



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

November 19, 2013 Government Records Council Meeting

John P. Schmidt
Complainant

Complaint No. 2012-14

v.

Salem City Board of Education (Salem)
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council (“Council”) considered the November 12, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed. The Complainant’s Counsel, via letter dated October 16, 2013 to the Honorable Damon Tyner, A.L.J., copied to the GRC, withdrew his complaint from the Office of Administrative Law as the parties had reached settlement in this matter. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 19th Day of November, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council



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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 21, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 19, 2013 Council Meeting**

**John P. Schmidt¹
Complainant**

GRC Complaint No. 2012-14

v.

**Salem City Board of Education (Salem)²
Custodial Agency**

Records Relevant to Complaint: Copies, sent via e-mail, of:

1. The three (3) most recent Board of Education executive session minutes, which are publically disclosable either in full or redacted form.
2. The resolutions that authorized each executive session for which minutes are provided in response to request item no. 1.
3. The resolutions that authorized the (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable.
4. The Board of Education's current OPRA request form.

Custodian of Record: Deborah Piccirillo

Request Received by Custodian: December 20, 2011

Response Made by Custodian: December 22, 2011 and January 11, 2012

GRC Complaint Received: January 17, 2012

Background

April 30, 2013 Council Meeting:

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

1. The Custodian failed to comply with the terms of the Council's March 22, 2013 Interim Order. Specifically, the Custodian failed to disclose to the Complainant the legal basis for each redaction made to the records provided, pursuant to N.J.S.A. 47:1A-5(g). The Custodian also failed to disclose to the Complainant the Board of Education's current OPRA request form and the resolutions that authorized the three (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable, or legally certify that the resolutions were

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

² Represented by Roger A. Barbour, Esq. (Maple Shade, NJ).

already provided to the Complainant with the requested meeting minutes on January 11, 2012. Finally, the Custodian failed to simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

2. The Custodian unlawfully denied access to the Complainant's request for the Board of Education's current OPRA request form and the resolutions that authorized the three (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable. Additionally, the Custodian failed to comply with the any of the terms of the Council's March 22, 2013 Interim Order. The GRC confirmed the Custodian's receipt of said Order via telephone on April 5, 2013. Therefore, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's March 22, 2013 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. 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 Council ordered the disclosure of records, as well as the specific legal basis for redactions. 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.

Settlement:

On May 1, 2013, the Council distributed its Interim Order to all parties. On October 16, 2013, Complainant's counsel sent a letter to the Honorable Damon Tyner, A.L.J., copied to the GRC, advising the Office of Administrative Law and the GRC that the parties had reached a settlement and requested that the complaint be withdrawn.

Analysis

No analysis is required.

Conclusion and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed. The Complainant's Counsel, via letter dated October 16, 2013 to the Honorable Damon Tyner, A.L.J., copied to the GRC, withdrew his complaint from the Office of Administrative Law as the parties had reached settlement in this matter. Therefore, no further adjudication is required.

Prepared By: Dawn R. SanFilippo, Esq.
Senior Counsel

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

November 12, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

April 30, 2013 Government Records Council Meeting

John P. Schmidt
Complainant

Complaint No. 2012-14

v.

Salem City Board of Education (Salem)
Custodian of Record

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

1. The Custodian failed to comply with the terms of the Council’s March 22, 2013 Interim Order. Specifically, the Custodian failed to disclose to the Complainant the legal basis for each redaction made to the records provided, pursuant to N.J.S.A. 47:1A-5(g). The Custodian also failed to disclose to the Complainant the Board of Education’s current OPRA request form and the resolutions that authorized the three (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable, or legally certify that the resolutions were already provided to the Complainant with the requested meeting minutes on January 11, 2012. Finally, the Custodian failed to simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant’s request for the Board of Education’s current OPRA request form and the resolutions that authorized the three (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable. Additionally, the Custodian failed to comply with the any of the terms of the Council’s March 22, 2013 Interim Order. The GRC confirmed the Custodian’s receipt of said Order via telephone on April 5, 2013. Therefore, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council’s March 22, 2013 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the

custodian's conduct." *Id.* at 432. 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 Council ordered the disclosure of records, as well as the specific legal basis for redactions. 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 30th Day of April, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**John P. Schmidt¹
Complainant**

GRC Complaint No. 2012-14

v.

**Salem City Board of Education (Salem)²
Custodian of Records**

Records Relevant to Complaint: Copies, sent via e-mail, of:

1. The three (3) most recent Board of Education executive session minutes, which are publically disclosable either in full or redacted form.
2. The resolutions that authorized each executive session for which minutes are provided in response to request item no. 1.
3. The resolutions that authorized the (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable.
4. The Board of Education's current OPRA request form.

Request Made: December 20, 2011

Response Made: December 22, 2011 and January 11, 2012

GRC Complaint Filed: January 17, 2012³

Background

At its March 22, 2013 public meeting, the Council considered the March 15, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Complainant very clearly states in his non-form request that he is seeking records under OPRA. Therefore, pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), the Complainant's e-mail request dated December 20, 2011 is a valid OPRA request.
2. The Custodian Counsel's January 11, 2012 response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5(g) because the Custodian's Counsel failed to provide any specific legal basis for the redactions made to the

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

² Deborah Piccirillo, Custodian of Records. Represented by Roger A. Barbour, Esq., of Barbour and Associates, LLC (Maple Shade, NJ).

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

requested meeting minutes. Thus, the Custodian must disclose the legal basis for each redaction to the Complainant.

3. The Custodian unlawfully denied access to the Complainant's request for the Board of Education's current OPRA request form and the resolutions that authorized the three (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable, and must disclose said records to the Complainant. In the event that the resolutions were already provided to the Complainant with the requested meeting minutes on January 11, 2012, the Custodian must legally certify to said fact.
4. **The Custodian shall comply with item nos. 2-3 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**
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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

The Council distributed its Interim Order to all parties on March 25, 2013. The Custodian failed to respond to the Council's Interim Order.⁶

Analysis

Compliance

On March 22, 2013, the Council issued an Interim Order directing the Custodian to take the following actions:

1. Disclose to the Complainant the legal basis for each redaction made to the records provided, pursuant to N.J.S.A. 47:1A-5(g);
2. Disclose to the Complainant the Board of Education's current OPRA request form and the resolutions that authorized the three (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable, or legally

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

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

⁶ The GRC confirmed the Custodian's receipt of the Council's Order via telephone on April 5, 2013.

- certify that the resolutions were already provided to the Complainant with the requested meeting minutes on January 11, 2012; and
3. Simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

On March 25, 2013, the Council distributed the Council's Interim Order to all parties. Said Order required the Custodian to comply with its terms within five (5) business days from receipt of said Order, which expired on April 2, 2013. The Custodian failed to submit any documentation to the Council in response to its Interim Order.

Therefore, the Custodian failed to comply with the terms of the Council's March 22, 2013 Interim Order. Specifically, the Custodian failed to disclose to the Complainant the legal basis for each redaction made to the records provided, pursuant to N.J.S.A. 47:1A-5(g). The Custodian also failed to disclose to the Complainant the Board of Education's current OPRA request form and the resolutions that authorized the three (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable, or legally certify that the resolutions were already provided to the Complainant with the requested meeting minutes on January 11, 2012. Finally, the Custodian failed to simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

Knowing & Willful

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been

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

Here, the Custodian unlawfully denied access to the Complainant's request for the Board of Education's current OPRA request form and the resolutions that authorized the three (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable. Additionally, the Custodian failed to comply with the any of the terms of the Council's March 22, 2013 Interim Order. The GRC confirmed the Custodian's receipt of said Order via telephone on April 5, 2013. Therefore, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase

“prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, *supra*, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

“OPRA itself contains broader language on attorney’s fees than the former RTKL did. OPRA provides that ‘[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.’ N.J.S.A. 47:1A-6. Under the prior RTKL, ‘[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney’s fee not to exceed \$500.00.’ N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.” (Footnote omitted.) Mason at 73-76 (2008).

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

Here, the Custodian unlawfully denied access to the Complainant’s request for the Board of Education’s current OPRA request form and the resolutions that authorized the three (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable. Thus, the Council ordered the Custodian to disclose said records to the Complainant. Additionally, the Custodian Counsel’s January 11, 2012 response to the Complainant’s OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5(g) because the Custodian’s Counsel failed to provide any specific legal basis for the redactions made to the requested meeting minutes. Thus, the Council ordered the Custodian to disclose the legal basis for each redaction to the Complainant. However, the Custodian failed to comply with the terms of the Council’s Interim Order.

Pursuant to Teeters, *supra*, and the Council's March 22, 2013 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. 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 Council ordered the disclosure of records, as well as the specific legal basis for redactions. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply with the terms of the Council's March 22, 2013 Interim Order. Specifically, the Custodian failed to disclose to the Complainant the legal basis for each redaction made to the records provided, pursuant to N.J.S.A. 47:1A-5(g). The Custodian also failed to disclose to the Complainant the Board of Education's current OPRA request form and the resolutions that authorized the three (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable, or legally certify that the resolutions were already provided to the Complainant with the requested meeting minutes on January 11, 2012. Finally, the Custodian failed to simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant's request for the Board of Education's current OPRA request form and the resolutions that authorized the three (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable. Additionally, the Custodian failed to comply with the any of the terms of the Council's March 22, 2013 Interim Order. The GRC confirmed the Custodian's receipt of said Order via telephone on April 5, 2013. Therefore, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council’s March 22, 2013 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. 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 Council ordered the disclosure of records, as well as the specific legal basis for redactions. 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.

Prepared By: Dara L. Barry
Communications Manager

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

April 23, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
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INTERIM ORDER

March 22, 2013 Government Records Council Meeting

John P. Schmidt
Complainant

Complaint No. 2012-14

v.

Salem City Board of Education (Salem)
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council ("Council") considered the March 15, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Complainant very clearly states in his non-form request that he is seeking records under OPRA. Therefore, pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), the Complainant's e-mail request dated December 20, 2011 is a valid OPRA request.
2. The Custodian Counsel's January 11, 2012 response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5(g) because the Custodian's Counsel failed to provide any specific legal basis for the redactions made to the requested meeting minutes. Thus, the Custodian must disclose the legal basis for each redaction to the Complainant.
3. The Custodian unlawfully denied access to the Complainant's request for the Board of Education's current OPRA request form and the resolutions that authorized the three (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable, and must disclose said records to the Complainant. In the event that the resolutions were already provided to the Complainant with the requested meeting minutes on January 11, 2012, the Custodian must legally certify to said fact.
4. **The Custodian shall comply with item nos. 2-3 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."

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

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

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: March 25, 2013

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**John P. Schmidt¹
Complainant**

GRC Complaint No. 2012-14

v.

**Salem City Board of Education (Salem)²
Custodian of Records**

Records Relevant to Complaint: Copies, sent via e-mail, of:

1. The three (3) most recent Board of Education executive session minutes, which are publically disclosable either in full or redacted form.
2. The resolutions that authorized each executive session for which minutes are provided in response to request item no. 1.
3. The resolutions that authorized the (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable.
4. The Board of Education's current OPRA request form.

Request Made: December 20, 2011

Response Made: December 22, 2011 and January 11, 2012

GRC Complaint Filed: January 17, 2012³

Background⁴

The Complainant submitted his Open Public Records Act ("OPRA") request, via e-mail, seeking records listed above on December 20, 2011. The Custodian's Counsel responded to said request on December 22, 2011, the second (2nd) business day following the Custodian's receipt of said request, stating that the Complainant's e-mail does not count as a written OPRA request, but that Counsel will inquire with the Board Secretary as to the request. Via e-mail dated December 23, 2011, the Complainant informed the Custodian's Counsel that OPRA requests cannot be rejected for not being on an official OPRA request form pursuant to Renna v. County of Union, 2009 WL 1405572 (N.J. Super A.D.). On January 11, 2012, the Custodian's Counsel provided the Complainant only with the requested meeting minutes.

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

² Deborah Piccirillo, Custodian of Records. Represented by Roger A. Barbour, Esq., of Barbour and Associates, LLC (Maple Shade, NJ).

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

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

On January 17, 2012, the Government Records Council (“GRC”) received the Complainant’s Denial of Access Complaint. The Complainant filed this complaint because:

1. The Custodian, through legal counsel, claimed that the Complainant’s e-mail request did not constitute a “written” request;
2. The Custodian provided redacted records without providing the reasons for the redactions;
3. The Custodian denied access to the Board of Education’s (“Board”) OPRA request form;
4. It is not clear whether the meeting minutes provided were the “most recent,” as requested.

The Complainant requests the following relief from the GRC:

1. A finding that the Complainant’s e-mailed OPRA request was proper;
2. An order directing the Custodian to identify the legal basis for the redactions made to the executive session minutes;
3. An order directing the Custodian to provide the Complainant with a copy of the OPRA request form;
4. An order directing the Custodian to provide the Complainant with copies of the resolutions that authorized the Board’s three (3) most recent executive sessions (if not already provided);
5. A finding that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees pursuant to N.J.S.A. 47:1A-6.

On September 28, 2012, the GRC received the Custodian’s Statement of Information (“SOI”) in response to the Complainant’s Denial of Access Complaint.⁵ The Custodian’s Counsel states that he responded to the Complainant’s OPRA request via e-mail dated December 22, 2011. The Custodian’s Counsel also states that no records were denied. Further, the Custodian’s Counsel fails to provide any additional facts or arguments, but rather refers the Council to the enclosed correspondence between the parties, which appears to have been transmitted during the mediation process.⁶

Analysis⁷

Valid OPRA Request

The Complainant submitted his OPRA request on December 20, 2011 via e-mail and not on an official OPRA request form. In the text of the Complainant’s e-mailed request, the Complainant writes, “[p]lease accept this as my request for government records. Please note that

⁵ The Custodian’s SOI submission is incomplete because the Custodian failed to sign the SOI form and thus, legally certify to the facts presented therein.

⁶ Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

⁷ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

the Open Public Records Act (OPRA) is not the only basis for my request...” In response, the Custodian’s Counsel asserted that the Complainant’s e-mail does not count as a written request under OPRA.

In Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), the Appellate Division held that although requestors shall continue to use public agencies’ OPRA request forms when making requests, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in the section of OPRA requiring custodians to adopt a form. *Id.* In effect, this permits requesters to write their own correspondence that requests records from a custodian, as long as the request properly invokes OPRA.

Here, the Complainant very clearly states in his non-form request that he is seeking records under OPRA. Therefore, pursuant to Renna, *supra*, the Complainant’s e-mail request dated December 20, 2011 is a valid OPRA request.

Redactions

The Complainant also stated in his Denial of Access Complaint that the Custodian’s Counsel provided the requested meeting minutes with redactions, but failed to provide the specific legal basis for the redactions. The Custodian and the Custodian’s Counsel failed to address the redactions at all in the Custodian’s SOI submission.

OPRA mandates that, “if the custodian is unable to comply with a request for access, the custodian shall indicate the specific legal basis therefor on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g). This means that a custodian is required to provide the requestor with the specific legal basis for each redacted portion of the requested meeting minutes. The evidence of record provides that on January 11, 2012 the Custodian’s Counsel provided the Complainant with the requested meeting minutes, redacted, and failed to provide any specific legal basis for said redactions.

Therefore, the Custodian Counsel’s January 11, 2012 response to the Complainant’s OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5(g) because the Custodian’s Counsel failed to provide any specific legal basis for the redactions made to the requested meeting minutes. Thus, the Custodian must disclose the legal basis for each redaction to the Complainant.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the Complainant's Denial of Access Complaint, the Complainant seeks an order directing the Custodian to provide the Complainant with a copy of the Board's OPRA request form and an order directing the Custodian to provide the Complainant with copies of the resolutions that authorized the Board's three (3) most recent executive sessions (if not already provided). In the Custodian's SOI, the Custodian failed to provide any evidence to contradict the Complainant's assertion that the above referenced records were not provided.

Therefore, the Custodian unlawfully denied access to the Complainant's request for the Board of Education's current OPRA request form and the resolutions that authorized the three (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable, and must disclose said records to the Complainant. In the event that the resolutions were already provided to the Complainant with the requested meeting minutes on January 11, 2012, the Custodian must legally certify to said fact.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant very clearly states in his non-form request that he is seeking records under OPRA. Therefore, pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), the Complainant's e-mail request dated December 20, 2011 is a valid OPRA request.
2. The Custodian Counsel's January 11, 2012 response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5(g) because the Custodian's Counsel failed to provide any specific legal basis for the redactions made to the requested meeting minutes. Thus, the Custodian must disclose the legal basis for each redaction to the Complainant.
3. The Custodian unlawfully denied access to the Complainant's request for the Board of Education's current OPRA request form and the resolutions that authorized the three (3) most recent Board of Education executive session minutes, regardless of whether the minutes are publically disclosable, and must disclose said records to the Complainant. In the event that the resolutions were already provided to the

Complainant with the requested meeting minutes on January 11, 2012, the Custodian must legally certify to said fact.

4. **The Custodian shall comply with item nos. 2-3 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 1:4-4,⁸ to the Executive Director.⁹**
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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Dara L. Barry
Communications Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

March 15, 2013

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

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