



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

February 25, 2014 Government Records Council Meeting

Stephanie Maureen Nevin  
Complainant

Complaint No. 2013-18

v.

New Jersey Department of Health and  
Senior Services  
Custodian of Record

At the February 25, 2014 public meeting, the Government Records Council (“Council”) considered the February 18, 2014 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 review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel’s fee application, conforms with the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. Noting that the Custodian did not object to the fees requested and having reviewed the application, the Council finds that 4.9 hours at \$300 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Luers, Counsel to the Complainant, for the full amount of \$1,470, representing 4.9 hours of service at \$300 per hour.**
2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

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 25<sup>th</sup> Day of February, 2014

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 26, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
February 25, 2014 Council Meeting**

**Stephanie Maureen Nevin<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-18**

v.

**New Jersey Department of  
Health and Senior Services  
Custodial Agency<sup>2</sup>**

**Records Relevant to Complaint:** Copies of all reports, interviews, medical records, and reviews your office performed in researching my complaint #NJ00055442, involving my C-Diff infections and other treatment at the Jersey Shore University Medical Center.

**Custodian of Record:** Michele Maiello

**Request Received by Custodian:** December 24, 2012

**Response Made by Custodian:** January 7, 2013 and July 8, 2013

**GRC Complaint Received:** January 18, 2013

**Background<sup>3</sup>**

January 28, 2014 Council Meeting:

At its January 28, 2014 public meeting, the Council considered the January 21, 2014 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: The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian conducted an insufficient search for responsive records. Further, the relief ultimately achieved had a basis in law.

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Bridget C. O’Neill, DAG.

<sup>3</sup> The parties may have submitted additional correspondence or made additional statement/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.

Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, and Mason. Because the Complainant's counsel has already submitted his application for an award of attorney's fees to the GRC, and served it upon Counsel for the Custodian, there is no need for the Council to order submission of a fee application. **The Custodian or Custodian's Counsel shall have ten (10) business days from the date of service of this Order to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

#### Procedural History:

On January 29, 2014, the Council distributed its January 28, 2014 Interim Order ("Interim Order") to all parties. The Council's January 28<sup>th</sup> Interim Order noted that Walter M. Luers, Esq., Counsel for the Complainant ("Counsel"), had filed and served his fee application on November 27, 2013. Thus, the Council did not order Counsel to file an application for fees, but did provide the Custodian or her counsel to ten (10) business days from the date of service of this Order to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).

On February 7, 2014, Counsel for the Custodian, Brigid C. O'Neill, DAG, submitted a letter to the GRC stating that the Department of Health & Senior Services did not object to the fees sought by Mr. Luers. February 7, 2014 was the sixth 6<sup>th</sup> business day following the service of the Council's Interim Order.

#### Compliance:

The Council, in its January 28, 2014 Interim Order found that Counsel had filed a timely fee application with the Government Records Council ("GRC").

February 7, 2014 being the sixth 6<sup>th</sup> business day following the service of the Council's Interim Order; Ms. O'Neil complied with the Council's January 28<sup>th</sup> Interim Order.

#### Analysis

In its January 29<sup>th</sup> Interim Order, the Council found that the Complainant was a prevailing party. The Council did not require an additional filing by Counsel because he previously filed a fee application with the GRC.

Council's Interim Order further provided that the Custodian was afforded ten (10) business days from the date of service of the application for attorney's fees to object to Counsel's fee request. N.J.A.C. 5:105-2.13(d). The Custodian, through Ms. O'Neill, DAG, submitted a letter to the GRC stating that the Department of Health & Senior Services did not object to the fees sought by Mr. Luers.

### **Prevailing Party Attorney Fee Award**

“Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney’s fee from the loser.” New Jerseyans for a Death Penalty Moratorium v. N.J. Dep’t of Corrections, (“NJMDP”) 185 N.J. 137, 152 (2005) (quoting, Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted)). However, this principle is not without exception. NJDPM, 185 N.J. at 152. Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.’” NJDPM, 185 N.J. at 153 (quoting, Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

New Jersey public policy, as codified in OPRA, is that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” NJDPM, 185 N.J. at 153 (citing, N.J.S.A. 47:1A-1). 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. See generally, NJDPM, 185 N.J. at 137. “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.” Id. at 153. (quoting, Courier News v. Hunterdon Cty. Prosecutor’s Off., 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. at 432. Further, the Council found a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 73. Accordingly, the Council ruled that the Complainant was a prevailing party entitled to an award of a reasonable attorney’s fee and was directed to file an application for attorney’s fees.

#### **A. Standards for Fee Award**

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” NJDPM, 185 N.J. at 153. (quoting, Rendine, 141 N.J. at 324 (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983))). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for

similar services by lawyers of reasonably comparable experience, skill and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting, Rendine, 141 N.J. at 337). What the fee-shifting statutes do not contemplate is that the losing party has to pay for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing, Council Enter., Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Once the reasonable number of hours has been ascertained, the court should adjust the lodestar in light of the success of the prevailing party in relation to the relief sought. Walker, 415 N.J. Super. at 606 (citing, Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004)). The lodestar amount may be adjusted, either upward or downward, depending on the degree of success achieved. See NJDPM, 185 N.J. at 153-55. OPRA neither mandates nor prohibits enhancements. Rivera v. Office of the Cty. Prosec., 2012 N.J. Super. Unpub. LEXIS 2752 \*1, \* 10 (Law Div. Dec. 2012) (citing, NJDPM, 185 N.J. at 157 (applying, Rendine, 141 N.J. 292 (1995) to OPRA)). However, “[b]ecause enhancements are not preordained . . . enhancements should not be made as a matter of course.” NJDPM, 185 N.J. at 157.

“[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting, Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting, Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success. . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting, Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting, Hensley, 461 U.S. at 435). Notwithstanding that position, the NJDPM court cautioned that “unusual circumstances may occasionally justify and upward adjustment of the lodestar,” but cautioned that “[o]rdinarily[] the facts of an OPRA case will not warrant and enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157.

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at \*10-11 (citing, Furst, 182 N.J. 1, 21-22 (2004) (applying RPC § 1.5(a))).

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and

ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

Rivera, at 11 (citing, R.P.C. 1.5(a)). In addition, N.J.A.C. 5:105-2.13 sets forth the information which counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by that Code section permits the reviewing tribunal to analyze the reasonableness of the requested fee.

Finally, the appellate court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate the fact that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting, Furey v. County of Ocean, 287 N.J. Super. 42, 46 (1996)).

## **B. Evaluation of Fee Application**

### **1. Lodestar Analysis**

#### **a. Hourly Rate**

In the instant matter Counsel is seeking a fee award of \$1,470 representing 4.9 hours at \$300 per hour. In support of this hourly rate Counsel submits legal precedent of comparable rates for attorneys that were ruled as reasonable. Citing, O’Boyle v. Borough of Longport, ATL-L-002294-09 (approving an hourly rate of \$325) and Pat Doe v. Rutgers, MID-L-488-11 (finding \$325 is a reasonable fee in an OPRA matter).

With respect to Counsel’s request for a \$300 hourly rate, he cites to his experience representing clients in OPRA matters at the Supreme and Superior Courts of New Jersey as well as before the GRC. Luers Certif. at ¶ 10. The Council also takes notice of the thirty plus published and unpublished decisions of the Supreme Court, Appellate and Law Divisions as well as the numerous GRC cases wherein Mr. Luers appeared.

The rate of \$300 is reasonable for a practitioner with experience and skill level of Mr. Luers in this geographical area.

#### **b. Time Expended**

In support of his request for fees, Counsel submitted a log of his time. For the period from February 21, 2013 through November 27, 2014 Counsel billed a total of 4.9 hours for work on the file. This included reviewing of file; reviewing of e-mail correspondence to and/or from the GRC; communicating with the client regarding the action; participating in mediation, and preparing fee application.

Further in accordance with the mandates of N.J.A.C. 105-2.13(b), Counsel’s time-sheets provide detailed descriptions of the exact work performed and when, in the required tenths of an

hour. N.J.A.C. 105-2.13(b)(5). Most entries are broken into time increments of one tenth of an hour, with an accompanying description of the work performed. Time entries of exchanges identify the entity or individual with whom Mr. Luers communicated.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application, conforms with the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. Noting that the Custodian did not object to the fees requested and having reviewed the application, the Council finds that 4.9 hours at \$300 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Luers, Counsel to the Complainant, for the full amount of \$1,470, representing 4.9 hours of service at \$300 per hour.**

## 2. Enhancement Analysis

Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application, conforms with the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. Noting that the Custodian did not object to the fees requested and having reviewed the application, the Council finds that 4.9 hours at \$300 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Luers, Counsel to the Complainant, for the full amount of \$1,470, representing 4.9 hours of service at \$300 per hour.**
2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

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

February 18, 2014





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

January 28, 2014 Government Records Council Meeting

Stephanie Maureen Nevin  
Complainant

Complaint No. 2013-18

v.

NJ Department of Health & Senior Services  
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian conducted an insufficient search for responsive records. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, and Mason. Because the Complainant’s counsel has already submitted his application for an award of attorney’s fees to the GRC, and served it upon Counsel for the Custodian, there is no need for the Council to order submission of a fee application. **The Custodian or Custodian’s Counsel shall have ten (10) business days from the date of service of this Order to object to the attorney’s fees requested. N.J.A.C. 5:105-2.13(d).**



Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of January, 2014

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: January 29, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 28, 2014 Council Meeting**

**Stephanie Maureen Nevin<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-18**

v.

**NJ Department of Health & Senior Services<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of all reports, interviews, medical records, and reviews your office performed in researching my complaint #NJ00055442, involving my C-Diff infections and other treatment at the Jersey Shore University Medical Center.

**Custodian of Record:** Michele Maiello

**Request Received by Custodian:** December 24, 2012

**Response Made by Custodian:** January 7, 2013 and July 8, 2013

**GRC Complaint Received:** January 18, 2013

**Background**

**October 29, 2013 Council Meeting:**

At its October 29, 2013 public meeting, the Council considered the October 22, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian performed an inadequate initial search to locate all responsive documents, thus she unlawfully denied access to the additional documents responsive to Complainant's November 26, 2012 OPRA request. N.J.S.A. 47:1A-6; Schnebel v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008); Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013).

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter Luers (Clinton, NJ).

<sup>2</sup> Represented by Deputy Attorney General Brigid C. O'Neill.

2. Because there is no evidence to refute the Custodian's certification that the Complainant's medical records, the email dated March 27, 2013, and the intake form letter each contain medical information, the Custodian has borne her burden of proving that she lawfully denied access to those records, and properly redacted the records where appropriate. N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Governor McGreevey, 2002).
3. Because N.J.A.C. 8:43G-2.10(a) explicitly prohibits the Department from disclosing patient or employee staff names obtained in the course of an inspection, the Custodian has borne her burden of proving that she lawfully denied access to said record. N.J.S.A. 47:1A-9(a).
4. Because there is no evidence to refute the Custodian's certification and argument that the Inspector's narrative worksheet is exempt from disclosure as a pre-decisional and deliberative material, the Custodian has borne her burden of proving that she lawfully denied access to the record. N.J.S.A. 47:1A-1.1; O'Shea v. West Milford Bd. of Educ., GRC Complaint No. 2004-93 (April 2006); In re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000).
5. Although the Custodian initially conducted an insufficient search in response to the Complainant's request under N.J.S.A. 47:1A-6, she ultimately provided the Complainant with all records responsive to the request not otherwise exempt from access under OPRA. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

#### Procedural History:

On, November 1, 2013, the Council distributed its Order to all parties.

On or about December 2, 2013, counsel for the Complainant submitted a fee application to the GRC. The Council, though ruling in the Complainant's favor, did not conduct a fee award analysis, necessitating the within supplemental findings and recommendations.

## Analysis

### 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, 196 N.J. at 71, (quoting Buckhannon Board & Care Home v. West Virginia Dep’t of Health & Human Res., 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 (7<sup>th</sup> 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 that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 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.” Mason, 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.

196 N.J. Super. at 73-76.

The Court in Mason further held that:

[R]equestors 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, *certif. denied* (1984).

Id. at 76.

The Complaint was filed on January 18, 2013, which led the parties to enter mediation negotiations in April 2013. The mediation caused the Custodian to conduct another search for responsive records. The Custodian discovered responsive records during her secondary search and produced them to the Complainant on July 8, 2013. Accordingly, the Council, in its October 29, order, found that the Custodian had not conducted a sufficient search.

#### Conclusion:

Therefore, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J.

Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. Super. at 76. Specifically, the Custodian conducted an insufficient search for responsive records. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 423 and Mason, 196 N.J. Super. at 51. Because the Complainant's counsel has already submitted his application for an award of attorney's fees to the GRC, and served it upon Counsel for the Custodian, there is no need for the Council to order submission of a fee application. **The Custodian or Custodian's Counsel shall have ten (10) business days from the date of service of this Order to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian conducted an insufficient search for responsive records. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, and Mason. Because the Complainant's counsel has already submitted his application for an award of attorney's fees to the GRC, and served it upon Counsel for the Custodian, there is no need for the Council to order submission of a fee application. **The Custodian or Custodian's Counsel shall have ten (10) business days from the date of service of this Order to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Prepared By: Samuel A. Rosado, Esq.  
Staff Attorney

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

January 21, 2014



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

October 29, 2013 Government Records Council Meeting

Stephen Maureen Nevin  
Complainant

Complaint No. 2013-18

v.

NJ Department of Health & Senior Services  
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian performed an inadequate initial search to locate all responsive documents, thus she unlawfully denied access to the additional documents responsive to Complainant’s November 26, 2012 OPRA request. N.J.S.A. 47:1A-6; Schnebel v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008); Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013).
2. Because there is no evidence to refute the Custodian’s certification that the Complainant’s medical records, the email dated March 27, 2013, and the intake form letter each contain medical information, the Custodian has borne her burden of proving that she lawfully denied access to those records, and properly redacted the records where appropriate. N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Governor McGreevey, 2002).
3. Because N.J.A.C. 8:43G-2.10(a) explicitly prohibits the Department from disclosing patient or employee staff names obtained in the course of an inspection, the Custodian has borne her burden of proving that she lawfully denied access to said record. N.J.S.A. 47:1A-9(a).
4. Because there is no evidence to refute the Custodian’s certification and argument that the Inspector’s narrative worksheet is exempt from disclosure as a pre-decisional and deliberative material, the Custodian has borne her burden of proving that she lawfully denied access to the record. N.J.S.A. 47:1A-1.1; O’Shea v. West Milford Bd. of Educ., GRC Complaint No. 2004-93 (April 2006); In re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000).





5. Although the Custodian initially conducted an insufficient search in response to the Complainant's request under N.J.S.A. 47:1A-6, she ultimately provided the Complainant with all records responsive to the request not otherwise exempt from access under OPRA. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the  
Government Records Council  
On The 29th Day of October, 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 1, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Stephanie Maureen Nevin<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-18**

**v.**

**N.J. Department of Health & Senior Services<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of all reports, interviews, medical records, and reviews your office performed in researching my complaint #NJ00055442, involving my C-Diff infections and other treatment at the Jersey Shore University Medical Center.

**Custodian of Record:** Michele Maiello

**Request Received by Custodian:** December 24, 2012

**Response Made by Custodian:** January 7, 2013 and July 8, 2013

**GRC Complaint Received:** January 18, 2013

**Background<sup>3</sup>**

**Request and Response:**

On November 26, 2012, the Complainant mailed an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Complainant addressed the OPRA request to Tara R. Hurley, RN (“Inspector”), who had conducted an investigation of the Jersey Shore University Medical Center (“JSUMC”) on or around September 29, 2012. On December 24, 2012, the Custodian received the Complainant’s OPRA request via interoffice mail. On December 31, 2013, five (5) business days after receiving the request, the Custodian responded, in writing, that there were three (3) responsive records:

1. A Summary Statement of Deficiencies;
2. A Letter dated from October 29, 2012 from Tara Hurley to the President of the Jersey Shore University Medical Center; and
3. A letter to the Complainant dated November 5, 2013.

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<sup>1</sup> Represented by Walter M. Luers, Esq. of the Law Offices of Walter Luers (Clinton, NJ).

<sup>2</sup> Represented by Deputy Attorney General Brigid C. O’Neill.

<sup>3</sup> 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.

That same day, the Custodian requested a \$.20 payment from the Complainant for copies of the documents. On January 7, 2013, the Custodian received the \$.20 payment and mailed the copies of the responsive documents to the Complainant.

Denial of Access Complaint:

On January 18, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). Specifically, the records sought concerned a negligence complaint the Complainant filed with the N.J. Department of Health & Senior Services (“Department”) against JSUMC pertaining to the Complainant’s hospitalization. The Complainant asserts that the records she received on January 7, 2013, from the Custodian were not responsive to her request.

The Complainant does not elaborate or supplement her Denial of Access Complaint in reference to events occurring subsequent to her original filing.

Statement of Information:

On August 9, 2013, Custodian’s Counsel filed a Statement of Information (“SOI”). The Custodian certifies that she discovered a total of three (3) responsive records in her initial search. Following receipt of payment for copying costs, the Custodian certifies that she mailed the records to the Complainant on January 7, 2013.

The Custodian certifies that she checked with the “Assessment & Survey Program,” the division within the Department which handles hospital complaints, to confirm that the records produced comprised of all responsive records to the request. The Custodian states she received an email from Stephanie Dzurkoc of the Assessment & Survey Program on February 28, 2013, confirming that, “[the Custodian has] the complete file. Nothing else to send.”

On or about June, 2013, the Inspector informed the Custodian that other possibly responsive records existed, such as the Inspector’s notes, the Complainant’s medical records, a list of hospital staff and patients who were interviewed in the course of the inspection, and JSUMC’s policies and procedures. The Custodian certifies that none of these records were in the original file when she initially responded to Complainant’s request. On or about July 3, 2013 the Custodian retrieved the additional records which the Custodian certifies were located at JSUMC’s file room.

On July 8, 2013, Custodian’s Counsel produced an unredacted copy of the JSUMC’s policies and procedures to the Complainant. The remaining documents were either redacted or denied by the Custodian. The Counsel explains its redactions and denials as follows:

1. Complainant’s medical records reviewed during the investigation – Exempt under Executive Order No. 26 (Governor McGreevey, 2002) (“EO 26”).
2. Email dated March 27, 2012 that includes a narrative description by the Complainant of her medical condition and treatment – Exempt under EO 26.

3. Intake Form – References to patients and their medical information have been redacted pursuant to EO 26.
4. List of patients whose medical records were reviewed during the inspection of the hospital and a “Facility Staff Sign-In Sheet” from the date of the inspection – Both records exempt pursuant to N.J.A.C. 8:43G-2.10(a), which pertains to hospital licensing standards which prevent the Department from disclosing the names of “specific patents or hospital employees.”
5. Inspector’s narrative worksheet, consisting of the inspector’s notes during the inspection of the hospital – Exempt as advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

The Custodian certifies that all responsive documents have now been delivered to the Complainant.

### Analysis

#### Insufficient Search

It is the custodian’s responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian’s response is accurate and has an appropriate basis in law. Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013). In Schnebel v. N.J. Dep’t of Env’tl. Protection, the custodian initially stated that no records responsive to the complainant’s OPRA request existed. GRC Complaint No. 2007-220 (April 2008). The custodian certified that after receipt of the complainant’s denial of access complaint, which contained e-mails responsive to the complainant’s request, the custodian conducted a second search and found records responsive to the complainant’s request. Id. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. Id.

In Weiner, the custodian initially responded to the complainant’s request, producing four (4) responsive records and stating that no other records existed. GRC 2013-52. However, after receiving the denial of access complaint, the custodian performed another search and discovered several other records. Id. Pursuant to Schnebel, the Council held that the Custodian failed to perform an adequate initial search and unlawfully denied access to those additional records. Weiner, GRC 2013-52.

This case is analogous to Weiner, as the Custodian initially responded to the Complainant and provided three (3) responsive documents to the Complainant. Subsequently after receiving the Complainant’s Denial of Access Complaint, the Custodian was informed that there were additional documents responsive to the Complainant’s request. In accordance with Schnebel, the Custodian had a responsibility to perform an adequate initial search and to locate all records responsive. GRC 2007-220.

The Custodian performed an inadequate initial search to locate all responsive documents, thus she unlawfully denied access to the additional documents responsive to Complainant’s

November 26, 2012 OPRA request. N.J.S.A. 47:1A-6; Schnebel, GRC 2007-220; Weiner, GRC 2013-52.

### **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.

OPRA provides that:

The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.); any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute or Executive Order* of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

N.J.S.A. 47:1A-9(a) (emphasis added).

### **Medical Information**

EO 26 provides that:

The following records shall not be considered to be government records subject to public access ... Information concerning individuals ... relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation ...

Id. at 4(b)(1).

Here, the Custodian denied access to two (2) of the subsequently discovered records and redacted one (1) other pursuant to EO 26. The Complainant provides no additional submissions or evidence refuting the Custodian’s certification or the Counsel’s argument.

As to whether the Custodian has borne her burden of proving that she lawfully denied access to the above records under EO 26, her certification provides significant facts to make a determination. On its face, the Complainant’s own medical records would contain medical information as its purpose is to document a patient’s medical symptoms, diagnosis and treatment. Furthermore, the Custodian certifies that the March 27, 2013 email contains information regarding the medical procedures and treatment which the Complainant underwent during her stay at JSUMC. Finally, the Counsel argues that the intake form letter was redacted to remove the names of patients and their medical information.

Thus, because there is no evidence to refute the Custodian's certification that the Complainant's medical records, the email dated March 27, 2013, and the intake form letter each contain medical information, the Custodian has borne her burden of proving that she lawfully denied access to those records and properly redacted the records where appropriate. N.J.S.A. 47:1A-9(a); EO 26.

#### List of Patient & Employee Names

N.J.A.C. 8:43G-2.10(a) provides that, in the course of receiving information during a hospital inspection, such information "shall not be disclosed to the public in such a way as to indicate the names of the specific patients or hospital employees to whom the information pertains."

The Custodian's Counsel argues that after she reviewed the "Facility Sign-In" sheet and the list of patients interviewed in the course of the inspection with the Custodian, she asserts that these records are explicitly exempt from disclosure pursuant to N.J.A.C. 8:43G-2.10(a). The Complainant does not provide any facts or arguments to refute the Custodian's certification or the Counsel's argument.

Therefore, because N.J.A.C. 8:43G-2.10(a) explicitly prohibits the Department from disclosing patient or employee staff names obtained in the course of an inspection, the Custodian has borne her burden of proving that she lawfully denied access to said records. N.J.S.A. 47:1A-9(a).

#### Inspector's Narrative Worksheet

OPRA excludes from the definition of a government record "... inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

In O'Shea v. West Milford Bd. of Educ., the Council provided that:

[N]either the statute nor the courts have defined the terms ... "advisory, consultative, or deliberative" in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA's ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption with Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).

GRC Complaint No. 2004-93 (April 2006).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in the decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274 (2009) (emphasis added). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. Id. at 286. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in Integrity, 165 N.J. at 81. There, the Court addressed the question of whether the Commissioner of Insurance, acting in the capacity of liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. Id. The Court adopted a qualified deliberative process privilege based upon the holding of McClain v. Coll. Hosp., 99 N.J. 346 (1985). Integrity, 165 N.J. at 88. In doing so, the Court noted that:

A document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.

Id. at 84-85 (citations omitted).

The Court further set out procedural guidelines based upon those discussed in McClain:

The initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.

Integrity, 165 N.J. at 88 (citing McClain, 99 N.J. at 361-62).

Here, the Custodian discovered the Inspector's narrative worksheet after her initial search for responsive documents. After review with Custodian's Counsel, the Custodian denied access to the record, certifying that the worksheet consists of the Inspector's personal notes drafted in the course of her inspection of JSUMC. The Custodian certifies that the worksheet was used by the Department to make a final determination of the inspection, and is therefore considered deliberative material under OPRA.

On the basis of the Custodian's certification and argument, in addition to the lack of any refutation or challenge from the Complainant, it is concluded that the Inspector's narrative worksheet qualifies as material exempt from disclosure. N.J.S.A. 47:1A-1.1; Integrity, 165 N.J. at 84-85. The worksheet, as the Custodian certifies, was drafted for the purpose of guiding the Department's determination as to the Complainant's negligence complaint against JSUMC, thus making it "pre-decisional" in nature. In addition, the Custodian certifies that the worksheet contains the Inspector's draft opinions and observations taken in the course of her inspection of JSUMC, thus making it "advisory and deliberative" material made in furtherance of making a final determination.

Therefore, because there is no evidence to refute the Custodian's certification and argument that the Inspector's narrative worksheet is exempt from disclosure as pre-decisional and deliberative material, the Custodian has borne her burden of proving that she lawfully denied access to the record. N.J.S.A. 47:1A-1.1; O'Shea, GRC 2004-93; Integrity, 165 N.J. at 84-85.

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

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



Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (E.C.E.S. v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian initially conducted an insufficient search in response to the Complainant's request under N.J.S.A. 47:1A-6, she ultimately provided the Complainant with all records responsive to the request not otherwise exempt from access under OPRA. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian performed an inadequate initial search to locate all responsive documents, thus she unlawfully denied access to the additional documents responsive to Complainant's November 26, 2012 OPRA request. N.J.S.A. 47:1A-6; Schnebel v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008); Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013).
2. Because there is no evidence to refute the Custodian's certification that the Complainant's medical records, the email dated March 27, 2013, and the intake form letter each contain medical information, the Custodian has borne her burden of proving that she lawfully denied access to those records, and properly redacted the records where appropriate. N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Governor McGreevey, 2002).
3. Because N.J.A.C. 8:43G-2.10(a) explicitly prohibits the Department from disclosing patient or employee staff names obtained in the course of an inspection, the Custodian has borne her burden of proving that she lawfully denied access to said record. N.J.S.A. 47:1A-9(a).
4. Because there is no evidence to refute the Custodian's certification and argument that the Inspector's narrative worksheet is exempt from disclosure as a pre-decisional and deliberative material, the Custodian has borne her burden of proving that she lawfully denied access to the record. N.J.S.A. 47:1A-1.1; O'Shea v. West Milford Bd. of Educ., GRC Complaint No. 2004-93 (April 2006); In re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000).
5. Although the Custodian initially conducted an insufficient search in response to the Complainant's request under N.J.S.A. 47:1A-6, she ultimately provided the Complainant with all records responsive to the request not otherwise exempt from access under OPRA. Additionally, the evidence of record does not indicate that the

Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado, Esq.  
Staff Attorney

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

October 22, 2013