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

January 29, 2013 Government Records Council Meeting

Richard Rivera
Complainant
v.
Borough of Ho-Ho-Kus Police Department (Bergen)
Custodian of Record

Complaint No. 2010-280

At the January 29, 2013 public meeting, the Government Records Council ("Council") considered the January 22, 2013 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 January 4, 2013. 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 29th Day of January, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 6, 2013

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
January 29, 2013 Council Meeting

Richard Rivera[1] **GRC Complaint No. 2010-280**
Complainant

v.

Borough of Ho-Ho-Kus Police Department (Bergen)[2]
Custodian of Records

Records Relevant to Complaint: The Complainant requests the following records in electronic format via e-mail:

1. Internal Affairs Annual Summary Reports for 2005-2009.
2. Use of force annual summary reports for 2005-2009.
3. Police mobile data terminal ("MDT") transmissions to and from all terminals from thirty (30) minutes prior to the traffic stop of Mr. Terrance Jones while operating a silver Lincoln Navigator in the early morning hours of September 2, 2010 (hereinafter "vehicle stop") until thirty (30) minutes thereafter.
4. Police telephone recordings from all recorded phone extensions from thirty (30) minutes prior to the vehicle stop until thirty (30) minutes thereafter.
5. Police radio transmissions on all frequencies and channels from thirty (30) minutes prior to the vehicle stop until thirty (30) minutes thereafter.
6. Mobile video recording of the vehicle stop in DVD or VHS format.
7. Computer Aided Dispatch ("CAD") entries for the shift that worked at the time of the vehicle stop.
8. Duty roster for police employees working the shift during the vehicle stop, including employee and vehicle assignments but excluding undercover officers.

Request Made: September 30, 2010
Response Made: October 18, 2010
Custodian: Laura Borchers, Borough Clerk
GRC Complaint Filed: October 26, 2010[3]

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

[1] Represented by Walter M. Luers, Esq., Law Offices of Walter M. Luers, LLC (Clinton, NJ).
[2] Represented by David B. Bole, Esq. (Paramus, NJ); however, there are no submissions on file from the Custodian's Counsel to the GRC.
[3] The GRC received the Denial of Access Complaint on said date.

voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Because the Custodian failed to respond to each item contained in the Complainant's OPRA request, the Custodian's response to the effect that she referred the Complainant's request for Police Department records to the Custodian's Counsel for a response and that the vehicle stop did not occur in the municipality was legally insufficient and violated N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

3. Because the Custodian failed to disclose request item numbers 1, 2, 7 and 8 until almost seven (7) months after the date of the Complainant's OPRA request, the Custodian unlawfully denied the Complainant access to the requested records in violation of N.J.S.A. 47:1A-6.

4. Because the Custodian certified in the Statement of Information dated June 7, 2011 that no records responsive to request item numbers 3, 4, 5 and 6 exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

5. Although the Custodian failed 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 which resulted in a "deemed" denial of the Complainant's OPRA request, and although the Custodian failed to respond to each item contained in the Complainant's OPRA request, and failed to disclose request item numbers 1, 2, 7 and 8 until almost seven (7) months after the date of the Complainant's OPRA request; the Custodian did disclose all records located that were responsive to the Complainant's request on April 21, 2011 and no records responsive to request item numbers 3, 4, 5 and 6 exist. Further, there is no evidence in the record to suggest that the Custodian's actions 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.

6. 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, the Custodian failed to respond to the Complainant's OPRA request and the Complainant filed a Denial of Access Complaint on October 26, 2010, which resulted in the Custodian disclosing the records responsive to request item numbers 1, 2, 7 and 8 on April 21, 2011. 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").

January 4, 2013

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 January 4, 2013. Therefore, no further adjudication is required.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013

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.
Borough of Ho-Ho-Kus Police Department (Bergen)
Custodian of Record

Complaint No. 2010-280

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. 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 (Interim Order October 31, 2007).

2. Because the Custodian failed to respond to each item contained in the Complainant's OPRA request, the Custodian's response to the effect that she referred the Complainant's request for Police Department records to the Custodian's Counsel for a response and that the vehicle stop did not occur in the municipality was legally insufficient and violated N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

3. Because the Custodian failed to disclose request item numbers 1, 2, 7 and 8 until almost seven (7) months after the date of the Complainant's OPRA request, the Custodian unlawfully denied the Complainant access to the requested records in violation of N.J.S.A. 47:1A-6.

4. Because the Custodian certified in the Statement of Information dated June 7, 2011 that no records responsive to request item numbers 3, 4, 5 and 6 exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

5. Although the Custodian failed 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 which resulted in a "deemed" denial of the Complainant's OPRA request, and although the Custodian failed to respond to each item contained in the Complainant's OPRA request, and failed to disclose request item numbers 1, 2, 7 and 8 until almost seven (7) months after the date of the Complainant's OPRA request; the Custodian did disclose all records located that were responsive to the Complainant's request on April 21, 2011 and no records responsive to request item numbers 3, 4, 5 and 6 exist. Further, there is no evidence in the record to suggest that the Custodian's actions 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.

6. 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, the Custodian failed to respond to the Complainant's OPRA request and the Complainant filed a Denial of Access Complaint on October 26, 2010, which resulted in the Custodian disclosing the records responsive to request item numbers 1, 2, 7 and 8 on April 21, 2011. 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. 2010-280**
Complainant

v.

Borough of Ho-Ho-Kus Police Department (Bergen)[2]
Custodian of Records

Records Relevant to Complaint: The Complainant requests the following records in electronic format via e-mail:

1. Internal Affairs Annual Summary Reports for 2005-2009.
2. Use of force annual summary reports for 2005-2009.
3. Police mobile data terminal ("MDT") transmissions to and from all terminals from thirty (30) minutes prior to the traffic stop of Mr. Terrance Jones while operating a silver Lincoln Navigator in the early morning hours of September 2, 2010 (hereinafter "vehicle stop") until thirty (30) minutes thereafter.
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6. Mobile video recording of the vehicle stop in DVD or VHS format.
7. Computer Aided Dispatch ("CAD") entries for the shift that worked at the time of the vehicle stop.
8. Duty roster for police employees working the shift during the vehicle stop, including employee and vehicle assignments but excluding undercover officers.

Request Made: September 30, 2010
Response Made: October 18, 2010
Custodian: Laura Borchers, Borough Clerk
GRC Complaint Filed: October 26, 2010[3]

Background

[1] Represented by Walter M. Luers, Esq., Law Offices of Walter M. Luers, LLC (Clinton, NJ).
[2] Represented by David B. Bole, Esq. (Paramus, NJ); however, there are no submissions on file from the Custodian's Counsel to the GRC.
[3] The GRC received the Denial of Access Complaint on said date.

September 30, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA.

October 18, 2010

E-mail from the Complainant to the Custodian. The Complainant states that a response to his OPRA request is late and he requests the status of the Custodian's response.

October 18, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the eleventh (11th) business day following receipt of such request. The Custodian informs the Complainant that she referred the request for Police Department records to the Custodian's Counsel for a response. The Custodian further informs the Complainant that the vehicle stop did not occur in the municipality.

October 26, 2010

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

- Complainant's OPRA request dated September 30, 2010
- E-mail from the Complainant to the Custodian dated October 18, 2010
- Custodian's response to the OPRA request dated October 18, 2010

The Complainant states that he provided his OPRA request to the Custodian via e-mail dated September 30, 2010. The Complainant also states that he asked the Custodian for the status of his request via e-mail dated October 18, 2010. The Complainant states that the Custodian responded to his request by e-mail dated October 18, 2010 and informed him that the Custodian's Counsel was looking into the matter. The Complainant further states that he also submitted a written request to the Borough Chief of Police; however, he never received a response from the Chief of Police.[4]

The Complainant does not agree to mediate this complaint.

April 6, 2011

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

April 19, 2011

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on April 6, 2011 and to date has not received a response. Further, the GRC states that if the SOI is

[4] The exact content and format of the written request submitted to the Chief of Police is unknown; the Complainant did not attach to his complaint a copy of the communication to the Chief.

not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

April 20, 2011

Telephone call from the Custodian to the GRC. The Custodian states that she wants to provide to the Complainant any of the requested records that can be lawfully disclosed and asks if, after disclosing the records, the complaint will be dismissed. The GRC informs the Custodian that she will have to contact the Complainant to see if he is willing to withdraw the complaint upon receipt of the requested records.

April 20, 2011

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that she is in receipt of his Denial of Access Complaint. The Custodian asks the Complainant for a telephone number where she can contact him.

April 20, 2011

E-mail from the Custodian to the GRC. The Custodian states that she e-mailed the Complainant and asked him for a telephone number where he could be contacted. The Custodian further states that the Complainant gave her a telephone number and asked that she telephone him at said number on April 21, 2011 or April 22, 2011.

April 21, 2011

E-mail from the Custodian to the GRC. The Custodian states that she telephoned the Complainant and that the Complainant informed her that he would withdraw the complainant upon receipt of the requested records.[5]

April 29, 2011

E-mail from the GRC to the Custodian. The GRC informs the Custodian that because the Complainant has not withdrawn his complaint, the Custodian must submit the SOI to the GRC within five (5) business days.

May 4, 2011

E-mail from the Custodian to the GRC. The Custodian states that she recently e-mailed the Complainant regarding his withdrawal of the complaint; however, she states that the Complainant has not responded to her e-mail. The Custodian asks the GRC for another copy of the SOI.

May 5, 2011

E-mail from the GRC to the Custodian. The GRC informs the Custodian that another request for the SOI is attached and that the SOI must be submitted to the GRC by

[5] The Custodian certified in the SOI that later this date she mailed to the Complainant six (6) pages of Internal Affairs Annual Summary Reports for the years 2005-2009, three (3) pages of use of force annual summary reports for the years 2005-2009, one (1) page of CAD entries for the shift that worked at the time of the vehicle stop, and a two (2) page duty roster for police employees working the shift during the vehicle stop, including employee and vehicle assignments.

May 13, 2011; however, if the Complainant withdraws the complaint before May 13, 2011 it will not be necessary for the Custodian to submit the SOI.

May 6, 2011

E-mail from the Custodian to the GRC. The Custodian informs the GRC that the Complainant informed her he was referring this complaint to his attorney.

May 16, 2011

Letter from Walter Luers, Esq., to the GRC. Mr. Luers enters his appearance as the Complainant's Counsel.

May 16, 2011

E-mail from the Complainant's Counsel to the Custodian. Counsel informs the Custodian that the Complainant is not withdrawing his complaint.

May 23, 2011

E-mail from the GRC to the Custodian. The GRC informs the Custodian that it has received the SOI from the Custodian; however, SOI item numbers 6, 7, 8, 9, 10, 11 and 12 are incomplete and therefore the SOI is being returned to the Custodian for proper completion.

May 25, 2011

E-mail from the Custodian to the GRC. The Custodian asks for an extension of time to complete and submit the SOI to the GRC.

May 26, 2011

E-mail from the GRC to the Custodian. The GRC grants the Custodian a five (5) business day extension of time to prepare and submit the SOI. The GRC informs the Custodian that the GRC has extended the SOI submission date several times and that the GRC's Executive Director must grant any further extensions of time.

June 7, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 30, 2010
- E-mail from the Custodian to the Complainant dated April 20, 2011
- E-mail from the Complainant's Counsel to the Custodian dated May 16, 2011
- Certification of Chief of Police John Wanamaker dated June 7, 2011[6]

The Custodian certifies that her search for the requested records involved having the Police Department undertake a search for any records that may be responsive to the Complainant's request. The Custodian also certifies that the records responsive to the request have not been destroyed because they must be retained by the agency

[6] The Custodian also attached to the SOI copies of all of the records that the Custodian determined were responsive to the Complainant's request and that were not otherwise exempt from disclosure. The Custodian did not state in the SOI the reason why the copies of the records were attached to the SOI.

permanently in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies the dates and events comprising the procedural background of this complaint commencing with receipt of the Complainant's OPRA request.[7] The Custodian also certifies that she received the Complainant's OPRA request on September 30, 2010 and that she sought advice from the Bergen County Prosecutor's Office, Custodian's Counsel and the Borough Police Department.

The Custodian certifies that the Complainant filed a complaint on October 26, 2010, and between the date of the complaint and April 6, 2011, when she received the request for the SOI from the GRC; there was no communication by and between the Custodian and the Complainant. The Custodian certifies that she knew that her failure to respond in writing to the OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily-mandated seven (7) business days would result in a "deemed" denial of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. but that because there was no communication from the Complainant to her between October 26, 2010 and April 6, 2011, she assumed the matter had been resolved. However, the Custodian certifies that when she received the request for the SOI from the GRC on April 6, 2011, she realized the complaint was not resolved and she therefore telephoned the Complainant on April 21, 2011. The Custodian certifies that the Complainant told her to mail the requested records to the Complainant and that after the Complainant reviewed the requested records he would withdraw the complaint. The Custodian certifies that she responded to the Complainant's request on April 21, 2011 by mailing to the Complainant six (6) pages of Internal Affairs Annual Summary Reports for the years 2005-2009, three (3) pages of use of force annual summary reports for the years 2005-2009, one (1) page of CAD entries for the shift that worked at the time of the vehicle stop, and a two (2) page duty roster for police employees working the shift during the vehicle stop, including employee and vehicle assignments.[8] The Custodian further certifies that request item numbers 3, 4, 5 and 6 are nonexistent. The Custodian certifies that the Complainant subsequently refused to withdraw the complaint.

The Custodian certifies that her failure to respond to the Complainant's request in a timely fashion or to otherwise obtain an extension of time did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances because she did not knowingly and willfully violate OPRA, rather the Complainant's OPRA request "fell between the cracks.

The Custodian attaches to the SOI a certification from the Borough Police Chief wherein the Chief certifies that records responsive to request item numbers 3 and 6 are nonexistent. The Chief also certifies that the Police Department's recording machine was

[7] It would be redundant to describe the procedural background here because it was already set forth at length under the "Background" heading of these Findings and Recommendations.
[8] These records constitute request item numbers 1, 2, 7 and 8.

out of service during a three (3) week period, part of which encompassed the time of the Complainant's request. The Chief certifies that for this reason, records responsive to request item numbers 4 and 5 are also nonexistent.

Analysis

Whether the Custodian properly responded to the Complainant's OPRA request?

OPRA 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 also 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 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.[9] 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 (Interim Order October 31, 2007).

In the instant complaint, the Custodian certified that she received the Complainant's OPRA request on September 30, 2010; however, the Custodian did not respond in writing to the Complainant's OPRA request until October 18, 2010, which was the eleventh (11th) business day following receipt of such request. Therefore, the

[9] 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.

Custodian has failed to respond to the Complainant's OPRA request in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Accordingly, 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*.

Moreover, when the Custodian did respond, she merely informed the Complainant that she had referred his request for Police Department records to the Custodian's Counsel for a response and that the vehicle stop did not occur in the municipality.

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 specifically states that a custodian "shall indicate the specific basis [for denial of access]…" N.J.S.A. 47:1A-5.g. Further, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that:

> "[a]lthough the Custodian responded in writing to the Complainant's…OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., *the Custodian's response was legally insufficient because he failed to respond to each request item individually*. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g." (Emphasis added.)

In this complaint, the Custodian's response failed to address each item contained in the Complainant's OPRA request and failed to specify a date certain on which the Complainant could expect access to be granted or denied.

Therefore, because the Custodian failed to respond to each item contained in the Complainant's OPRA request, the Custodian's response to the effect that she had referred the Complainant's request for Police Department records to the Custodian's Counsel for a response and that the vehicle stop did not occur in the municipality was legally insufficient and violated N.J.S.A. 47:1A-5.g. and Paff, *supra*.

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 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.

Request item number 1 - Internal Affairs Annual Summary Reports for 2005-2009.

Request item number 2 - use of force annual summary reports for 2005-2009.

Request item number 7 - CAD entries for the shift that worked at the time of the vehicle stop.

Request item number 8 - Duty roster for police employees working the shift during the vehicle stop, including employee and vehicle assignments but excluding undercover officers.

The Custodian determined that she had records responsive to request item numbers 1, 2, 7 and 8 and those records were not exempt from disclosure.[10] The Custodian certified that she did not disclose the records to the Complainant, however, because there was no communication by and between the Custodian and the Complainant from the date the Complainant filed the complaint on October 26, 2010 until April 6, 2011, when she received the request for the SOI from the GRC. The Custodian certified that during the period of inactivity she assumed the matter had been resolved. The

[10] In Rivera v. Rutgers, The State University of New Jersey, GRC Complaint No. 2009-311 (January 2012), the Council, citing McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388, 391 (App. Div. 2008), determined that duty logs include details regarding surveillance techniques and staffing levels. As such, the Council concluded that if disclosed such information could pose a risk to the safety of police personnel and such records were therefore exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1. In the instant complaint, however, the Custodian determined that request item number 8, which is a duty roster of police employees, was not exempt from disclosure. Because the Custodian determined that the record was subject to disclosure, and in fact did disclose it to the Complainant, she was required under OPRA to have done so in a timely manner.

Custodian further certified that following receipt of the request for the SOI from the GRC on April 6, 2011, she disclosed request item numbers 1, 2, 7 and 8 in unredacted form to the Complainant on April 21, 2011.

Accordingly, because the Custodian failed to disclose request item numbers 1, 2, 7 and 8 until almost seven (7) months after the date of the Complainant's OPRA request, the Custodian unlawfully denied the Complainant access to the requested records in violation of N.J.S.A. 47:1A-6.

Request item number 3 - MDT transmissions to and from all terminals from thirty (30) minutes prior to the traffic stop of Mr. Terrance Jones while operating a silver Lincoln Navigator in the early morning hours of September 2, 2010 (hereinafter "vehicle stop") until thirty (30) minutes thereafter.

Request item number 4 - police telephone recordings from all recorded phone extensions from thirty (30) minutes prior to the vehicle stop until thirty (30) minutes thereafter.

Request item number 5 - police radio transmissions on all frequencies and channels from thirty (30) minutes prior to the vehicle stop until thirty (30) minutes thereafter.

Request item number 6 - mobile video recording of the vehicle stop in DVD or VHS format.

The Custodian certified in the SOI that records responsive to request item numbers 3, 4, 5 and 6 do not exist. Further, the Complainant 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 responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed and the complainant did not provide any evidence to refute the custodian's certification. The GRC determined that although the custodian failed to respond to the OPRA request in a timely manner, the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified in the SOI dated June 7, 2011 that no records responsive to request item numbers 3, 4, 5 and 6 exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, *supra*.

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).

In the instant complaint, although the Custodian failed 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 which resulted in a "deemed" denial of the Complainant's OPRA request, and although the Custodian failed to respond to each item contained in the Complainant's OPRA request, and failed to disclose request item numbers 1, 2, 7 and 8 until almost seven (7) months after the date of the Complainant's OPRA request; the Custodian did disclose all records located that were responsive to the Complainant's request on April 21, 2011 and no records responsive to request item numbers 3, 4, 5 and 6 exist. Further, there is no evidence in the record to suggest that the Custodian's actions 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 entitled to an award of prevailing party attorney 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 matter before the Council, the Custodian failed to respond to the Complainant's September 30, 2010 OPRA request in a timely manner which resulted in a "deemed" denial of the request. Thereafter, on October 26, 2010, the Complainant filed a Denial of Access Complaint demanding the requested records. The Custodian subsequently disclosed to the Complainant records responsive to request item numbers 1, 2, 7 and 8 on April 21, 2011.

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, the Custodian failed to respond to the Complainant's OPRA request and the Complainant filed a Denial of Access Complaint on October 26, 2010, which resulted in the Custodian disclosing the records responsive to request item numbers 1, 2, 7 and 8 on April 21, 2011. 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. 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 (Interim Order October 31, 2007).

2. Because the Custodian failed to respond to each item contained in the Complainant's OPRA request, the Custodian's response to the effect that she referred the Complainant's request for Police Department records to the Custodian's Counsel for a response and that the vehicle stop did not occur in the municipality was legally insufficient and violated N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

3. Because the Custodian failed to disclose request item numbers 1, 2, 7 and 8 until almost seven (7) months after the date of the Complainant's OPRA request, the Custodian unlawfully denied the Complainant access to the requested records in violation of N.J.S.A. 47:1A-6.

4. Because the Custodian certified in the Statement of Information dated June 7, 2011 that no records responsive to request item numbers 3, 4, 5 and 6 exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

5. Although the Custodian failed 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 which resulted in a "deemed" denial of the Complainant's OPRA request, and although the Custodian failed to respond to each item contained in the Complainant's OPRA request, and failed to disclose request item numbers 1, 2, 7 and 8 until almost seven (7) months after the date of the Complainant's OPRA request; the Custodian did disclose all records located that were responsive to the Complainant's request on April 21, 2011 and no records responsive to request item numbers 3, 4, 5 and 6 exist. Further, there is no evidence in the record to suggest that the Custodian's actions 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.

6. 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, the Custodian failed to respond to the Complainant's OPRA request and the Complainant filed a Denial of Access Complaint on October 26, 2010, which resulted in the Custodian disclosing the records responsive to request item numbers 1, 2, 7 and 8 on April 21, 2011. 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