



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

January 28, 2014 Government Records Council Meeting

Jolanta Maziarz
(On behalf of the Borough of Raritan)
Complainant

Complaint No. 2013-36

v.
Raritan Public Library (Somerset)
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 it needs not take further action with respect to this matter because the Complainant has not filed an application for an award of attorney’s fees with the Council.

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 28th 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 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jolanta Maziarz
(On behalf of the Borough of Raritan)¹
Complainant**

GRC Complaint No. 2013-36

v.

**Raritan Public Library (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Copies of all recordings for any regular, special or executive meeting of the Raritan Public Library Board of Trustees for the period January 1, 2011 through January 18, 2013.

Custodian of Records: MaryJane Paese
Request Received by Custodian: January 18, 2013
Response Made by Custodian: January 22, 2013
GRC Complaint Received: January 31, 2013

Background

December 20, 2013 Council Meeting:

At its December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council’s October 29, 2013 Interim Order because the Custodian in a timely manner provided to the Executive Director certified confirmation of compliance which stated that the Custodian, through Counsel, had disclosed to the Complainant in April 2013 a recording of the January 17, 2013 meeting.
2. Although the Custodian failed to bear her burden of proving that the denial of access to a recording of the January 17, 2013 meeting was authorized by law, she did fully comply in a timely manner with the Council’s October 29, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s actions

¹ The Borough of Raritan is represented by Jolanta Maziarz, Esq., of Woolson Sutphen Anderson (Somerville, NJ).

² Represented by Paul Rizzo, Esq., of DiFrancesco Bateman, P.C. (Warren, NJ).

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

3. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (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, following the filing of the Denial of Access Complaint, the Custodian's Counsel delivered to the Complainant one of the records responsive to the request which formed the basis for the complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. **Thus, the Complainant is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Procedural History:

On December 23, 2013, the Council distributed its Interim Order to all parties. On January 8, 2014, the Complainant faxed a letter to the GRC wherein the Complainant stated that the Borough of Raritan will not be submitting an application for an award of attorney's fees in connection with the instant complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council need not take further action with respect to this matter because the Complainant has not filed an application for an award of attorney's fees with the Council.

Prepared By: John E. Stewart, Esq.

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

January 21, 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

December 20, 2013 Government Records Council Meeting

Jolanta Maziarz
(On behalf of the Borough of Raritan)
Complainant

Complaint No. 2013-36

v.
Raritan Public Library (Somerset)
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 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 complied with the Council’s October 29, 2013 Interim Order because the Custodian in a timely manner provided to the Executive Director certified confirmation of compliance which stated that the Custodian, through Counsel, had disclosed to the Complainant in April 2013 a recording of the January 17, 2013 meeting.
2. Although the Custodian failed to bear her burden of proving that the denial of access to a recording of the January 17, 2013 meeting was authorized by law, she did fully comply in a timely manner with the Council’s October 29, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (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, following the filing of the Denial of Access Complaint, the Custodian’s Counsel delivered to the Complainant one of the records responsive to the request which formed the basis for the complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. **Thus, the Complainant is entitled to**

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submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees 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 20th Day of December, 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: December 23, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 20, 2013 Council Meeting**

Jolanta Maziarz
(On behalf of the Borough of Raritan)¹
Complainant

GRC Complaint No. 2013-36

v.

Raritan Public Library (Somerset)²
Custodial Agency

Records Relevant to Complaint: Copies of all recordings for any regular, special or executive meeting of the Raritan Public Library Board of Trustees for the period January 1, 2011 through January 18, 2013.

Custodian of Records: MaryJane Paese
Request Received by Custodian: January 18, 2013
Response Made by Custodian: January 22, 2013
GRC Complaint Received: January 31, 2013

Background

At its 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, found that:

1. The Custodian did not unlawfully deny access to recordings for any regular, special or executive meeting of the Raritan Public Library Board of Trustees disposed of eighty (80) days after the minutes were approved (with the possible exception of the January 17, 2013 meeting recording addressed below) because the Custodian certified that such records no longer exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).
2. The Custodian failed to bear her burden of proving that the denial of access to a recording of the January 17, 2013 meeting, which would not yet have been disposed of at the time of the request, was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said record, if any.

¹ The Borough of Raritan is represented by Jolanta Maziarz, Esq., of Woolson Sutphen Anderson, P.C. (Somerville, NJ).

² Represented by Paul Rizzo, Esq., of DiFrancesco Bateman, P.C. (Warren, NJ).

3. **The Custodian shall (a) comply with paragraph 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for any such redactions, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director; or (b) within five (5) business days from receipt of the Council's Interim Order deliver a certification in accordance with N.J. Court Rule 1:4-4, to the Executive Director stating that no meeting or recording of a meeting took place on January 17, 2013; therefore the requested recording of said meeting does not exist.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On October 30, 2013, the Council distributed its October 29, 2013 Interim Order to all parties. On November 1, 2013, the second (2nd) business day following receipt of the Council's Interim Order, the Custodian submitted a certification to the GRC wherein she stated that at the time of the OPRA request the Board of Trustees of the Raritan Public Library was in litigation with the Borough of Raritan and that the Custodian's Counsel also represented the Library in the litigation. The Custodian stated that she relied upon the advice of Counsel in responding to the OPRA request. The Custodian further certified that in April 2013, at Counsel's direction she provided to Counsel a disc containing the requested recording of the January 17, 2013 meeting. The Custodian stated that it was her understanding Counsel forwarded the disc to the Complainant.

On November 1, 2013, the Custodian's Counsel submitted a certification to the GRC wherein he stated that all of the Custodian's statements in her November 1, 2013 certification regarding her response to the OPRA request are accurate, specifically that she acted upon Counsel's advice. Counsel further stated that on April 15, 2013, he personally delivered to the Complainant a disc containing a recording of the requested January 17, 2013 meeting. Counsel attached to his certification as "Exhibit A" a letter dated April 15, 2013, which states, *inter alia*, "...I will advise [the Custodian] to now provide a copy of the January 17, 2013 meeting, and will provide it to you upon payment for the discs which you have already received and that disc."

Analysis

Compliance

On October 29, 2013, the Council ordered the above-referenced compliance. On October 30, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On November 1, 2013, two (2) business days after receipt of the Interim Order, the Custodian submitted a certification to the GRC

wherein she certified that in April 2013, at Counsel's direction she provided to Counsel a disc containing the requested recording of the January 17, 2013 meeting with the understanding that the disc would be delivered to the Complainant. On November 1, 2013, the Custodian's Counsel certified that on April 15, 2013, he personally delivered to the Complainant a disc containing a recording of the requested January 17, 2013 meeting.

Therefore, the Custodian complied with the Council's October 29, 2013 Interim Order because the Custodian in a timely manner provided to the Executive Director certified confirmation of compliance which stated that the Custodian, through Counsel, had disclosed to the Complainant in April 2013 a recording of the January 17, 2013 meeting.

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 (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, although the Custodian failed to bear her burden of proving that the denial of access to a recording of the January 17, 2013 meeting was authorized by law, she did fully comply in a timely manner with the Council's October 29, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court ...; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council ... A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

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

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties," Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

Mason at 73-76 (2008).

The Court in Mason, *supra*, 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, *cert denied* (1984).

Id. at 76.

Here, the Custodian failed to bear her burden of proving that the denial of access to a recording of the January 17, 2013 Raritan Public Library Board of Trustees meeting was authorized by law. On January 31, 2013, the Complainant, on behalf of her client the Borough of Raritan, filed a Denial of Access Complaint seeking, among other records, a recording of the January 17, 2013 meeting. Thereafter, the Custodian's Counsel certified that on April 15, 2013, he personally delivered to the Complainant a disc containing a recording of the requested January 17, 2013 meeting.

Therefore, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct.” Teeters, *supra*, at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, *supra*. Specifically, following the filing of the Denial of Access Complaint, the Custodian's Counsel delivered to the Complainant one of the records responsive to the request which formed the basis for the complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. **Thus, the Complainant is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees 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:

1. The Custodian complied with the Council's October 29, 2013 Interim Order because the Custodian in a timely manner provided to the Executive Director certified confirmation of compliance which stated that the Custodian, through Counsel, had disclosed to the Complainant in April 2013 a recording of the January 17, 2013 meeting.
2. Although the Custodian failed to bear her burden of proving that the denial of access to a recording of the January 17, 2013 meeting was authorized by law, she did fully comply in a timely manner with the Council's October 29, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (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, following the filing of the Denial of Access Complaint, the Custodian's Counsel delivered to the Complainant one of the records responsive to the request which formed the basis for the complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. **Thus, the Complainant is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Prepared By: John E. Stewart, Esq.

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

December 10, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
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RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

October 29, 2013 Government Records Council Meeting

Jolanta Maziarz (On behalf of the Borough
of Raritan)

Complainant

v.

Raritan Public Library (Somerset)

Custodian of Record

Complaint No. 2013-36

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 did not unlawfully deny access to recordings for any regular, special or executive meeting of the Raritan Public Library Board of Trustees disposed of eighty (80) days after the minutes were approved (with the possible exception of the January 17, 2013 meeting recording addressed below) because the Custodian certified that such records no longer exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).
2. The Custodian failed to bear her burden of proving that the denial of access to a recording of the January 17, 2013 meeting, which would not yet have been disposed of at the time of the request, was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said record, if any.
3. **The Custodian shall (a) comply with paragraph 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for any such redactions, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director;² or (b) within five (5) business days from receipt of the Council's Interim Order deliver a certification in accordance with N.J. Court Rule 1:4-4, to the Executive Director**

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

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

stating that no meeting or recording of a meeting took place on January 17, 2013; therefore the requested recording of said meeting does not exist.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order 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: October 30, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting**

**Jolanta Maziarz
(On behalf of the Borough of Raritan)¹
Complainant**

GRC Complaint No. 2013-36

v.

**Raritan Public Library (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Copies of all recordings for any regular, special or executive meeting of the Raritan Public Library Board of Trustees for the period January 1, 2011 through January 18, 2013.

Custodian of Records: MaryJane Paese
Request Received by Custodian: January 18, 2013
Response Made by Custodian: January 22, 2013
GRC Complaint Received: January 31, 2013

Background³

Request and Response:

On January 18, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On January 22, 2013, the first (1st) business day following receipt of said request, the Custodian’s Counsel responded in writing, informing the Complainant that he instructed the Custodian not to respond to the OPRA request pending further direction from him because he believes the filing of the OPRA request is contrary to the directions of Superior Court Judge Yolanda Ciccone.⁴

Denial of Access Complaint:

On January 31, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that she provided her OPRA

¹ The Borough of Raritan is represented by Jolanta Maziarz, Esq., of Woolson Sutphen Anderson, P.C. (Somerville, NJ).

² Represented by Paul Rizzo, Esq., of DiFrancesco Bateman, P.C. (Warren, NJ).

³ 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.

⁴ This remains a denial of the requested records because the Custodian’s Counsel did not provide the Custodian with “further direction” altering such denial within the statutorily-mandated time period for granting or denying access.

request to the Custodian on January 18, 2013 and received a response to the request on January 22, 2013. The balance of the complaint consists of correspondence which the Complainant asks the GRC to review. The correspondence includes the following:

- A January 22, 2013 letter from the Custodian's Counsel to the Complainant informing the Complainant that filing the OPRA request is contrary to the directions of Superior Court Judge Yolanda Ciccone.
- A January 22, 2013 letter from the Custodian's Counsel to Judge Ciccone asking if the filing of an OPRA request by the Complainant is contrary to the court's intentions and if the Custodian should respond to the request.
- A January 25, 2013 letter from Judge Ciccone to the Custodian's Counsel informing Counsel that, with respect to the OPRA request, it is outside the court's purview to intervene.
- A January 29, 2013 letter from the Complainant to the Custodian advising the Custodian to respond to the request without further delay.
- A January 31, 2013 letter from the Custodian's Counsel to the Complainant informing the Complainant that the requested tapes are not required to be maintained, and are therefore only maintained for eighty (80) days following approval of the minutes. Counsel states that he will make tapes of meetings held within the last eighty days available to the Complainant and that she should make arrangements with him for disclosure of same.

Statement of Information:

On February 15, 2013, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that she received the Complainant's OPRA request on January 18, 2013, and that a response to the request was made on January 22, 2013 and January 31, 2013. The Custodian certifies that tapes of regular, special or executive meetings are disposed of eighty days after the minutes are approved. The Custodian further certifies that tapes of all meetings within the past eighty days were made available to the Complainant.⁵

The Custodian's Counsel states that on February 15, 2013, he forwarded two discs which contain recordings of meetings on November 15, 2012 and December 20, 2012. Counsel states that these are the only two meetings for which tapes have been maintained.

Additional Information:

By letter dated February 25, 2013, the Complainant informs the GRC that the Custodian's Counsel did disclose to her two discs containing recordings of the November 15, 2012 and December 20, 2012 meetings. The Complainant further states that her OPRA request

⁵ The Custodian does not clarify whether the tapes are of audio or video recordings.

was dated January 18, 2013, and therefore a recording of the January 17, 2013 meeting should have also been disclosed to her.⁶

On April 8, 2013, the Custodian's Counsel sent a letter to the Complainant wherein he informed her that because her OPRA request was dated December 10, 2012, and requested copies of minutes from December 1, 2011 through December 10, 2012, the discs containing information regarding the November and December 2012 meetings satisfy the request.

By letter dated April 8, 2013, the Complainant informs the Custodian's Counsel that the December 10, 2012 request did not form the basis of the instant complaint. The Complainant again renews her demand for the January 17, 2013 recording.

Analysis⁷

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 Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that all records that may have been responsive to the Complainant's request were disposed of eighty (80) days after the minutes were approved; therefore such tapes are nonexistent.

As such, the Custodian did not unlawfully deny access to recordings for any regular, special or executive meeting of the Raritan Public Library Board of Trustees disposed of eighty (80) days after the minutes were approved (with the possible exception of the January 17, 2013 meeting recording addressed *infra*) because the Custodian certified that such records no longer exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer, supra.

The Custodian's Counsel stated that recordings of meetings on November 15, 2012 and December 20, 2012 were the only two meetings for which tapes had been maintained. Counsel

⁶ The Complainant attached a copy of a letter to the Custodian's Counsel dated February 25, 2013, asking him to immediately disclose to her a recording of the January 17, 2013 meeting.

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.

further stated that two discs containing the recordings were disclosed to the Complainant on February 15, 2013. By letter dated February 25, 2013, the Complainant acknowledged receipt of the discs. For this reason, the only record still in controversy is the recording of a meeting which allegedly occurred on January 17, 2013. The Custodian acknowledged that the Library maintains recordings of regular, special or executive meetings for eighty (80) days after the minutes are approved. The evidence of record reveals that the Complainant's request is dated January 18, 2013. Moreover, there is no dispute between the parties that the Complainant's OPRA request was received by the Custodian on January 18, 2013. If, as alleged by the Complainant, a meeting occurred and was recorded on January 17, 2013, the recording would have been available from January 17, 2013 until eighty days after the minutes were approved. Therefore, the recording would have been available as of the date of the Complainant's OPRA request. The Custodian failed to submit any competent, credible evidence to refute the Complainant's allegation that a meeting occurred and was recorded on January 17, 2013.

Accordingly, the Custodian failed to bear her burden of proving that the denial of access to a recording of the January 17, 2013 meeting, which would not yet have been disposed of at the time of the request, was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said record, if any.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny access to recordings for any regular, special or executive meeting of the Raritan Public Library Board of Trustees disposed of eighty (80) days after the minutes were approved (with the possible exception of the January 17, 2013 meeting recording addressed below) because the Custodian certified that such records no longer exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).
2. The Custodian failed to bear her burden of proving that the denial of access to a recording of the January 17, 2013 meeting, which would not yet have been disposed of at the time of the request, was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said record, if any.

3. **The Custodian shall (a) comply with paragraph 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for any such redactions, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁸ to the Executive Director;⁹ or (b) within five (5) business days from receipt of the Council's Interim Order deliver a certification in accordance with N.J. Court Rule 1:4-4, to the Executive Director stating that no meeting or recording of a meeting took place on January 17, 2013; therefore the requested recording of said meeting does not exist.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart, Esq.

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

October 22, 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.