



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

Robert A. Verry
Complainant

Complaint No. 2015-156

v.

West Milford Board of Education (Passaic)
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 the Council dismisses the complaint because the Complainant withdrew it in writing via e-mail to the GRC on November 7, 2016. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 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**

**Supplemental Findings and Recommendations of the Executive Director
November 15, 2016 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2015-156

v.

**West Milford Board of Education (Passaic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of an exact copy of Terry Charles' attendance records from October 30, 2014, to November 12, 2014.

Custodian of Record: Barbara Francisco
Request Received by Custodian: May 19, 2015
Response Made by Custodian: None
GRC Complaint Received: June 1, 2015

Background

September 29, 2016 Council Meeting:

At its September 29, 2016 public meeting, the Council considered the September 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC declines to order disclosure of the responsive record because Complainant's Counsel acknowledged in his July 9, 2015 letter brief that the Custodian disclosed it to the Complainant on June 15, 2015.

2. Although the Custodian's failure to respond in the statutory time frame resulted in a "deemed" denial of access, she ultimately disclosed a responsive record on June 15,

¹ Represented by John A. Bermingham, Esq. (Mt. Bethel, PA).

² Represented by Joseph Roselle, Esq., of Schenk, Price, Smith, & King, LLP (Florham Park, NJ).

2015. 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. 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, in light of her "deemed" denial violation, the Custodian failed to bear her burden of proving that this complaint was not the catalyst for her June 15, 2015 disclosure. 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 3, 2016, the Council distributed its Interim Order to all parties.

On October 25, 2016, the Custodian's Counsel sent a letter to the Government Records Council ("GRC"), stating that the parties agreed to an attorney's fee through an independent settlement agreement. The Custodian's Counsel further stated that because no additional issues exist, this complaint was resolved in its entirety.

On November 2, 2016, the GRC sent an e-mail to the Complainant and Complainant's Counsel, advising that it received Custodian Counsel's letter. Additionally, the GRC noted that only the Complainant or Complainant's Counsel has the authority to withdraw the instant complaint. Thus, the GRC asked the Complainant (or Complainant's Counsel) to advise whether the Complainant wished to withdraw the complaint.

Having received no response from either the Complainant or Complainant's Counsel, the GRC again e-mailed the Complainant on November 7, 2016, asking whether he wished to withdraw the complaint. On that same day, the Complainant confirmed via e-mail that he wished to withdraw the complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss the complaint because the Complainant withdrew it in writing via e-mail to the GRC on November 7, 2016. Therefore, no further adjudication is required.

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

November 9, 2016



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

INTERIM ORDER

September 29, 2016 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2015-156

v.

West Milford Board of Education (Passaic)
Custodian of Record

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC declines to order disclosure of the responsive record because Complainant’s Counsel acknowledged in his July 9, 2015 letter brief that the Custodian disclosed it to the Complainant on June 15, 2015.
2. Although the Custodian’s failure to respond in the statutory time frame resulted in a “deemed” denial of access, she ultimately disclosed a responsive record on June 15, 2015. 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. 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, in light of her “deemed” denial violation, the Custodian failed to bear her burden of proving that this complaint was not the catalyst for her June 15,



2015 disclosure. 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 29th Day of September, 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: October 3, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2016 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2015-156

v.

**West Milford Board of Education (Passaic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of an exact copy of Terry Charles' attendance records from October 30, 2014, to November 12, 2014.

Custodian of Record: Barbara Francisco
Request Received by Custodian: May 19, 2015
Response Made by Custodian: None
GRC Complaint Received: June 1, 2015

Background³

Request and Response:

On May 19, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On June 1, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he requested Ms. Charles's attendance records to prove that, in the Custodian's absence, she was available to respond to the subject OPRA request in Verry v. West Milford Bd. of Educ. (Passaic), GRC Complaint No. 2014-376 (September 2015). The Complainant asserted that the Custodian refused to disclose the records to avoid prejudicing her position in Verry. The Complainant contended that, based on the foregoing, the Custodian's actions represented a knowing and willful violation.

¹ Represented by John A. Birmingham, Esq. (Mt. Bethel, PA).

² Represented by Joseph Roselle, Esq., of Schenk, Price, Smith, & King, LLP (Florham Park, 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.

The Complainant requested that the GRC: 1) determine that the Custodian's failure to respond resulted in a "deemed" denial; 2) order disclosure of all responsive records; 3) determine that the Custodian knowingly and willfully violated OPRA, thus warranting an assessment of the civil penalty; 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees; and 5) order any further relief deemed appropriate.

Statement of Information:

On June 15, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request in her e-mail inbox on May 19, 2015; however, she did not see the Complainant's OPRA request. The Custodian certified that she was not aware of the existence of the subject OPRA request until she received this complaint on June 2, 2015.

The Custodian certified that she left for vacation on May 27, 2015, or the fifth (5th) business day after apparent receipt of the request. The Custodian affirmed that, because she did not see the request, she was unable to direct the substitute custodian to respond to it in her absence.

Additional Submissions:

On July 9, 2015, the Complainant's Counsel submitted a letter brief refuting the Custodian's SOI. Therein, Counsel asserted that the Custodian, who is responsible for running the day-to-day operations of the West Milford Board of Education ("Board"), is charged with performing her "duties and responsibilities . . . efficiently, effectively and earnestly." See School Business Administrator/Board Secretary Job Description at ¶ 11. Counsel contended that there is no dispute that the Custodian "received" the Complainant's OPRA request on May 19, 2015. However, Counsel states that the Custodian argued in the SOI that she "did not see" the OPRA request within the five (5) full business days prior to departing for vacation. Counsel alleged that the Custodian's actions are indicative of "an employee who is not *efficient, effective or earnest*" (emphasis in original).

Counsel further argued that in the SOI, the Custodian admitted that 1) she failed to comply with OPRA; and 2) this complaint prompted disclosure of the responsive records, thus rendering the Complainant a prevailing party entitled to an award of attorney's fees. See Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Counsel also noted that the Custodian acknowledged that she received this complaint on June 2, 2015; however, she waited until June 15, 2015, to disclose a responsive record.⁴ Counsel argued that, put differently, the Custodian continued to withhold records for several more days. Counsel alleged that such actions, in light of Verry, 2014-376 and the implications of disclosure here, prove that the Custodian knowingly and willfully violated OPRA within the totality of the circumstances.

⁴ The GRC notes that the Custodian did not include any evidence as part of the SOI that memorialized this disclosure. However, the Complainant's Counsel did include a copy of the disclosed record as part of his letter brief.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Complainant filed the instant complaint, arguing that the Custodian violated OPRA by failing to respond within seven (7) business days. In the SOI, the Custodian certified that her e-mail account received the e-mail on May 19, 2015, but she did not see it in her inbox. The Custodian further affirmed that she left for vacation on May 27, 2015, having never seen the OPRA request. The Custodian finally certified that she was still unaware of the OPRA request until she received the instant complaint on June 2, 2015.

The evidence of record here supports that the Custodian violated OPRA by failing to respond in a timely manner. While the Custodian certified that she did not see the Complainant's OPRA request, she also certified that her e-mail account received the subject OPRA request on May 19, 2015. Specifically, a review of the OPRA request shows that the Complainant clearly identified his e-mail as such in the subject line as follows: "OPRA Request – West Milford – Terry Charles Attendance Records 10/30 – 11/12, 2014." Further, the Custodian affirmed that she was at work for five (5) business days after the OPRA request was delivered to her inbox and before departing for vacation on May 27, 2015. The GRC is not satisfied that the Custodian could have overlooked the request for five (5) full business days before leaving for vacation.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the GRC declines to order disclosure of the responsive record because Complainant's Counsel acknowledged in his July 9, 2015 letter brief that the Custodian disclosed it to the Complainant on June 15, 2015.

⁵ A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian’s failure to respond in the statutory time frame resulted in a “deemed” denial of access, she ultimately disclosed a responsive record on June 15, 2015. 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.

Also in Mason, the plaintiff submitted an OPRA request on February 9, 2004. The defendant responded on February 20, eight (8) business days later, or one day beyond the statutory limit. Id. at 79. As a result, the Court shifted the burden to the defendant to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind defendant's voluntary disclosure. Id. Because defendant's February 20 response included a copy of a memo dated February 19 (the seventh (7th) business day), advising plaintiff of pending disclosures, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. Id. at 80.

In determining whether the Complainant is a prevailing party, the GRC acknowledges that the Custodian's failure to respond in writing in a timely manner resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Thus, the burden of proving that this complaint was not the catalyst for providing the responsive records to the Complainant shifts to the Custodian pursuant to Mason, 196 N.J. at 79-80.

In this matter, the Complainant filed the instant complaint, arguing that the Custodian failed to respond to his OPRA request. The Complainant sought an order requiring that the Custodian disclose the responsive records, which the evidence of record supports that Custodian did on June 15, 2015. Thus, the GRC did not order any additional disclosures. However, the issue of prevailing party attorney's fees shifted to the Custodian to prove that this complaint did not compel the referenced disclosure.

After reviewing the facts of this complaint, the GRC is satisfied that this complaint was the catalyst for the Custodian's disclosure. The Custodian argued in the SOI that she did not see the Complainant's OPRA request in her inbox prior to leaving for vacation. Further, the Custodian argued that she did not know about the request until she received the Denial of Access Complaint on June 2, 2015. However, the Custodian did not endeavor to respond for several days, or until June 15, 2015. The GRC finds the Custodian's delay compelling in proving that the complaint brought about a change in the Custodian's conduct. Accordingly, the Custodian failed to bear her burden of proving that this complaint was not the catalyst for disclosure; thus, the Complainant prevailed in this complaint and is entitled to an award of reasonable attorney's fees.

Accordingly, 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,

in light of her “deemed” denial violation, the Custodian failed to bear her burden of proving that this complaint was not the catalyst for her June 15, 2015 disclosure. 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC declines to order disclosure of the responsive record because Complainant’s Counsel acknowledged in his July 9, 2015 letter brief that the Custodian disclosed it to the Complainant on June 15, 2015.
2. Although the Custodian’s failure to respond in the statutory time frame resulted in a “deemed” denial of access, she ultimately disclosed a responsive record on June 15, 2015. 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. 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, in light of her “deemed” denial violation, the Custodian failed to bear her burden of proving that this complaint was not the catalyst for her June 15, 2015 disclosure. 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

September 22, 2016