed and closed on June 3, 2010.

The Custodian states that after a thorough investigation, the Complainant's OPRA request is denied because the NJSP does not maintain the records sought by the Complainant. The Custodian states that the NJSP did not conduct any investigation, assist any local departments or have any involvement in the events referenced in the Complainant's OPRA request. The Custodian suggests that the Complainant contact

either the local police department having jurisdiction over the alleged incident or the County Prosecutor's Office.<sup>4</sup>

**July 21, 2010**

Offer of Mediation sent to the Custodian.

**July 28, 2010**

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension until August 4, 2010 to respond to the Offer of Mediation.

**August 3, 2010**

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel a second (2<sup>nd</sup>) extension until August 11, 2010 to respond to the Offer of Mediation.

**August 11, 2010**

The Custodian does not agree to mediate this complaint.

**September 2, 2010**

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

**September 7, 2010**

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension until September 30, 2010 to submit the requested SOI as she was just assigned this complaint and needs time to familiarize herself with the complaint.

**September 9, 2010**

E-mail from the GRC to the Custodian's Counsel. The GRC states that it routinely grants an extension of five (5) business days to submit an SOI. The GRC states that although it understands the circumstances of this situation, an extension of three (3) weeks is unreasonable.

The GRC thus grants Counsel an extension until September 16, 2010 to submit the requested SOI.

**September 15, 2010**

Custodian's SOI with the following attachments:

- Government Records Request Receipt dated June 3, 2010.
- Facsimile cover sheet dated June 28, 2010.

The Custodian certifies that his search for the requested records involved conducting a search of all internal records and databases and contacting the NJSP Central Security Unit and the NJSP Criminal Investigations offices in both Bordentown and Hamilton. The Custodian further certifies that although it was not required, the Custodian contacted the Bordentown City Police Chief in an effort to ensure that he had all the information necessary to thoroughly search for responsive records.

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<sup>4</sup> The Government Records Request Receipt sent to the Complainant is dated June 3, 2010.

The Custodian also certifies that no 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 (“DARM”).

The Custodian certifies that the Complainant submitted his OPRA request to the NJSP on May 25, 2010. The Custodian certifies that upon receipt of the Complainant’s OPRA request, the Custodian conducted an investigation as described above to determine whether the NJSP maintained any responsive records. The Custodian certifies that on June 3, 2010, the sixth (6<sup>th</sup>) business day after receipt of the Complainant’s OPRA request, the Custodian prepared a Government Records Request Receipt advising that after conducting a thorough investigation, no records responsive exist.

The Custodian certifies that he printed the prepared response on June 3, 2010 and left it for his assistant to send to the Complainant. The Custodian certifies that the assistant inadvertently filed the response instead of mailing it, thus the response was not sent to the Complainant. The Custodian certifies that after preparing the response, the Custodian was out of the office much of the time between June 4, 2010 and June 18, 2010, after which the Custodian was on a scheduled leave.

The Custodian certifies that on June 13, 2010, a Sunday, the Complainant apparently left a voicemail message for the Custodian; however, the Complainant called the wrong number so the Custodian never received the message. The Custodian further certifies that the e-mail from the Complainant to the Citizen’s Services Unit dated June 13, 2010 was forwarded to his office and received on June 18, 2010. The Custodian certifies that he did not receive the Complainant’s June 13, 2010 e-mail until returning to work on June 28, 2010. The Custodian certifies that upon receipt of said e-mail, he immediately faxed to the Complainant the response to the OPRA request dated June 3, 2010.

The Custodian certifies that the Complainant filed his Denial of Access Complaint on June 23, 2010; however, his office did not receive a copy of said complaint until July 1, 2010.

The Custodian’s Counsel submits a legal brief in support of the NJSP. Counsel states that the NJSP does not dispute that OPRA requires, with certain exceptions, government records to be readily accessible for inspection, copying or examination by citizens pursuant to N.J.S.A. 47:1A-1. Counsel further states that OPRA provides that a custodian must respond in writing no later than seven (7) business days after receipt of an OPRA request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Counsel states that a custodian’s failure to respond in writing within the statutorily mandated time frame results in a “deemed” denial. N.J.S.A. 47:1A-5.i.

Counsel argues that because the Custodian responded in writing to the Complainant, no unlawful denial of access occurred and this complaint should be dismissed. Counsel states that the Custodian received the Complainant’s OPRA request on May 25, 2010 and prepared a response on June 3, 2010 after finding no records

responsive to said request. Counsel states that the Custodian's assistant mistakenly filed the response instead of sending same to the Complainant. Counsel further notes that the Custodian faxed his response dated June 3, 2010 to the Complainant on June 28, 2010 immediately after being made aware that the Complainant did not receive such response.

Counsel argues that although an administrative error resulted in an untimely response, the Custodian informed the Complainant on June 28, 2010 that no records responsive exist. Counsel argues that there can be no unlawful denial of access because no records responsive exist. Pusterhofer v. New Jersey Department of Education, GRC Complaint no. 2005-49 (July 2005).

Counsel further argues that the facts of this complaint do not demonstrate that the Custodian knowingly and willfully violated OPRA. Counsel argues that in order for the GRC to find that a custodian may have knowingly and willfully violated OPRA, the GRC must find that the custodian's actions 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)).

Counsel argues that the totality of the circumstances do not support a knowing and willful violation. Counsel argues that an administrative error led to the "deemed" denial. Moreover, Counsel asserts that the Custodian faxed his prepared response dated June 3, 2010 to the Complainant on June 28, 2010 immediately after being informed that the Complainant had not received same. Counsel asserts that the Custodian further forwarded said response prior to being made aware that the Complainant had filed a Denial of Access Complaint.

Counsel contends that the Complainant is not entitled to prevailing party attorney's fees because no unlawful denial of access occurred. Counsel states that a complainant must demonstrate a factual causal nexus between the filing of the complaint and the relief ultimately achieved and that the relief ultimately achieved had a basis in law in order to qualify as a prevailing party. Mason v. City of Hoboken, 196 N.J. 51, 76 (2008).

Counsel argues that the Complainant here is not a prevailing party. Counsel argues that the Custodian took immediate action to provide his response dated June 3, 2010 to the Complainant on June 28, 2010 and further had no knowledge that the Complainant had filed a Denial of Access Complaint with the GRC. Counsel argues that based on the foregoing, the relationship between the parties was not "materially altered," nor was the Custodian's behavior modified "in a way that directly [benefitted]" the Complainant by the filing of this complaint. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006), cert. denied, 189 N.J. 426 (2007)(quoting Warrington v. Village Supermarket, Inc., 328 N.J. Super. 410, 420 (App. Div. 2000)). Counsel contends that

the Complainant is clearly not a prevailing party in this complaint and his request for prevailing party attorney's fees should be denied.

### **October 7, 2010**

Letter from Complainant's Counsel to the GRC. Counsel states that there is no dispute that the Custodian attempted to search for and respond to the Complainant's OPRA request. Counsel states that there is also no dispute that the Complainant attempted to call and e-mail the NJSP regarding his OPRA request and that the Complainant filed this complaint after receiving no response to his follow-up inquiries.

Counsel contends that this complaint highlights two important issues. Counsel asserts that a public agency is still legally obligated to respond to OPRA requests even if the custodian goes on vacation, is unavailable, or goes on a leave of absence. Counsel contends that there is no evidence that the NJSP made any provisions to accommodate the Custodian's leave of absence; thus, the NJSP could neither detect the error of the Custodian's assistant nor respond to the Complainant's follow-up inquiries.

Counsel further contends that the GRC should apply its holding in Paff v. Borough of Lawnside (Camden), GRC Complaint No. 2009-155 (April 2010) to this complaint. Counsel states that in that complaint, the Council held that the complainant was a prevailing party for the following reasons:

“Specifically, the Custodian and Counsel failed to provide the Complainant ... a ... response to his OPRA request until after the filing of this complaint, despite the Complainant's repeated attempts to obtain such a response prior to the filing of this complaint. Further, the relief ultimately achieved had a basis in law. The Custodian was obligated to either grant access, deny access, seek clarification, or request an additional extension of time by March 25, 2009, the extended deadline date, pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. 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.” *Id.* at pg. 18.

Counsel argues that the Custodian failed to respond in writing within the statutorily mandated time frame. Additionally, Counsel states that the Custodian did not provide a response to the Complainant's OPRA request until after the filing of this complaint. Counsel contends that although the NJSP argues that the Custodian was not personally aware of this Denial of Access Complaint, there is no doubt that the NJSP as an agency was aware of this complaint: that receipt of the complaint constituted “constructive notice” of receipt to the entire agency. *Restatement (Third) of Agency* § 5.03 (Tentative Draft No. 6, 2005)(“[N]otice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of that is material to the agent's duties to the principal.”); Hercules Powder Co. v. Nieratko, 113 N.J.L. 195, 199 (E. & A. 1934)(principal has “constructive knowledge” of agent's knowledge).



Counsel requests that, based on the foregoing, the Council hold that the NJSP violated OPRA by not granting access, denying access, seeking clarification or requesting an extension of time within the seven (7) business days after receipt of the Complainant's OPRA request and that the Complainant is a prevailing party entitled to reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

### Analysis

#### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

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.

Further, OPRA 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.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>5</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).

In this complaint, the Custodian certified that he received the Complainant’s OPRA request on May 25, 2010. The Custodian further certified that he prepared a written response on June 3, 2010 and left it for his assistant to send out because he would be away on leave for a few weeks; however, his assistant filed the response instead of sending the response to the Complainant. Additionally, the Custodian certified that he immediately sent the prepared response to the Complainant on June 28, 2010 after being notified that the Complainant never received same; however, June 28, 2010 was the twenty-third (23<sup>rd</sup>) business day after receipt of said request.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

In this complaint, the Custodian further certified in the SOI that no records responsive to the Complainant’s OPRA request exist and the Complainant has provided no evidence to refute the Custodian’s certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian certified in the SOI that no records responsive to the complainant’s request existed. The complainant

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<sup>5</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

submitted no evidence to refute the custodian's certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing within the statutorily required time frame resulting in a "deemed" denial, the Custodian has not unlawfully denied access to the records requested in the Complainant's OPRA request pursuant to Pusterhofer, *supra*.

Additionally, in his response to the SOI, the Complainant's Counsel noted that this complaint highlights the issue of a public agency's obligation to respond to OPRA requests in the absence of a custodian of record. Counsel argued that there was no evidence here that the Custodian arranged to have another employee serve as custodian in his absence; such an arrangement could have identified the assistant's mistake and addressed the Complainant's follow-up phone call and e-mail prior to the Custodian's return to work.

OPRA defines a custodian as "in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be." N.J.S.A. 47:1A-1.1. OPRA further requires that a custodian "shall permit the record to be inspected, examined, and copied by any person during regular business hours ..." with certain exceptions. N.J.S.A. 47:1A-5.a. These provisions, however, do not address situations in which a custodian is unavailable. Thus, best practices dictates that if a custodian is to be unavailable for an extended amount of time, another employee should be designated to accept and respond to OPRA requests in his/her stead for the duration of his/her absence.

In the instant complaint, although there is no evidence in the record to suggest that the Custodian designated another employee to act as custodian in his absence, there is also no evidence to suggest that a backup custodian would have caught the assistant's mistake. Therefore, the Council declines to determine that the Custodian violated OPRA in this regard.

**Whether the Custodian's "deemed" denial 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)).

Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian has not unlawfully denied access to the requested records pursuant to Pusterhofer, *supra*, 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. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was 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 an 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 (7<sup>th</sup> 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.<sup>6</sup> Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" Singer v. State, 95 N.J. 487, 495, cert denied (1984)."

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<sup>6</sup> The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

However, in Mason, the New Jersey Supreme Court shifted the traditional burden of proof to the responding agency in one category of cases: when an agency has failed to respond *at all* to a request within seven business days. The Court noted that:

“OPRA requires that an agency provide access or a denial no later than seven business days after a request. The statute also encourages compromise and efforts to work through certain problematic requests. But under the terms of the statute, the agency must start that process with some form of response within seven business days of a request. *If an agency fails to respond at all within that time frame, but voluntarily discloses records after a requestor files suit, the agency should be required to prove that the lawsuit was not the catalyst for the agency's belated disclosure.* Such an approach is faithful to OPRA's clear command that an agency not sit silently once a request is made.” (Emphasis added). Mason v. City Clerk of the City of Hoboken, 196 N.J. 51, 77 (2008).

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight (8) business days later, or one (1) day beyond the statutory limit. *Id.* at 79. As a result, the Court shifted the burden to Hoboken to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind the City's voluntary disclosure. *Id.* Because Hoboken's February 20 response included a copy of a memo dated February 19 -- the seventh (7<sup>th</sup>) business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

Because the Custodian herein failed to respond in writing to the Complainant until after the expiration of the statutorily mandated time frame, the burden now shifts to the Custodian to prove that the filing of this complaint did not bring about a change in his conduct pursuant to Mason, *supra*.

The Custodian certified in the SOI that he prepared a written response to the Complainant's OPRA request on June 3, 2010, or the sixth (6<sup>th</sup>) business day after receipt of the Complainant's request, and left it for his assistant to send to the Complainant. The Custodian further certified in the SOI that his assistant failed to do so. The Custodian also certified that he was not made aware that the assistant did not send the response until June 28, 2010, at which time he immediately faxed a copy of the response to the Complainant.

In the interim, the Complainant called the NJSP and sent an e-mail to the Citizen's Services Unit to inquire about the status of the OPRA request on June 13, 2010. The Custodian certified in the SOI that he never received the Complainant's call because the Complainant called the wrong number and he did not receive the Complainant's e-mail to the Citizen's Services Unit dated June 13, 2010 until June 28, 2010. The Complainant subsequently filed this complaint on June 23, 2010; however, the Custodian certified in the SOI that he had no knowledge of this complaint until July 1, 2010.



In his response to the SOI, the Complainant's Counsel asserted that the GRC should apply its holding in Paff v. Borough of Lawnside (Camden), GRC Complaint No. 2009-155 (April 2010) to the instant complaint because the Custodian herein failed to respond until after the complaint was filed. Counsel further argued that even though the Custodian asserts that he had no knowledge of the complaint when faxing the written response to the Complainant on June 28, 2010, receipt of the complaint by the agency constituted "constructive notice" of receipt on the entire agency. *Restatement (Third) of Agency* § 5.03 (Tentative Draft No. 6, 2005).

First, the GRC notes that the facts of Paff, *supra*, are inapposite to the facts of this complaint. In Paff, the custodian's counsel responded in writing on March 6, 2009, the fourth (4<sup>th</sup>) business day after receipt of the complainant's OPRA request, requesting an extension of ten (10) days to respond to said request. The burden of proving that the filing of that complaint did not bring about a change in position did not shift to the Borough of Lawnside because the Borough responded to the OPRA request in a timely manner requesting an extension of time, but failed to respond within the extended time period. In the matter before the Council, the Custodian failed to respond to the OPRA request *at all* within the statutorily mandated time frame. Thus, the burden shifts to the NJSP to prove that the filing of this complaint did not bring about a change in the Custodian's actions.

The evidence of record illustrates that the Custodian has borne his burden of proof that his failure to respond in a timely manner stating that no records responsive exist was based on a mistake and that his subsequent response following the filing of this complaint were based solely on that mistake and not the actual initiation of this complaint. Specifically, the Custodian certified in the SOI that he left the prepared response dated June 3, 2010 for his assistant to send to the Complainant; however, she mistakenly filed same. Had the Custodian's assistant sent the written response dated June 3, 2010 to the Complainant instead of filing same, the Custodian's response would have been timely.

Moreover, the Complainant has not offered any competent, credible evidence to refute the Custodian's certification in this regard. The Complainant's Counsel acknowledged in his letter to the GRC dated October 7, 2010 that there is no disputing that the Custodian made an attempt to respond to the Complainant's OPRA request.

However, Complainant's Counsel contends that although the Custodian may not have been personally aware of the filing of this Denial of Access Complaint at the time he responded to the OPRA request on June 28, 2010, there is no doubt that the NJSP as an agency was aware of the filing of the instant complaint on June 23, 2010; Counsel asserts that NJSP's receipt of the complaint therefore constituted "constructive notice" of receipt to the entire agency. *Restatement (Third) of Agency* § 5.03 (Tentative Draft No. 6, 2005)("[N]otice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of that is material to the agent's duties to the principal."); Hercules Powder Co. v. Nieratko, 113 N.J.L. 195, 199 (E. & A. 1934(principal has "constructive knowledge" of agent's knowledge).

The Complainant Counsel's citation to the law of agency has no application to the matter herein and the case cited is inapposite to this matter. Hercules, *supra*, involved a

claim for compensation under the New Jersey Workman's Compensation Act, N.J. Pamph. L. pp. 134, 140 (1911), which contained time limitations to submit notice of a worker's injury. *Id.* at 198. In challenging the award of compensation, the employer argued that it did not have actual knowledge of the occurrence of the claimed injury or notice within the time prescribed by the law. *Id.* at 197. On appeal, the Court rejected the assertion, holding that the requirements of the Act were substantially met; the Court found that the decedent worker's administratrix informed the employer's safety employment supervisor and general superintendent of the employee's symptoms as soon as she learned of the problem from the employee's physicians. *Id.* at 198. Thus, the Court found that the employer acquired knowledge of the employee's injury through its agents. Moreover, as the Court observed:

“[f]irst-hand personal knowledge’ is not required [under the Act]. The statute is satisfied if the employer is in possession of what is called ‘knowledge in common parlance, such knowledge as most of us are confined to in the daily affairs of life.’ And a corporate body, as a legal entity, cannot itself have knowledge. If it can be said to have knowledge at all, that must be the imputed knowledge of some corporate agent. Knowledge of the proper corporate agent must be regarded as, in legal effect, the knowledge of the corporation. Allen v. City of Millville, 87 N.J.L. 356; affirmed, 88 N.J.L. 693.” *Id.* at 199. [Emphasis added].

In the matter before the Council, the evidence of record indicates that the proper corporate agent, here the Custodian, did not have actual knowledge of the filing of the Denial of Access Complaint until July 1, 2010. There is no evidence in the record to support a conclusion that NJSP was actually or constructively aware of the filing of the instant complaint; the evidence is clear that NJSP's agent, the Custodian, was out of the office and no one was acting as custodian in his absence.

Thus, the Council rejects Complainant Counsel's argument that the NJSP had constructive knowledge of the filing of the instant complaint on June 23, 2010 because the evidence of record indicates that the proper corporate agent, here the Custodian, did not have knowledge of the filing of the Denial of Access Complaint herein until July 1, 2010.

Therefore, pursuant to Teeters, *supra*, the Complainant has not 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*, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian prepared a response on June 3, 2010, but the response was not forwarded to the Complainant until June 28, 2010 due to a mistake. Further, the Custodian faxed his prepared response dated June 3, 2010 to the Complainant prior to receiving the instant Denial of Access Complaint. Therefore, the Complainant is not 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*.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).
2. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing within the statutorily required time frame resulting in a "deemed" denial, the Custodian has not unlawfully denied access to the records requested in the Complainant's OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian has not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), 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. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was 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 an unreasonable denial of access under the totality of the circumstances.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not 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 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian prepared a response on June 3, 2010, but the response was not forwarded to the Complainant until June 28, 2010 due to a mistake. Further, the Custodian faxed his prepared response dated June 3, 2010 to the Complainant prior to receiving the instant Denial of Access Complaint. Therefore, the Complainant is not 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).

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