



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

November 15, 2016 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2014-402

v.

Harrison Township Fire District (Gloucester)
Custodian of Record

At the November 15, 2016 public meeting, the Government Records Council (“Council”) considered the November 9, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council finds that \$300 is a reasonable fee for attorneys of Complainant Counsel’s experience representing clients before the GRC. Accordingly, the Council finds that Complainant Counsel’s hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters. Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-153 (May 2013) (“The rate of \$300 is reasonable for [an OPRA] practitioner . . . in this geographical area”).
2. The GRC finds Complainant Counsel’s fee conforms to the requirements of N.J.A.C. 1:105-2.13(B) However, while the GRC found that the time spent on the file was mostly reasonable, it exceeds that which an experienced OPRA attorney should ordinarily require. Accordingly, the GRC disallows 0.3 hours billed time for basic pre-complaint research. For the reasons set forth above, the Council finds that the said time expended is disallowed and not reasonable. The Council finds that 7.9 hours at \$300.00 per hour is reasonable for the work performed by Counsel in the instant matter. Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-228 (March 2014); Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Executive Director recommends that the Council awards fees to Complainant’s Counsel in the amount of \$2,370.00, representing 7.9 hours of service at \$300.00 per hour.**

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 15th Day of November, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 17, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
November 15, 2016 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2014-402

v.

**Harrison Township Fire District (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all Harrison Township Fire District (“HTFD”) executive session minutes for meetings held between March 1, 2013, and August 31, 2013.

Custodian of Record: Brian Bartholomew
Request Received by Custodian: June 14, 2014
Response Made by Custodian: June 23, 2014
GRC Complaint Received: November 26, 2014

Background

January 26, 2016 Council Meeting:

At its January 26, 2016 public meeting, the Council considered the January 19, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian’s Counsel has failed to establish in his request for reconsideration of the Council’s October 27, 2015 Interim Order that either: 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian’s Counsel also failed to establish that the complaint should be reconsidered based on a mistake and extraordinary circumstances. The Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the filing of this complaint and the Council’s September 29, 2015 Interim Order prove that there is a causal nexus between the complaint and the Custodian’s change in conduct. Thus, the Custodian Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div.

¹ Represented by Anthony H. Ogozalek, Esq., of Beckman, Ogozalek, Paglione, Londar (Gibbsboro, NJ).

² Represented by Eric J. Riso, Esq., of Platt & Riso, P.C. (Stratford, NJ).

1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). As provided for in the Council's Order, **the Custodian shall have ten (10) business days from the date of service of this decision to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

2. Because the Complainant Counsel's request for reconsideration was filed untimely, the Council should reject same and proceed with a determination on the issue of prevailing party attorney's fees. N.J.A.C. 5:105-2.10.

Procedural History:

On January 27, 2016, the Council distributed its Interim Order to all parties. On February 2, 2016, three (3) business days following the Interim Order, the Custodian's Counsel timely submitted objections.³

Analysis

Compliance

Complainant Counsel's Fee Application

In his Fee Certification and Application ("Certification"), the Complainant's Counsel certified that he seeks 8.2 hours at the rate of \$300.00 per hour, for a total of \$2,460.00 in attorney's fees. He seeks nothing by way of reimbursement of costs. Certification pg. 1, ¶ Exhibit 1, and pg. 11, ¶12.⁴ Counsel argues that his hourly rate is justified by his nine (9) years of experience as an attorney, some of which has included appearances before the Superior Court, Appellate Division, and before the GRC. Counsel attached a copy of his résumé, which details his litigation experience and governmental affairs. He argues that the fee must be based on rates prevailing at the time of the fee application, not the rates prevailing at the time the services were performed. Citing Rendine v. Pantzer, 141 N.J. 292, 337 (1995).

Counsel, referring to his résumé (Exhibit A), seeks an hourly rate of \$300 per hour. Certification, pg. 5, ¶ 7. In support of his hourly request, Counsel argues that \$300 per hour is "certainly reasonable and slightly less than what other attorneys who work in the field of OPRA charge for OPRA cases." Counsel notes that a New Jersey Superior Court judge awarded an hourly rate of \$325 in a 2009 OPRA case to a well-known OPRA practitioner. Citing O'Boyle v.

³ The GRC notes that it did not require the Complainant's Counsel to resubmit his fee application, which it received on November 13, 2015.

⁴ In paragraph 3(1)(a) of his Certification, Counsel claims 15.9 hours "for OPRA issues and fee Certification" and states that his itemized hours and expenses are shown in an attached exhibit. However, the exhibit, consisting of three (3) pages, only itemizes 8.2 hours of work. The exhibit multiplies 8.2 by \$300.00 per hour to reach \$2,460.00, the sum sought by Counsel. Those figures are consistent with the rest of Counsel's fee certification. Therefore, the GRC will trust that Counsel's statement regarding 15.9 hours was a misprint and unintentional.

Borough of Longport, ATL-L-002294-09. Further, Counsel stated that an Atlantic County Superior Court judge more recently awarded a fee of \$350.00 an hour to the same attorney. He cited two other attorneys, who have received fees of \$350 per hour and that at least one award was for a fee of over \$500 per hour. *See* Counsel's Exhibits 4 through 8.

Custodian Counsel's Objections

On behalf of HTFD, the Custodian's Counsel argued that while the rate for attorney's fees has been approved at \$300 per hour, the rate is not "written in stone" and that fees as low as \$155 per hour and \$250 per hour have been approved. However, Counsel does not argue that the attorney in those cases sought an hourly rate higher than that was awarded. Moreover, the cases he cited were from 2005, eleven years ago. The Custodian's Counsel also argues that the fee should be adjusted because Counsel only achieved "very limited success" and that certain services appear excessive. However, he did not address the issue of the hourly rate.

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, 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. 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 Cnty. Prosecutor's Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found that the Complainant 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. 432 (App. Div. 2006). Further, the Council found

that 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). Accordingly, the Council ruled that the Complainant was a prevailing party entitled to an award of a reasonable attorney's fee and directed the Complainant 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 (1995)(*quoting Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. See 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. See HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (Law Div. 1996) (citing, Council Enter., Inc. v. Atl. City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)). Nor do they contemplate redundancy. Ursic v. Bethlehem Mines, 719 F.2d 670, 677 (3d Cir. 1983)(*citations omitted*).

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. See Walker, 415 N.J. Super. at 606 (*citing Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 22 (2004)). The loadstar 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 Cnty. Prosecutor, 2012 N.J. Super. Unpub. LEXIS 2752 (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 an upward adjustment of the lodestar,” but cautioned that “[o]rdinarily the facts of an OPRA case will not warrant an 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 R.P.C. § 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(b) 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 Division 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. Cnty. 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 \$2,460.00, representing 8.2 hours of work at \$300 per hour. Counsel supports the hourly rate through a recitation of his experience and years in practice. Certification at ¶1(c) and (d), ¶3, and ¶7; (Exhibit B).

The Council finds that \$300 is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. Accordingly, the Council finds that Counsel's hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters. Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-153 (May 2013) (“The rate of \$300 is reasonable for [an OPRA] practitioner . . . in this geographical area”).

b. Time Expended

To be compensable, hours expended must not be excessive, redundant, or otherwise

unnecessary. *See Hensley*, 461 U.S. at 434. The New Jersey District Court, in *PIRG v. Powell Duffryn Terminals*, 1991 U.S. Dist. LEXIS 21199 (D.N.J. 1991), reduced plaintiff's trial preparation fee request by 50%. The *PIRG* court, noting that plaintiff's counsel had tried numerous similar cases, found the work performed to be both redundant and unnecessary.

In accordance with N.J.A.C. 105-2.13(b), Counsel's time-sheets provide descriptions of the work performed. N.J.A.C. 105-2.13(b)(5). Most of Counsel's entries are broken into time increments of one tenth of an hour, with an accompanying description of the work performed. *Id.* The time entries memorialize communications, both oral and written, and identify the entity or individual with whom Counsel communicated. Similarly, the notations for reviewing and drafting of pleadings identify the specific document examined or drafted and the time spent on the task.

The GRC awarded fees to the Complainant based upon the Council's ruling of prevailing party status. By necessity, a review of a fee application must be conducted on a case-by-case basis. The GRC conducted a review of the fee application submitted. Each time entry was reviewed and considered. The Council indeed recognizes that any fees awarded will be paid from public funds. *See HIP*, 291 N.J. Super. at 167. The time expended by Counsel was evaluated in light of the work performed and the benefit to the Complainant, if any, and to determine whether it was reasonable when considered by the standards set forth in R.P.C. 1.5(a). The GRC finds that the fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). The Council also finds that, for the most part, the Counsel's fees were reasonable in light of the services rendered and the result achieved.

In support of his request for fees, Counsel attached to his Certification of Services a three (3) page chart that itemizes his hours and expenses ("Invoice"). For the period from "October 15, 2014, and November 4, 2015," Counsel billed a total of 8.2 hours for work on the file. This time included reviewing the file, legal research and review, analysis of correspondence, preparation of the Denial of Access Complaint, review and analysis of the Custodian's Statement of Information and reply to same, drafting the complaint and accompanying brief, reviewing e-mail correspondence to and/or from the GRC and/or the client, communicating with the client regarding the action, reviewing the Findings and Recommendations of the GRC, review and analysis of Interim Orders of the GRC, and drafting a certification and Exhibits for the fee application.

The Custodian's Counsel notes that the only result achieved was "a piece of paper with a header on it." While this statement is possibly intended to diminish Complainant Counsel's efforts, it is also true that most likely Counsel spent at least as much time and effort limiting the Complainant's OPRA request. There is therefore no rational basis for a downward adjustment of the loadstar amount based on the success achieved.

Regarding the reasonableness of the fee, the Custodian's Counsel argues that some of the billing was excessive, pointing specifically to an entry of 0.7 hours Complainant's Counsel spent on October 15, 2014, talking to his client and performing research. The GRC is concerned because that entry is for block billing, making it difficult to separate the reasonableness of the particular services. Moreover, the GRC agrees with the Custodian's Counsel that there should be

a reduction, considering that Complainant's Counsel bases the reasonableness of his fees partly due to his experience and familiarity with the law that he certified made basic research less necessary. Accordingly, the GRC reduces that billing entry by 0.3 hours because an experienced attorney would not need basic or preliminary research.

Moreover, the GRC disagrees with Custodian's Counsel that the amount of time expended on preparing the fee application was not reasonable. In fact, the Appellate Division has previously upheld a trial court's award of fees connected to time spent preparing the fee application. *See Courier News v. Hunterdon Cnty. Prosecutor's Office*, 378 N.J. Super. 539, 547 (App. Div., 2005)(plaintiff is also entitled to be compensated for the time spent by counsel in preparing a counsel fee petition so long as the amount charged is reasonable). *See also Tanksley v. Cook*, 360 N.J. Super 63, 67, 821 A.2d 524 (App. Div. 2003); *H.I.P. (Heightened Independence & Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc.*, 291 N.J. Super. 144, 163, 676 A.2d 1166 (Law Div. 1996); and *Robb v. Ridgewood Bd. of Educ.*, 269 N.J. Super. 394, 411, 635 A.2d 586 (Ch. Div. 1993). Therefore, the GRC allows 1.4 hours of time spent for preparing the fee application.

In sum, the GRC conducted a review of the fee application submitted. The GRC finds the Counsel's fee conforms to the requirements of N.J.A.C. 1:105-2.13(B). However, while the GRC found that the time spent on the file was mostly reasonable, it exceeds that which an experienced OPRA attorney should ordinarily require. Accordingly, the GRC disallows 0.3 hours billed time for basic pre-complaint research. For the reasons set forth above, the Council finds that the said time expended is disallowed and not reasonable. The Council finds that 7.9 hours at \$300.00 per hour is reasonable for the work performed by Counsel in the instant matter. *Carter v. Franklin Fire Dist. No. 1* (Somerset), GRC Complaint No. 2012-228 (March 2014); *Teeters*, 387 N.J. Super. 432; *Mason*, 196 N.J. 51. **Accordingly, the Executive Director recommends that the Council awards fees to Complainant's Counsel in the amount of \$2,370.00, representing 7.9 hours of service at \$300.00 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 Council finds that \$300 is a reasonable fee for attorneys of Complainant Counsel's experience representing clients before the GRC. Accordingly, the Council finds that Complainant Counsel's hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters. *Paff v. Bordentown Fire Dist. No. 2 (Burlington)*, GRC Complaint No. 2012-153 (May 2013) ("The rate of \$300 is reasonable for [an OPRA] practitioner . . . in this geographical area").

2. The GRC finds Complainant Counsel's fee conforms to the requirements of N.J.A.C. 1:105-2.13(B) However, while the GRC found that the time spent on the file was mostly reasonable, it exceeds that which an experienced OPRA attorney should ordinarily require. Accordingly, the GRC disallows 0.3 hours billed time for basic pre-complaint research. For the reasons set forth above, the Council finds that the said time expended is disallowed and not reasonable. The Council finds that 7.9 hours at \$300.00 per hour is reasonable for the work performed by Counsel in the instant matter. Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-228 (March 2014); Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Executive Director recommends that the Council awards fees to Complainant's Counsel in the amount of \$2,370.00, representing 7.9 hours of service at \$300.00 per hour.**

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

November 9, 2016



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

January 26, 2016 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2014-402

v.

Harrison Township Fire District (Gloucester)
Custodian of Record

At the January 26, 2016 public meeting, the Government Records Council (“Council”) considered the January 19, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s Counsel has failed to establish in his request for reconsideration of the Council’s October 27, 2015 Interim Order that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian’s Counsel also failed to establish that the complaint should be reconsidered based on a mistake and extraordinary circumstances. The Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the filing of this complaint and the Council’s September 29, 2015 Interim Order prove that there is a causal nexus between the complaint and the Custodian’s change in conduct. Thus, the Custodian Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). As provided for in the Council’s Order, **the Custodian shall have ten (10) business days from the date of service of this decision to object to the attorney’s fees requested. N.J.A.C. 5:105-2.13(d).**
2. Because the Complainant Counsel’s request for reconsideration was filed untimely, the Council should reject same and proceed with a determination on the issue of prevailing party attorney’s fees. N.J.A.C. 5:105-2.10.



Interim Order Rendered by the
Government Records Council
On The 26th Day of January, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 27, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**John Paff¹
Complainant**

GRC Complaint No. 2014-402

v.

**Harrison Township Fire District (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all Harrison Township Fire District (“HTFD”) executive session minutes for meetings held between March 1, 2013, and August 31, 2013.

Custodian of Record: Brian Bartholomew

Request Received by Custodian: June 14, 2014

Response Made by Custodian: June 23, 2014

GRC Complaint Received: November 26, 2014

Background

October 27, 2015 Council Meeting:

At its October 27, 2015 public meeting, the Council considered the October 20, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council’s September 29, 2015, Interim Order because he responded in the prescribed time frame by providing the responsive executive session minutes with redactions (in accordance with the Council’s Findings of the *In Camera* Examination) and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to small portions of the May 16 and June 19, 2013, executive session minutes, he timely complied with both the Council’s July 28, and September 29, 2015, Interim Orders. 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

¹ Represented by Anthony H. Ogozalek, Esq., of Beckman, Ogozalek, Paglione, Londar (Gibbsboro, NJ).

² Represented by Eric J. Riso, Esq., of Platt & Riso, P.C. (Stratford, NJ).

Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's September 29, 2015, Interim Order, 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 Council ordered disclosure of the minutes with redactions, and the Custodian complied with said order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, 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 October 28, 2015, the Council distributed its Interim Order to all parties. On November 13, 2015, the Complainant's Counsel submitted a fee application.

On the same day, the Custodian's Counsel filed a request for reconsideration of the Council's October 27, 2015 Interim Order based on a mistake and extraordinary circumstances.³ Therein, Custodian's Counsel requested that the GRC reconsider its finding that the Complainant was a prevailing party, contending that the Custodian's unlawful denial of the header information does not represent an "unjustifiable" denial of access. New Jerseyans for a Death Penalty Moratorium v. NJ Dep't of Corr., 185 N.J. 137 (2005).

On November 15, 2015, the Complainant's Counsel submitted objections to Custodian Counsel's request for reconsideration. Therein, Complainant's Counsel contended that the GRC should not accept Custodian Counsel's request for reconsideration because it was not timely filed. N.J.A.C. 5:105-2.10(b). Additionally, the Complainant's Counsel argued that the Complainant was a prevailing party because he achieved the desired result through filing the instant complaint with the GRC.

Additionally, the Complainant's Counsel filed a request for reconsideration of the Council's October 27, 2015 Interim Order based on new evidence. Therein, the Custodian's Counsel argued that on November 4, 2015, the Complainant discovered that the May 16 and

³ The Custodian's Counsel also sought guidance on whether the request for reconsideration effectively stayed the District's time frame to submit a response to the fee application. On November 20, 2015, the GRC confirmed that the time frame to submit a response to the fee application would be suspended until the Council ruled on the parties' requests for reconsideration.

June 19, 2013, executive session minutes provided to the GRC for an *in camera* review were different from minutes for the same two (2) dates that were provided to another requestor. The Complainant's Counsel asserted that this revelation calls into question whether the Custodian provided true versions of the subject minutes to the GRC for the *in camera* review. The Complainant's Counsel requested that the GRC: 1) reopen the complaint; 2) order the Custodian to provide a certification as to the discrepancy between the minutes provided to the GRC for an *in camera* review and those provided to another requestor; 3) permit the Complainant to respond to said certification; and 4) further adjudicate the complaint as necessary.

On November 30, 2015, the Custodian's Counsel submitted objections to the request for reconsideration. The Custodian's Counsel first disputed that his request for reconsideration was untimely, noting that it was signed and mailed on November 10, 2015 and subsequently e-mailed to the GRC on November 13, 2015.

The Custodian's Counsel next argued that Complainant Counsel's request for reconsideration was untimely and that no prior GRC case law supports the contention that the reconsideration time frame began at the time that the Complainant came into possession of "new evidence." The Custodian's Counsel further asserted that the GRC has already ruled on this complaint and does not have the authority to admonish or sanction the District for a discrepancy in the minutes

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian's Counsel filed the request for reconsideration of the Council's October 27, 2015 Interim Order on November 13, 2015, ten (10) business days from the issuance of the Council's Order.

Further, the Complainant's Counsel filed a request for reconsideration on November 15, 2013, twelve (12) business days from issuance of the Order. Therein, the Complainant's Counsel argued that his request for reconsideration was timely based on the date that the Complainant discovered new evidence, or on November 4, 2015.

Applicable case law holds that:

"A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a

“palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D’Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Custodian Counsel’s Request for Reconsideration

The Custodian’s Counsel requested that the Council reverse its Order holding that the Complainant was a prevailing party because the disclosure of only the header information did not amount to an “unjustifiable” denial of access. The Complainant’s Counsel filed objections in accordance with N.J.A.C. 5:105-2.10(d), arguing that the request for reconsideration was untimely. Further, Complainant’s Counsel argued that the Complainant was a prevailing party because he achieved the desired result by filing the complaint.

The GRC begins by noting that it received Custodian Counsel’s request for reconsideration via e-mail on November 13, 2015, and thus same was timely filed on the last business day.

Regarding the merits of the request for reconsideration, the Council should reject same. In accordance with precedential case law in Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51, and as discussed in the Council’s October 27, 2015 Interim Order, the filing of this complaint brought about a change in the Custodian’s conduct (disclosure of the responsive minutes with redactions). Additionally, there was a casual nexus between the filing of this complaint and relief ultimately achieved. The GRC finds the Custodian Counsel’s reliance on New Jerseyans, 185 N.J. 137, to be misplaced, as the Supreme Court in that matter was tasked with determining how several factors (including level of achievement) impacted the fees requested and the total amount ultimately awarded. In this way, if the Custodian’s Counsel believes that the relief achieved should impact the fees awarded, he is free to make such an argument in his objections to the fee application.

As the moving party, the Custodian’s Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See* Cummings, 295 N.J. Super. at 384. The Custodian’s Counsel failed to establish that the complaint should be reconsidered based on a mistake and extraordinary circumstances. The Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See* D’Atria, 242 N.J. Super. at 401. Specifically,

the filing of this complaint and the Council's September 29, 2015 Interim Order prove that there is a causal nexus between the complaint and the Custodian's change in conduct. Thus, the Custodian Counsel's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6. As provided for in the Council's Order, **the Custodian shall have ten (10) business days from the date of service of this decision to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Complainant Counsel's Request for Reconsideration

As a threshold matter, the Complainant's Counsel filed his request for reconsideration twelve (12) business days after receipt of the Council's Order, Therein, he argued that the request should be considered timely because it fell within ten (10) business days from the discovery of the new evidence. The Custodian's Counsel objected to same, asserting that no prior GRC case law supported the shift in time frame.

The GRC's regulations addressing reconsiderations provide all relevant time frames within which parties must submit requests for reconsideration and objections. However, the regulations do not provide for a separate time frame predicated on the discovery of new evidence. N.J.A.C. 5:105-2.10. For this reason, the request for reconsideration should be denied as untimely.

Accordingly, because the Complainant Counsel's request for consideration was filed untimely, the Council should reject same and proceed with a determination on the issue of prevailing party attorney's fees. N.J.A.C. 5:105-2.10.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's Counsel has failed to establish in his request for reconsideration of the Council's October 27, 2015 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian's Counsel also failed to establish that the complaint should be reconsidered based on a mistake and extraordinary circumstances. The Custodian's Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the filing of this complaint and the Council's September 29, 2015 Interim Order prove that there is a causal nexus between the complaint and the Custodian's change in conduct. Thus, the Custodian Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). As provided for in the Council's Order, **the Custodian shall have ten (10) business days from the date of service of this decision to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

2. Because the Complainant Counsel's request for reconsideration was filed untimely, the Council should reject same and proceed with a determination on the issue of prevailing party attorney's fees. N.J.A.C. 5:105-2.10.

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

Reviewed By: Joseph D. Glover
Executive Director

January 19, 2016



State of New Jersey
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

October 27, 2015 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2014-402

v.

Harrison Township Fire District (Gloucester)
Custodian of Record

At the October 27, 2015 public meeting, the Government Records Council (“Council”) considered the October 20, 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 Custodian complied with the Council’s September 29, 2015, Interim Order because he responded in the prescribed time frame by providing the responsive executive session minutes with redactions (in accordance with the Council’s Findings of the *In Camera* Examination) and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to small portions of the May 16 and June 19, 2013, executive session minutes, he timely complied with both the Council’s July 28, and September 29, 2015, Interim Orders. 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 unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s September 29, 2015, Interim Order, 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 Council ordered disclosure of the minutes with redactions, and the Custodian complied with said order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, 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).

Interim Order Rendered by the
Government Records Council
On The 27th Day of October, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: October 28, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 27, 2015 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2014-402

v.

**Harrison Township Fire District (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all Harrison Township Fire District (“HTFD”) executive session minutes for meetings held between March 1, 2013, and August 31, 2013.

Custodian of Record: Brian Bartholomew
Request Received by Custodian: June 14, 2014
Response Made by Custodian: June 23, 2014
GRC Complaint Received: November 26, 2014

Background

September 29, 2015, Council Meeting:

At its public meeting on September 29, 2015, the Council considered the September 22, 2015, *In Camera* 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 July 28, 2015, Interim Order because he responded in the prescribed time frame by providing nine (9) copies of the subject executive session minutes for an *in camera* review and simultaneously submitting certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.³**

¹ Represented by Anthony H. Ogozalek, Esq., of Beckman, Ogozalek, Paglione, Londar (Gibbsboro, NJ).

² Represented by Eric J. Riso, Esq., of Platt & Riso, P.C. (Stratford, NJ).

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If the Complainant incurred a copying or special service charge, the Custodian must certify that the record
John Paff v. Harrison Township Fire District (Gloucester), 2014-402 – Supplemental Findings and Recommendations of the Executive Director 1

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

Procedural History:

On October 1, 2015, the Council distributed its Interim Order to all parties. On October 2, 2015, the Custodian e-mailed the Complainant copies of the May 16 and June 19, 2013, executive session minutes with redactions, as specified by the Council's *in camera* review

On October 7, 2015, the Government Records Council ("GRC") received the Custodian's response to the Council's Interim Order. Therein, the Custodian certified that he complied with the Council's Interim Order by providing the Complainant copies of the subject meeting minutes via e-mail on October 2, 2015.

Analysis

Compliance

At its September 29, 2015 meeting, the Council ordered the Custodian to comply with the Council's Findings of the *in camera* examination and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On October 1, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on October 8, 2015.

On October 2, 2015, the Custodian provided to the Complainant via e-mail redacted copies of the subject minutes in accordance with the Council's *in camera* findings. On October 7, 2015, the fourth (4th) business day after receipt of the Council's Order, the GRC received the Custodian's certified confirmation of compliance.

Therefore, the Custodian complied with the Council's September 29, 2015, Interim Order because he responded in the prescribed time frame by providing the responsive executive session minutes with redactions (in accordance with the Council's Findings of the *in camera* examination) and simultaneously provided certified confirmation of compliance.

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

has been *made available* to the Complainant, but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

the 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 (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully denied access to small portions of the May 16 and June 19, 2013, executive session minutes, he timely complied with both the Council’s July 28, and September 29, 2015, Interim Orders. 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 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 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 Bd. & 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 (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 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.” 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 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.

The Complainant filed the instant complaint, requesting that: 1) the GRC find that the Custodian unlawfully denied access to the May 16 and June 19, 2013, executive session minutes; and 2) the GRC order disclosure of the records in part or whole. After reviewing the subject minutes *in camera*, the Council determined that the Custodian unlawfully denied access to same, in part. Thus, the Council ordered that the Custodian disclose the minutes with redactions, which the Custodian did on October 2, 2015. Thus, the Complainant is a prevailing party entitled to an award of attorney’s fees.

Therefore, pursuant to the Council’s September 29, 2015, Interim Order, 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. 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. 51. Specifically, the Council ordered disclosure of the minutes with redactions and the Custodian complied with said order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, 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 September 29, 2015, Interim Order because he responded in the prescribed time frame by providing the responsive executive session minutes with redactions (in accordance with the Council’s Findings of the *In Camera* Examination) and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to small portions of the May 16 and June 19, 2013, executive session minutes, he timely complied with both the Council’s July 28, and September 29, 2015, Interim Orders. 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 unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s September 29, 2015, Interim Order, 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 Council ordered disclosure of the minutes with redactions, and the Custodian complied with said order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, 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: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

October 20, 2015



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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

September 29, 2015 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2014-402

v.

Harrison Township Fire District (Gloucester)
Custodian of Record

At the September 29, 2015 public meeting, the Government Records Council (“Council”) considered the September 22, 2015 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 July 28, 2015, Interim Order because he responded in the prescribed time frame by providing nine (9) copies of the subject executive session minutes for an *in camera* review and simultaneously submitting certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.¹**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

¹ 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.

Interim Order Rendered by the
Government Records Council
On The 29th Day of September, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: October 1, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
September 29, 2015 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2014-402

v.

**Harrison Township Fire District (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all Harrison Township Fire District (“HTFD”) executive session minutes for meetings held between March 1, 2013, and August 31, 2013.

Custodian of Record: Brian Bartholomew
Request Received by Custodian: June 14, 2014
Response Made by Custodian: June 23, 2014
GRC Complaint Received: November 26, 2014

Records Submitted for *In Camera* Examination:

- Executive session minutes, dated May 16, 2013.
- Executive session minutes, dated June 19, 2013.

Background

July 28, 2015 Council Meeting:

At its July 28, 2015, public meeting, the Council considered the July 21, 2015, 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. Because OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is without authority to impose a statute of limitations where one does not exist, there is no statute of limitations barring the GRC’s adjudication of this complaint. See Mason v. City of Hoboken, 196 N.J. 51 (2008). See also N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240 (1950)

¹ Represented by Anthony H. Ogozalek, Esq., of Beckman, Ogozalek, Paglione, Londar (Gibbsboro, NJ).

² Represented by Eric J. Riso, Esq., of Platt & Riso, P.C. (Stratford, NJ).

Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.* (Interim Order dated October 29, 2013).

2. The GRC must conduct an *in camera* review of the responsive May 16, and June 19, 2013, executive session minutes to determine the validity of the Custodian's assertion that the records are exempt in their entirety under OPRA because they contain information regarding labor negotiations, ongoing litigation, and included attorney-client privileged material. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12(b)(4) and (7).
3. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁵ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 July 29, 2015, the Council distributed its Interim Order to all parties. On August 3, 2015, the GRC received the Custodian's response to the Council's Interim Order. Therein, the Custodian certified that he had provided nine (9) copies of the subject executive session minutes to the Council for an *in camera* review.

Analysis

Compliance

At its July 28, 2015, meeting, the Council ordered the Custodian to provide to the GRC the two (2) sets of executive session minutes for an *in camera* review and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On July 29, 2015, the Council distributed its Interim Order to all parties, providing the Custodian

³ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁵ "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."

five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on August 5, 2015.

On August 3, 2015, the third (3rd) business day after receipt of the Council's Order, the GRC received the Custodian's response wherein he provided nine (9) copies of the subject minutes for an *in camera* review and simultaneously submitted certified confirmation of compliance to the Executive Director.

Therefore, the Custodian properly complied with the Council's July 28, 2015, Interim Order because he responded in the prescribed time frame by providing nine (9) copies of the subject executive session minutes for an *in camera* review and simultaneously submitting certified confirmation of compliance to the Executive Director.

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

OPRA provides that "[a] government record shall not include . . . any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1. OPRA further provides that its provisions ". . . shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute . . . promulgated under the authority of any statute or Executive Order of the Governor . . ." N.J.S.A. 47:1A-9(a).

To the extent that the Open Public Meetings Act ("OPMA") provides exemptions to the disclosure of government records, those exemptions are recognized by OPRA. Id. More specifically, OPMA provides that:

A public body may exclude the public only from that portion of a meeting at which the public body discusses . . .

(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body

. . .

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could

be adversely affected request in writing that such matter or matters be discussed at a public meeting.

N.J.S.A.10:4-12(b).

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record No.	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination⁶
1.	May 16, 2013 executive session minutes	The header includes the date of the meeting and a generic description of the content of same. The first (1 st) paragraph contains a discussion of on-going labor negotiations. The second (2 nd) paragraph contains discussions of an employee discipline matter and includes advice from counsel.	Labor negotiations, personnel matters and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12(b)(4) and (7)</u>	The header information does not fall within the exemptions cited by the Custodian. However, the entirety of both paragraphs does fall under the exemptions cited. Thus, the Custodian has unlawfully denied access to the header portion of the minutes and must disclose same with redactions of the first (1st) and second (2nd) paragraph.
2.	June 19, 2013 executive session minutes	The header includes the date of the meeting and a generic description of the content of	Labor negotiations, personnel matters and attorney-client privilege. <u>N.J.S.A.</u>	The header information does not fall within the exemptions cited by the Custodian. However, the entirety of both

⁶ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted, a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

		the minutes. The first (1 st) paragraph contains discussion of on-going labor negotiations. The second (2 nd) paragraph contains discussions of an employee discipline matter and includes advice from counsel.	47:1A-1.1, <u>N.J.S.A.</u> 10:4-12(b)(4) and	paragraphs does fall under the exemptions cited. Thus, the Custodian has unlawfully denied access to the header portion of the minutes and must disclose same with redactions of the first (1st) and second (2nd) paragraph.
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Thus, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above-mentioned table.

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 complied with the Council’s July 28, 2015, Interim Order because he responded in the prescribed time frame by providing nine (9) copies of the subject executive session minutes for an *in camera* review and simultaneously submitting certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**⁷

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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

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

Reviewed By: Joseph D. Glover
Executive Director

September 22, 2015



State of New Jersey
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

July 28, 2015 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2014-402

v.

Harrison Township Fire District (Gloucester)
Custodian of Record

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 2015 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. Because OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is without authority to impose a statute of limitations where one does not exist, there is no statute of limitations barring the GRC’s adjudication of this complaint. See Mason v. City of Hoboken, 196 N.J. 51 (2008). See also N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240 (1950) Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.* (Interim Order dated October 29, 2013).
2. The GRC must conduct an *in camera* review of the responsive May 16, and June 19, 2013, executive session minutes to determine the validity of the Custodian’s assertion that the records are exempt in their entirety under OPRA because they contain information regarding labor negotiations, ongoing litigation, and included attorney-client privileged material. See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12(b)(4) and (7).
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by**

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "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."



the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

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 28th Day of July, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 29, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 28, 2015 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2014-402

v.

**Harrison Township Fire District (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all Harrison Township Fire District (“HTFD”) executive session minutes for meetings held between March 1, 2013, and August 31, 2013.

Custodian of Record: Brian Bartholomew
Request Received by Custodian: June 14, 2014
Response Made by Custodian: June 23, 2014
GRC Complaint Received: November 26, 2014

Background³

Request and Response:

On June 5, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 14, 2014, the Complainant e-mailed the Custodian noting that his initial request errantly included the dates “March 1, 2014 to August 31, 2014.” The Complainant thus clarified his initial request to reflect the appropriate dates of “March 1, 2013 to August 31, 2013.”

On June 23, 2014, the sixth (6th) business day after receipt of the clarified OPRA request, the Custodian responded in writing, stating that the responsive records are not in electronic format and that the Complainant must pay \$0.40 in applicable copy costs to provide same. Additionally, the Custodian denied access to the minutes from May 16, and June 19, 2013, claiming that those records are exempt in their entirety because they contain information pertaining to labor negotiations, ongoing litigation, and are subject to the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12(b)(4) and (7); O’Shea v. West

¹ Represented by Anthony H. Ogozalek, Esq., of Beckman, Ogozalek, Paglione, Londar (Gibbsboro, NJ).

² Represented by Eric J. Riso, Esq., of Platt & Riso, P.C. (Stratford, 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.

Milford Bd. of Educ., 391 N.J. Super. 534, 540 (App. Div. 2007)(*certif. denied*, 192 N.J. 292)(2007)).

On September 1, 2014, the Complainant sent a check to the Custodian in the amount of \$0.40. However, the Complainant requested that the Custodian explain why he could not have faxed him the responsive records. The Complainant also requested that the Custodian disclose the May 16, and June 19, 2013 minutes with redactions. On September 10, 2014, the Custodian faxed nine (9) pages of records to the Complainant and deposited the Complainant's check into HTFD's bank account.

Denial of Access Complaint:

On November 26, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant contended that the Custodian unlawfully denied access to the May 16, and June 19, 2013 minutes. The Complainant asserted that other minutes provided by the Custodian, which included start and stop times, contained at least some innocuous information that is not exempt under OPRA. The Complainant asserted that the Custodian should have disclosed the minutes with redactions because they are not inherently exempt from disclosure in their entirety. N.J.S.A. 47:1A-5(g).

Further, the Complainant asserted that he had no knowledge of the content of the minutes with the exception of the topics identified in the closed session resolutions that he received from the Custodian. The Complainant noted that the Custodian did not include in his response a document index, privilege log, or other explanation. The Complainant asserted that he was thus unable to evaluate and assess the reasonableness of the Custodian's denial. Burke v. Brandes, 429 N.J. Super. 169, 178 (App. Div. 2012).

The Complainant requested that the GRC: 1) determine that the Custodian violated OPRA by denying access to the May 16, and June 19, 2013, executive session minutes in their entirety; 2) order the Custodian to disclose the responsive records in redacted or unredacted form, but only to the extent necessary; and 3) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Statement of Information:

On December 18, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on June 14, 2015. The Custodian certified that he responded in writing on June 23, 2014, denying access to the HTFD's May 16, and June 19, 2013, minutes in their entirety.

The Custodian first argued that this complaint should be dismissed because same is time barred. Mason v. City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian contended that he last responded on September 10, 2014, by providing access to responsive records. Thus, the Complainant had until October 27, 2014, to file a Denial of Access Complaint and waited until November 26, 2014.

The Custodian next argued that the Complainant appeared to be misleading the GRC by failing to note that he submitted more than two (2) OPRA requests seeking the records at issue here. The Custodian also noted that the HTFD provided the Complainant with numerous records in response to both requests. Further, the Custodian argued that although the Complainant acknowledged receipt of records that he stated were not at issue in this complaint, such records are indeed at issue.

The Custodian stated that the HTFD acknowledges that OPRA's purpose is to maximize the public's knowledge of government but that the right to disclosure is not unlimited. Mason, 196 N.J. at 64; Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 588 (2011). The Custodian stated that OPRA provides for multiple exemptions, to include the attorney-client privilege and personnel exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; Burnett v. Cnty. of Bergen, 198 N.J. 408, 422 (2009). Moreover, the Custodian stated that OPRA also recognizes exemptions contained in the Open Public Meetings Act ("OPMA"). See O'Shea, 391 N.J. Super. at 540 (holding that OPRA "dovetails with OPMA" to exempt records under N.J.S.A. 10:4-12(b) in accordance with N.J.S.A. 47:1A-9). To this end, the Custodian contended that he lawfully denied access to the responsive minutes. N.J.S.A. 47:1A-6. The Custodian asserted that, to the extent that the minutes dealt solely with matters not subject to disclosure, he lawfully denied access to same in their entirety. Additionally, the Custodian noted that the minutes at issue here are different from the minutes he provided to the Complainant due to a change in HTFD secretaries: the new secretary began omitting the start and stop times from the minutes.⁴

Additional Submissions:

On January 8, 2015, the Complainant's Counsel e-mailed the GRC, requesting that the GRC disregard HTFD's accusation that the Complainant acted to mislead. Counsel noted that the Complainant chose not to include the prior OPRA request in this complaint because he repeated his request for the June 19, 2013, minutes in the OPRA request at issue herein.

On January 12, 2015, the Custodian's Counsel e-mailed the GRC, objecting to Complainant Counsel's reply. Counsel further reiterated prior SOI arguments as to why the Custodian properly denied access to the May 16, and June 19, 2013, minutes. O'Boyle v. Borough of Longport, 218 N.J. 168, 185 (2014).

Analysis

Statute of Limitations

As a threshold issue, the Custodian asserted in the SOI that the Complainant did not timely file his Denial of Access Complaint because the Complainant waited to file his complaint until well after forty-five (45) days from the September 10, 2014, response. The Custodian argued that the Supreme Court of New Jersey held that requestors who choose to file an

⁴ The Custodian argued that the Complainant abandoned his claim to the records under common law by failing to present any legal arguments herein. However, pursuant to N.J.S.A. 47:1A-7, the GRC only has the authority to adjudicate requests made pursuant to OPRA. See also Rowan v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013).

action to challenge a Custodian's denial must do so within forty-five (45) days. Mason, 196 N.J. 51 (2008). For this reason, the Custodian argued that the complaint must be dismissed.

In Mason v. City of Hoboken, 196 N.J. 51 (2008), the Supreme Court determined that the appropriate statute of limitations for filing a denial of access complaint *in Superior Court* was 45 days from the date of the Custodian's denial of access. The Court noted that this statute of limitations was consistent with the limitations period in actions in lieu of prerogative writs. Id. The Court further noted that "the former Right to Know Law specifically directed that litigants headed to Superior Court should proceed via an action in lieu of prerogative writs. N.J.S.A. 47:1A-4 (repealed 2002). That language does not appear in OPRA. *See* N.J.S.A. 47:1A-6." Id.

The Court also stated that:

The Legislature plainly stated that requestors denied access to public records may file an action in Superior Court or a complaint before the GRC. N.J.S.A. 47:1A-6. Those matters "shall proceed in a summary or expedited manner." Beyond that, the Legislature specifically deferred to the Supreme Court to adopt court rules "necessary to effectuate the purposes of this act." N.J.S.A. 47:1A-12. The Legislature's action was consistent with our Constitution, which vests this Court with the authority to create procedural rules *for court practices*. *See* N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240, 255 (1950).

Id. at 68 (emphasis added).

The Court therefore held that "requestors who choose to file an action in Superior Court to challenge the decision of an OPRA custodian must do so within 45 days . . ." Id. at 70. Thus, the holding in Mason, 196 N.J. 51, is limited to complaints filed in the Superior Court of New Jersey.

The New Jersey Legislature is empowered to delegate to an administrative agency the authority to promulgate rules and regulations interpreting and implementing a statute. An appellate court will defer to an agency's interpretation of a statute unless it is plainly unreasonable. The presumption of validity, however, is not without limits. If an agency's statutory interpretation is contrary to the statutory language, or if the agency's interpretation undermines the Legislature's intent, no deference is required. An appellate court's deference does not go so far as to permit an administrative agency, under the guise of an administrative interpretation, to give a statute any greater effect than is permitted by the statutory language. *See*, Reilly v. AAA Mid-Atlantic Ins. Co. of NJ, 194 N.J. 474 (2008). OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC. Therefore, the GRC is without authority to impose a statute of limitations where one does not exist. *See also* Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.* (Interim Order dated October 29, 2013) at 4.

Accordingly, because OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is without authority to impose a statute of limitations where one does not exist, there is no statute of limitations barring the GRC's

adjudication of this complaint. See Mason, 196 N.J. 51. See also N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240; Carter, GRC 2012-288 *et seq.*

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 Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁵ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Complainant disputed the Custodian’s denial of access to the May 16, and June 19, 2013, executive session minutes. The Complainant asserted that the Custodian could have provided the minutes with redactions, as some of the information contained therein likely did not

⁵ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

fall under any OPRA exemption. Conversely, the Custodian argued that the responsive minutes were exempt in their entirety under OPRA because they contained information regarding labor negotiations, ongoing litigation, and included attorney-client privileged material. N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12(b)(4) and (7). However, the GRC must review same in order to determine the full applicability of the cited exemptions.

Therefore, the GRC must conduct an *in camera* review of the responsive May 16, and June 19, 2013, executive session minutes to determine the validity of the Custodian's assertion that the records are exempt in their entirety under OPRA because they contain information regarding labor negotiations, ongoing litigation, and included attorney-client privileged material. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12(b)(4) and (7).

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. Because OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is without authority to impose a statute of limitations where one does not exist, there is no statute of limitations barring the GRC's adjudication of this complaint. *See Mason v. City of Hoboken*, 196 N.J. 51 (2008). *See also* N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240 (1950) Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.* (Interim Order dated October 29, 2013).
2. The GRC must conduct an *in camera* review of the responsive May 16, and June 19, 2013, executive session minutes to determine the validity of the Custodian's assertion that the records are exempt in their entirety under OPRA because they contain information regarding labor negotiations, ongoing litigation, and included attorney-client privileged material. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12(b)(4) and (7).
3. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction**

⁶ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁸ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

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: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

July 21, 2015

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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."