State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Jeff Carter
Complainant
v.
Franklin Fire District No. 1 (Somerset)
Custodian of Record

Complaint No. 2011-76

At the June 30, 2015 public meeting, the Government Records Council ("Council") considered the June 23, 2015 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. Regarding prevailing party attorney's fees, the Council should find that the Custodian's Counsel has provided sufficient evidence to decrease the amount of fees awarded. Thus, the Council should modify Judge Scarola's decision to reduce the fees and hold that "the Custodian's Counsel is entitled to reasonable counsel fees of $1,020.00, plus costs of $300.45, for a total of $1,320.45." Id. at 18.

2. In paragraph No. 10 of the "Factual Discussion," the language should instead read that the Council determined "that it was possible that the custodian's actions" resulted in a knowing and willful violation. Id. at 5.

3. In the last paragraph, 3rd sentence of the "Testimony" section, change language from "the GRC offered training or counsel . . ." to reflect that the Custodian was unaware that "the GRC offered training or guidance in this area." Id. at 10.

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 30th Day of June, 2015

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 2, 2015

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
June 30, 2015 Council Meeting

Jeff Carter[1] **GRC Complaint No. 2011-76**
Complainant

v.

Franklin Fire District No. 1 (Somerset)[2]
Custodial Agency

Records Relevant to Complaint: Copies of annual financial disclosure statements ("FDS forms") for all Franklin Fire District No. 1 ("FFD") Commissioners in office from 2000 through present.

Custodian of Record: Melissa Kosensky[3]
Request Received by Custodian: January 21, 2011
Response Made by Custodian: February 10, 2011
GRC Complaint Received: April 4, 2011

Background

August 28, 2012, Council Meeting:

At its August 28, 2012, public meeting, the 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, found that:

1. The current Custodian timely complied with the Council's June 26, 2012, Interim Order by providing the Complainant access (via Counsel) to the requested records via e-mail, providing certified confirmation to the GRC within the prescribed time frame to comply, and further certifying that no other responsive records existed.

2. Because the original Custodian received responsive records on January 25, 2011, and subsequently certified in the Statement of Information that no records responsive existed, it is possible that the original Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the original

[1] Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).
[2] Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).
[3] The current Custodian of Record is Tim Szymborski, who replaced Ms. Melissa Kosensky on March 1, 2011.

Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the current Custodian provided the Complainant with the responsive FDS forms and certified that no other records existed in accordance with the Council's June 26, 2012 Interim 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 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.

Procedural History:

On August 30, 2012, the Council distributed its Interim Order to all parties. On April 23, 2013, the complaint was transmitted to the Office of Administrative Law ("OAL"). On April 23, 2015, following two (2) extensions, the Honorable Susan M. Scarola, Administrative Law Judge ("ALJ"), issued an Initial Decision in this matter.

Complainant's Exceptions

On May 5, 2015, the Complainant's Counsel filed exceptions to the ALJ's Initial Decision, requesting that the GRC: 1) reject the Initial Decision and determine that the Custodian and William T. Cooper, III, Esq., the original Counsel for the Custodian, knowingly and willfully violated OPRA, and 2) refer this complaint back to OAL to address arguments that Complainant's Counsel had timely submitted but that were not included in the ALJ's decision.

First, the Complainant's Counsel argued that the last minute production of discovery (provided the Friday before a Monday hearing) unfairly hindered his client's ability to counter the Custodian's "legal advice defense." Counsel argued that this move was calculated with no reasonable advanced notice given to the parties. Counsel asserted that he requested an adjournment of the hearing to subpoena Mr. Cooper but was denied. Counsel noted that he entered his concerns about the inability to subpoena Mr. Cooper repeatedly, but the OAL

determined that Mr. Cooper was not a party to this complaint. Counsel argued that the determination is erroneous, given that the Custodian relied on Mr. Cooper to respond to the request. Counsel argued that this action not only made Mr. Cooper a witness, but also a *de facto* records custodian. Counsel thus requested that this complaint be remanded back to the OAL so that Mr. Cooper's sworn testimony may be heard.

Second, Counsel argued that the OAL failed to address the Custodian's own admission that she should have timely provided the responsive FDS forms to the Complainant; however, she continued to deny their existence in her certified Statement of Information ("SOI"). Counsel contended that the evidence of record belies the OAL's determination that the Custodian did not knowingly and willfully violate OPRA. Specifically, the Custodian knew that certain records existed, believed that Mr. Cooper would disclose the records, received and reviewed Mr. Cooper's response but did not correct same, and continuously denied the existence of same under penalty of law. Counsel thus argued that the OAL erred in finding that the Custodian did not knowingly and willfully violate OPRA.

Third, Counsel argued that the OAL erroneously accepted the Custodian's testimony that she had no training and experience in handling OPRA requests. Counsel argued that he provided competent, credible evidence to refute this testimony, which the OAL failed to consider and further ignored in the Initial Decision. Specifically, Counsel disputed the Custodian's testimony that she was not aware of the existence of the "Handbook for Records Custodians" ("Handbook"), which is available on the GRC's website. Counsel asserted that the Complainant referenced the Handbook several times in OPRA requests he submitted to the Custodian around the same time of the subject OPRA request. Counsel also disputed the Custodian's testimony that she received no training. Counsel stated that the FFD's May 24, 2010, meeting minutes memorialized that the Custodian, FFD Chairman, and John Paff met to go over OPRA "point by point." Counsel noted that Mr. Paff is a premier OPRA advocate; yet, the Custodian denied under oath that she received any training. Counsel argued that, for this reason, the ALJ should have found that the Custodian was not credible.

Fourth, Counsel stated that he asked the OAL to consider the Complainant's August 24, 2012, legal certification omitted from the Council's August 28, 2012, Interim Order[4] and address: 1) whether Mr. Cooper should be fined, and 2) to acknowledge that the Council did not refer the issue of Mr. Cooper's culpability to the OAL. Counsel asserted that both the Council and ALJ failed to address same, even though Mr. Cooper's involvement was pertinent to the knowing and willful analysis. Counsel argued that the evidence of record demonstrated that both the Custodian and Mr. Cooper knowingly and willfully violated OPRA. Counsel further contended that he reiterated his request that Council determine whether Mr. Cooper violated OPRA knowingly and willfully. *See* Komuves v. Twp. of Edison, 2006 N.J. Super. Unpub. LEXIS 1418, 15 (App. Div. 2006). Counsel argued that this complaint should be referred back to OAL for a hearing on whether Mr. Cooper knowingly and willfully violated OPRA.

[4] The GRC rejected the Complainant's legal certification because this complaint was already tentatively scheduled for the Council's review and approval. Additionally, the GRC noted that the submission did not conform with the GRC's regulations, which do not provide for submissions in advance of the Council's consideration of a complaint without a hearing. N.J.A.C. 5:105-2.6.

Fifth, Counsel contended that, although not addressed at the hearing, the Custodian's Counsel has become a witness because the evidence of record is unclear on whether he had knowledge that the responsive FDS forms existed at the time that he aided the Custodian in preparing the SOI. Further, Counsel noted that the Custodian did not include a document index in the SOI, which she was required to submit per Paff v. NJ Dep't of Labor, 392 N.J. Super. 334 (App. Div. 2007). Counsel argued that this fact suggested that the Custodian intended to deny the existence of the responsive FDS forms throughout the GRC's adjudication process. Counsel contended that the ALJ's decision was devoid of any analysis on this issue.

Sixth, Counsel questioned which "documents" the ALJ "review[ed]" in determining that the Custodian did not knowingly and willfully violate OPRA. Id. at 11. Counsel argued that the "documents" he submitted impeached the Custodian's credibility and testimony through evidence. Counsel contended that the Custodian's continued denial of the existence of FDS forms was belied by her admission that the FFD should have provided any records in their possession. Counsel thus requested that the Council reject the ALJ's decision and refer this complaint back to the OAL to address the issue of Custodian's perjury in the SOI.

Seventh, Counsel questioned the OAL's purpose for allowing the parties to submit closing statements if the ALJ intended to ignore them when rending an Initial Decision. Counsel reiterated that he was denied the ability to counter the FFD's defense due to last-minute production of discovery and was denied an adjournment to subpoena Mr. Cooper; yet, the OAL ignored the factual record in his closing statement submissions, which he presented to refute the Custodian's testimony.

In closing, Counsel reiterated all arguments set forth above and argued that the OAL simply turned a blind eye to all factual evidence in determining that the Custodian did not knowingly and willfully violate OPRA. Counsel asserted that, if left uncorrected, this decision would set a dangerous precedent that would allow custodians to certify falsely that no records exist without any repercussion. Counsel contended that accepting the ALJ's decision will be a travesty of justice, providing grounds for appeal and reversal.

Custodian's Exceptions

On May 5, 2015, the Custodian's Counsel filed exceptions to the ALJ's Initial Decision awarding prevailing party attorney's fees in the amount of $7,528.50 (not including $300.45 for costs). Counsel stated that prior to the commencement of an action at OAL, the parties agreed to an amount of $1,020.00, covering time spent just prior to the GRC's referral of this complaint to the OAL on April 25, 2013. Counsel asserted that the parties agreed that additional attorney's fees would hinge on a determination of the knowing and willful issue. Counsel noted that the Complainant's Counsel acknowledged this in the fee application that he submitted to the OAL.

Counsel asserted that the OAL erred in awarding prevailing party attorney's fees because the ALJ did not return a knowing and willful violation. Counsel contended that because the ALJ determined that the original Custodian did not knowingly and willfully violate OPRA, the Complainant did not prevail, and no fees should have been awarded. N.J.S.A. 47:1A-6. Counsel asserted that the FFD is only responsible for the fees agreed prior to OAL. Counsel thus

requested that the GRC modify the ALJ's Initial Decision to award prevailing party attorney's fees in the amount of $1,020.00 plus costs.

Additional Submissions

On June 12, 2015, the Complainant's Counsel submitted a letter brief to the GRC, asserting new evidence not available in prior briefs (*citing* Gilleran v. The Rutherford Downtown P'ship, 2014 N.J. Super. Unpub. 2188, 10-11 (September 5, 2014); N.J. Court Rule 4:49-2). Counsel stated that, following the Initial Decision, the Complainant submitted an OPRA request to FFD seeking e-mails regarding FDS forms. Counsel stated that the Custodian's Counsel responded by providing several e-mails, one of which is relevant to this complaint. Counsel stated that in said e-mail, dated April 4, 2011, Ms. Nelson advised the current Custodian that she forwarded FDS forms to the Custodian on January 25, 2011, but that the OPRA request remained open. Counsel noted that Ms. Nelson attached to that e-mail the same FDS file she previously forwarded to the Custodian.

Counsel argued that the current Custodian had a legal obligation to respond to the Complainant by providing access to the FDS forms on that day; however, the current Custodian never disclosed the fact that he possessed the records throughout the pendency of this complaint. Specifically, Counsel contended that the current Custodian received this complaint the day prior to receiving Ms. Nelson's e-mail. Counsel noted that the current Custodian immediately forwarded the complaint to FFD commissioners and Custodian's Counsel, stating that he would wait "on legal [counsel] first." Counsel presumed that this statement necessarily infers that the current Custodian would discuss the complaint with Custodian's Counsel and logically include the FDS forms in his possession. Further, Counsel asserted that Custodian's Counsel prepared the SOI for review and forwarded same to the Custodian (copying the current Custodian on the first e-mail, but not the second e-mail with the revised SOI); yet, the current Custodian consciously chose not to intercede to correct the SOI. Counsel asserted that the current Custodian's silence is indicative of the lengths that the FFD has gone to deny the Complainant access to records.

Counsel argued that, based on the foregoing, the GRC should seek a certification from the current Custodian asking him to explain his actions after receiving Ms. Nelson's April 4, 2011, e-mail. Counsel asserted that this new evidence also further implicates Custodian Counsel's subjective actions.[5] Counsel contended that this new evidence provides that FFD officials may have conspired to conceal the existence of responsive FDS forms from both the Complainant and the GRC. Further, Counsel contended that, if true, this evidence overwhelmingly supports a knowing and willful violation. N.J.S.A. 47:1A-11.

Analysis

Administrative Law Judge's Initial Decision

The ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties. "The reason for the rule is that the

[5] The Complainant's Counsel reiterated issues presented in his Exceptions dated May 5, 2015.

administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), *certif. denied* 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." Cavalieri v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." Id. at 443. Additionally, the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

The ALJ's April 23, 2015, Initial Decision, set forth as "Exhibit A," determined that:

> I **CONCLUDE** that [the Complainant] has not met his burden of proof by a preponderance of the credible evidence that the [Custodian's] conduct in failing to provide the information that was the subject of his OPRA request was knowing and willful under the totality of the circumstances. Accordingly, a civil penalty shall not be imposed upon [the Custodian] or the [FFD].

Id. at 14-15.

Moreover, the ALJ held that "[the Complainant] is entitled to a total of $7,528.50 in reasonable counsel fees, plus $300.45 in costs (copies, audio recording and transcripts)." Id. at 18. Based on the foregoing, the ALJ ordered the following:

> Having concluded, under the totality of the circumstances presented herein, that the [Custodian] did not intentionally and willfully fail to provide the requested documents, I hereby **ORDER** that no civil penalty be imposed upon [the Custodian] or the [FFD].
>
> Having also concluded, pursuant to the findings of the [GRC], that the petitioner is a prevailing party in that the records originally sought were deemed denied to him, and only released after the First Interim Order, I **ORDER** that the [Custodian's Counsel] is entitled to reasonable counsel fees of $7,528.50, plus costs of $300.45, for a total of $7,828.95.

Id. at 18.

Thereafter, both parties submitted exceptions to the ALJ's Initial Decision. The Complainant's Counsel requested that the GRC reject the decision and remand same back to the OAL based on a number of issues. Additionally, the Complainant's Counsel submitted to the GRC e-mails that he claimed were "new evidence" implicating the current Custodian's actions as possibly knowing and willful. The Custodian's Counsel requested that the GRC modify the decision with regard to prevailing party attorney's fees. The GRC will address both parties' exceptions and submissions henceforth.

Complainant Counsel's Exceptions:

1st and 4th Exceptions

The Complainant Counsel's first (1st) exception raised the issue that the OAL rejected his request for adjournment in order to subpoena Mr. Cooper to testify. Further, Counsel argued that he was unfairly hindered by the FFD's last minute production of discovery. Counsel further argued that the Custodian's reliance on Mr. Cooper to respond to the subject OPRA request not only made him a witness, but also a *de facto* records custodian. Additionally, Counsel's fourth (4th) exception raised the issue that both the GRC and OAL failed to address the Complainant's August 24, 2012, legal certification, which spoke directly to Mr. Cooper's relevance to this complaint and the possibility that he knowingly and willfully violated OPRA (*citing* Komuves, 2006 N.J. Super. Unpub. LEXIS 1418 (App. Div. 2006)).

The Council should reject Counsel's first (1st) exception for the reasons that the ALJ advanced during the October 20, 2014, hearing. *See* Hearing Transcript, T86-9 to 23. Specifically, the ALJ advised the Counsel that he had adequate time to subpoena Mr. Cooper and failed to do so. Additionally, notwithstanding Counsel's "last second discovery" argument, he was aware that Mr. Cooper responded to the request on behalf of the Custodian and the Complainant made several arguments in regard to Mr. Cooper's actions in his August 24, 2012, certification. The Council should also reject Counsel's fourth (4th) exception based on the foregoing. Additionally, the Council has already held that it does not have the authority to fine a licensed attorney. Blanchard v. Rahway Bd. of Educ., GRC Complaint No. 2003-57 (October 2003). The Courts have ruled that such an issue is reviewable only by the Supreme Court. N.J. Court Rule 1:20-1(a); Robertelli v. NJ Office of Attorney Ethics, 2015 N.J. Super. Unpub. LEXIS 213 (App. Div. 2015).

2nd and 3rd Exceptions

Counsel's second (2nd) exception contended that the OAL failed to address the Custodian's own admission that she should have provided access to the FDS forms in her possession from the outset of the Complainant's OPRA request. Counsel contended that this action, given her subsequent position that no records existed, should have resulted in a knowing and willful violation. Counsel's third (3rd) exception contended that the ALJ erroneously accepted the Custodian's testimony that she was unaware of the "Handbook" and that she had no

training. Counsel argued that he provided competent credible evidence to refute the Custodian's testimony and that the ALJ should have determined that same was not credible.

The Council should reject Counsel's second (2nd) exception. In fact, the Initial Decision makes mention of the Custodian's admission on multiple occasions. Id. at 10-11, 14. The Council should also reject Counsel's third (3rd) exception. The GRC is not satisfied that the Complainant's mere mention of the Handbook in other OPRA requests independently provided the Custodian with knowledge of its existence. In fact, the Custodian also noted that she did not know of the existence of the GRC or any of its training opportunities until receiving the first complaint. Additionally, while the GRC is aware of Mr. Paff's work as an advocate for open government, the GRC cannot give the same weight to a meeting between Mr. Paff and the Custodian, which occurred eight (8) months prior to the instant request, as an official GRC training session.

Fifth (5th) Exception and New Evidence:

Counsel's fifth (5th) exception argued that the OAL, at the hearing, did not address Custodian's Counsel role in aiding the Custodian's continuing denial of the existence of any FDS forms. However, Counsel argued that it is unclear whether he had any knowledge of the existence of records. Further, Counsel pointed to the Custodian's failure to submit a document index as part of the SOI as evidence that at least the Custodian intended to deny the existence of records.

Additionally, on June 12, 2015, Counsel submitted a letter brief asserting that he had obtained "new evidence," indicating that the current Custodian had received the FDS forms from Ms. Nelson the day after receiving the Denial of Access Complaint. Counsel argued that this evidence called into question the current Custodian's role in denying the existence of these records. Counsel also argued that the new evidence indicated that he discussed this complaint with the Custodian's Counsel, which further advances the issue of Custodian Counsel's culpability here.

The Council should reject both the exception and new evidence submissions. The fact is that both Custodian's Counsel and the current Custodian were active participants in the OPRA affairs of the FFD at the time that the Complainant filed this complaint. However, Counsel did not address this issue, either before the GRC or Courts, until after the Initial Decision. Additionally, as previously noted, Counsel had many months to explore these issues but failed to do so. Regarding Custodian's Counsel, he prepared and sent the SOI to the GRC on June 9, 2011. In Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-284 (Interim Order dated August 27, 2013), the Complainant alleged that the current custodian knowingly and willfully violated OPRA based on his receipt of an "OPRA request log" that tracked 2011 requests to include outstanding requests handled by the Custodian. Id. at 2. However, the Council's focus throughout the pendency of this complaint has centered on the Custodian's actions and whether or not same constituted a knowing and willful violation under OPRA. Had the Council believed that additional focus was needed on others within the FFD, it would have named them as well. *See* Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-107 (Interim Order dated July 25, 2007).

Additionally, the e-mails provided to the GRC do not constitute "new evidence," which is defined as "evidence that could not have been provided prior to the Council's decision because the evidence did not exist at that time." *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2012-15 (August 2013). More specifically, the e-mails existed contemporaneously to the filing of this complaint in 2011. That the e-mails did not come to light until after the Initial Decision, at which time the Complainant felt compelled to request same, does not classify the e-mails as "new evidence."

Finally, the GRC notes that the OAL closed the record on December 19, 2014 and the Initial Decision only allowed for the parties to submit exceptions. Thus, Counsel's reliance on Gilleran and R. 4:49-2, which address reconsideration submissions, may be misplaced at this point in the adjudication process.

6th and 7th Exceptions

Counsel's sixth (6th) exception questioned what "documents" the OAL reviewed in determining that the Custodian did not knowingly and willfully violate OPRA. Counsel argued that he submitted documentary evidence that adequately refuted the Custodian's testimony. Counsel's seventh (7th) exception questioned the OAL's purpose for allowing the parties to submit closing statements when the Initial Decision does not refer to them.

The Council should reject both exceptions as speculation. That the ALJ did not refer in her Initial Decision specifically to those records she reviewed does not detract from her review of same. Additionally, the ALJ made it clear that her decision was based on both "the documents" and "testimony" where she "observe[d] [the Custodian's] demeanor . . ." Id. at 11, 14.

Custodian Counsel's Exception

The Custodian's Counsel objected to the ALJ's decision awarding prevailing party attorney's fees to the Complainant's Counsel in the amount of $7,528.50. Counsel averred that the parties agreed to settle for $1,020.00 related to all work Complainant's Counsel conducted prior to OAL. Counsel asserted that the parties agreed to additional fees, predicated on the OAL's determination of the knowing and willful issue. Counsel noted that this arrangement was also memorialized during the hearing. However, notwithstanding that the Complainant did not prevail, the ALJ awarded fees anyway. Counsel requested that the Council modify the ALJ's decision to only allow for payment of the settled fee plus $300.45 in costs.

The GRC accepts Custodian Counsel's exception based on a number of factors. First, Counsel provided a copy of Resolution 14-30, which clearly memorializes the settlement and deferral of additional fees until after the OAL's decision. Second, the hearing memorializes that both parties were aware of this agreement. *See* T8-13 to 23. Finally, and most importantly, the Complainant did not prevail at OAL on the issue of the knowing and willful violation. In applying the "catalyst theory," the parties already agreed to those portions of the complaint on which the Complainant prevailed; however, he did not prevail at OAL. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, the only fees

contemplated herein are those that the parties agreed to prior to the referral of this complaint to the OAL along with costs.

Additionally, the GRC should make two (2) technical modifications to the ALJ's Initial Decision to correct the record.

First, paragraph No. 10 of the "Factual Discussion" states that the Council determined "that the custodian's actions were intentional and deliberate with knowledge of their wrongfulness." Id. at 5. The Council's actual finding reflected that "it was possible" that the Custodian knowingly and willfully violated OPRA but left this determination to the OAL. Thus, paragraph No. 10 should reflect that the Council determined "that it was possible that the custodian's actions were intentional and deliberate with knowledge of their wrongfulness." (emphasis added).

Second, in the last paragraph, 3rd sentence of the "Testimony" section, the Custodian purportedly noted that she was unaware that "the GRC offered training or counsel . . ." Id. at 10. However, the GRC notes that information provided through its inquiry process is guidance and does not constitute legal advice or a final decision of the GRC. Thus, paragraph No. 10 should reflect that the Custodian was unaware that "the GRC offered training or guidance in this area." (emphasis added).

Here, the ALJ fairly summarized the testimony and evidence, explaining how she weighed the proofs before her and explaining why she credited, or discredited, certain testimony. The ALJ's conclusions are aligned and consistent with those credibility determinations. As such, the GRC is satisfied that it can ascertain which testimony the ALJ accepted as fact, and further, finds that those facts provide a reasonable basis for the ALJ's conclusions.

The GRC has reviewed the ALJ's Initial Decision and recommends that the Council accept said decision with modifications. Specifically, the Council should accept the ALJ's conclusion that the Custodian "did not intentionally and willfully fail to provide the requested documents"; thus, "no civil penalty be imposed upon the Custodian" (emphasis added). In addition, the Council should modify the ALJ's decision on fees as follows: "the Complainant's Counsel is entitled to reasonable counsel fees of $1,020.00, plus costs of $300.45, for a total of $1,320.45" (emphasis added). Additionally, the Council should make two (2) minor modifications to correct the record are as follows: 1) in paragraph No. 10 of the "Factual Discussion," change language from "the custodian's actions were" to reflect that the Council determined "that it was possible that the custodian's actions. . ." (emphasis added) resulted in a knowing and willful violation; and 2) in the last paragraph, 3rd sentence of the "Testimony" section, change the language from "the GRC offered training or counsel . . ." to reflect that the Custodian was unaware that "the GRC offered training or guidance in this area" (emphasis added).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Honorable Susan M. Scarola's Initial Decision, dated April 23, 2015, with modifications. Specifically, the Council should accept the ALJ's conclusion that the Custodian "did not intentionally and willfully fail to

provide the requested documents"; thus, "no civil penalty be imposed upon [the Custodian]." In addition, the Council should modify the ALJ's decision as follows:

1. Regarding prevailing party attorney's fees, the Council should find that the Custodian's Counsel has provided sufficient evidence to decrease the amount of fees awarded. Thus, the Council should modify Judge Scarola's decision to reduce the fees and hold that "the Custodian's Counsel is entitled to reasonable counsel fees of $1,020.00, plus costs of $300.45, for a total of $1,320.45." Id. at 18.

2. In paragraph No. 10 of the "Factual Discussion," the language should instead read that the Council determined "that it was possible that the custodian's actions" resulted in a knowing and willful violation. Id. at 5.

3. In the last paragraph, 3rd sentence of the "Testimony" section, change language from "the GRC offered training or counsel . . ." to reflect that the Custodian was unaware that "the GRC offered training or guidance in this area." Id. at 10.

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

Reviewed By: Joseph D. Glover
Executive Director

June 23, 2015

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

JEFF CARTER,	OAL DKT. NO. GRC 5741-13
Petitioner,	AGENCY DKT. NO. 2011-76
v.	
FRANKLIN FIRE DISTRICT NO. 1 (SOMERSET),	
Respondent.	
And	
JEFF CARTER,	OAL DKT. NO. GRC 6038-13
Petitioner,	AGENCY DKT. NO. 2011-73
v.	
FRANKLIN FIRE DISTRICT NO. 1 (SOMERSET),	
Respondent.	**CONSOLIDATED**

_____

Walter M. Luers, Esq., for petitioner Jeff Carter (Law Office of Walter M. Luers, attorneys)

Dominic P. DiYanni, Esq., for respondent Franklin Fire District No. 1 (Eric M. Bernstein & Associates, attorneys)

Record Closed: December 19, 2014 Decided: April 23, 2015

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

GRC 5741-13

On April 23, 2013, the Government Records Council (GRC) transmitted a Denial of Access Complaint under the New Jersey Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq., to the Office of Administrative Law (OAL) for a hearing to determine two issues: first, whether the original custodian knowingly and willfully violated OPRA and unreasonably denied access to financial disclosure statements (FDS forms) for all Franklin Fire District No. 1 (FFD) commissioners in office from 2000 through to the present under the totality of the circumstances; and second, the determination of an award of reasonable attorney's fees because the GRC had determined the petitioner to be a prevailing party because "a factual causal nexus exists between the [petitioner's] filing of a Denial of Access Complaint and the relief ultimately achieved."

On April 25, 2013, the matter was filed under OAL Docket Number **GRC 5741-13**. This matter and the complaint filed under GRC 6038-13 were consolidated for hearing by Order entered on September 27, 2013.[1]

This matter was heard on October 20, 2014, and the record remained open to December 19, 2014, for the receipt of briefs, at which time the record closed.[2]

On December 5, 2014, petitioner submitted a brief and attorney's certification on the issue of counsel fees.

GRC 6038-13

On April 29, 2013, the GRC transmitted a second Denial of Access Complaint under OPRA to the OAL for a hearing to determine whether the custodian lawfully

[1] As a result of the settlement in GRC 6038-13 (see below), this initial decision relates solely to GRC 5741-13.
[2] An extension of time was granted for the filing of this decision.

denied access to certain requested documents, including all legal appointments, contracts, and professional-services agreements for services provided by Cooper & Cooper, as well as payment vouchers and invoices for 2008, 2009, 2010, and 2011; whether the original custodian's actions rose to a level of a knowing and willful violation of OPRA; and whether the complainant was a prevailing party subject to an award of reasonable counsel fees.

The matter was filed on May 1, 2013, under OAL Docket Number **GRC 6038-13**, and was consolidated for hearing with GRC 5741-13 by Order entered on September 27, 2013. However, on June 30, 2014, counsel advised that the parties had negotiated a settlement in GRC 6038-13. By letter dated October 27, 2014, the petitioner withdrew this complaint. No further action is required in this matter and this file shall be returned to the GRC.

FACTUAL DISCUSSION

Many of the facts in this matter are not in dispute and, accordingly, I **FIND**:

1. On January 1, 2011, the petitioner submitted a written OPRA request to the FFD for "Copies of the annual Financial Disclosure Statements for all Commissioners in office from 2000 through present."

2. On January 21, 2011, Deborah Nelson acknowledged receipt of the request and indicated that she would forward the request to Melissa Kosensky, a fire commissioner serving out an unexpired term of office, who was the records custodian.

3. On February 10, 2011, William T. Cooper, Esq., counsel for the FFD, advised the petitioner that the FFD did not maintain these documents as its records, as public officials must file directly with the municipal clerk, and that Carter should direct his request to the township municipal clerk, as the FFD did not have the records petitioner was requesting.

4. On April 4, 2011, the petitioner filed a Denial of Access Complaint with the GRC.

5. On June 9, 2011, Kosensky filed a Statement of Information (SOI) with the GRC. She said in her statement that she was out of state for training between January 21 and January 27, 2011, and had received twenty OPRA requests from January 10 through January 21, 2011, of which eighteen were from the petitioner. She indicated that the petitioner's request was forwarded to counsel to obtain a legal opinion regarding disclosure of the requested documents, and that counsel responded on February 10, 2011. Kosensky felt that these were exceptional circumstances, in that she had been away for five of the thirteen business days it took her to fulfill the request; that she had reached out to counsel to find out the entity that was responsible for keeping such records, as the FFD had no obligation to maintain the FDS forms; that she relied on the advice of counsel when she referred the request to him; that the position of fire commissioner was unpaid; and that as custodian, she had to find the records on her own time.

6. On July 7, 2011, the petitioner responded that Kosensky was not forthright in her response: that the conference she attended out of state was shorter than the number of days she had reported; that she failed to disclose that four of the requested FDS forms were in fact contained in the FFD's files; and that she received a $5,000 stipend as a fire commissioner.

7. On August 19, 2011, Kosensky's counsel objected to the July 7, 2011, submission of the petitioner.

8. On June 19, 2012, the executive director of the GRC made Findings and Recommendations.

9. On June 26, 2012, the GRC issued an Interim Order finding that the custodian did not timely respond to the petitioner's OPRA request, resulting in a "deemed" denial of the OPRA request.

10. On August 28, 2012, the GRC issued an Interim Order with the following findings: one, the current custodian timely complied with the June 26, 2012, Interim Order by providing access to the requested records; two, because the original custodian had received the responsive records on January 25, 2011, and subsequently certified that no responsive records existed, that the custodian's actions were intentional and deliberate with knowledge of their wrongfulness, and therefore the matter should be referred to the OAL for determination of whether the original custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances; and three, because a factual causal nexus existed between the filing of the Denial of Access Complaint and the relief ultimately achieved, the complainant is a prevailing party entitled to an award of reasonable counsel fees without an enhancement of the lodestar fee because there were no unusual circumstances justifying an upward adjustment, the matter was not one of significant public importance, the matter was not an issue of first impression, and the risk of failure was not high because the issues involved matters of settled law.

TESTIMONY

Dr. Jeff Carter is a resident within the district and was an elected commissioner of FFD from 1987 to 1997. He retired after twenty-five years as a police officer. He holds a bachelor's degree in sociology, a master's degree in leadership and public administration, and a doctorate in business administration.

On January 21, 2011, Carter requested copies of all FDS forms for the fire commissioners from the year 2000 to the present, which he believed the FFD had the responsibility of maintaining. If a public agency has the record, it is required to disclose it, and whether the FFD was required to keep these records is irrelevant. It was Carter's belief when he made his request on January 21, 2011, that the FFD was the public agency responsible for maintaining those records.

In January 2011 the fire district had four elected commissioners; the fifth commissioner was not included in the request because he had resigned. Carter was looking for the 2010 FDSs, but it was too early in 2011 for them to be available yet.

Carter's specific request was for the FDSs of the five elected commissioners each year from 2000 through January 21, 2011. The statements are filed in the spring, so those due for 2011 would not have yet been filed. The total was eleven years of statements; approximately fifty-five commissioners' financial statements would be the expected response. The custodian of records was Melissa Kosensky, a fire commissioner who was running for election that year.

On February 10, 2011, Carter received an email from attorney Cooper which said that the FFD did not have the records and that Carter should file directly with Franklin Township (township). Cooper said the FFD "does not have the records you are requesting," and cited a statute. Carter reviewed the law and determined that the FDS forms were maintained by the township municipal clerk. Carter thought Cooper's response meant the FFD had no responsive records. He did not know if this response encompassed all his requests. The FFD gave him the proper statutory citation and told him where to file to get the records, although the FFD did not tell him where to submit his request.

As the matter went forward, Carter had been hearing comments about what was happening behind the scenes, which formed the basis of his July 2011 certification certified on August 14, 2012, with the GRC. Although Kosensky had lost the election in February 2012, Carter formed the opinion that she had knowledge of the records he was seeking.

Carter then filed a second OPRA request, for emails between Kosensky and Deborah Nelson, an employee of the FFD. Nelson is Carter's sister. He received a copy of an email between Kosensky and Nelson that indicated that four of the FDSs he was seeking from 2007 existed. Carter also wanted other communications between Cooper and Kosensky, because he believed that even more nefarious conduct was occurring.

Carter found that Kosensky sent an email to the attorney, Cooper, on or about January 27, 2011, stating that the FFD did have four FDSs on file for 2007, and attaching the PDF statements. But no one sent these PDF statements to Carter.

On February 10, 2011, Cooper sent an email to Carter stating that the FFD did not have the records he requested. This is what prompted his June 2011 complaint to the GRC—the fact that he was denied access to the records by not receiving a response within fourteen days of his request.

Carter could not think of any factual reason why the FFD did not give him the FDS forms it had from 2007, as he was able to get all the documents he sought from the Franklin Township clerk after he made his request to that agency.

Carter knew, as a fire commissioner, that it was not true when Kosensky claimed she was out of state when he made his request for the records. He did know that there had been an increase in OPRA requests and that the FFD was defending against a sexual-harassment suit filed by Nelson. When the GRC issued its interim order on June 14, 2014, the FFD complied with it.

Deborah Nelson -- **Stipulation of the Parties**

The parties stipulated the following:

Nelson is the administrative aide for the FFD. She received Carter's OPRA request and forwarded it to Kosensky. On January 21, 2011, Kosensky asked Nelson to pull the records on file and send them in PDF form to her by year. On January 25, 2011, Nelson emailed to Kosensky an attachment containing the FDS forms that were on file. These were the same documents produced on July 2, 2012, in response to the GRC's interim order.

Deborah Nelson testified that she was the FFD aide from 2000 to 2010. It was part of her job to forward the original FDS forms to the township clerk if she received

them from the elected commissioners. However, she did not receive any FDS for any year other than 2007.

In 2011, William Cooper was the FFD attorney. Nelson spoke with him about the ORPA requests from Carter, and sent them to Kosensky. Cooper called Nelson and asked her to explain the procedure to him. She said that if a commissioner gave her a copy of the FDS form, she would put it in the file, and then she would then send the original to the township clerk.

Nelson knew that Cooper had copies of what she sent to Kosensky because he received them from Kosensky. Cooper did not explain why these documents should not be disclosed to Carter. Nelson saw Cooper's email saying these records did not exist, and they discussed this on the telephone. She had not been copied on the email.

Melissa Kosensky testified that she was a fire commissioner from March 2010 to February 2011 as she completed a one-year unexpired term. A full term for a fire commissioner is three years; elections are held in February; and the reorganization of the FFD is in March. The records custodian was always selected from among the elected commissioners. During her one-year term, Kosensky served as records custodian. She received a stipend of $5,000 per year as a commissioner but received no additional stipend as records custodian. The FFD had one full-time employee, Deborah Nelson, who served as an aide.

Kosensky received Carter's OPRA request from Nelson on January 21, 2011, and acknowledged it. She sent it back to Nelson asking if there were any documents on file. Kosensky received four of the requested FDS forms from Nelson and then forwarded them to Cooper. Kosensky did not recall the exact discussion she had with the attorney, except that Cooper said he would respond to Carter on behalf of the FFD. She thought that she was being responsive to Carter by acting through Cooper.

Kosensky was copied on Cooper's response on February 10, 2011. She thought the district had responded to Carter's OPRA request and that the request had been handled appropriately and was closed. They were getting a lot of OPRA requests

around that time. She thought Cooper's response was good, because the petitioner could get all that he was seeking from the township clerk, since the FDSs were filed with that official and not with the FFD itself.

Kosensky did not think that she was doing something wrong by not providing the four FDSs from 2007. She would rather that Carter got all the records he was seeking from one source. She did not feel that she was intentionally withholding records. When the FFD provided its response through Cooper, she thought the inquiry was over. It was not until the GRC complaint was filed that she learned the inquiry was not concluded.

Kosensky recalled signing a Statement of Information (SOI), and that she had certified it was true. In the SOI, Kosensky did not disclose that the FFD had four of the requested FDSs from 2007.

Kosensky did not recall any discussions with Carter other than the January 27, 2011, email. She was not sure if additional communications were sent by email and she could not access her back emails. But she and Cooper spoke on the phone and Cooper agreed to handle the OPRA request from Carter.

Once Nelson identified the 2007 FDSs, Kosensky did not send them directly to Carter, but did send them to Cooper because of possible redactions, and because these documents were only a partial response to Carter's request. In addition, she was traveling, and Cooper had said he was taking care of it. She had referred most of Carter's OPRA requests (anything that had to do with money or third parties) to the attorney. She could not say for certain that she saw and read Cooper's response to the request, but agreed that she must have seen it at some point and thought the reply was appropriate.

Carter wanted fifty-five to sixty FDS forms, and she had only four dating back to 2007. She knew that the FFD was not the agency responsible for keeping these records. On an annual basis, Nelson made copies of the commissioners' FDS forms and forwarded them to the township clerk's office, where they were officially filed.

Kosensky relied on Nelson to handle most of the OPRA requests, as Nelson handled the office on a day-to-day basis. Kosensky still would have forwarded the responses to the attorney, because she relied on him for legal expertise.

Kosensky did not knowingly and willfully keep the records from Carter. She agreed that the FDS forms that were in the FFD's file should have been given to Carter when he requested them in January 2011. She should have told him that they had these four records and the records should have been given to him right away. She did not tell Carter that they had any of these records. Cooper did not tell Carter that they had any of the records. Cooper said they did not have anyone's FDSs, even though he was aware that they had four of the requested documents, which dated back to 2007. Kosensky did not respond to Cooper's email after he sent it to Carter.

Kosensky was not elected to a full term in 2011. Kosensky had received no specific training in OPRA requests. Prior to this complaint, she was not aware that the GRC offered training or counsel in this area. She had taken no courses on OPRA, but had read the statute. The GRC should have been told that four of the requested documents from 2007 were located in the FFD's files. Kosensky should have advised the GRC that she was unpaid to be the custodian of records, but did receive a stipend as a fire commissioner. Kosensky was aware that Nelson had filed two lawsuits against the FFD.

FINDINGS

On January 21, 2011, Kosensky received an OPRA request from Carter for all the FDSs for fire commissioners from 2000 to 2011. She asked Nelson about this information and Nelson responded to her that the FFD had four such statements dating to 2007. It was not the responsibility of the FFD to maintain these records, as they were kept by the township clerk in accordance with the statute. Carter was not aware of this law, and had assumed that the FFD maintained these records. Kosensky then immediately left for a conference and was unavailable until January 27, 2011. At that time, Kosensky forwarded the information she had about the four statements to her counsel, Cooper, who responded to Carter on Kosensky's behalf on February 11, 2011.

Cooper indicated that there were no FDS records maintained within the FFD. Because of the delay in the response, this was deemed a denial of access.

Carter later ascertained that four FDSs from 2007 had been located within the FFD's files which had not been provided to him after his request. Carter was able to obtain the approximately fifty-five to sixty records he was seeking from the township clerk, but he only received the four FDSs maintained in the FFD after the GRC issued its First Interim Order in June 2012.

After having the opportunity to listen to the testimony and review the documents, I accept the testimony of Kosensky as credible. She received the OPRA request on January 21, 2011, and promptly asked Nelson for the information. Nelson provided this information, namely, four FDSs out of the fifty-five to sixty requested, to Kosensky by January 27, 2011, after she returned to the FFD from a conference. Kosensky then forwarded this information to the FFD's counsel, Cooper, and relied upon him to handle the response to the request. Cooper, however, did not provide the documents sent by Kosensky to him, but rather, indicated to Carter that no such documents existed within the FFD, and that he should seek the documents from the agency responsible for maintaining them. Kosensky should have advised the GRC that these records existed and that she failed to provide them to the petitioner; however, she did provide them to the attorney, who assumed the responsibility of responding for Kosensky and releasing the records to the petitioner, but failed to do so.

I also **FIND** that there were extenuating circumstances that caused the delay in the response to the petitioner's OPRA request, including Kosensky's attendance at a conference for several days immediately after the request was made; the number of OPRA requests she received within the ten-day period preceding this OPRA request; the reliance she placed upon counsel to respond directly to the petitioner; and Kosensky's lack of any training and experience in handling OPRA requests, particularly when the records requested were not required to be maintained by the FFD.

LEGAL ANALYSIS AND CONCLUSION

The issues presented in this matter are, first, whether the original custodian (Kosensky) knowingly and willfully violated OPRA and unreasonably denied access to financial disclosure statements for all Franklin Fire District No. 1 commissioners in office from 2000 through to the present under the totality of the circumstances; and, second, the determination of reasonable attorney's fees because the GRC has determined that the petitioner is a prevailing party because "a factual causal nexus exists between the [petitioner's] filing of a Denial of Access Complaint and the relief ultimately achieved."

The Open Public Records Act (Act), N.J.S.A. 47:1A-1 et seq., known as "OPRA," provides that it is the public policy in this state that government records shall be readily accessible for inspection, copying, or examination, with certain exceptions for the protection of the public. N.J.S.A. 47:1A-1. Or, as the New Jersey Supreme Court succinctly stated in Mason v. Hoboken, 196 N.J. 51, 65 (2008), "OPRA calls for the prompt disclosure of government records." N.J.S.A. 47:1A-1.1 defines "Government record" or "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 in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

To this end, custodians of government records must grant access to them or deny a request for them as soon as possible, but no later than seven business days after receiving the request, provided that the records are available and not in storage or archived. N.J.S.A. 47:1A-5(i). Failure to respond shall be deemed a denial. Ibid. If the

records are in storage or archived, then the custodian must advise the requestor within those seven days when they will be made available. Ibid. Failure to make them available by that time shall also be deemed a denial. Ibid.

Consequently, a person who is denied access to public records may file a complaint in the Superior Court or with the GRC. N.J.S.A. 47:1A-6. Moreover, a custodian who is found to have knowingly and willfully violated the Act, 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. N.J.S.A. 47:1A-11(a) provides:

> A public official, officer, employee or custodian who knowingly and willfully violates P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty of $1,000 for an initial violation, $2,500 for a second violation that occurs within 10 years of an initial violation, and $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," P.L.1999, c.274 (C.2A:58-10 et seq.), 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. Appropriate disciplinary proceedings may be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

A knowing and willful violation, however, requires actual knowledge that the actions were wrongful and a positive element of conscious wrongdoing. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008) (citing Fielder v. Stonack, 141 N.J. 101, 124 (1995); Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)). Willful misconduct requires "much more" than mere negligence. Fielder, supra, 141 N.J. at 124. Willful misconduct falls somewhere on the continuum between simple negligence and the intentional infliction of harm. Id. at 123 (citing Foldi v. Jeffries, 93 N.J. 533, 549 (1983)).

In this matter, the petitioner bears the burden of proof, and argues that Kosensky knowingly and willfully violated OPRA. Petitioner argues that Kosensky was aware of his OPRA request and failed to respond to it in a timely manner, did not search for responsive records, relied on counsel to do her job, and certified that the records did not exist when she knew that four records from 2007 did exist.

It is conceded that Kosensky did not provide the requested documents within the time permitted by statute and, accordingly, this was deemed a denial of access. But she did not willfully withhold the documents from Carter. Rather, she relied on the attorney to make the determination of release for her, and he was the one who failed to pass the documents on to Carter. These documents were from 2007, and were not required to be maintained by the FFD. Nevertheless, Carter initiated his OPRA request with the FFD and he was entitled to the FFD's compliance if any records had been inadvertently maintained there. Carter did not receive the records he was seeking from the FFD, but was able to get them from the township clerk, and later received them pursuant to the First Interim Order addressed to a different custodian.

Having had the opportunity to observe Kosensky's demeanor throughout the course of these proceedings and during her testimony, she did not impress me as anything other than a worker who was doing her job to the best of her ability without an ulterior motive of denying Carter to access to records he requested. Once she returned from her conference, she immediately forwarded the four records which had been located by Nelson to Cooper, the attorney, and relied on his assurances that he would respond on her behalf to Carter.

Was Kosensky negligent in not immediately providing the documents to Carter? Yes. Was she negligent in relying on the attorney to respond to Carter for her? Yes. But did she act willfully and intentionally with knowledge that what she was doing was wrong? Given the totality of the circumstances presented here, I cannot reach that conclusion.

As a result, I **CONCLUDE** that petitioner has not met his burden of proof by a preponderance of the credible evidence that the records custodian's conduct in failing to

provide the information that was the subject of his OPRA request was knowing and willful under the totality of the circumstances. Accordingly, a civil penalty shall not be imposed upon Kosensky or the Franklin Fire District.

COUNSEL FEES

The GRC has previously determined that because a factual causal nexus existed between the filing of the Denial of Access Complaint and the relief ultimately achieved, Carter is a prevailing party entitled to an award of reasonable counsel fees without an enhancement of the lodestar fee because there were no unusual circumstances justifying an upward adjustment, the matter was not one of significant public importance, the matter was not an issue of first impression, and the risk of failure was not high because the issues involved matters of settled law.

Petitioner's attorney is seeking $7,528.50 in reasonable counsel fees and costs of $300.40. The respondent has not filed any objections to either the itemization or the hourly rate set forth in the fee certification filed by Walter M. Luers, Esq., on December 5, 2014.

The Open Public Records Act's fee-shifting provision states, "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Without the fee-shifting provision, "'the ordinary citizen would be waging a quixotic battle against a public entity vested with almost inexhaustible resources. By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.'" New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr., 185 N.J. 137, 153 (2005) (citation omitted) (hereinafter "NJDPM").

Under a State fee-shifting statute, such as OPRA's N.J.S.A. 47:1A-6, the first step in the fee-setting process is to determine the "lodestar"—the number of hours reasonably expended multiplied by a reasonable hourly rate. Rendine v. Pantzer, 141 N.J. 292, 334–35 (1995). The court should not passively accept the submissions of counsel in determining the lodestar amount, but rather "evaluate carefully and critically

the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application." Id. at 335.

In calculating the lodestar, the initial focus should be the number of hours reasonably expended in the litigation. Singer v. State, 95 N.J. 487, 499 (1984). The most important factor in calculating the number of hours reasonably spent is the actual results obtained by the attorney. Ibid. "[W]here a 'prevailing' plaintiff has succeeded on only some of his claims for relief, 'the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount.'" Id. at 500 (quoting Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40, 52 (1983)). However, courts have rejected a mathematical approach comparing total issues to total issues prevailed upon. New Jerseyans for a Death Penalty Moratorium, supra, 185 N.J. at 154. "'[T]he fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.' Hensley, supra, 461 U.S. at 435, 103 S. Ct. at 1940, 76 L. Ed. 2d at 52. Because 'the critical factor is the degree of success obtained,' [Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993)], '[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee,' Hensley, supra, 461 U.S. at 435, 103 S. Ct. at 1940, 76 L. Ed. 2d at 52." Ibid.

In the OPRA context, a qualitative analysis should be conducted that weighs such factors as the number of documents received versus the number of documents requested, and whether the purpose of OPRA was vindicated by the litigation. Id. at 155. In addition to weighing the success of the claim, hours that are not reasonably expended should be excluded. Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, supra, 461 U.S. at 434, 103 S. Ct. at 1939–40, 76 L. Ed. 2d at 51. "Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." Ibid. (quoting Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980)). Thus, no compensation is due under a fee-shifting statute for nonproductive time.

The second focus in the calculation of the lodestar mandates that the court determine "the reasonableness of the hourly rate of 'the prevailing attorney in

comparison to rates "for similar services by lawyers of reasonably comparable skill, experience, and reputation" in the community.'" Litton Indus., Inc. v. IMO Industries, Inc., 200 N.J. 372, 387 (2009) (citation omitted). It is also "appropriate to consider that any costs imposed on a governmental entity are ultimately borne by the public." Kieffer v. High Point Reg'l High Sch., No. A-1737-09 (App. Div. December 28, 2010), <http://njlaw.rutgers.edu/collections/courts/>. In Kieffer, the court recognized that a public entity was involved and the amount that the public entity paid its own attorneys was half of the rate sought by the plaintiff's counsel. By making an award halfway between the defendants' hourly rate for attorney services and that of plaintiff's attorney, the Kieffer court found that the trial judge properly exercised his discretion in adjusting the hourly rate downward.

Ordinarily, the facts of an OPRA case will not warrant enhancement of the lodestar because the economic risk in securing access to a particular government record will be minimal. Ibid. "[I]n a 'garden variety' OPRA matter, if a person's request for a traffic or tax record is denied, resulting in an action that forces the custodian to promptly produce the record, enhancement will likely be inappropriate." New Jerseyans for a Death Penalty Moratorium, supra, 185 N.J. at 157.

Based on the foregoing, the analysis begins with a determination of the hours reasonably expended in this litigation, taking into consideration the results achieved. Petitioner's attorney, Walter M. Luers, Esq., has certified that he spent 23.9 hours working on the case. The records were released to the petitioner after the First Interim Order was entered by the GRC.

The next step in calculating the lodestar is to determine the reasonable hourly rate. Mr. Luers has charged a rate of $315 per hour. In light of the extensive experience of Mr. Luers in the OAL and in the New Jersey Superior and Supreme Courts, this appears to be a reasonable hourly fee for attorneys in OPRA matters generally in this area with that level of expertise. See Lebbing v. Middlesex Cnty. Clerk's Office, No. A-2738-10T3 (App. Div. May 4, 2012), <http://njlaw.rutgers.edu/collections/courts/>. Therefore, the total lodestar amount can be calculated as follows:

$315 x 23.9 = $7,528.50

No contingency fee or enhancement of the lodestar fee is awarded because there were no unusual circumstances justifying an upward adjustment, the matter was not one of significant public importance, the matter was not an issue of first impression, and the risk of failure was not high because the issues involved matters of settled law. Indeed, there was nothing extraordinary about this matter requiring an enhancement of the lodestar fee.

The petitioner also seeks costs totaling $300.45 (for copies, audio recording, and transcripts), which appears reasonable.

CONCLUSION

The petitioner is entitled to a total of $7,528.50 in reasonable counsel fees, plus $300.45 in costs (copies, audio recording and transcripts).

ORDER

Having concluded, under the totality of the circumstances presented herein, that the custodian of records did not intentionally and willfully fail to provide the requested documents, I hereby **ORDER** that no civil penalty be imposed upon Kosensky or the Franklin Fire District.

Having also concluded, pursuant to the findings of the Government Records Council, that the petitioner is a prevailing party in that the records originally sought were deemed denied to him, and only released after the First Interim Order, I **ORDER** that the petitioner's counsel, Walter M. Luers, Esq., is entitled to reasonable counsel fees of $7,528.50, plus costs of $300.45, for a total of $7,828.95.

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL,** who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 23, 2015
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/cb

APPENDIX

WITNESSES

For petitioner:

Dr. Jeff Carter

Deborah Nelson

For respondent:

Melissa Kosensky

EXHIBITS

For petitioner:

P-1 Denial of Access Complaint received April 11, 2011

P-2 Certification of Jeff Carter

P-3 Government Records Council Statement of Information Form

P-4 Interim Order dated June 26, 2012

P-5 Email to Counsel dated July 2, 2012

P-6 Interim Order dated August 28, 2012

For respondent:

None

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
v.
Franklin Fire District No. 1 (Somerset)
Custodian of Record

Complaint No. 2011-76

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. The current Custodian timely complied with the Council's June 26, 2012 Interim Order by providing access (via Counsel) to the requested records to the Complainant via e-mail, providing certified confirmation to the GRC within the prescribed time frame to comply and further certifying that no other records responsive existed.

2. Because the original Custodian received responsive records on January 25, 2011 and subsequently certified in the Statement of Information that no records responsive existed, it is possible that the original Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the current Custodian provided the Complainant with the responsive FDS forms and certified that no other records existed in accordance with the Council's June 26, 2012 Interim 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 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 Carter[1] **GRC Complaint No. 2011-76**
Complainant

v.

Franklin Fire District No. 1 (Somerset)[2]
Custodian of Records

Records Relevant to Complaint: Copies of annual financial disclosure statements ("FDS forms") for all Franklin Fire District No. 1 ("FFD") Commissioners in office from 2000 through present.

Request Made: January 21, 2011
Response Made: February 10, 2011
Custodian: Melissa Kosensky
GRC Complaint Filed: April 4, 2011[3]

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 did not timely respond to the Complainant's OPRA request. As such, 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. The Custodian unlawfully denied access to the responsive 2007 financial disclosure statements that were in the possession of the Franklin Fire District

[1] Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ). Counsel entered his appearance to the GRC via e-mail on July 11, 2011.
[2] Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).
[3] The GRC received the Denial of Access Complaint on said date.

No. 1 at the time of the Complainant's OPRA request. The Custodian has further failed to bear her burden of proving a lawful denial of access to said forms. N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the responsive 2007 financial disclosure statements to the Complainant via his preferred method of delivery. Additionally, the Custodian must disclose to the Complainant any additional financial disclosure statements for the time period 2000 to January 21, 2011 in her possession or certify that none exist.

3. **The Custodian shall comply with Item No. 2 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]**

4. Because the language of N.J.S.A. 47:1A-5.e. is clear and unambiguous as to which specific records are classified as "immediate access" records and because financial disclosure statements are not included in the list of government records subject to immediate access under OPRA set forth therein, the GRC declines to determine that financial disclosure statements are "immediate access" records.

5. 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.

June 27, 2012

Council's Interim Order ("Order") distributed to the parties.

July 2, 2012

E-mail from the Custodian's Counsel to the Complainant's Counsel attaching the FDS forms responsive to the Complainant's January 21, 2011 OPRA request. Counsel states that pursuant to the Council's Order received on June 27, 2012, attached are the records responsive to the Complainant's OPRA request that the FFD has in its possession.

July 3, 2012

Custodian's response to the Council's Interim Order attaching an e-mail from the Custodian's Counsel to the Complainant's Counsel dated July 2, 2012 (with attachment).

[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 records 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.

The Custodian certifies that he has served as custodian for the FFD since March 2011. The Custodian certifies that the FFD received the Council's Order on June 27, 2012. The Custodian certifies that pursuant to said Order, the Custodian's Counsel provided the responsive 2007 FDS forms to the Complainant's Counsel via e-mail on July 2, 2012.

The Custodian further certifies that he searched the FFD's files and cannot locate any additional FDS forms for the time period 2000 to January 21, 2011. The Custodian certifies that the FFD does not maintain these records because the Municipal Ethics Board currently sends FDS forms to the commissioners' personal residence for completion and return to the Board.

Analysis

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

At its June 26, 2012 meeting, the Council ordered the Custodian to:

> "…disclose the responsive 2007 financial disclosure statements to the Complainant via his preferred method of delivery. Additionally, the Custodian must disclose to the Complainant any additional financial disclosure statements for the time period 2000 to January 21, 2011 in her possession or certify that none exist … **The Custodian shall comply … 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, to the Executive Director.**" (Footnotes omitted.)

The Council disseminated its Interim Order to the parties on June 27, 2012. Thus, the current Custodian's response was due by close of business on July 5, 2012.

On July 2, 2012, the Custodian's Counsel e-mailed the Complainant's Counsel the responsive 2007 FDS forms. Thereafter on July 5, 2012, the current Custodian provided certified confirmation of compliance to the Executive Director that Counsel forwarded the responsive FDS forms to the Complainant's Counsel via e-mail on July 2, 2012. Moreover, the current Custodian certified that no other FDS forms for the time period 2000 to January 21, 2011 exist.

Therefore, the current Custodian timely complied with the Council's June 26, 2012 Interim Order by providing access (via Counsel) to the requested records to the Complainant via e-mail, providing certified confirmation to the GRC within the prescribed time frame to comply and further certifying that no other records responsive existed.

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

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

In the instant complaint, Mr. William T. Cooper, III, Esq. ("Mr. Cooper"), previous FFD Counsel, initially responded in writing to the Complainant's OPRA request advising that no FDS forms responsive to same existed. The original Custodian further certified to this in the Statement of Information ("SOI"). However, the Complainant submitted a letter on July 7, 2011 attaching an e-mail in which Ms. Debi Nelson ("Ms. Nelson"), Administrative Aide, forwarded responsive 2007 FDS forms to the original Custodian on January 25, 2011. This e-mail is approximately 12 business days prior to Mr. Cooper's response stating that no records responsive exist. Thus, the evidence of record indicates that the original Custodian had some knowledge that responsive records existed prior to Mr. Cooper's response and the submission of the SOI.

Thus, because the original Custodian received responsive records on January 25, 2011 but subsequently certified in the SOI that no records responsive existed, it is

possible that the original Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the original 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 the 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), *cert. 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)."

The Complainant filed this complaint on April 4, 2011 requesting that the GRC determine that the original Custodian violated OPRA by failing to respond in a timely manner. Thereafter, on July 11, 2011, the Complainant's Counsel notified the GRC of his appearance in the matter. Although neither the Complainant nor Complainant's Counsel specifically sought prevailing party attorney's fees, based on the Court's specific language in Mason, *supra*, a complainant need not request that the Council determine whether he/she is a prevailing party entitled to reasonable attorney's fees because the provision is not permissive; rather, it is mandatory. Thus, the GRC must address this issue because the Complainant has retained Counsel.

Subsequent to the filing of the SOI, the Complainant submitted competent, credible evidence that the FFD was in possession of FDS forms that were responsive to the Complainant's OPRA request. Based on this evidence, the Council ordered the Custodian in its June 26, 2012 Interim Order to provide the responsive FDS forms to the Complainant and further certify whether any other records existed. The current Custodian submitted certified confirmation of compliance on July 3, 2012 certifying that the Custodian's Counsel e-mailed the responsive FDS forms to the Complainant's Counsel on July 2, 2012 and that no other records responsive exist. Therefore, the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Pursuant to Teeters, *supra*, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the current Custodian provided the Complainant with the responsive FDS forms and certified that no other records existed in accordance with the Council's June 26, 2012 Interim 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 pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason,

supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ... justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian timely complied with the Council's June 26, 2012 Interim Order by providing access (via Counsel) to the requested records to the Complainant via e-mail, providing certified confirmation to the GRC within the prescribed time frame to comply and further certifying that no other records responsive existed.

2. Because the original Custodian received responsive records on January 25, 2011 and subsequently certified in the Statement of Information that no records responsive existed, it is possible that the original Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the current Custodian provided the Complainant with the responsive FDS forms and certified that no other records existed in accordance with the Council's June 26, 2012 Interim 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 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

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Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012

State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

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Complaint No. 2011-76

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 did not timely respond to the Complainant's OPRA request. As such, 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. The Custodian unlawfully denied access to the responsive 2007 financial disclosure statements that were in the possession of the Franklin Fire District No. 1 at the time of the Complainant's OPRA request. The Custodian has further failed to bear her burden of proving a lawful denial of access to said forms. N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the responsive 2007 financial disclosure statements to the Complainant via his preferred method of delivery. Additionally, the Custodian must disclose to the Complainant any additional financial disclosure statements for the time period 2000 to January 21, 2011 in her possession or certify that none exist.

3. **The Custodian shall comply with Item No. 2 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]**

[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 records 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

4. Because the language of N.J.S.A. 47:1A-5.e. is clear and unambiguous as to which specific records are classified as "immediate access" records and because financial disclosure statements are not included in the list of government records subject to immediate access under OPRA set forth therein, the GRC declines to determine that financial disclosure statements are "immediate access" records.

5. 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.

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

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.

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

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

Jeff Carter[1] **GRC Complaint No. 2011-76**
Complainant

v.

Franklin Fire District No. 1 (Somerset)[2]
Custodian of Records

Records Relevant to Complaint: Copies of annual financial disclosure statements ("FDS forms") for all Franklin Fire District No. 1 ("FFD") Commissioners in office from 2000 through present.

Request Made: January 21, 2011
Response Made: February 10, 2011
Custodian: Melissa Kosensky
GRC Complaint Filed: April 4, 2011[3]

Background

January 21, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA. The Complainant indicates that the preferred method of delivery is via e-mail. The Complainant further requests that the Custodian confirm receipt of this OPRA request via e-mail.

January 21, 2011

E-mail from Ms. Debi Nelson ("Ms. Nelson"), Administrative Aide, to the Complainant. Ms. Nelson acknowledges receipt of the Complainant's OPRA request and states that she will forward same to the Custodian.

January 23, 2011

E-mail from the Custodian to Ms. Nelson. The Custodian asks if copies of the requested records are on file in the FFD office. The Custodian requests that if any FDS forms are maintained, Ms. Nelson convert them to .pdf files and forward same organized by year to the Custodian via e-mail.

[1] No representation listed on the record.
[2] Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).
[3] The GRC received the Denial of Access Complaint on said date.

January 25, 2011

E-mail from Ms. Nelson to the Custodian attaching 2007 FDS forms. Ms. Nelson states that attached are the FDS forms that were on file at the FFD office.

February 10, 2011

Custodian's response to the OPRA request. On behalf of the Custodian, Mr. William T. Cooper, III, Esq. ("Mr. Cooper"), previous FFD Counsel, responds in writing via e-mail to the Complainant's OPRA request on the fourteenth (14th) business day following receipt of such request. Mr. Cooper states that the FFD does not maintain the responsive records. Mr. Cooper states that pursuant to N.J.S.A. 40A:9-22.1 et seq., public officials file FDS forms directly to the Franklin Township ("Township") Municipal Clerk. Mr. Cooper states that the Complainant should therefore submit his OPRA request to the Township as the FFD does not maintain the responsive records.

April 4, 2011

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

- Complainant's OPRA request dated January 21, 2011.
- E-mail from Ms. Nelson to the Complainant dated January 21, 2011.
- E-mail from Mr. Cooper to the Complainant dated February 10, 2011.

The Complainant states that he submitted an OPRA request to the FFD via e-mail on January 21, 2011. The Complainant states that Ms. Nelson acknowledged receipt of said request on the same day via e-mail and stated that she would forward the OPRA request to the Custodian. The Complainant states that Mr. Cooper responded in writing via e-mail on February 10, 2011 denying access to the records requested and advising that the Complainant should submit an OPRA request to the Township.

The Complainant contends that even if the FFD did not possess the responsive records, the Custodian still violated OPRA by failing to respond in a timely manner. The Complainant contends that the Custodian, with assistance from Mr. Cooper, knowingly and willfully failed to respond within the statutorily mandated time frame advising that the FFD did not maintain the responsive records. The Complainant thus requests the following:

1. A determination that the Custodian's failure to respond within the statutorily mandated time frame resulted in a "deemed" denial of access and a violation of OPRA.
2. A determination that the Custodian, with the aid of Mr. Cooper, knowingly and willfully violated OPRA.

The Complainant does not agree to mediate this complaint.

May 6, 2011

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

May 9, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that the FFD recently retained him on April 15, 2011. Counsel requests an extension of fifteen (15) business days to submit the SOI. Counsel states that this extension is necessary to allow Counsel to familiarize himself with the complaint and obtain a sworn statement from the Custodian.

May 11, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until June 2, 2011 to submit the SOI for the reasons stated by Counsel.

June 2, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until June 9, 2011 to submit the SOI because the Custodian is currently unavailable for personal reasons.

June 2, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC states that given the circumstances, it will grant Counsel an extension of time until June 9, 2011 to submit the SOI.

June 9, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated January 21, 2011.
- E-mail from Ms. Nelson to the Complainant dated January 21, 2011.
- E-mail from Mr. Cooper to the Complainant dated February 10, 2011.

The Custodian certifies that her search for the requested records included contacting Mr. Cooper to obtain an opinion on the request at issue. The Custodian certifies that Mr. Cooper performed some research and determined that the FFD did not maintain the requested records.

The Custodian also certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable.

The Custodian certifies that Ms. Nelson received the Complainant's OPRA request on January 21, 2011. The Custodian certifies that she was out of state for training from January 21, 2011 through January 27, 2011. The Custodian certifies that Ms. Nelson acknowledged receipt of the Complainant's OPRA request on the same date as receipt thereof and advised the Complainant that she would forward same to the Custodian. The Custodian certifies that Mr. Cooper responded to the Complainant in writing on February 10, 2011 stating that the Township, not the FFD, maintained the responsive records and that the Complainant should request same from them. The Custodian certifies that N.J.S.A. 40A:9-22.1 et seq. requires that FDS forms be filed with the Township's Municipal Clerk; therefore, the FFD maintained no responsive records.

The Custodian certifies that she was an unpaid, elected official for the FFD on a one (1) year term and did not maintain office hours. The Custodian certifies that as an elected official, she was required to utilize limited free time in order to respond properly to OPRA requests filed on almost a daily basis. The Custodian further certifies that she did not have any full-time or part-time office hours to respond to OPRA requests. The Custodian certifies that from January 10, 2011 through January 21, 2011, the FFD received 22 OPRA requests for various records, or an average of two (2) OPRA requests per business day. The Custodian certifies that it is important to note that she was out of state for training from January 21, 2011 to January 27, 2011, which decreased the amount of time she had to respond to these various OPRA requests. The Custodian further notes that prior to this point, the FFD routinely received between three (3) and five (5) OPRA requests on an annual basis. The Custodian certifies that although the task of sufficiently responding to multiple OPRA requests became almost impossible, she attempted to ensure that either she or the FFD's legal counsel requested extensions of time to respond.

The Custodian certifies that she did not request an extension of time to respond to the subject OPRA request. The Custodian certifies that she requested advice from Mr. Cooper because she was unaware whether FDS forms were subject to access under OPRA. The Custodian certifies that Mr. Cooper failed to respond to the Complainant's request until the fourteenth (14^{th}) business day after receipt of said OPRA request. The Custodian certifies that notwithstanding the foregoing, the responsive records are not maintained by the FFD.

The Custodian asserts that she was not able to respond in a timely manner based on the totality of the circumstances; however, this "deemed" denial of access does not amount to a knowing and willful violation under OPRA because the FFD did not maintain the responsive records. The Custodian further contends that if the Complainant wanted a status update on his OPRA request, he could have contacted the FFD and he would have been informed that no responsive records were maintained by the FFD. The Custodian asserts that for all of reasons above, the FFD's failure to respond in a timely manner was an oversight.

July 7, 2012

Letter from the Complainant to the GRC with the following attachments: [4]

- Memorandum of the Custodian dated March 11, 2010.
- Voucher dated March 16, 2010.
- E-mail from Ms. Nelson to the Custodian dated August 4, 2010.
- E-mail from the Custodian to Ms. Nelson dated August 4, 2010.
- Complainant's OPRA request dated January 21, 2011.
- E-mail from Ms. Nelson to the Custodian (undated).
- E-mail from the Custodian to Ms. Nelson dated January 23, 2011.
- E-mail from Ms. Nelson to the Custodian dated January 25, 2011 (attaching 2007 FDS forms).
- Fire Department Safety Officers Association Certificate of Participation ("Certificate") dated January 23, 2011 to January 26, 2011.

[4] The Complainant submitted additional documents that are not relevant to the instant complaint.

- Voucher dated February 1, 2011.

The Complainant disputes the Custodian's certification in the SOI. The Complainant contends that the Custodian established a lack of credibility that is supported by the evidence submitted for the GRC's review.

The Complainant notes that the Custodian certifies that her elected position was unpaid; however, she submitted a voucher for a $5,000 "Commissioner's fee" to the FFD on March 16, 2010. The Complainant argues that the Custodian was also issued a smartphone enabling her to use effectively e-mail from any location. *See* Memorandum of the Custodian dated March 11, 2010.

The Complainant further disputes the Custodian's certification that she was at an out of state training event from January 21, 2011 to January 27, 2011 because the training only occurred from January 23, 2011 to January 26, 2011. *See* Certificate *and* Voucher dated February 1, 2011.

The Complainant disputes that the FFD did not maintain any responsive records. The Complainant argues that the attached evidence shows that the FFD did possess records responsive to his OPRA request. The Complainant states that Ms. Nelson sent a .pdf of 2007 FDS forms to the Custodian via e-mail on January 25, 2011. The Complainant argues that the evidence clearly proves that the Custodian did have records and failed to provide same.

The Complainant further disputes that the Custodian was personally overburdened with tracking and responding to the FFD's OPRA requests. The Complainant states that the FFD employs Ms. Nelson to perform these duties and has done so since OPRA's inception. The Complainant notes that an e-mail from Ms. Nelson to the Custodian dated August 4, 2010 proves that Ms. Nelson was handling the tracking and gathering of records for OPRA requests at least as early as August 2010. The Complainant requests that the GRC obtain a legal certification from the FFD as to how their administrative aide processes OPRA requests.

The Complainant disputes the Custodian's assertion that the "deemed" denial does not amount to a knowing and willful violation because the FFD did not maintain the responsive records. The Complainant argues that the Custodian was also up for election at the time of his two (2) OPRA requests. The Complainant contends that the Custodian is not best suited to make this type of determination simply because she is the Custodian and was a candidate running for re-election in February 2011. The Complainant contends that the Custodian thus had a direct interest in denying access to any responsive records that may be adverse to her campaign.

The Complainant also disputes the Custodian's assertion that the Complainant should have contacted or visited the FFD to check on the status of his OPRA request. The Complainant argues that he is under no obligation to check on the status of his request.

The Complainant requests that the GRC take judicial notice of the long held legal principal of "false in one, false in all" that the New Jersey Supreme Court held in State v.

Ernst, 32 N.J. 560 (1960) and invalidate the Custodian's certifications in this complaint and all others filed against her.[5] The Complainant contends that the attached evidence contradicts the Custodian's SOI certifications.

The Complainant reiterates that he requests the GRC determine that the Custodian violated OPRA by failing to respond in a timely manner and that the Custodian knowingly and willfully violated OPRA. The Complainant additionally requests that the GRC determine, as a matter of public policy, that FDS forms are equivalent to an "immediate access record" as defined in N.J.S.A. 47:1A-5.e.

August 19, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel objects to the Complainant's July 7, 2011 submission. Counsel asserts that the GRC's regulations do not permit a complainant to submit reply papers. Counsel thus requests that the GRC not consider the Complainant's submission.

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

[5] The Complainant filed seven (7) additional complaints with the GRC against the Custodian.

[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,

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

In the instant complaint, Ms. Nelson acknowledged receipt of the Complainant's OPRA request on January 21, 2011. However, the Custodian's Counsel responded in writing to the request on February 10, 2011, the fourteenth (14th) business day after receipt of such request. Thus, the Custodian failed to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days. Thus, the Complainant's OPRA request is "deemed" denied.

Therefore, the Custodian did not timely respond to the Complainant's OPRA request. As such, 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 FDS forms?

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

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even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

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.

The Complainant's OPRA request at issue herein sought FDS forms from 2000 to present. On behalf of the Custodian, Mr. Cooper responded to the Complainant's OPRA request in writing on February 10, 2011 stating that the FFD maintained no responsive records. Following the filing of this complaint, the Custodian certified in the SOI that no responsive records were maintained by the FFD.

However, on July 7, 2011, the Complainant submitted evidence showing that the FFD actually possessed at least some responsive records. Specifically, the Complainant provided to the GRC a copy of an e-mail from the Custodian to Ms. Nelson asking her to forward any FDS forms that the FFD had in her possession. In response, Ms. Nelson e-mailed the Custodian on January 25, 2011 attaching FDS forms for 2007. This evidence clearly contradicts the Custodian's assertion that no responsive records exist.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian certified in the SOI that no records responsive to the complainant's request existed. The complainant submitted no evidence to refute the custodian's certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, inapposite to the facts of Pusterhofer, the Complainant provided competent, credible evident refuting the Custodian's denial of access: an e-mail from Ms. Nelson to the Custodian dated January 25, 2011 forwarding FDS forms from 2007. Thus, the Custodian should have provided same in response to the Complainant's OPRA request and failed to do so. Further, the Custodian failed to prove that her denial of access was lawful. N.J.S.A. 47:1A-6.

Therefore, the Custodian unlawfully denied access to the responsive 2007 FDS forms that were in the possession of the FFD at the time of the Complainant's OPRA request. The Custodian has further failed to bear her burden of proving a lawful denial of access to said forms. N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the responsive 2007 FDS forms to the Complainant via his preferred method of delivery. Additionally, the Custodian must disclose to the Complainant any additional FDS forms for the time period 2000 to January 21, 2011 in her possession or certify that none exist.

Whether FDS forms are "immediate access" records as defined under OPRA?

OPRA provides that:

> "*Immediate access ordinarily shall be granted* to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual

employment contracts, and public employee salary and overtime information." (Emphasis added.) N.J.S.A. 47:1A-5.e.

In a letter to the GRC dated July 7, 2012, the Complainant requested that the GRC determine that FDS forms be considered "immediate access" records under OPRA.

When construing the meaning of a statute, the court must first consider the plain meaning of the words in the provision. Burns v. Belafsky, 166 N.J. 466, 473, 766 A.2d 1095 (2001)(citing State v. Hoffman, 149 N.J. 564, 578, 695 A.2d 236 (1997)). Unless the legislative intent instructs otherwise, the words and language at issue must be given their plain and ordinary meaning. *Ibid.* (citing Merin v. Maglaki, 126 N.J. 430, 434-35, 599 A.2d 1256 (1992)). When "… the statutory language is clear and unambiguous, and susceptible to only one interpretation, courts should apply the statute as written without resort to extrinsic interpretive aids." State v. Hodde, 181 N.J. 375, 379 (2004)(quoting In re Passaic County Utils. Auth., 164 N.J. 270, 299 (2000)).

Here, OPRA provides that "immediate access ordinarily shall be granted …" to certain specific types of government records. N.J.S.A. 47:1A-5.e. A review of this provision of OPRA reveals that FDS forms are not specifically identified as "immediate access" records. Thus, the GRC must adhere to the clear and unambiguous language of N.J.S.A. 47:1A-5.e.

Therefore, because the language of N.J.S.A. 47:1A-5.e. is clear and unambiguous as to which specific records are classified as "immediate access" records and because FDS forms are not included in the list of government records subject to immediate access under OPRA set forth therein, the GRC declines to determine that FDS forms are "immediate access" records.

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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not timely respond to the Complainant's OPRA request. As such, 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. The Custodian unlawfully denied access to the responsive 2007 financial disclosure statements that were in the possession of the Franklin Fire District No. 1 at the time of the Complainant's OPRA request. The Custodian has further failed to bear her burden of proving a lawful denial of access to said forms. N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the responsive 2007 financial disclosure statements to the Complainant via his preferred method of delivery. Additionally, the Custodian must disclose to the Complainant any additional financial disclosure statements for the time period 2000 to January 21, 2011 in her possession or certify that none exist.

3. **The Custodian shall comply with Item No. 2 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,[7] to the Executive Director.[8]**

4. Because the language of N.J.S.A. 47:1A-5.e. is clear and unambiguous as to which specific records are classified as "immediate access" records and because financial disclosure statements are not included in the list of government records subject to immediate access under OPRA set forth therein, the GRC declines to determine that financial disclosure statements are "immediate access" records.

5. 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.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

June 19, 2012

[7] "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."

[8] Satisfactory compliance requires that the Custodian deliver the records 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.