



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

FINAL DECISION

July 26, 2016 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-319

v.

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

At the July 26, 2016 public meeting, the Government Records Council (“Council”) considered the July 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 dismisses the complaint. The Complainant (via Counsel) withdrew his complaint in a letter to the Honorable John F. Russo, Administrative Law Judge, dated August 12, 2014, because the parties settled the matter. 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 July 26th Day of July, 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: July 29, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-319

v.

**Franklin Fire District No. 2 (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copy of the instruction manual cover page for Franklin Fire District No. 2 (“District”) electronic book system.

Custodian of Record: William Klieber

Request Received by Custodian: August 9, 2011

Response Made by Custodian: August 16, 2011

GRC Complaint Received: October 17, 2011

Background

April 30, 2013 Council Meeting:

At its April 30, 2013 public meeting, the Council considered the April 23, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The current Custodian timely complied with the Council’s March 22, 2013 Order because on April 1, 2013, the fourth (4th) business day after receipt of the Council’s Order, the Custodian provided certified confirmation of compliance to the Executive Director that he provided the cover page responsive to the Complainant on April 1, 2013.
2. The former Custodian violated N.J.S.A. 47:1A-6 by failing to prove that he lawfully denied access to the requested cover page. However, the current Custodian timely complied with the Council’s March 22, 2013 Interim Order and provided the requested cover page to the Complainant. Therefore, the former Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has achieved “the desired result because the complaint brought

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

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

about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the current Custodian provided responsive records pursuant to the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, and Mason. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Further, 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. *See* 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).

Procedural History:

On May 1, 2013, the Council distributed its Interim Order to all parties. On June 17, 2013, the GRC transmitted the complaint to the Office of Administrative Law ("OAL").

On August 12, 2014, the Complainant's Counsel sent a letter to the Honorable John F. Russo, Administrative Law Judge, withdrawing the complaint because the parties had settled all issues. The OAL notified the GRC on June 22, 2016,³ that the Complaint had been withdrawn.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss the complaint. The Complainant (via Counsel) withdrew his complaint in a letter to the Honorable John F. Russo, Administrative Law Judge, dated August 12, 2014, because the parties settled the matter. Therefore, no further adjudication is required.

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

July 19, 2016

³ The GRC notes that the Complainant sent a letter to the OAL on May 9, 2016, indicating that, among other things, the instant complaint had been settled. The GRC received that letter as part of another returned OAL file in Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-259 (May 2016). The GRC subsequently contacted OAL for a status update on GRC 2011-319. In response to this inquiry, the OAL located and returned GRC 2011-319 as withdrawn on June 22, 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

April 30, 2013 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-319

v.

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

At the April 30, 2013 public meeting, the Government Records Council (“Council”) considered the April 23, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian timely complied with the Council’s March 22, 2013 Order because on April 1, 2013, the fourth (4th) business day after receipt of the Council’s Order, the Custodian provided certified confirmation of compliance to the Executive Director that he provided the cover page responsive to the Complainant on April 1, 2013.
2. The former Custodian violated N.J.S.A. 47:1A-6 by failing to prove that he lawfully denied access to the requested cover page. However, the current Custodian timely complied with the Council’s March 22, 2013 Interim Order and provided the requested cover page to the Complainant. Therefore, the former Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the current Custodian provided responsive records pursuant to the Council’s Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See 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. Further, 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. *See 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).*

Interim Order Rendered by the
Government Records Council
On The 30th Day of April, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-319

v.

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

Records Relevant to Complaint: Electronic copy of the instruction manual cover page for Franklin Fire District No. 2 ("District") electronic book system.

Request Made: August 9, 2011

Response Made: August 16, 2011

GRC Complaint Filed: October 17, 2011³

Background

March 22, 2013 Council Meeting:

On March 22, 2013, the Council considered the March 15, 2013 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 failed to prove that there was a lawful denial of access to the requested cover page pursuant to N.J.S.A. 47:1A-6. As such, the Custodian must disclose the cover page responsive to the Complainant's request.
2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA). Mr. Bermingham entered notice of appearance before the GRC on June 21, 2012.

² Pelham Stewart, Custodian of Records. William Klieber was the Custodian of Records at the time of the Denial of Access Complaint and Statement of Information. Represented by Eric M. Perkins, Esq. (Skillman, NJ).

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

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."

3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order & Response:

On March 25, 2013, the Council distributed its Interim Order to all parties. On April 1, 2013, the fourth (4th) business day following receipt of said Order, the current Custodian responded to the Council's Interim Order. The Custodian certified that pursuant to the Council's March 22, 2013 Order, he is attaching a copy of the cover page responsive to the Complainant's request.

Analysis

Compliance

On March 22, 2013, the Council ordered the Custodian to provide a copy of the cover page responsive to the Complainant's August 9, 2011 OPRA request within five (5) business days of receipt of said Order. On March 25, 2013, the Council disseminated its Order. Thus, the Custodian's response was due by close of business on April 2, 2013.

The current Custodian timely complied with the Council's March 22, 2013 Order because on April 1, 2013, the fourth (4th) business day after receipt of the Council's Order, the Custodian provided certified confirmation of compliance to the Executive Director that he provided the cover page responsive to the Complainant on April 1, 2013.

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:

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.

“... 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)).

The former Custodian violated N.J.S.A. 47:1A-6 by failing to prove that he lawfully denied access to the requested cover page. However, the current Custodian timely complied with the Council’s March 22, 2013 Interim Order and provided the requested cover page to the Complainant. Therefore, the former Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party 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.*

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 Supreme 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.

However, the Court noted in Mason, *supra*, that 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 accepted the application of the catalyst theory within the context of OPRA, stating that:

“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 at 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.

After the filing of this Denial of Access Complaint, the Council ordered the Custodian to provide to the Complainant a copy of the cover page responsive to the request within five (5) business days from receipt of the Interim Order. In response to the Council's Interim Order, the current Custodian provided certified confirmation of compliance to the Executive Director that he provided the responsive cover page to the Complainant on April 1, 2013.

The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, at 432. Additionally a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, *supra*. Specifically, the current Custodian provided responsive records pursuant to the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See 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. Further, 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. See 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),

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian timely complied with the Council's March 22, 2013 Order because on April 1, 2013, the fourth (4th) business day after receipt of the Council's Order, the Custodian provided certified confirmation of compliance to the Executive Director that he provided the cover page responsive to the Complainant on April 1, 2013.
2. The former Custodian violated N.J.S.A. 47:1A-6 by failing to prove that he lawfully denied access to the requested cover page. However, the current Custodian timely complied with the Council's March 22, 2013 Interim Order and provided the

requested cover page to the Complainant. Therefore, the former Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the current Custodian provided responsive records pursuant to the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See 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. Further, 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. See 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).

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

April 23, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

March 22, 2013 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-319

v.

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

At the March 22, 2013 public meeting, the Government Records Council ("Council") considered the March 15, 2013 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 failed to prove that there was a lawful denial of access to the requested cover page pursuant to N.J.S.A. 47:1A-6. As such, the Custodian must disclose the cover page responsive to the Complainant's request.
2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 22nd Day of March, 2013

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.

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: March 25, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 22, 2013 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-319

v.

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

Records Relevant to Complaint: Electronic copy of the instruction manual cover page for Franklin Fire District No. 2 (“District”) electronic book system

Request Made: August 9, 2011

Response Made: August 16, 2011

GRC Complaint Filed: October 17, 2011³

Background⁴

The Complainant filed an OPRA request on August 9, 2011 for an electronic copy of the cover page listed above. Custodian’s Counsel responded via e-mail on August 16, 2011, the fifth (5th) business day following receipt of such request. Counsel states that he questions whether the material the Complainant seeks is a public record because it is neither created nor maintained by the District. Counsel also states that he will release the cover page responsive if the company who created the record consents to its release. Counsel further states that N.J.S.A. 47:1A-1.1 specifically exempts “proprietary commercial or financial information obtained from any source.” Counsel additionally states that he will seek the permission from the company who owns the program and prepared the manual to release the cover page.

The Complainant filed his Denial of Access Complaint with the Government Records Council (“GRC”) on October 17, 2011. The Complainant asserts that as of October 16, 2011, the Complainant is still not in receipt of the cover page responsive to his request. The Complainant argues that the responsive cover page is a government record and that Counsel’s position of the record being exempt as proprietary commercial or financial information is improper. The Complainant states that he has several pending complaints filed against the District with the GRC and both the Custodian and Counsel have established a pattern of deliberate, intentional

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA). Mr. Bermingham entered notice of appearance before the GRC on June 21, 2012.

² William Klieber, Custodian of Records. Represented by Eric M. Perkins, Esq. (Skillman, NJ).

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

⁴ The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

and willful conduct. The Complainant also argues that since the Custodian and Counsel have failed to provide the cover page responsive within seven (7) business days, his request is “deemed denied.” The Complainant requests the GRC to find that 1) the Custodian and Counsel violated OPRA by failing to provide the Complainant with a copy of the cover page responsive to his request within seven (7) business days; 2) the Custodian and Counsel knowingly and willfully violated OPRA and impose the civil penalties pursuant to N.J.S.A. 47:1A-11; and 3) order the Custodian and Counsel to immediately release the cover page responsive.

The Custodian filed his Statement of Information (“SOI”) on November 16, 2011. The Custodian certifies that the cover page responsive to the request is not maintained by the District and thus is not a government record subject to OPRA. The Custodian argues that if the cover page responsive is deemed to be a government record, then all documents in the District’s possession could also be construed as a government record, including all instruction manuals for all fire equipment purchases. The Custodian certifies that the District does not control or edit this record because it is provided solely by the manufacturer.

Complainant’s Counsel responded to the Custodian’s SOI on June 27, 2012. Counsel asserts that the Custodian confirmed that the cover page responsive to the Complainant’s request does exist. Counsel also asserts that because this cover page is kept on file or has been received in the course of official business, it is considered a government record pursuant to N.J.S.A. 47:1A-1.1.

Analysis⁵

Unlawful Denial of Access:

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.

Custodian’s Counsel responded to the Complainant’s OPRA request in writing stating that he questioned whether the responsive cover page is a public record because it is neither created nor maintained by the District. The Custodian certified in the SOI that the District does not control or edit this record because it is provided solely by the manufacturer. Conversely, Complainant’s Counsel argued in his response to the Custodian’s SOI that because this cover page is kept on file or has been received in the course of official business, it is considered a government record pursuant to N.J.S.A. 47:1A-1.1.

OPRA clearly defines a government record. The Custodian certified in the SOI that because the District cannot control or edit the cover page, it is not a government record. However, the Custodian’s argument is unfounded. The definition of a government record does not include any consideration whether the District can control or edit the record, only if it was

⁵ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

kept on file in the course of official business. Thus, since the Custodian retains the cover page responsive to the Complainant's request, said record must be disclosed.

Therefore, the Custodian failed to prove that there was a lawful denial of access to the requested cover page pursuant to N.J.S.A. 47:1A-6. As such, the Custodian must disclose the cover page responsive to the Complainant's request.

The Council notes that the Custodian originally denied the cover page responsive to the request as "proprietary commercial or financial information" pursuant to N.J.S.A. 47:1A-1.1. However, the requested cover page does not contain such information. See Belth v. Department of Banking and Insurance, GRC Complaint No. 2003-29 (February 2004); Renna v. County of Union, GRC Complaint No. 2003-100 (February 2004) and Albrecht v. New Jersey Department of Treasury, GRC Complaint No. 2006-191 (Interim Order July 25, 2007).

Knowing & Willful

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.

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to prove that there was a lawful denial of access to the requested cover page pursuant to N.J.S.A. 47:1A-6. As such, the Custodian must disclose the cover page responsive to the Complainant's request.
2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**

⁶ "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."

⁷ 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.

3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

March 15, 2013