



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

April 25, 2017 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2015-365

v.

Port Authority of New York and New Jersey
Custodian of Record

At the April 25, 2017 public meeting, the Government Records Council (“Council”) considered the April 18, 2017 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 complaint should be dismissed because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. 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 25th Day of April, 2017

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: April 27, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 25, 2017 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2015-365

v.

**Port Authority of New York and New Jersey²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Settlement agreement that resolved Shostack v. Port Authority, Federal Case No. 2:11-CV-00177.
2. Port Authority of New York and New Jersey's ("Authority") official Open Public Records Act ("OPRA") form adopted in accordance with N.J.S.A. 47:1A-5(f).
3. The writing memorializing the Authority's formal action officially designating a custodian of record in accordance with N.J.S.A. 47:1A-1.1.

Custodian of Record: Karen Eastman
Request Received by Custodian: October 14, 2015
Response Made by Custodian: October 21, 2015
GRC Complaint Received: November 17, 2015

Background

February 21, 2017 Council Meeting:

At its February 21, 2017 public meeting, the Council considered the February 14, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's January 31, 2017 Interim Order because she responded in the prescribed time frame by certifying that the Authority adopted an official OPRA request form and simultaneously providing certified confirmation of compliance to the Executive Director.
2. Mr. Ng's response was insufficient because, although he responded in a timely manner seeking an extension of time, he failed to provide a date certain on which he

¹ Represented by Candida Griffin, Esq., of Pashman, Stein, P.C. (Hackensack, NJ).

² Represented by Margaret Taylor-Finucane, Esq. (New York, NY).

would respond. N.J.S.A. 47:1A-5(i). Further, the Authority's failure to adopt an official OPRA request form resulted in a violation of OPRA. N.J.S.A. 47:1A-5(f). Moreover, the Custodian unlawfully denied access to the Complainant's OPRA request item No. 1. However, the Custodian lawfully denied access to the Complainant's OPRA request items Nos. 2 and 3 because no records existed. Further, the Custodian timely complied with the Council's January 31, 2017 Interim Order. Additionally, the evidence of record does not indicate that either Mr. Ng's or the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither Mr. Ng's nor the Custodian's actions 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 January 31, 2017 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 Custodian adopted an official OPRA request form in compliance with the Council's 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. Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Procedural History:

On February 23, 2017, the Council distributed its Interim Order to all parties. On March 13, 2017, the Complainant's Counsel advised that the parties appeared to reach an agreement and that she did not believe submission of a fee application was necessary. On March 17, 2017, the Complainant again confirmed that no final agreement had yet been signed but that the pending deadline to notify the GRC notwithstanding, she reiterated that she did not believe a fee application would be necessary.

On March 20, 2017, the GRC e-mailed the Complainant's Counsel, advising that the final business day to notify the GRC of a settlement was March 23, 2017. The GRC allowed for an extension of an additional twenty (20) business days, or until April 21, 2017, to allow the parties to confirm with the GRC that a settlement had been reached. On April 6, 2017, the Complainant's Counsel confirmed via e-mail, which was copied to all parties, that a settlement was reached and that she had received payment.

Analysis

Prevailing Party Attorney's Fees

At its February 21, 2017 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify it of a settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On February 23, 2017, the Council distributed its Interim Order to all parties; thus, the Custodian's response was due by close of business on March 23, 2017. On March 20, 2017, the GRC extended the notification time frame until April 21, 2017, to allow the parties additional time to finalize their agreement. On April 6, 2017, the Complainant's Counsel notified the GRC that the parties reached a settlement and she received payment.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the complaint should be dismissed because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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

April 18, 2017



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

February 21, 2017 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2015-365

v.

Port Authority of New York and New Jersey
Custodian of Record

At the February 21, 2017 public meeting, the Government Records Council (“Council”) considered the February 14, 2017 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 January 31, 2017 Interim Order because she responded in the prescribed time frame by certifying that the Authority adopted an official OPRA request form and simultaneously providing certified confirmation of compliance to the Executive Director.
2. Mr. Ng’s response was insufficient because, although he responded in a timely manner seeking an extension of time, he failed to provide a date certain on which he would respond. N.J.S.A. 47:1A-5(i). Further, the Authority’s failure to adopt an official OPRA request form resulted in a violation of OPRA. N.J.S.A. 47:1A-5(f). Moreover, the Custodian unlawfully denied access to the Complainant’s OPRA request item No. 1. However, the Custodian lawfully denied access to the Complainant’s OPRA request item Nos. 2 and 3 because no records existed. Further, the Custodian timely complied with the Council’s January 31, 2017 Interim Order. Additionally, the evidence of record does not indicate that either Mr. Ng’s or the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither Mr. Ng’s nor the Custodian’s actions 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 January 31, 2017 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 Custodian adopted an official OPRA request form in compliance with the Council’s



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. Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 21st Day of February, 2017

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 23, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 21, 2017 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2015-365

v.

**Port Authority of New York and New Jersey²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Settlement agreement that resolved Shostack v. Port Authority, Federal Case No. 2:11-CV-00177.
2. Port Authority of New York and New Jersey's ("Authority") official Open Public Records Act ("OPRA") form adopted in accordance with N.J.S.A. 47:1A-5(f).
3. The writing memorializing the Authority's formal action officially designating a custodian of record in accordance with N.J.S.A. 47:1A-1.1.

Custodian of Record: Karen Eastman
Request Received by Custodian: October 14, 2015
Response Made by Custodian: October 21, 2015
GRC Complaint Received: November 17, 2015

Background

January 31, 2017 Council Meeting:

At its January 31, 2017 public meeting, the Council considered the January 24, 2017 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. Although Mr. Ng timely responded in writing to the Complainant's OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008), because he failed to provide a date certain upon which he, or the Custodian, would respond to the Complainant. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).

¹ Represented by Candida Griffin, Esq., of Pashman, Stein, P.C. (Hackensack, NJ).

² Represented by Margaret Taylor-Finucane, Esq. (New York, NY).

2. The Authority's failure to adopt an official OPRA request form following New Jersey's passage of N.J.S.A. 32:1-6.4 resulted in a violation of OPRA. N.J.S.A. 47:1A-5(f). In essence, the Authority's failure to adopt an official OPRA request form, which could be as misleading to the public as a deficient or misleading form, constitutes a denial of access. Id.; *See also* Wolosky v. City of Paterson (Passaic), GRC Complaint No. 2011-134 (Interim Order dated August 28, 2012). As such, the Authority shall either adopt the GRC's Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or create a comparable form that includes all elements of N.J.S.A. 47:1A-5(f). However, if the Authority adopted an official OPRA request form during the pendency of this complaint, the Custodian must certify to this fact and include supporting documentation.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴**
4. The Custodian unlawfully denied access to the settlement agreement responsive to the Complainant's OPRA request item No. 1. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). However, the GRC declines to order disclosure of the agreement because the Custodian provided it to the Complainant as part of the Statement of Information.
5. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request item Nos. 2 and 3 because she certified in the Statement of Information, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
6. The Council defers analysis of whether Mr. Ng and/or 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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."

⁴ 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.

Procedural History:

On February 2, 2017, the Council distributed its Interim Order to all parties. On February 9, 2017, New Jersey State Government offices were closed due to inclement weather. Nonetheless, the Custodian responded on that date to the Council's Interim Order.

Therein, the Custodian affirmed that, in response to lateral legislation in New York and New Jersey, the Authority adopted a policy and form it believed reconciled its new requirement to follow both New York's Freedom of Information Law ("FOIL") and New Jersey's OPRA. The Custodian further affirmed that the Authority also adopted an electronic request form intended to meet both the requirements of FOIL and OPRA.

The Custodian certified that, subsequent to the receipt of the Council's Order, the Authority adopted a form that complied with the statutory requirements of N.J.S.A. 47:1A-5(f). The Custodian attached the Authority's official OPRA request form as proof of compliance. The Custodian further certified that the Authority added a link to its Public Records Access webpage for those not wishing to use the electronic form.

Analysis

Compliance

At its January 31, 2017 meeting, the Council ordered the Custodian to adopt an official OPRA request form in accordance with N.J.S.A. 47:1A-5(f) and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On February 2, 2017, 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 February 9, 2017.

On February 9, 2017, New Jersey State Government offices were closed due to inclement weather. Notwithstanding the closure, the Custodian responded on that date, certifying that the Authority adopted an official OPRA request form in accordance with the Council Order. Further, the Custodian provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's January 31, 2017 Interim Order because she responded in the prescribed time frame by certifying that the Authority adopted an official OPRA request form and simultaneously providing certified confirmation of compliance to the Executive Director.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states "[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)).

Initially, Mr. Ng’s response was insufficient because, although he responded in a timely manner seeking an extension of time, he failed to provide a date certain on which he would respond. N.J.S.A. 47:1A-5(i). Further, the Authority’s failure to adopt an official OPRA request form resulted in a violation of OPRA. N.J.S.A. 47:1A-5(f). Moreover, the Custodian unlawfully denied access to the Complainant’s OPRA request item No. 1. However, the Custodian lawfully denied access to the Complainant’s OPRA request item Nos. 2 and 3 because no records existed. Further, the Custodian timely complied with the Council’s January 31, 2017 Interim Order. Additionally, the evidence of record does not indicate that either Mr. Ng’s or the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, neither Mr. Ng’s nor the Custodian’s actions 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 the GRC require the Authority to install OPRA procedures and that it violated OPRA by refusing to accept OPRA requests. Upon review of the submissions, the Council determines that the Authority violated OPRA because the Denial of Access Complaint was the catalyst for the change in the Custodian’s behavior. The Council required the Authority to adopt an official OPRA request form, which it did in compliance with the January 31, 2017 Interim Order. Thus, consistent with the Council’s prior decision in Wolosky v. City of Paterson (Passaic), GRC Complaint No. 2011-134 (Interim Order dated September 25, 2012), the Complainant is a prevailing party entitled to attorney’s fees. *See also* Paff v. Lawrence Township (Mercer), GRC 2009-24 (April 2010).

Therefore, pursuant to the Council’s January 31, 2017 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 Custodian adopted an official OPRA request form in compliance with the Council’s 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. Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council’s January 31, 2017 Interim Order because she responded in the prescribed time frame by certifying that the Authority adopted an official OPRA request form and simultaneously providing certified confirmation of compliance to the Executive Director.
2. Mr. Ng’s response was insufficient because, although he responded in a timely manner seeking an extension of time, he failed to provide a date certain on which he would respond. N.J.S.A. 47:1A-5(i). Further, the Authority’s failure to adopt an official OPRA request form resulted in a violation of OPRA. N.J.S.A. 47:1A-5(f).

Moreover, the Custodian unlawfully denied access to the Complainant's OPRA request item No. 1. However, the Custodian lawfully denied access to the Complainant's OPRA request item Nos. 2 and 3 because no records existed. Further, the Custodian timely complied with the Council's January 31, 2017 Interim Order. Additionally, the evidence of record does not indicate that either Mr. Ng's or the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither Mr. Ng's nor the Custodian's actions 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 January 31, 2017 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 Custodian adopted an official OPRA request form in compliance with the Council's 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. Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

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

February 14, 2017



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

January 31, 2017 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2015-365

v.

Port Authority of NY and NJ
Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council ("Council") considered the January 24, 2017 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. Although Mr. Ng timely responded in writing to the Complainant's OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008), because he failed to provide a date certain upon which he, or the Custodian, would respond to the Complainant. *See also Bentz v. Borough of Paramus (Bergen)*, GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).
2. The Authority's failure to adopt an official OPRA request form following New Jersey's passage of N.J.S.A. 32:1-6.4 resulted in a violation of OPRA. N.J.S.A. 47:1A-5(f). In essence, the Authority's failure to adopt an official OPRA request form, which could be as misleading to the public as a deficient or misleading form, constitutes a denial of access. *Id.*; *See also Wolosky v. City of Paterson (Passaic)*, GRC Complaint No. 2011-134 (Interim Order dated August 28, 2012). As such, the Authority shall either adopt the GRC's Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or create a comparable form that includes all elements of N.J.S.A. 47:1A-5(f). However, if the Authority adopted an official OPRA request form during the pendency of this complaint, the Custodian must certify to this fact and include supporting documentation.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

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

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

4. The Custodian unlawfully denied access to the settlement agreement responsive to the Complainant's OPRA request item No. 1. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). However, the GRC declines to order disclosure of the agreement because the Custodian provided it to the Complainant as part of the Statement of Information.
5. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request item Nos. 2 and 3 because she certified in the Statement of Information, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
6. The Council defers analysis of whether Mr. Ng and/or 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.
7. 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 31st Day of January, 2017

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 2, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2017 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2015-365

v.

**Port Authority of New York and New Jersey²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Settlement agreement that resolved Shostack v. Port Authority, Federal Case No. 2:11-CV-00177.
2. Port Authority of New York and New Jersey's ("Authority") official Open Public Records Act ("OPRA") form adopted in accordance with N.J.S.A. 47:1A-5(f).
3. The writing memorializing the Authority's formal action officially designating a custodian of record in accordance with N.J.S.A. 47:1A-1.1.

Custodian of Record: Karen Eastman
Request Received by Custodian: October 14, 2015
Response Made by Custodian: October 21, 2015
GRC Complaint Received: November 17, 2015

Background³

Request and Response:

On October 14, 2015, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On October 21, 2015, Danny Hg, Freedom of Information ("FOI") Administrator, responded in writing on behalf of the Custodian, advising the Complainant that an extension of "at least three weeks" would be necessary to review the request.

Denial of Access Complaint:

On November 17, 2015, the Complainant filed a Denial of Access Complaint with the

¹ Represented by Candida Griffin, Esq., of Pashman, Stein, P.C. (Hackensack, NJ).

² Represented by Margaret Taylor-Finucane, Esq. (New York, NY).

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.

Government Records Council (“GRC”). The Complainant stated that he has attempted to obtain a settlement agreement in Shostack for several years now. The Complainant stated that he was previously denied access to the agreement under the Authority’s FOI Code, as the agreement was not subject to disclosure under OPRA at that time. The Complainant noted that on June 26, 2015, the State Legislature enacted legislation officially recognizing that the Authority was subject to OPRA. N.J.S.A. 32:1-6.4. The Complainant stated that he subsequently attempted to obtain the agreement under OPRA on July 6, 2015, via fax and e-mail, to which the Authority did not respond. The Complainant stated that he resubmitted his OPRA request via fax on July 22, 2015, and again received no response.

The Complainant averred that on October 14, 2015, he decided to submit the subject OPRA request in one last effort to obtain the agreement. The Complainant stated that, believing that he would not receive a response, he went to the Authority’s website to seek proper transmission methods. The Complainant averred that he could not locate any information about the Authority’s OPRA procedures. The Complainant also noted that the Authority’s website did not identify a custodian of record, nor did the Authority post an official OPRA request form. The Complainant stated that he spoke with Genia Torres Rojas on the phone, who advised that he could simply submit his OPRA request through the Authority’s online FOI system. The Complainant stated that he was not comfortable submitting an OPRA request through the FOI system but did so after not receiving a response to an e-mail he had sent to Jonathan Meinen, Esq., expressing those concerns. The Complainant stated that he received a response from Danny Ng on October 21, 2015, wherein he acknowledged receipt of the request and sought an extension of “at least three (3) weeks.” However, the Complainant noted that Mr. Ng only referenced FOI and never once referenced OPRA. The Complainant stated that he received no further correspondence regarding his request.

The Complainant asserted that, as a threshold issue, the Authority cannot argue that it is not subject to OPRA because N.J.S.A. 32:1-6.4 deemed it a “public agency.” The Complainant contended that the Authority violated OPRA because Mr. Ng failed to provide a date certain on which he would respond to the OPRA request. N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway (Morris), GRC Complaint No. 2007-11 (Interim Order October 31, 2007); Paff v. Twp. of Springfield (Union), GRC Complaint No. 2008-77 (Interim Order dated June 23, 2009); Hardwick v. NJ Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008); Campbell v. NJ Turnpike Auth., GRC Complaint No. 2013-32 (November 2013). The Complainant contended that “at least three weeks” does not represent a “date certain” as is required under OPRA. Further, the Complainant contended that Mr. Ng only identified this time frame as needed for the Authority to review the request, as opposed to providing a proper response granting access.

Further, the Complainant argued that the Authority imposed unreasonable obstacles to public access under OPRA. Specifically, the Complainant argued that the Authority requires requestors to submit OPRA requests through the FOI system, which is extremely inconsistent with OPRA. The Complainant also contended that the FOI system’s failure to recognize OPRA is extremely problematic. Ultimately, the Complainant contended that the Authority’s continued rejection of OPRA requests and requirement that requestors file through the FOI system is a clear violation of OPRA.

The Complainant thus requested that the Council: 1) determine that the Authority violated OPRA by refusing to accept OPRA requests and requiring requestors to submit them through the FOI system; 2) determine that Mr. Ng violated OPRA by failing to provide a date certain in his initial response; 3) require the Authority to install procedures for OPRA requests; 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees; and 5) award any further relief the GRC deems appropriate.

Statement of Information:

On December 16, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that the Authority received the Complainant's OPRA request on October 14, 2015. The Custodian certified that Mr. Ng responded in writing on October 21, 2015, advising that the Authority would require at least three weeks to review and respond to the subject OPRA request. The Custodian certified that, in the meantime, the Authority's Law Department reviewed the request and located the responsive agreement.

Initially, the Custodian certified that she was providing the agreement to the Complainant as an attachment to the SOI. The Custodian further affirmed that no records responsive to request item Nos. 2 and 3 existed. The Custodian certified that the Authority was legally reviewing both N.J.S.A. 32:1-6.4 and the New York equivalent (making the Authority subject to the Freedom of Information Law). The Custodian averred that the Authority anticipated that it would vote on an action to implement policies and procedures consistent with the bi-state legislation at its next Board of Commissioners meeting. The Custodian thus requested that this complaint be dismissed.

Analysis

Preface

OPRA defines a "public agency" as:

[A]ny of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

N.J.S.A. 47:1A-1.1.

In the case of bi-state agencies, the United States Supreme Court has held that these entities created by compact, “are not subject to the unilateral control of any one of the states that compose the federal system.” Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 42 (1994). See also E. Paralyzed Veterans Ass’n v. Camden, 11 N.J. 389, 398 (1988)(holding that because the Delaware River Port Authority “is not the agency of a single state, but rather a public corporate instrumentality of both New Jersey and Pennsylvania[,] . . . neither creator state can unilaterally impose additional duties, powers or responsibilities upon the Authority.” There are three scenarios in which a bi-state agency may be subject to New Jersey law: (1) the compact explicitly provides for unilateral state action; (2) both states have complementary or parallel legislation; or (3) the bi-state agency impliedly consented to a single state’s jurisdiction. Ballinger v. Del. River Port Auth., 311 N.J. Super. 317, 324 (App. Div. 1998), *aff’d*, 172 N.J. 586 (2002)).

In Del. River & Bay Auth. v. NJ Pub. Emp’t Relations Comm’n, 112 N.J. Super. 160 (App. Div. 1970), *aff’d*, 58 N.J. 388 (1971), the Delaware River & Bay Authority, a bi-state agency created by compact between New Jersey and Delaware, appealed from the judgment of a New Jersey superior court affirming the Public Employment Relations Commission’s order to DRPA to hold elections under a New Jersey statute, the New Jersey Employer-Employee Relations Act. In reversing the trial court decision, the Court held that if the term “any authority” in N.J.S.A. 34:13A-3(c) applied to bi-state agencies, “it would have specifically provided for . . .” same: “[i]ts failure to do so evidences an intent not to include them because it realized bi-state agencies are controlled by the compacts entered into . . .” *Id.* at 164. See also Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 115 S.Ct 394, 130 L.Ed 2d 245 (1994).

The Council previously reviewed a bi-state agency’s status as a “public agency” under OPRA in Frey v. Delaware Valley Reg’l Planning Comm’n, GRC Complaint No. 2012-139 (June 2013). There, the Council held that the Commission was not subject to OPRA, reasoning in part that, “there is no complementary or parallel legislation . . .” designating the Commission as subject to OPRA. *Id.* at 4.

Regarding the Authority, in Dittrich v. Port Authority of NY and NJ, 2012 N.J. Super. Unpub. LEXIS 2254 (App. Div. 2012), the Appellate Division considered whether it was subject to OPRA. The Court, relying on Del. River & Bay Auth., 112 N.J. Super. 160, held that:

[T]he definitions contained in OPRA do not suggest any intent on the part of the Legislature to extend its application to bi-state agencies . . . OPRA fails to reflect any intent to exercise unilateral control over a bi-state agency’s procedures to provide public access to its records.

Id. at 9.

However, subsequent to the Court’s decision in Dittrich, 2012 N.J. Super. Unpub. LEXIS 2254, both New Jersey and New York proposed parallel legislation subjecting the Authority to both OPRA and New York’s similarly constructed Freedom of Information Law (“FOIL”). N.Y. Senate Bill 1698 (2015); N.J. Senate Bill 2183 (216th Legislature). On March 13, 2015, New York enacted NY CLS Unconsol Ch. 151, §1 Article XV-B, which provided that the Authority

would be subject to both OPRA and FOI, contingent on New Jersey enacting similar legislation. On June 26, 2015, New Jersey enacted such legislation, thereby effectively and immediately classifying the Authority as a “public agency” under OPRA. N.J.S.A. 32:1-6.4. Based on the foregoing, the GRC proceeds through the analysis with the knowledge that the Authority was subject to OPRA as of June 26, 2015, several months before the Complainant submitted the OPRA request at issue here.

Sufficiency of Response

OPRA provides that a custodian may have an extension of time to respond to a complainant’s OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i).

In Hardwick v. NJ Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008), the custodian provided the complainant with a written response to the complainant’s OPRA request. In the response, the custodian requested an extension of time to respond to said request but failed to provide a date certain upon which the requested records would be provided. The Council held that the custodian’s request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i).

Here, Mr. Ng responded in writing to the Complainant’s OPRA request on October 21, 2015, stating that “it will take *at least* three weeks” for the Authority to respond to the Complainant. (Emphasis added). Although Mr. Ng included a time frame, the inclusion of “at least” reasonably suggests an open-ended extension with only minimal expectation that the Authority would respond within “three weeks.” The GRC is not persuaded that such a characterization of an extension time frame amounts to a “date certain” as required in OPRA. N.J.S.A. 47:1A-5(i). Additionally, the fact that neither Mr. Ng nor the Custodian responded prior to the Complainant’s filing of this complaint on November 17, 2015 (or more than three (3) weeks after Mr. Ng’s initial response) further proves the open-ended nature of Mr. Ng’s response. The GRC is thus satisfied that Mr. Ng failed to provide a date certain on which he (or the Custodian) would respond, either granting access, denying access, seeking clarification, or requesting another extension of time.

Therefore, although Mr. Ng timely responded in writing to the Complainant’s OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick, GRC 2007-164, because he failed to provide a date certain upon which he, or the Custodian, would respond to the Complainant. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).

OPRA Request Form

OPRA provides that:

The custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

1. specific directions and procedures for requesting a record;
2. a statement as to whether prepayment of fees or a deposit is required;
3. the time period within which the public agency is required by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, to make the record available;
4. a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
5. space for the custodian to list reasons if a request is denied in whole or in part;
6. space for the requestor to sign and date the form;
7. space for the custodian to sign and date the form if the request is fulfilled or denied.

N.J.S.A. 47:1A-5(f).

Thus, OPRA mandates that public agencies adopt an official OPRA request form. While OPRA does not mandate that agencies adopt the GRC's OPRA request form, the GRC has required public agencies to alter OPRA request forms that are inconsistent with the requirements of N.J.S.A. 47:1A-5(f) or were potentially misleading to requestors. *See O'Shea v. Twp. of West Milford (Passaic)*, GRC Complaint No. 2007-237 (Interim Order dated December 18, 2008); *Wolosky v. City of Paterson (Passaic)*, GRC Complaint No. 2011-134 (Interim Order dated August 28, 2012).

In the instant matter, the Complainant contended that the Authority required requestors seeking to obtain records under OPRA to use the FOI form that was inconsistent with OPRA and imposed an unreasonable obstacle to public access. The Complainant also contended that the FOI system form made no reference to OPRA, which he found problematic. The Complainant further argued that both issues represented an overall violation of OPRA. The Complainant requested that the GRC determine that the Authority violated OPRA by forcing him to submit his request through the FOI system and further require the Authority to install proper OPRA procedures.

In the SOI, the Custodian certified that the Authority was still legally reviewing both the New York and New Jersey statutes but would vote to implement policies and procedures consistent with OPRA "at its next Board of Commissioners meeting." This action eventually occurred, but not until more than four (4) months after the SOI, or April 2016. Further, the Custodian confirmed that the Authority created no official OPRA request form by certifying that none existed in response to the Complainant's OPRA request item No. 2. This is presumably

beyond the FOI system form, which contains a minimal number of the elements required by N.J.S.A. 47:1A-5(f).

The GRC first notes that the Authority did eventually adopt an OPRA/FOIL policy in April 2016. *See* “Access to Port Authority Records – Enhanced Transparency and Efficiency – Port Authority Public Records Access Policy” dated April 28, 2016.⁴ Additionally, at some point after the Complainant filed this complaint, the Authority did include a reference to both OPRA and FOIL at the bottom of its electronic FOI system request form.⁵ Ultimately, the threshold issue here is whether the Authority has properly followed OPRA by adopting an official OPRA request form, as required by N.J.S.A. 47:1A-5(f).

The evidence of record does not support that the Authority adopted an official form at any time between its official designation as a “public agency” under OPRA on June 26, 2015, and the Complainant submitting the OPRA request at issue here. Further, the GRC finds the Complainant’s arguments regarding the FOI system persuasive. Notwithstanding that the Authority eventually included a minor reference to OPRA thereon, the FOI electronic form is so woefully deficient of the elements required under OPRA that it reasonably could not be considered an official OPRA request form at all. Further, the Custodian admitted that the Authority had not adopted an official OPRA request form in the SOI by certifying that no records responsive to the Complainant’s OPRA request item No. 2 existed. In looking at the plain reading of OPRA and past case law regarding deficient official OPRA request forms, the GRC finds that the Authority has violated OPRA by failing to adopt an official OPRA request in conformance to N.J.S.A. 47:1A-5(f).

Accordingly, the Authority’s failure to adopt an official OPRA request form following New Jersey’s passage of N.J.S.A. 32:1-6.4 resulted in a violation of OPRA. N.J.S.A. 47:1A-5(f). In essence, the Authority’s failure to adopt an official OPRA request form, which could be as misleading to the public as a deficient or misleading form, constitutes a denial of access. *Id.*; *See also Wolosky*, GRC 2011-134. As such, the Authority shall either adopt the GRC’s Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or create a comparable form that includes all elements of N.J.S.A. 47:1A-5(f). However, if the Authority adopted an official OPRA request form during the pendency of this complaint, the Custodian must certify to this fact and include supporting documentation.

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.

⁴ <http://corpinfo.panynj.gov/documents/Access-to-Port-Authority-Public-Records/> (viewed December 29, 2016).

⁵ <http://corpinfo.panynj.gov/pages/public-records-access-form/> (viewed December 29, 2016).

OPRA Request Item No. 1

Precedential case law provides that settlement agreements are public records subject to disclosure. *See Burnett v. Cnty. of Gloucester*, 415 N.J. Super. 506 (App. Div. 2010) at 512-13; *Paff v. Barrington Sch. Dist. (Camden)*, GRC Complaint No. 2009-55 (Interim Order dated February 23, 2010).

Here, the Complainant sought a settlement agreement in *Shostack*, Federal Case No. 2:11-CV-00177. On November 17, 2015, after the Authority failed to follow up Mr. Ng's initial correspondence, he filed the instant complaint. As part of the SOI, the Custodian disclosed the responsive agreement, but provided no lawful basis for delaying disclosure until that time. Further, the GRC should note that the settlement agreement was executed by both parties in 2012; thus, there was no question as to whether the record was disclosable at the time of the Complainant's OPRA request. *See Paff v. City of Union City (Hudson)*, GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). The evidence thus clearly supports that the Custodian unlawfully denied access to the responsive settlement agreement.

Therefore, the Custodian unlawfully denied access to the settlement agreement responsive to the Complainant's OPRA request item No. 1. N.J.S.A. 47:1A-6; *Paff*, GRC 2013-195. However, the GRC declines to order disclosure of the agreement because the Custodian provided it to the Complainant as part of the SOI.

OPRA Request Item Nos. 2 and 3

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, neither Mr. Ng nor the Custodian responded to the subject OPRA request. However, she certified in the SOI that the Authority did not maintain an official OPRA request form or record designating an official custodian of record. Additionally, there is no evidence in the record to refute the Custodian's certification. To the contrary, the record supports that no records responsive to these request items existed.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request item Nos. 2 and 3 because she certified in the SOI, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer*, GRC 2005-49.

Knowing & Willful

The Council defers analysis of whether Mr. Ng and/or 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. Although Mr. Ng timely responded in writing to the Complainant's OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008), because he failed to provide a date certain upon which he, or the Custodian, would respond to the Complainant. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).
2. The Authority's failure to adopt an official OPRA request form following New Jersey's passage of N.J.S.A. 32:1-6.4 resulted in a violation of OPRA. N.J.S.A. 47:1A-5(f). In essence, the Authority's failure to adopt an official OPRA request form, which could be as misleading to the public as a deficient or misleading form, constitutes a denial of access. *Id.*; *See also* Wolosky v. City of Paterson (Passaic), GRC Complaint No. 2011-134 (Interim Order dated August 28, 2012). As such, the Authority shall either adopt the GRC's Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or create a comparable form that includes all elements of N.J.S.A. 47:1A-5(f). However, if the Authority adopted an official OPRA request form during the pendency of this complaint, the Custodian must certify to this fact and include supporting documentation.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
4. The Custodian unlawfully denied access to the settlement agreement responsive to the Complainant's OPRA request item No. 1. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). However, the GRC declines to order disclosure of the agreement because the Custodian provided it to the Complainant as part of the Statement of Information.
5. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request item Nos. 2 and 3 because she certified in the

⁶ "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."

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.

Statement of Information, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).

6. The Council defers analysis of whether Mr. Ng and/or 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.
7. 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

January 24, 2017