



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 25, 2019 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-141

v.

Franklin Fire District No.2 (Somerset)
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council (“Council”) considered the June 18, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Complainant’s Counsel has failed to establish in his request for reconsideration of the Council’s January 31, 2019 Final Decision that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Complainant’s Counsel failed to establish that the complaint should be reconsidered based on a mistake and illegality. Complainant’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, Complainant’s Counsel withdrew this complaint (with prejudice) from consideration pursuant to a settlement agreement, which prompted the Council to dismiss same. Additionally, Complainant’s Counsel confirmed in his request for reconsideration that “dismissal of the complaint was appropriate.” Thus, Complainant Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Based on his own admittance on the record in a June 8, 2017 hearing, as well as in the executed settlement agreement, the Custodian knowingly and willfully violated OPRA. Thus, the Custodian is subject to the civil penalty set forth in OPRA as follows:
 1. Because this is the Custodian’s third (3rd) violation within the last ten (10) years, the penalty assessed is \$5,000. N.J.S.A. 47:1A-11; Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC 2011-124 et seq. (August 2013); Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-382 (December 2014).

2. The Custodian must remit payment from his own personal funds made payable to the Treasurer of the State of New Jersey, to the GRC within twenty (20) days from receipt of the Council's Order.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 25th Day of June 2019

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: June 28, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
**Supplemental Findings and Recommendations of the Council Staff
June 25, 2019 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-141

v.

**Franklin Fire District No. 2 (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies, sent via e-mail, of check registers used by the Commissioners to disburse public funds (including any reasonably construed variation thereof), detailing registers of checks issued for budget years 2008, 2009, 2010 and 2011.

Custodian of Record: William Kleiber

Request Received by Custodian: March 20, 2011

Responses Made by Custodian: None

GRC Complaint Received: April 26, 2011

Background

January 31, 2019 Council Meeting:

At its January 31, 2019 public meeting, the Council considered the January 22, 2019 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations.

The Council, therefore, found that the complaint should be dismissed “because Complainant’s Counsel, based on a settlement agreement, withdrew the instant complaint in a letter to the Honorable Patricia M. Kerins, Administrative Law Judge [“ALJ”], dated December 13, 2018.” The Council thus determined that “no further adjudication is required.”

Procedural History:

On February 5, 2019, the Council distributed its Final Decision to all parties. On February 19, 2019, the Complainant’s Counsel filed a request for reconsideration of the Council’s Final Decision based on a mistake and illegality. Therein, while acknowledging that “dismissal of the

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

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ). Previously represented by Eric M. Perkins, Esq. (Skillman, NJ).

complaint was appropriate,” Counsel nonetheless asserted that the GRC failed to impose a third civil penalty on the Custodian after he waived his right to a hearing and admitted “on the record” that he knowingly and willfully violated OPRA. Counsel stated that the settlement agreement, which he attached, resolved several aspects of the complaint and is broken into three (3) components: prevailing party fees, imposition of a civil penalty, and withdrawal of the complaint. Counsel averred that the prevailing party fee and withdrawal issues were satisfied.

Counsel argued that the settlement was specifically approved by the ALJ; thus, the GRC should accept, reject, or modify the civil penalty portion of the settlement agreement. Counsel argued that should the GRC fail to accept ALJ’s decision, ¶ 7 of the settlement would render it null and void and the matter would have to return to the Office of Administrative Law (“OAL”). Counsel thus requested that the GRC explicitly levy a third civil penalty on the Custodian pursuant to the executed and approved settlement agreement between the parties.

On May 22, 2019, Complainant’s Counsel sent a letter to the GRC acknowledging receipt of the Council’s recent decision in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43, *et seq.* (May 2019). Counsel noted that the GRC should review the Council’s decision and similarly accept or reject the parties’ settlement agreement here.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, Complainant’s Counsel filed the request for reconsideration of the Council’s January 31, 2019 Final Decision on February 19, 2019, nine (9) business days from the issuance of the Council’s Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D’Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable

whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

The GRC is compelled to reject Complainant’s Counsel’s request for reconsideration based solely on his admittance that “dismissal of the complaint was appropriate.” It is clear that the Council neither made a mistake or acted illegally by memorializing that Complainant’s Counsel withdrew this complaint.

Notwithstanding, the GRC briefly addresses Complainant Counsel’s request that it “accept, reject, or modify” the knowing and willful aspect of the settlement agreement because it was “specifically approved by [the ALJ].” Also, in a subsequent submission, Complainant’s Counsel suggested that the GRC act here as it had in Verry, GRC 2013-43, *et seq.* (accepting an Initial Decision approving a settlement agreement, as well as an Order on Motion settling the attorney fee issue).

However, the agreement between the parties here was not “approved” by the ALJ through an Initial Decision, as was the case in Carter, GRC 2011-141 (Interim Order dated April 26, 2016) and Verry, GRC 2013-43. Such an approval would have required the Council to accept, reject, or modify the Initial Decision in accordance with N.J.S.A. 52:14B-10, as it previously did in Carter. Further, although the terms of the agreement were discussed in a June 8, 2017 hearing, the ALJ stated that she would “leave the record open until [she got] a fully executed settlement agreement.” T10:25 – 11:2. Thereafter, without the benefit of an Initial Decision or review by either the OAL or GRC, Complainant’s Counsel withdrew the complaint with prejudice in accordance with ¶ 4 of the settlement agreement. In fact, the GRC was not provided a copy of the agreement, executed or otherwise, until receipt of Complainant Counsel’s request for reconsideration. Complainant’s Counsel cannot now argue that the Council somehow failed to act on an agreement never provided to the OAL or GRC. Nor could he reasonably argue that the Council’s alleged inaction would result in a remand back to the OAL.

Further, and inapposite to Verry, GRC 2013-43, the GRC cannot accept, reject, or modify the approval of the settlement agreement because no Initial Decision was issued here. Without said decision, and in the face of a withdrawn complaint (with prejudice per ¶ 4 of the agreement), the GRC’s requirement under N.J.S.A. 52:14B-10 to accept, reject, or modify a decision within forty-five (45) days does not exist. The GRC also finds the withdraw peculiar given that a ¶ 7 of the agreement called for it to be submitted to the ALJ for “review and approval and subsequent approval by the GRC.” The parties nonetheless abrogated this portion of the agreement when Complainant’s Counsel voluntarily withdrew the complaint.

As the moving party, Complainant’s Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance

of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. Complainant’s Counsel failed to establish that the complaint should be reconsidered based on a mistake or illegality. Complainant’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D’Atria, 242 N.J. Super. at 401. Specifically, Complainant’s Counsel withdrew this complaint (with prejudice) from consideration pursuant to a settlement agreement, which prompted the Council to dismiss same. Additionally, Complainant’s Counsel confirmed in his request for reconsideration that “dismissal of the complaint was appropriate.” Thus, Complainant Counsel’s request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D’Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Knowing and Willful

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 “. . . [i]f 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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 matter before the Council, the GRC has now been provided with the executed settlement agreement dismissing this complaint. Therein, the Custodian admitted that he “knowingly and willfully violated OPRA and unreasonably denied access [to the responsive check registers] under the totality of the circumstances. . .” N.J.S.A. 47:1A-11; Settlement Agreement at ¶ 1. The agreement also memorialized that the Custodian’s admission was set forth on the record in a June 8, 2017 hearing before the ALJ. Id.

In Carter, GRC 2011-141 (Interim Order dated April 26, 2016), the Council held that “the penalty is mandatory and jurisdictional, pursuant to N.J.S.A. 47:1A-11, and cannot be waived.” Id. at 4-5. Unlike the agreement the OAL approved there, the instant settlement agreement contains no such waiver provision. Because the GRC is now aware of the Custodian’s admittance, it is statutorily required to follow N.J.S.A. 47:1A-11 and assess the appropriate penalty. To this end,

the GRC notes that the Custodian has already been fined on two (2) prior occasions in the last ten (10) years. See Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC 2011-124 et seq. (August 2013); Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-382 (December 2014). Thus, the Custodian is now subject to a \$5,000 fine because of a third violation in the last ten (10) years. N.J.S.A. 47:1A-11.

Accordingly, based on his own admittance on the record in a June 8, 2017 hearing, as well as in the executed settlement agreement, the Custodian knowingly and willfully violated OPRA. Thus, the Custodian is subject to the civil penalty set forth in OPRA as follows:

1. Because this is the Custodian's third (3rd) violation within the last ten (10) years, the penalty assessed is \$5,000. N.J.S.A. 47:1A-11; Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC 2011-124 et seq. (August 2013); Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-382 (December 2014).
2. The Custodian must remit payment from his own personal funds made payable to the Treasurer of the State of New Jersey, to the GRC within twenty (20) days from receipt of the Council's Order.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. Complainant's Counsel has failed to establish in his request for reconsideration of the Council's January 31, 2019 Final Decision that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Complainant's Counsel failed to establish that the complaint should be reconsidered based on a mistake and illegality. Complainant's Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, Complainant's Counsel withdrew this complaint (with prejudice) from consideration pursuant to a settlement agreement, which prompted the Council to dismiss same. Additionally, Complainant's Counsel confirmed in his request for reconsideration that "dismissal of the complaint was appropriate." Thus, Complainant Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Based on his own admittance on the record in a June 8, 2017 hearing, as well as in the executed settlement agreement, the Custodian knowingly and willfully violated OPRA. Thus, the Custodian is subject to the civil penalty set forth in OPRA as follows:
 1. Because this is the Custodian's third (3rd) violation within the last ten (10) years, the penalty assessed is \$5,000. N.J.S.A. 47:1A-11; Carter v. Franklin Fire Dist. No.

2 (Somerset), GRC 2011-124 et seq. (August 2013); Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-382 (December 2014).

2. The Custodian must remit payment from his own personal funds made payable to the Treasurer of the State of New Jersey, to the GRC within twenty (20) days from receipt of the Council's Order.

Prepared By: Frank F. Caruso
Acting Executive Director

June 18, 2019



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 31, 2019 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-141

v.

Franklin Fire District No. 2 (Somerset)
Custodian of Record

At the January 31, 2019 public meeting, the Government Records Council (“Council”) considered the January 22, 2019 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 the Council dismiss the complaint because Complainant’s Counsel, based on a settlement agreement, withdrew the instant complaint in a letter to the Honorable Patricia M. Kerins, Administrative Law Judge, dated December 13, 2018. 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 31st Day of January, 2019

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 5, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
January 31, 2019 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-141

v.

**Franklin Fire District No. 2 (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies, sent via e-mail, of check registers used by the Commissioners to disburse public funds (including any reasonably construed variation thereof), detailing registers of checks issued for budget years 2008, 2009, 2010 and 2011.

Custodian of Record: William Kleiber

Request Received by Custodian: March 20, 2011

Responses Made by Custodian: None

GRC Complaint Received: April 26, 2011

Background

April 26, 2016 Council Meeting:

At its April 26, 2016 public meeting, the Council considered the April 19, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

[T]hat the Council reject the Honorable John Schuster, III's Initial Decision on the basis that the Agreement does not meet the requirements of N.J.A.C. 1:1-19.1. Specifically, the parties agreed to waive the mandatory and jurisdictional civil penalty: such an action is contrary to OPRA, and thus the Agreement is not "consistent with law." For that reason, the GRC must refer this complaint back to the Office of Administrative Law for a determination of whether the Custodian committed a third (3rd) knowing and willful violation within ten (10) years in accordance with the Council's August 28, 2012 Interim Order. The Office of Administrative Law shall also make a determination of prevailing party attorney's fees.

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

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ). Previously represented by Eric M. Perkins, Esq. (Skillman, NJ).

Procedural History:

On April 28, 2016, the Council distributed its Interim Order to all parties. On July 1, 2016, the Government Records Council (“GRC”) transmitted the complaint to the Office of Administrative Law (“OAL”). On December 13, 2018, Complainant’s Counsel sent a letter to the Honorable Patricia M. Kerins, Administrative Law Judge, withdrawing the instant complaint based on a settlement agreement between the parties. On December 20, 2018, the OAL returned this complaint to the GRC marked “WITHDRAWAL.”

Analysis

No analysis required.

Conclusions and Recommendations

The Council Staff respectfully recommends that the Council dismiss the complaint because Complainant’s Counsel, based on a settlement agreement, withdrew the instant complaint in a letter to the Honorable Patricia M. Kerins, Administrative Law Judge, dated December 13, 2018. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Acting Executive Director

January 22, 2019



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

April 26, 2016 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-141

v.

Franklin Fire District No. 2 (Somerset)
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the April 19, 2016 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 it rejects the Honorable John Schuster, III’s Initial Decision on the basis that the Agreement does not meet the requirements of N.J.A.C. 1:1-19.1. Specifically, the parties agreed to waive the mandatory and jurisdictional civil penalty: such an action is contrary to OPRA, and thus the Agreement is not “consistent with law.” For that reason, the GRC must refer this complaint back to the Office of Administrative Law for a determination of whether the Custodian committed a third (3rd) knowing and willful violation within ten (10) years in accordance with the Council’s August 28, 2012 Interim Order. The Office of Administrative Law shall also make a determination of prevailing party attorney’s fees.

Interim Order Rendered by the
Government Records Council
On The 26th Day of April, 2016

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: April 28, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-141

v.

**Franklin Fire District No. 2 (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies, sent via e-mail, of check registers used by the Commissioners to disburse public funds (including any reasonably construed variation thereof), detailing registers of checks issued for budget years 2008, 2009, 2010 and 2011.

Custodian of Record: William Kleiber

Request Received by Custodian: March 20, 2011

Responses Made by Custodian: None

GRC Complaint Received: April 26, 2011

Background

August 28, 2012 Council Meeting:

At its August 28, 2012 public meeting, the Council considered the August 22, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian's Counsel did respond to the Council's June 26, 2012 Interim Order within the extended deadline date, the Custodian has failed to comply with said Order for the following reasons:
 - a. The Custodian failed to provide the GRC certified confirmation of compliance, confirming that he provided the Complainant with the requested check register report;
 - b. The Custodian failed to provide any check register report to the Complainant. The record the Custodian's Counsel provided to the GRC is a purchase order by vendor report, which is not the record at issue in this Denial of Access Complaint;

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

² Represented by Eric M. Perkins, Esq. (Skillman, NJ).

- c. The Custodian failed to provide the Complainant access to the requested record in the medium requested, as directed in the Council's Interim Order.
 2. Based on all of the below, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances:
 - a. The Custodian failed to respond at all to the Complainant's OPRA request;
 - b. The Custodian failed to provide any defenses for his lack of response to the Complainant's OPRA request;
 - c. The Custodian failed to respond to the GRC's first request for a legal certification regarding whether it was possible for the Board to produce the requested report from its existing software.
 - d. The Custodian failed to make any indication that he attempted to produce the requested check register report, either using the instructions provided by the Complainant, or otherwise.
 - e. The Custodian failed to comply with the Council's June 26, 2012 Interim Order for the following reasons:
 - The Custodian failed to provide the GRC certified confirmation of compliance, confirming that he provided the Complainant with the requested check register report;
 - The Custodian failed to provide any check register report to the Complainant. The record the Custodian's Counsel provided to the GRC is a purchase order by vendor report, which is not the record at issue in this Denial of Access Complaint;
 - The Custodian failed to provide the Complainant access to the requested record in the medium requested, as directed in the Council's Interim Order.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and the Council's June 26, 2012 Interim Order, 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. Specifically, the Council ordered the Custodian to disclose the requested check register report; however,

the Custodian has yet to actually produce said record to the Complainant. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, prior to the filing of this complaint, the Custodian failed to respond at all to the Complainant's OPRA request. Further, the relief ultimately achieved had a basis in law. Check registers are public records which are subject to public access. 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 Dep't of Corr., 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Twp. 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.

Procedural History:

On August 30, 2012, the Council distributed its Interim Order to all parties. On April 23, 2013, this complaint was transmitted to the Office of Administrative Law ("OAL"). On January 10, 2014, this complaint was transmitted back to the GRC because the Complainant failed to appear at a scheduled hearing. Therein, the Complainant was provided thirteen (13) days to submit an explanation to the Government Records Council ("GRC"). On January 23, 2014, the Complainant submitted his explanation, prompting the GRC to re-transmit the complaint to the OAL on August 10, 2014.

On January 26, 2016, the Honorable John Schuster, III, Administrative Law Judge ("ALJ"), issued an Initial Decision as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, the ALJ ". . . **CONCLUDE[D]** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, the ALJ ordered "that the parties comply with the settlement terms and that these proceedings be concluded."

Analysis

Administrative Law Judge's Initial Decision

Here, the parties sought to settle this complaint through a “Settlement Agreement” (“Agreement”). Therein, the Custodian agreed to a third (3rd) knowing and willful violation within ten (10) years;³ however, the parties agreed to waive the penalty and proof of payment based on a financial hardship. The Agreement also dismissed the complaint upon payment of an agreed to prevailing party attorney’s fee. Finally, the parties agreed that the Agreement would be null and void should the ALJ or GRC not approve any portion. In his Initial Decision, the ALJ concluded that the settlement agreement met “the requirements of N.J.A.C. 1:1-19.1” and “should be approved.”

N.J.A.C. 1:1-19.1 provides that, in the instance that the transmitting agency is not a party to an OAL matter, an ALJ may issue an initial decision if he or she “determines [that] the written order/stipulation . . . is voluntary, *consistent with the law* and fully dispositive of all issues in controversy.” *Id.* at (b)(emphasis added). Thus, for the GRC’s purposes, it follows that any and all settlements of contested GRC cases, whether at OAL or in the Superior Court of New Jersey, must comport with OPRA. To that end, the Council is charged with enforcing the provisions of OPRA and therefore must review settlement agreements prior to their execution to determine compliance with OPRA. The Council is not bound by any settlement agreements that conflict with OPRA.

The GRC is currently tasked with determining whether to accept, reject, or modify the ALJ’s Initial Decision accepting the Agreement. Based on its review of the Agreement, the Council should reject the ALJ’s Initial Decision on the basis that the Agreement did not meet the requirements of N.J.A.C. 1:1-19.1. The Agreement that the ALJ approved by way of Initial Decision was not in accord with OPRA’s penalty provisions.

OPRA provides that:

A public official, officer, employee or custodian who knowingly and willfully violates [OPRA] and is found to have unreasonably denied access under the totality of the circumstances, *shall be subject to a civil penalty of . . . \$5,000 for a third violation that occurs within 10 years of an initial violation. This penalty shall be collected and enforced in proceedings in accordance with the “Penalty Enforcement Law of 1999,” . . . and the rules of court governing actions for the collection of civil penalties. The Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section.*

Id. (emphasis added).

However, Paragraph 1 of the Agreement contravenes OPRA by improperly allowing a waiver of the \$5,000 knowing and willful violation penalty assessed against the Custodian. Such an action is not consistent with OPRA because the penalty is mandatory and jurisdictional,

³ The Custodian previously admitted to a knowing and willful violation as part of a settlement agreement in Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-124 *et seq.* (August 2013), and was found to have knowingly and willfully violated OPRA in Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-382 (December 2014).

pursuant to N.J.S.A. 47:1A-11, and cannot be waived. Therefore, the GRC is not bound by this provision of the Agreement.

In reaching this conclusion, the GRC looks to the Appellate Division's reasoning in Cavalloro 556 Valley Street Corp. v. Div. of ABC, 351 N.J. Super. 33 (App. Div. 2002). There, the Court reviewed whether a statutorily established deadline was "directory or mandatory" based on jurisdictional rationale and legislative scheme. Appellant failed to renew a liquor license timely and sought relief under N.J.S.A. 33:1-12.18, which the Director of Alcoholic Beverage Control ("ABC") denied. Thereafter, Appellant sought relief from the denial in the Appellate Division. The Court was thus tasked with reviewing whether ABC properly denied the request.

The Court first reviewed the jurisdictional rationale issue. The Court noted that jurisdictional rationale "reflects the well-known principle that administrative agencies derive all their powers from the Legislature." Id. at 38 (*citing* Silverman v. Berkson, 141 N.J. 412 (*certif. denied* 516 U.S. 975 (1995))). The Court went on to state that an agency did not have the ability to waive or relax the establishment of a provision. The Court stated that a party must seek relief from perceived injustice to the Legislature. The Cavalloro Court next reviewed the legislative scheme issue. The Court had previously discerned that directory deadlines fell within an agency's jurisdiction, while the Legislature had sole jurisdiction to modify mandatory deadlines. Id. at 37. The Court reasoned that an agency could only adjust statutory deadlines when the Legislature codified exceptions as part of the statute's construction. Based on a review of both issues, the Cavalloro Court determined that the Director acted properly because he was "without legislative authority to consider any new license request, under N.J.S.A. 33:1-12.18, after September 28 of the year in which the license should have been renewed." Id. at 35.

Further, the GRC notes that the Appellate Division previously held that "[t]he use of the word 'shall' ordinarily denotes action that is mandatory . . ." Chase Bank USA, N.A. v. Staffenberg, 419 N.J. Super. 386, 396 (App. Div. 2011)(*citing* Quereshi v. Cintas Corp., 413 N.J. Super. 492, 498 (App. Div. 2010)). The GRC also notes that this is not the first time the Council considered the inclusion of the word "shall" in OPRA to identify a mandatory action. *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-161 (Interim Order dated December 20, 2011)(holding that OPRA mandates a prevailing party attorney's fee analysis when a complainant is represented by an attorney regardless of whether it was requested).

Accordingly, the "directory or mandatory" test, as spelled out by Cavalloro, is consistent with OPRA's penalty provisions. OPRA is clear that a custodian, public official, officer, or employee, found to have knowingly and willfully violated OPRA, "shall be subject to a civil penalty. . ." N.J.S.A. 47:1A-11 (emphasis added). Further, OPRA requires the "penalty shall be collected and enforced in proceedings in accordance with the 'Penalty Enforcement Law of 1999,' (N.J.S.A. 2A:58-10 et seq.) . . ." Id. (emphasis added). Henceforth, the Legislature authorized the GRC through OPRA to impose a civil penalty that is subject to collection under the Penalty Enforcement Law of 1999. Additionally, the Legislature did not include any exceptions in OPRA to provide the Council the authority to waive a penalty: the Superior Court maintains jurisdiction of proceedings for the collection and enforcement of the civil penalty.

Although the GRC respects that the parties attempted to settle this complaint to their collective satisfaction, a plain reading of OPRA provides the GRC's sole authority to impose and collect the personal civil penalty. Moreover, the penalty is payable to the State Treasurer, and neither the Complainant or Custodian have the authority to compromise on or waive monies owed to the State. Because the ALJ approved a settlement agreement "not consistent with law," the OAL did not satisfy the Council's August 28, 2012 Interim Order.

Therefore, the Council should reject the ALJ's Initial Decision on the basis that the Agreement does not meet the requirements of N.J.A.C. 1:1-19.1. Specifically, the parties agreed to waive the mandatory and jurisdictional civil penalty: such an action is contrary to OPRA, and thus the Agreement is not "consistent with law." For that reason, the GRC must refer this complaint back to the OAL for a determination of whether the Custodian committed a third (3rd) knowing and willful violation within ten (10) years in accordance with the Council's August 28, 2012 Interim Order. The OAL shall also make a determination of prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council reject the Honorable John Schuster, III's Initial Decision on the basis that the Agreement does not meet the requirements of N.J.A.C. 1:1-19.1. Specifically, the parties agreed to waive the mandatory and jurisdictional civil penalty: such an action is contrary to OPRA, and thus the Agreement is not "consistent with law." For that reason, the GRC must refer this complaint back to the Office of Administrative Law for a determination of whether the Custodian committed a third (3rd) knowing and willful violation within ten (10) years in accordance with the Council's August 28, 2012 Interim Order. The Office of Administrative Law shall also make a determination of prevailing party attorney's fees.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

April 19, 2016



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

INTERIM ORDER

August 28, 2012 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-141

v.

Franklin Fire District No. 2 (Somerset)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian’s Counsel did respond to the Council’s June 26, 2012 Interim Order within the extended deadline date, the Custodian has failed to comply with said Order for the following reasons:
 - a. The Custodian failed to provide certified confirmation of compliance to the GRC’s Executive Director confirming that he provided the Complainant with the requested check register report;
 - b. The Custodian failed to provide any check register report to the Complainant. The record the Custodian’s Counsel provided to the GRC is a purchase order by vendor report, which is not the record at issue in this Denial of Access Complaint;
 - c. The Custodian failed to provide the Complainant access to the requested record in the medium requested, as directed in the Council’s Interim Order
2. Based on all of the below, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances:
 - a. The Custodian failed to respond at all to the Complainant’s OPRA request;



- b. The Custodian failed to provide any defenses for his lack of response to the Complainant's OPRA request;
 - c. The Custodian failed to respond to the GRC's first request for a legal certification regarding whether it was possible for the Board to produce the requested report from its existing software.
 - d. The Custodian failed to make any indication that he attempted to produce the requested check register report, either using the instructions provided by the Complainant, or otherwise.
 - e. The Custodian failed to comply with the Council's June 26, 2012 Interim Order for the following reasons:
 - The Custodian failed to provide certified confirmation of compliance to the GRC's Executive Director confirming that he provided the Complainant with the requested check register report;
 - The Custodian failed to provide any check register report to the Complainant. The record the Custodian's Counsel provided to the GRC is a purchase order by vendor report, which is not the record at issue in this Denial of Access Complaint;
 - The Custodian failed to provide the Complainant access to the requested record in the medium requested, as directed in the Council's Interim Order.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and the Council's June 26, 2012 Interim Order, 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. Specifically, the Council ordered the Custodian to disclose the requested check register report; however, the Custodian has yet to actually produce said record to the Complainant. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, prior to the filing of this complaint, the Custodian failed to respond at all to the Complainant's OPRA request. Further, the relief ultimately achieved had a basis in law. Check registers are public records which are subject to public access. 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 28th Day of August, 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: August 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-141

v.

**Franklin Fire District #2 (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies, sent via e-mail, of check registers used by the Commissioners to disburse public funds (including any reasonably construed variation thereof), detailing registers of checks issued for budget years 2008, 2009, 2010 and 2011.

Requests Made: March 20, 2011

Responses Made: None

Custodian: William Kleiber

GRC Complaint Filed: April 26, 2011³

Background

June 26, 2012

Government Records Council's ("Council") Interim Order. At its June 26, 2012 public meeting, the Council considered the June 19, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. 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 legally certified that it *may* be possible to produce the requested report from the QuickBooks software, the Custodian has failed to bear his burden of proving a lawful denial of access pursuant to N.J.S.A.

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

² Represented by Eric M. Perkins, Esq. (Skillman, NJ).

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

47:1A-6. As such, the Custodian shall provide the Complainant with the requested check register report.

3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

June 27, 2012

Council's Interim Order distributed to the parties.

July 2, 2012

Letter from Custodian's Counsel to GRC. Counsel states that he is leaving the country for a two (2) week vacation on July 1, 2012 and as a solo practitioner he is unable to respond to the Council's Interim Order within the five (5) business day response time. As such, Counsel requests a two (2) week extension of time to respond to the Interim Order until he returns to the office on July 16, 2012.

Additionally, Counsel states that he has spoken to a member of the Board of Fire Commissioners and the Board has agreed to seek an outside consultant to determine if the requested check register can be obtained from the QuickBooks version utilized by the Board. Counsel states the consultant is expected to be obtained from the accounting firm that audits the Board's records.

July 3, 2012

E-mail from the GRC to Custodian's Counsel. The GRC states that the Council issued its Interim Order to all parties on June 27, 2012 making the five (5) business day deadline to respond on July 5, 2012, taking into account the July 4th holiday. The GRC grants a ten (10) business day extension of time for the Custodian to respond to the Council's Interim Order. The GRC states the extended deadline date is the close of business on July 19, 2012.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

July 19, 2012

Letter from Custodian's Counsel to GRC. Counsel states that he has attached a vendor report⁶ produced by Mr. Oliver Walling, the fire district's accountant. Counsel states the Mr. Walling prepared this report in response to the Complainant's OPRA request, at the Board's expense. Additionally, Counsel states that Mr. Walling indicated it took two (2) hours to prepare this document which is not routinely utilized by the Board or Mr. Walling as part of the annual audit. Counsel states that a copy of this report "will be forwarded to Mr. Carter."

July 20, 2012

The GRC forwards the Complainant the Custodian Counsel's letter dated July 19, 2012, with the attachment.

July 20, 2012

E-mail from the Complainant to the GRC. The Complainant states that this instant complaint challenges a denial of access to a check register. The Complainant asserts the document the Custodian's Counsel sent to the GRC is not a check register and may be a purchase order report, which is the subject of GRC Complaint No. 2011-140.

The Complainant states that he has provided detailed instructions on how to produce the requested check register. The Complainant contends that the time it has taken the Board to produce the requested report supports the Complainant's assertion that the Custodian's conduct was and is deliberate in unreasonably denying access to the requested records.

Analysis**Whether the Custodian complied with the Council's June 26, 2012 Interim Order?**

In its June 26, 2012 Interim Order, the Council directed the Custodian to provide the Complainant access with the requested check register report. Specifically, the Complainant requested copies, sent via e-mail, of check registers used by the Commissioners to disburse public funds (including any reasonably construed variation thereof) detailing registers of checks issued for budget years 2008, 2009, 2010 and 2011. The Council's Interim Order directed the Custodian to provide said records to the Complainant, in the medium requested, within five (5) business days from receipt of said order. Additionally, the Council ordered the Custodian to provide the GRC's Executive Director with certified confirmation of compliance with the Interim Order. The compliance deadline expired on July 5, 2012.

On July 2, 2012, the Custodian's Counsel requested a two (2) week extension of time to comply with the Council's Interim Order because Counsel was leaving the country on vacation. On July 3, 2012, the GRC granted a ten (10) business day extension of time, making the Custodian's extended compliance deadline the close of business on July 19, 2012.

⁶ The report attached is entitled, "Custom Transaction Detail Report – January 2005 through December 2011."

On July 19, 2012, within the extended deadline, the Custodian's Counsel provided the GRC with a copy of a vendor report, which Counsel stated "will be forwarded to Mr. Carter." The GRC forwarded said report to the Complainant on July 20, 2012. On the same date, the Complainant wrote to the GRC contending that the report provided by Custodian's Counsel is not responsive to the OPRA request that is the subject of this Denial of Access Complaint.

Therefore, although the Custodian's Counsel did respond to the Council's June 26, 2012 Interim Order within the extended deadline date, the Custodian has failed to comply with said Order for the following reasons:

1. The Custodian failed to provide certified confirmation of compliance to the GRC's Executive Director confirming that he provided the Complainant with the requested check register report;
2. The Custodian failed to provide any check register report to the Complainant. The record the Custodian's Counsel provided to the GRC is a purchase order by vendor report, which is not the record at issue in this Denial of Access Complaint;
3. The Custodian failed to provide the Complainant access to the requested record in the medium requested, as directed in the Council's Interim Order.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

"[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414

(1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996)).

Here, the Custodian ignored the Complainant's OPRA request and failed to provide any defenses in his Statement of Information as to why he did not respond at all to the Complainant's OPRA request. Additionally, although the Custodian certified that no records responsive to the Complainant's OPRA request existed, the Complainant provided instructions he accessed from the QuickBooks website on how the Custodian could produce the requested check register report from the Board's existing software.

The GRC then asked the Custodian whether it was possible for the Board to produce the requested report from its existing software. The Custodian failed to respond to the GRC's request. The GRC asked the Custodian a second time whether it was possible for the Board to produce the requested report from its existing software. The Custodian certified that it *may* be possible to produce the requested report, but that he has never had a formal course of instruction in the use of the QuickBooks product. The Custodian failed to submit any evidence to the GRC that he even attempted to produce the report, either using the instructions provided by the Complainant, or otherwise.

Because the Council has previously determined that a requestor should not be penalized in any way when a custodian or other employee does not know how to utilize agency software that is required to fulfill an OPRA request⁷, the Council ordered the Custodian to disclose the check register report to the Complainant. The specific language in the Council's June 26, 2012 Interim Order states, "the Custodian shall provide the Complainant with the requested *check register report*." (Emphasis added).

In response to the Interim Order, the Custodian's Counsel provided, not the check register report the Complainant requested, but a printout of a purchase order listing. Further, the Custodian failed to provide the required legal certification to the GRC confirming that he provided the requested records to the Complainant within the required timeframe. Additionally, the Custodian failed to submit any evidence that he provided the Complainant access to the requested record in the medium requested, as is required by the Council's Interim Order.

To summarize the Custodian's actions surrounding the OPRA request and Denial of Access Complaint:

1. The Custodian failed to respond at all to the Complainant's OPRA request;
2. The Custodian failed to provide any defenses for his lack of response to the Complainant's OPRA request;

⁷ See Rivera v. Town of Guttenberg, Police Department, GRC Complaint No. 2006- 154 (Interim Order dated February 2008).

3. The Custodian failed to respond to the GRC's first request for a legal certification regarding whether it was possible for the Board to produce the requested report from its existing software.
4. The Custodian failed to submit any evidence that he attempted to produce the requested check register report, either using the instructions provided by the Complainant, or otherwise.
5. The Custodian failed to comply with the Council's June 26, 2012 Interim Order for the following reasons:
 - a. The Custodian failed to provide certified confirmation of compliance to the GRC's Executive Director confirming that he provided the Complainant with the requested check register report;
 - b. The Custodian failed to provide any check register report to the Complainant. The record the Custodian's Counsel provided to the GRC is a purchase order by vendor report, which is not the record at issue in this Denial of Access Complaint;
 - c. The Custodian failed to provide the Complainant access to the requested record in the medium requested, as directed in the Council's Interim Order.

Based on all of the above, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

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

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under OPRA, 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 Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight (8) business days later, or one 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 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.

In this instant complaint, the Custodian failed to respond at all to the Complainant's OPRA request. Additionally, the Custodian failed to provide any defenses for his lack of response to the Complainant's request. The first time the Custodian provided any response to the Complainant's request was in his Statement of Information filed in answer to the Denial of Access Complaint, certifying that no records responsive exist. Finding that it *may* be possible to produce the requested records from the Board's QuickBooks software, the Council ordered disclosure of the check register report. The Custodian, through legal counsel, provided the GRC access to a purchase order inquiry report. The Custodian failed to provide any evidence that he actually provided the check register report to the Complainant, as ordered by the Council.

Pursuant to Teeters, *supra*, and the Council's June 26, 2012 Interim Order, 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. Specifically, the Council ordered the Custodian to disclose the requested check register report; however, the Custodian has yet to actually produce said record to the Complainant. 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, prior to the filing of this complaint, the Custodian failed to respond at all to the Complainant's OPRA request. Further, the relief ultimately achieved had a basis in law. Check registers are public records which are subject to public access. 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. Although the Custodian's Counsel did respond to the Council's June 26, 2012 Interim Order within the extended deadline date, the Custodian has failed to comply with said Order for the following reasons:
 - a. The Custodian failed to provide certified confirmation of compliance to the GRC's Executive Director confirming that he provided the Complainant with the requested check register report;
 - b. The Custodian failed to provide any check register report to the Complainant. The record the Custodian's Counsel provided to the

GRC is a purchase order by vendor report, which is not the record at issue in this Denial of Access Complaint;

- c. The Custodian failed to provide the Complainant access to the requested record in the medium requested, as directed in the Council's Interim Order

2. Based on all of the below, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances:

- a. The Custodian failed to respond at all to the Complainant's OPRA request;
- b. The Custodian failed to provide any defenses for his lack of response to the Complainant's OPRA request;
- c. The Custodian failed to respond to the GRC's first request for a legal certification regarding whether it was possible for the Board to produce the requested report from its existing software.
- d. The Custodian failed to make any indication that he attempted to produce the requested check register report, either using the instructions provided by the Complainant, or otherwise.
- e. The Custodian failed to comply with the Council's June 26, 2012 Interim Order for the following reasons:
 - The Custodian failed to provide certified confirmation of compliance to the GRC's Executive Director confirming that he provided the Complainant with the requested check register report;
 - The Custodian failed to provide any check register report to the Complainant. The record the Custodian's Counsel provided to the GRC is a purchase order by vendor report, which is not the record at issue in this Denial of Access Complaint;
 - The Custodian failed to provide the Complainant access to the requested record in the medium requested, as directed in the Council's Interim Order.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and the Council's June 26, 2012 Interim Order, 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. Specifically, the Council ordered the Custodian to disclose the requested check register report; however, the Custodian has yet to actually produce said record to the Complainant. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, prior to the filing of this complaint, the Custodian failed to respond at all to the Complainant’s OPRA request. Further, the relief ultimately achieved had a basis in law. Check registers are public records which are subject to public access. 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.

Prepared By: Dara L. Barry
Communications Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 22, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

June 26, 2012 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-141

v.

Franklin Fire District #2 (Somerset)
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council ("Council") considered the June 19, 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 legally certified that it *may* be possible to produce the requested report from the QuickBooks software, the Custodian has failed to bear his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. As such, the Custodian shall provide the Complainant with the requested check register report.
3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

5. The Council defers analysis of whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees pending the Custodian’s compliance with the Council’s Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 2012

Steven F. Ritardi, Esq., Acting 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: June 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 26, 2012 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-141

v.

**Franklin Fire District #2 (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies, sent via e-mail, of check registers used by the Commissioners to disburse public funds (including any reasonably construed variation thereof), detailing registers of checks issued for budget years 2008, 2009, 2010 and 2011.

Requests Made: March 20, 2011

Responses Made: None

Custodian: William Kleiber

GRC Complaint Filed: April 26, 2011³

Background

March 20, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail and facsimile referencing OPRA. The Complainant indicates that the preferred method of delivery is via e-mail or, if records are not available electronically, via facsimile.

April 26, 2011

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

- Complainant's OPRA request dated March 20, 2011, sent via e-mail
- Complainant's OPRA request dated March 20, 2011, sent via facsimile (including transmission verification)

The Complainant states that he submitted his OPRA request on March 20, 2011 via e-mail and facsimile for the Fire District's check registry for the years 2008-2011. The Complainant states that the Custodian has failed to provide any response to said request, which is considered a "deemed" denial after the statutorily mandated seven (7)

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

² Represented by Eric M. Perkins, Esq. (Skillman, NJ).

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

business day response time. As such, the Complainant requests the following relief from the GRC:

1. A finding that the Custodian violated OPRA by failing to provide the records requested;
2. A finding that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6; and
3. A determination regarding whether the Custodian knowingly and willfully violated OPRA.

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

May 17, 2011

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

May 24, 2011

E-mail from Custodian's Counsel to GRC requesting a five (5) business day extension of time to submit the Custodian's completed SOI.

May 24, 2011

E-mail from the GRC to Custodian's Counsel. The GRC grants a five (5) business day extension of time for Counsel to submit the Custodian's completed SOI.

June 9, 2011

Custodian's SOI attaching the Complainant's Denial of Access Complaint. The Custodian certified that he received the Complainant's OPRA request on March 20, 2011 and that he did not provide any response to the Complainant's request.

The Custodian certifies that the date on which any records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable because no records responsive to the Complainant's OPRA request exist.⁴

Additionally, in the Counsel's cover letter to the Custodian's SOI, Counsel states that the Fire District utilizes an electronic check system and does not maintain a "check register."

March 9, 2012

Complainant's Certification. The Complainant states that the Custodian certified in his SOI that the Fire District does not maintain a check register. The Complainant certifies that the term "check register" is commonly used to describe a listing and/or report of checks that were issued, along with other relevant data associated with those checks. The Complainant certifies that after filing several subsequent OPRA requests, he ascertained that the District utilizes Intuit's QuickBooks software program as its

⁴ The Custodian did not certify to the search undertaken to locate the records responsive to the Complainant's request.

“electronic check system” (as described in Counsel’s cover letter to the Custodian’s SOI submission). The Complainant certifies that the OPRA request which is the subject of this instant complaint sought “complete copies of check register used by the Commissioners to disburse public funds (including any reasonably construed variation thereof)” as the type of record, and further specified that the content and/or subject would include a “detailed register of checks issued (including any reasonably construed variation thereof).” Additionally, the Complainant certifies that he has attached a copy of the step-by-step instructions from the Intuit QuickBooks website explaining how to print a “check register report” from the QuickBooks software. The Complainant certifies that the instructions are readily available at the following website:

<http://support.quickbooks.intuit.com/support/Articles/HOW13256>. The Complainant asserts that the availability of a “check register” within the District’s “electronic check system” is factually controverted by the existence of the “check register report” function within the QuickBooks software.

The Complainant asserts that the facts presented in this matter establish the Custodian’s conscious, intentional and deliberate acts to unreasonably deny the Complainant access to records for which no lawful basis for denial was ever established (the Custodian’s SOI in this matter indicates that “no response was given”). Based on the foregoing, the Complainant requests that the GRC:

1. Actively pursue, or refer to the appropriate investigative authority, the Custodian’s factually controverted SOI certification in this matter;
2. Find that the Custodian violated OPRA by failing to provide the Complainant with the records sought within seven (7) business days;
3. Find that the Complainant is a prevailing party and order an award of reasonable attorney’s fees pursuant to N.J.S.A. 47:1A-6;
4. Find that the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, warranting the imposition of civil penalties pursuant to N.J.S.A. 47:1A-11; and
5. Order the Custodian to immediately release all outstanding records responsive.

April 19, 2012

Letter from the GRC to Custodian. The GRC requests the following information from the Custodian via legal certification, pursuant to N.J. Court Rule 1:4-4:

1. What is the name of the electronic check system utilized by Franklin Fire District #2?
2. What type of information does this electronic check system capture?
3. Can the electronic check system run a query/generate a report of all checks issued in a specific timeframe? If not, explain why.

The GRC requests that the Custodian submit his legal certification by the close of business on April 26, 2012.

May 3, 2012

E-mail from the GRC to Custodian and Counsel. The GRC states that on April 19, 2012 it sent a request for a legal certification from the Custodian to be submitted to

the GRC by the close of business on April 26, 2012. The GRC states that to date, it is not in receipt of said certification. The GRC states that if the GRC does not receive Custodian's certification by the close of business on May 4, 2012, the GRC will adjudicate the complaint based solely on the submissions already submitted and the GRC will not consider any submissions received after May 4, 2012.

May 3, 2012

Custodian's Certification. The Custodian certifies that as Treasurer, he maintains the Board's financial records on the Intuit software known as QuickBooks and that this is the electronic check system he uses to issue checks for the Board's business. The Custodian certifies that he has never had a formal course of instruction in the use of the QuickBooks product. The Custodian certifies that he enters the basic information required by QuickBooks to establish and pay each payee. The Custodian certifies that he does not know how to run a query/generate a report of all checks issued in a specific timeframe. The Custodian certifies that it may be within the ability of the QuickBooks product to generate such a report, but he has never done so. Additionally, the Custodian certifies that to the best of his knowledge the information contained on the QuickBooks system pertaining to checks has already been provided to the Complainant in response to prior OPRA requests.

May 14, 2012

Complainant's Certification with the following attachments:

- Complainant's OPRA request dated March 1, 2012 (with the Custodian's response and record provided attached)
- Complainant's Certification dated April 21, 2012 (with attachments)
- Custodian's Certification dated May 3, 2012

The Complainant states that in his certification dated May 3, 2012, the Custodian certified that he has never had a formal course of instruction in the use of the QuickBooks product and that he is unfamiliar with how to produce the requested reports. However, the Complainant certifies that he filed several other unrelated OPRA requests with the Custodian seeking reports that were easily generated within the QuickBooks software and the Custodian provided responsive records to those requests without the Complainant supplying the Custodian with instructions on how to generate reports from the Fire District's financial software. The Complainant asserts that this controverts the Custodian's contention that he is unfamiliar with the workings of the QuickBooks software. Additionally, the Complainant certifies that on March 9, 2012 he provided the simple step-by-step instructions from the Intuit QuickBooks website explaining how to generate a "check register report" which the Custodian and the Custodian's Administrative Assistant received before the Custodian filed his May 3, 2012 certification.

The Complainant also states that the Custodian certified to the best of his knowledge that the information on the QuickBooks system pertaining to checks has already been provided to the Complainant in response to his previous OPRA requests. The Complainant certified that he has never received a check register. The Complainant certifies that the Custodian has failed to provide any evidence that the Custodian ever

provided said records to the Complainant. The Complainant requests that the Council take judicial notice of the “false in one, false in all” legal principle held by the New Jersey Supreme Court in State v. Ernst, 32 N.J. 560 (1960). The Complainant asserts that the Custodian’s sworn SOI and Certification are factually refuted by the exhibits presented herein, thus rendering his written testimony either lacking in material fact or completely contradicted by said exhibits.

Additionally, the Complainant contends that the facts presented in this matter overwhelmingly establish the Custodian’s conscious, intentional and deliberate acts to unreasonably deny access to records for which no lawful basis for denial was ever established. The Complainant certifies that the Custodian even certified that the requested records exist, yet the Custodian has not yet provided access to said records.⁵

Analysis

Whether the Custodian timely 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.

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 mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁶ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an

⁵ The Complainant presents additional facts/arguments, which are either restatements of facts/arguments already presented to the Council, or are not relevant to the adjudication of this complaint.

⁶ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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 this instant complaint, the Complainant states that he submitted his OPRA request on March 20, 2011. The Custodian certified in his SOI that he received said request on March 20, 2011. The Custodian also certified that he did not provide the Complainant with any response to his OPRA 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.

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.

In this instant complaint, the Complainant sought access to copies of check registers used by the Commissioners to disburse public funds (including any reasonably

Jeff Carter v. Franklin Fire District #2 (Somerset), 2011-140 and 2011-141 – Findings and Recommendations of the Executive Director 6

construed variation thereof), detailing registers of checks issued for budget years 2008, 2009, 2010 and 2011. The Custodian certified in his SOI that no records responsive to the Complainant's OPRA request exist.

However, the Complainant submitted a certification on March 9, 2012 indicating that the Fire District utilizes Intuit's QuickBook's software system as its electronic check system. Additionally, the Complainant provided a website link to instructions for printing a "check register report" from the QuickBooks software system.

Pursuant to *N.J.A.C.* 1:1-15.2(a) and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant's record of convictions, because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. *See Sanders v. Division of Motor Vehicles*, 131 N.J. Super. 95 (App. Div. 1974).

Thus, the Council takes judicial notice of the following web page on Intuit QuickBook Support's website:

<http://support.quickbooks.intuit.com/support/articles/how13256>.⁷

In light of the Complainant's certification, the GRC requested a certification from the Custodian in response to the following questions:

4. What is the name of the electronic check system utilized by Franklin Fire District #2?
5. What type of information does this electronic check system capture?
6. Can the electronic check system run a query/generate a report of all checks issued in a specific timeframe? If not, explain why.

The Custodian certified that as Treasurer, he maintains the Board's financial records on the Intuit software known as QuickBooks and that this is the electronic check system he uses to issue checks for the Board's business. The Custodian certified that he has never had a formal course of instruction in the use of the QuickBooks product. The Custodian certified that he enters the basic information required by QuickBooks to establish and pay each payee. The Custodian certified that he does not know how to run a query/generate a report of all checks issued in a specific timeframe. The Custodian certified that it may be within the ability of the QuickBooks product to generate such a report, but he has never done so.

In Rivera v. Town of Guttenberg, Police Department, GRC Complaint No. 2006-154 (Interim Order dated February 2008), the custodian attempted to charge the requestor a special service charge which included fees to train personnel on how to utilize the specific equipment that was necessary to fulfill the complainant's OPRA request. The Council determined that:

⁷ GRC staff accessed this website on May 16, 2012.

“the \$2,099.41 charge proposed by the Custodian is not reasonable. The proposed charge includes a \$375.57 fee for instructing the computer consultant how to play calls outside of the software. The cost to obtain the ability to play back calls to the Police Department is one which the Town of Guttenberg Police Department should absorb, and the Complainant should not be charged for an administrative function inherent in the Police Department’s duties...Moreover, the \$2,099.41 charge proposed by the Custodian includes \$500 to train Sgt. Conversano how to locate and listen to audio files from the computerized system. Again, this is a cost which the Police Department should absorb; the Complainant should not be charged for this administrative training of Police Department personnel.”

Although no special service charge is at issue in this instant complaint, the question of agency personnel not knowing how to utilize software maintained by the agency is at issue. Based on the Council’s holding in Rivera, *supra*, a requestor should not be penalized in any way when a custodian or other employee does not know how to utilize agency software that is required to fulfill an OPRA request. Penalization in this instant complaint would be denying access to the request on the basis that the custodian is untrained on how to produce the requested report from the QuickBooks software. The Custodian certified that it *may* be possible to produce the requested report, but he is unaware of how to do so. The Complainant provided a website link to specific instructions on how to produce the requested report.

Therefore, because the Custodian legally certified that it *may* be possible to produce the requested report from the QuickBooks software, the Custodian has failed to bear his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. As such, the Custodian shall provide the Complainant with the requested check register report.

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?

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

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

The Council defers analysis of whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian'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 legally certified that it *may* be possible to produce the requested report from the QuickBooks software, the Custodian has failed to bear his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. As such, the Custodian shall provide the Complainant with the requested check register report.
3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁸ to the Executive Director.⁹**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Dara L. Barry
Communications Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

June 19, 2012

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.