



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 14, 2017 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2015-402

v.

Borough of Washington (Warren)
Custodian of Record

At the November 14, 2017 public meeting, the Government Records Council (“Council”) considered the November 8, 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 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.

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 14th Day of November, 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: November 17, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
November 14, 2017 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2015-402

v.

**Borough of Washington (Warren)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Actual existing official year-end payroll records for 2012, 2013, and 2014 or the last paystub for the Custodian for the same years.
2. Detailed vendor history activity report by vendor name for the Custodian from January 1, 2008, through present showing her personal reimbursements.
3. The last three (3) most recent cell phone statements for the phone the Custodian used as part of her employment.
4. The Custodian's employment application.
5. Records of the Custodian's continuing education courses for her certification renewal for 2012, 2013, 2014, and 2015.
6. Custodian's résumé.
7. Custodian's current financial disclosure statement ("FDS").
8. The Custodian's signed contract and relevant resolutions between her and the Borough of Washington ("Borough").
9. Complete copy of a blank Borough tort form.

Custodian of Record: Kristine Blanchard
Request Received by Custodian: November 12, 2015
Response Made by Custodian: November 24, 2015
GRC Complaint Received: December 14, 2015

Background

September 26, 2017 Council Meeting:

At its September 26, 2017 public meeting, the Council considered the September 19, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted

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

² Represented by Leslie Parikh, Esq., of Gebhardt & Keifer, P.C. (Clinton, NJ)

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 timely respond 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).
2. The Custodian's response was legally insufficient under OPRA because she failed to provide a written response that sets forth a detailed and lawful basis for each redaction. N.J.S.A. 47:1A-5(g), Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008). *See also* Scheeler v. Borough of West Cape May (Cape May), GRC Complaint No. 2014-143 (Interim Order dated April 28, 2015). The GRC notes that it declines to address whether the Custodian properly redacted home addresses because the Complainant did not take issue with the actual redactions.
3. The Custodian unlawfully denied access to responsive vendor history reports for years 2008 through the 2014. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of said records because the Chief Financial Officer disclosed same to the Complainant on August 21, 2017, as part of her legal certification sent to all parties.
4. The Custodian has borne her burden of proving that she lawfully denied access to her personal continuing education certificates because they do not fall within the definition of a "government record" for purposes of OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. *See also* Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2007-193 (April 2009) (holding that the plumbing inspector's construction official application is not a "government record" for purposes of OPRA).
5. The Custodian failed to respond timely to the Complainant's OPRA request, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian's response was insufficient because she failed to provide the specific lawful basis for redactions made to the responsive records. N.J.S.A. 47:1A-5(g). The Custodian also denied access to multiple vendor history reports. N.J.S.A. 47:1A-6. However, the Custodian ultimately provided a number of responsive records on January 6, 2016. Additionally, the Custodian lawfully denied access to copies of her continuing education course records because they are not "government records" as defined under OPRA. Further, and notwithstanding the unrelated allegations against her, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

6. The Complainant has partially 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 regarding OPRA request item No. 2. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Chief Financial Officer disclosed additional vendor history reports because of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is 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 September 28, 2017, the Council distributed its Interim Order to all parties.³ On October 27, 2017, the Complainant’s Counsel confirmed via e-mail, which was copied to Custodian’s Counsel, that the fee issue was amicably resolved.⁴

Analysis

Prevailing Party Attorney’s Fees

At its September 26, 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 of any 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 September 28, 2017, the Council distributed its Interim Order to all parties; thus, the Custodian’s response was due by close of business on October 27, 2017. On October 27, 2017, Complainant’s Counsel confirmed via e-mail, which was copied to Custodian’s Counsel, that the fee issues had been amicably resolved.

³ On October 6, 2017, Complainant’s Counsel sought an extension of time to file a request for reconsideration in the instance that a fee agreement was not reached. On the same day, the GRC granted an extension through October 27, 2017, for reconsideration.

⁴ On October 30, 2017, Complainant’s Counsel telephonically confirmed that she received a signed agreement from the Borough.

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 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.

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

November 8, 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

September 26, 2017 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2015-402

v.

Borough of Washington (Warren)
Custodian of Record

At the September 26, 2017 public meeting, the Government Records Council (“Council”) considered the September 19, 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. The Custodian did not timely respond 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).
2. The Custodian’s response was legally insufficient under OPRA because she failed to provide a written response that sets forth a detailed and lawful basis for each redaction. N.J.S.A. 47:1A-5(g), Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008). *See also* Scheeler v. Borough of West Cape May (Cape May), GRC Complaint No. 2014-143 (Interim Order dated April 28, 2015). The GRC notes that it declines to address whether the Custodian properly redacted home addresses because the Complainant did not take issue with the actual redactions.
3. The Custodian unlawfully denied access to responsive vendor history reports for years 2008 through the 2014. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of said records because the Chief Financial Officer disclosed same to the Complainant on August 21, 2017, as part of her legal certification sent to all parties.
4. The Custodian has borne her burden of proving that she lawfully denied access to her personal continuing education certificates because they do not fall within the definition of a “government record” for purposes of OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. *See also* Dittrich v. City of Hoboken (Hudson), GRC Complaint



No. 2007-193 (April 2009) (holding that the plumbing inspector's construction official application is not a "government record" for purposes of OPRA).

5. The Custodian failed to respond timely to the Complainant's OPRA request, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian's response was insufficient because she failed to provide the specific lawful basis for redactions made to the responsive records. N.J.S.A. 47:1A-5(g). The Custodian also denied access to multiple vendor history reports. N.J.S.A. 47:1A-6. However, the Custodian ultimately provided a number of responsive records on January 6, 2016. Additionally, the Custodian lawfully denied access to copies of her continuing education course records because they are not "government records" as defined under OPRA. Further, and notwithstanding the unrelated allegations against her, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

6. The Complainant has partially 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 regarding OPRA request item No. 2. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Chief Financial Officer disclosed additional vendor history reports because of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is 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 26th Day of September, 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: September 28, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 26, 2017 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2015-402

v.

**Borough of Washington (Warren)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Actual existing official year-end payroll records for 2012, 2013, and 2014 or the last paystub for the Custodian for the same years.
2. Detailed vendor history activity report by vendor name for the Custodian from January 1, 2008, through present showing her personal reimbursements.
3. The last three (3) most recent cell phone statements for the phone the Custodian used as part of her employment.
4. The Custodian's employment application.
5. Records of the Custodian's continuing education courses for her certification renewal for 2012, 2013, 2014, and 2015.
6. Custodian's résumé.
7. Custodian's current financial disclosure statement ("FDS").
8. The Custodian's signed contract and relevant resolutions between her and the Borough of Washington ("Borough").
9. Complete copy of a blank Borough tort form.

Custodian of Record: Kristine Blanchard
Request Received by Custodian: November 12, 2015
Response Made by Custodian: November 24, 2015
GRC Complaint Received: December 14, 2015

Background³

Request and Response:

On November 10, 2015, the Complainant submitted an Open Public Records Act

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

² Represented by Leslie Parikh, Esq., of Gebhardt & Keifer, P.C. (Clinton, 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.

(“OPRA”) request to the Custodian seeking the above-mentioned records. On November 12, 2015, the Custodian e-mailed the Complainant, advising that she received the relevant OPRA request on said date. On November 24, 2015, the eighth (8th) business day after receipt of the OPRA request, the Custodian responded in writing, seeking a thirty (30) day extension time to respond to the Complainant’s OPRA request.

On November 25, 2015, the Complainant e-mailed the Custodian, advising that she failed to respond within seven (7) business days and that he would not grant a thirty (30) business-day extension. The Complainant stated that he would allow until December 1, 2015, to fulfill his OPRA request.

On December 10, 2015, the Custodian sent a letter to the Complainant, providing an explanation for her extension of time. Therein, the Custodian stated that the Borough is small and responding to the Complainant’s “various requests”⁴ would take additional time, especially given the timing of Thanksgiving. The Custodian further stated that many of the records are not readily accessible. The Custodian noted that OPRA allows for extensions of time per N.J.S.A. 47:1A-1.1, and that the Borough intended to provide a response within the extended time frame.

Denial of Access Complaint:

On December 14, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian violated OPRA because she failed to respond in writing within seven (7) business days. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Further, the Complainant contended that, notwithstanding the Custodian’s untimely response, the Custodian’s extension request was unreasonable because the OPRA request sought easily identifiable records, which included some “immediate access” records. N.J.S.A. 47:1A-5(e).

The Complainant thus requested that the GRC: 1) determine that his OPRA request was “deemed” denied; 2) order the Custodian to disclose all responsive records; 3) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees; and 4) award any further relief as the GRC deems appropriate.

Supplemental Response:

On December 28, 2015, the Custodian responded in writing, seeking an additional thirty (30) days to allow her to gather the responsive records. On January 6, 2016, the Custodian responded in writing, providing the following responses to the Complainant’s OPRA request:

1. The Custodian disclosed payroll records for 2012, 2013, and 2014.
2. The Custodian disclosed vendor reports for 2014 and 2015, advising that she could not provide reports from 2008 through 2012 because the Borough switched financial systems.

⁴ The Custodian is referencing several OPRA requests that the Complainant filed for which she simultaneously sought thirty (30) day extensions of time.

3. The Custodian denied access because she does not have a Borough-issued cell phone and did not receive reimbursement for her personal cell phone.
4. The Custodian denied access because no employment application existed.
5. The Custodian denied access to her continuing education records because they were “not available.”
6. The Custodian disclosed a copy of her résumé (redacting her home address) from 2006.
7. The Custodian disclosed her 2015 FDS form (redacting her home address).
8. The Custodian disclosed her employment contract (redacting her home address).
9. The Custodian disclosed a blank copy of the Borough’s tort claim form.

Statement of Information:

On January 14, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 12, 2015, and that she responded in writing on November 24, 2015, seeking additional time because the Municipal Clerk’s Office had very limited staff and because the OPRA request was submitted during the holiday season. The Custodian noted that the Complainant objected to the extension on November 25, 2015; thereafter, the Custodian sent the Complainant a letter on December 1, 2015, providing an additional explanation for the extension. The Custodian also noted that the Borough received four (4) additional requests from the Complainant in a short time frame.

The Custodian acknowledged that her initial response fell beyond the seven (7) business days but that the delay was due to an inadvertent miscalculation. The Custodian certified that she ultimately responded on December 29, 2015, disclosing all responsive records (with redactions for the Custodian’s home address in accordance with N.J.S.A. 47:1A-1). Further, the Custodian affirmed that the Complainant made no indication that her response was deficient.

The Custodian next argued that her request for an extension was reasonable. The Custodian affirmed that she serves as both Municipal Clerk and Borough Manager. The Custodian further certified that the Complainant submitted a total of five (5) OPRA requests in a short time frame. The Custodian asserted that those requests would have caused a substantial disruption to the Borough’s operations, especially due to the holiday season. The Custodian also noted that the GRC has routinely upheld extensions, regardless of a complainant’s objection. Rivera v. City of Plainfield Police Dep’t (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010); O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); and Starkey v. NJ Dep’t of Transportation, GRC Complaint Nos. 2007-315 through 317 (February 2009). The Custodian thus argued that the Complainant’s unilateral demand for disclosure before the expiration of the extension was immaterial.

The Custodian further argued that the facts support that the Complainant should be denied prevailing party attorney’s fees. The Custodian asserted that the instant complaint was not the catalyst for her January 6, 2016 response. Mason v. City of Hoboken, 196 N.J. 51 (2008); Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). The Custodian further argued that there was no causal nexus between the complaint and her response, which was evidenced by her

extension e-mails and explanations as to why those extensions were needed. The Custodian averred that the Borough always intended to provide responsive records; thus, there was no causal nexus between the complaint and her disclosure on February 5, 2016. *See Wolosky v. Twp. of Stillwater (Sussex)*, GRC Complaint No. 2009-22 (September 2011).

Additional Submissions:⁵

On February 10, 2016, the Complainant's Counsel submitted a letter brief to refute the SOI and attached a legal certification executed by the Complainant. Therein, Counsel asserted that there were several major issues with the SOI.

Counsel first argued that the Custodian did not send a letter to the Complainant on December 1, 2015, but did so on December 10, 2015, via e-mail. *See Wolosky* certif. at ¶ 2. Counsel asserted that the Custodian attached the same letter in the SOI but with a date of December 1, 2015. Further, Counsel contended the Custodian did not respond by providing responsive records on December 29, 2015, at 1:47 a.m.; rather, she actually responded on January 6, 2016. *See Wolosky* certif. at ¶¶ 7 and 8. Counsel noted that the e-mail attached to the SOI was a forwarded e-mail. Counsel suggested that the Custodian could have concocted the e-mail for the purposes of misleading the GRC. Counsel also expressed disbelief that the Custodian remained at work until after 1:00 a.m. on December 29, 2015, to provide the responsive records when she sought another thirty (30) day extension on December 28, 2015. However, Counsel argued that, even if the GRC accepted the Custodian's "false evidence," the record reflects that the Custodian is a prevailing party. Counsel contended that even if the first thirty (30) day extension were valid, the Custodian's version of the facts shows that she provided records five (5) days after the expiration of the extension. Further, Counsel argued that the actual disclosure date of January 6, 2016, was two (2) weeks beyond the expiration of the extension and one (1) week after the GRC served the Custodian with the Denial of Access Complaint.

Counsel alleged that the Custodian knowingly took steps to falsify the SOI in order to avoid a determination that the Complainant was a prevailing party entitled to attorney's fees. Counsel argued that the foregoing facts prove that the Complainant is a prevailing party because this complaint was a catalyst for the Custodian's disclosure. *See Mason v. City of Hoboken*, 196 N.J. 51 (2008); *Jones v. Hayman*, 418 N.J. Super. 291, 297 (App. Div. 2011). Counsel further contended that the Custodian's conduct here warrants a hearing before the Office of Administrative Law to determine whether the Custodian knowingly and willfully violated OPRA and to determine the amount of prevailing party fee award.

Additionally, Counsel took issue with the Custodian's certification that she received the Complainant's OPRA request on November 12, 2015, and not November 10, 2015. Counsel

⁵ On May 13, 2016, the Custodian's Counsel requested that this complaint be consolidated with *Wolosky v. Borough of Washington (Warren)*, GRC Complaint No. 2016-19, 2016-29, and 2016-30 (currently pending adjudication). The GRC does have a long-standing policy of consolidating complaints based on the commonality of parties and issues. *Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint Nos. 2011-158 & 2011-193 (May 2013). However, after reviewing all complaints, the GRC has determined that consolidation would not be appropriate here due to the number of requested items, submissions, issues, and differences in the Complainant's representation.

noted that the Complainant sent his request via e-mail at 2:41 p.m. Counsel argued that the Custodian could not avoid her obligations under OPRA by ignoring an e-mail for two (2) days.

Next, Counsel argued that the Custodian violated OPRA by failing to provide her continuing education certifications responsive to OPRA request item No. 5. Counsel stated that New Jersey statute requires the Custodian to register as a municipal clerk, take continuing education classes, retain her certificates, and submit them to the Division of Local Government Services (“LGS”). N.J.S.A. 40A:9-133.3; N.J.S.A. 40A:9-133.10. Counsel argued that her response that records were “not available” was unlawful. Further, Counsel contended that the Custodian violated OPRA by failing to provide the lawful basis for redactions at the time of her January 6, 2016 response. N.J.S.A. 47:1A-5(i).

On February 18, 2016, the Custodian’s Counsel submitted a sur-reply, which included the Custodian’s legal certification that addressed Complainant’s Counsel’s February 10, 2016 letter brief. In explaining the date discrepancies, Counsel stated that both the December 1, 2015 letter and December 29, 2015 e-mail were working drafts that were errantly forwarded to her for attachment to the SOI. *See Custodian* certif. at ¶¶ 6 and 9. Further, Counsel asserted that the Custodian forwarded the December 29, 2015 e-mail to herself as a draft, which is why it was not sent to the Complainant and why there were no attachments. *Ibid.* Counsel noted that the Custodian sent the actual response on January 6, 2016. *See Custodian* certif. at ¶ 10. Counsel asserted that it would seem absurd that the Custodian would knowingly falsify records when she did not need to do so. Counsel noted that the December 10, 2015 letter was well within the extended time frame; thus, there was clearly no need to alter the date. Counsel also noted that the Custodian’s January 6, 2016 response was well within the second thirty (30) day extension sought on December 28, 2015.

Next, Counsel argued that the Custodian’s initial response actually came on the eighth (8th) business day. Counsel stated that the Custodian did not see the Complainant’s OPRA request on November 10, 2015, and the Borough was closed for Veterans’ Day on November 11, 2015. *See Custodian* certif. at ¶¶ 12 and 13. Counsel argued that regardless of the receipt discrepancy, the GRC has never found a knowing and willful violation where a custodian missed the response time by one (1) day. Moore v. Town of Old Bridge, GRC Complaint No. 2004-141 (July 2005); Colby v. Pittsgrove Twp. (Fire Comm’r Dist. No. 1), GRC Complaint No. 2005-88 (November 2005). Counsel alleged that the Complainant made a specious argument to detract from this issue.

Moreover, Counsel contended that the Custodian lawfully denied access to her continuing education certificates because they were not made, maintained, kept on file, or received in the course of official business. Counsel asserted that the Custodian personally maintains those records, for which she pays out of pocket at no cost to the Borough, for her license renewal. *See Custodian* certif. at ¶¶ 15, 16, 17, and 18. Further, Counsel noted that the Borough does not require the Custodian to produce and/or maintain her continuing education certificates.

Additionally, Counsel refuted that the Custodian’s response failed to include the lawful basis for five (5) redactions, contending that the redactions were self-explanatory. Counsel asserted that each home address redaction was marked “home address” (FDS form) or set in

obvious places where a home address would be present (purchase orders, letter head, résumé). Counsel further argued that the redacted entries were blacked out at specific locations per Wolosky v. Andover Reg'l Sch. Dist. (Sussex), GRC Complaint No. 2009-94 (Interim Order dated April 28, 2010). Counsel contended that New Jersey courts have determined that obvious redactions do not require *in camera* review. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005); Fisher v. Div. of Law, 400 N.J. Super. 61, 76 (App. Div. 2008). Counsel argued that the Custodian here could have provided no further information other than that which the Complainant could reasonably obtain by reviewing the disclosed records.

On June 19, 2017, the Complainant's Counsel sent a letter to the GRC, advising that the Custodian was recently charged for allegedly writing herself \$100,000 in checks. "*Former N.J. Borough Clerk Allegedly Wrote \$100K In Checks To Herself*," Lehigh Valley Live (May 13, 2017). Counsel stated that authorities raided the Custodian's Borough Office in July 2016, not long after the Complainant began "his own investigation" into the Custodian through OPRA. Counsel asserted that the Complainant believes that his investigation resulted in the Borough discovering the alleged theft, which proves that he was submitting OPRA requests for more than just "harass[ing]" purposes.

Regarding the instant complaint, Counsel stated that OPRA request item No. 1 sought the Custodian's payroll records. Counsel questioned whether the Custodian altered disclosed records. Specifically, Counsel noted that the record appeared to be copied and pasted together with some additional handwritten information. Counsel requested that the GRC require the Borough to provide an unaltered copy of the Custodian's payroll records to the Complainant.

Next, Counsel stated that OPRA request item No. 2 sought the Custodian's vendor history from 2008 to present; the Custodian provided one (1) report, two (2) invoices, and advised that no records from 2008 through 2012 could be retrieved. Counsel contended that the recent allegation raised the concern that the Custodian did not turn over all records. Counsel requested that the GRC require the Borough to conduct a new search and provide responsive records or a certification that no additional records exist.

Further, Counsel stated that OPRA request item No. 5 sought proof of CEUs. Counsel noted that the Complainant sought those records because he suspected that the Custodian was not properly licensed as a "Registered Municipal Clerk" ("RMC"). Counsel noted that the Custodian denied access, based on an assertion that the Borough did not maintain records or pay for her CEU classes. Counsel requested that, given the Custodian's questionable veracity, the GRC require the Borough to certify to the accuracy of those claims.

Finally, Counsel argued that the criminal charges bring into question whether the Custodian intentionally provided discrepancies to the GRC in explaining her failure to respond timely to the subject OPRA request. Counsel alleged that the new information now supports that she knowingly and willfully "doctor[ed]" her responses. Counsel requested that the GRC review the Custodian's conduct, especially if additional vendor records exist, and find that she knowingly and willfully violated OPRA, thereby subjecting her to a civil penalty.

On June 30, 2017, the Custodian's Counsel sought ten (10) business days to respond to Complainant Counsel's letter. On July 28, 2017, the GRC provided five (5) business days, or until August 4, 2017, to respond.

On August 4, 2017, the Custodian's Counsel responded to Complainant Counsel's letter, asserting that, contrary to the Complainant's belief, the Borough's Chief Financial Officer ("CFO") began investigating the Custodian absent any knowledge of the Complainant's OPRA request.

Regarding OPRA request item No. 1, Counsel averred that Complainant Counsel's altered payroll record allegation is without merit. However, Counsel stated that the Borough has requested its employee in charge of payroll verification to verify that the Complainant received the correct information; a legal certification would follow.

Regarding OPRA request item No. 2, Counsel stated that the Complainant received the responsive vendor history report. Counsel noted that she understood that the monies at the center of the investigation were withdrawn from the "Clerk" and "Registrar" accounts. Counsel stated that vendor history reports only track monies withdrawn from the general fund. Further, Counsel averred that the withdrawn monies would not appear on a vendor history report because they were not processed through the Borough's accounting system. Nonetheless, Counsel stated that the Borough would consult with the CFO and produce a certification stating that all records provided are those that existed.

Regarding OPRA request item No. 5, Counsel stated that the Custodian did not possess a valid RMC certificate. Counsel stated that it necessarily follows that the Borough did not possess any CEU records. Counsel also averred that the Borough has no proof of whether the Custodian attended any continuing education classes. However, Counsel offered to submit a legal certification, upon the GRC's request, regarding the search for the Custodian's CEU records.

Finally, Counsel reiterated from her February 18, 2016 sur-reply that Complainant's Counsel's allegations were baseless. Counsel also reiterated from her sur-reply that the alleged changes would not have altered the Borough's case in any way. Counsel also noted that the Borough obviously could not represent the Custodian personally any further. Thus, Counsel stated that, should the Complainant seek to impose a civil penalty, the Custodian would need to be notified and given the opportunity to defend herself.

On August 8, 2017, the GRC e-mailed the Custodian's Counsel to request legal certifications as identified in her August 4, 2017 letter. The GRC requested that Custodian's Counsel submit the relevant certifications by August 15, 2017.

On August 15, 2017, Tara St. Angelo, Esq., submitted a letter on behalf of the Custodian's Counsel, attaching a legal certification from Borough Manager Matthew Hall.⁶ Therein, regarding OPRA request item No. 1, Ms. St. Angelo noted that the CFO did not process

⁶ Ms. St. Angelo noted that the legal certification was awaiting Mr. Hall's signature but that she wanted to submit the unsigned version within the required time frame. Ms. St. Angelo subsequently provided a signed copy of Mr. Hall's legal certification to the GRC on August 21, 2017.

or store payroll records and thus could not certify to the accuracy of the Custodian's disclosure. Ms. St. Angelo stated that she instead obtained copies of the Custodian's W-2 forms⁷ (with redactions) for 2012, 2013, and 2014 through the Borough's payroll department. Ms. St. Angelo stated that the gross salary on the W-2s match the three (3) year-end pay stubs the Custodian provided to the Complainant on one (1) page in her December 28, 2015 response. Ms. St. Angelo averred that the W-2s prove that the Custodian did not alter her pay stubs in any way other than copying them to a single page.

In his legal certification, Mr. Hall addressed OPRA request item No. 5 by certifying that he thoroughly searched his office (formerly the Custodian's office). Mr. Hall certified that he did not locate any CEU records responsive to that request item.

Additionally, Ms. St. Angelo first sought an extension of time to submit the CFO's legal certification because she is only available once a week. Ms. St. Angelo thus requested time until August 18, 2017 to submit same.

On August 18, 2017, the GRC granted Ms. St. Angelo's request for an extension of time. Due to the delayed response, the GRC provided Ms. St. Angelo until August 22, 2017, to submit the remaining certifications.

On August 21, 2017, Ms. St. Angelo submitted a legal certification from the CFO. Therein, the CFO certified that she was asked to clarify accounting practices regarding the vendor history reports responsive to OPRA request item No. 2. The CFO certified that the Custodian already provided records showing optical and dental reimbursements; however, additional reimbursements for mileage, *etc.* exist between 2008 and 2011. The CFO affirmed that the Complainant asserted that the Borough did not produce all responsive records based on the current theft allegations. The CFO also affirmed that reimbursement for CEU courses would have appeared on the vendor history if the Custodian submitted valid requests for such.

The CFO certified that the money the Custodian misappropriated came from the "Clerk" and "Registrar" accounts, which are not included in the vendor history. The CFO affirmed that she ran a vendor report on her own, which included old data between 2008 and 2012 to which she had access and was attaching that report.

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

⁷ The GRC notes that W-2 forms and other federal tax forms are exempt from disclosure pursuant to 26 U.S.C.S. § 6103 (2014). *See* N.J.S.A. 47:1A-9; Lucente v. City of Union, GRC Complaint No. 2005-213 (July 2006); Gelber v. City of Hackensack (Bergen), GRC Complaint No. 2011-148 (June 2012).

N.J.S.A. 47:1A-5(g).⁸ 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, GRC 2007-11.

In the instant matter, the Custodian admitted in the SOI that she failed to respond timely in writing to the subject OPRA request. The Custodian certified that an inadvertent miscalculation caused her to respond on the eighth (8th) business day.

Therefore, the Custodian did not timely respond 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.

Finally, the GRC notes that it does not reach the issue of whether the extension was reasonable because the Complainant's OPRA request was already "deemed" denied at the time that the Custodian sought her first (1st) extension. Further, the GRC declines to address the discrepancy issues regarding the December 10, 2015 letter and January 6, 2016 e-mail response because the Custodian's supplemental certification addresses those issues.

Sufficiency of Response

OPRA provides that "[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor . . ." N.J.S.A. 47:1A-5(g).

The Council considered the issue of providing a specific lawful basis for redactions at the time of the denial in Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008). In Paff, the custodian provided access to the requested records with certain material redacted. The complainant argued that the custodian violated OPRA by failing to provide a specific lawful basis for the redactions made to the responsive records. The Council held that:

[T]he Custodian's response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction. *See Paff v. Twp. of Plainsboro*, GRC Complaint No. 2005-29, (July 2005) (ordering the custodian to provide redacted executive session minutes with a detailed and lawful basis for each redacted part.). *See also Schwarz v. NJ Dep't of Human Services*, GRC Complaint No. 2004-60, (February 2005) (setting forth the proposition that specific citations to the law

⁸ 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.

that allows a denial of access are required at the time of the denial). Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A- 5(g).

Id.

More recently, in Scheeler v. Borough of West Cape May (Cape May), GRC Complaint No. 2014-143 (Interim Order dated April 28, 2015), the custodian responded to a request for attorney bills on day of the request by providing the responsive bills with redactions. The custodian included in her response a document index identifying each redaction and the reason as “attorney-client privilege and/or attorney work product.” The Council held that, although the custodian provided the responsive records with a document index, noting the exact date of each invoice that was redacted and the reason for redaction, her response was insufficient because she did not provide a reasonable explanation of the information redacted to allow the complainant to determine whether the redactions were lawful.

In the instant complaint, the Custodian made several redactions for home addresses to the disclosed records and disclosed them without explanation. In her response, the Custodian did not identify exemptions applied to each redaction or provide specific citations to the law.⁹ In the SOI rebuttal, Complainant’s Counsel argued that the response was insufficient. Custodian’s Counsel subsequently argued in her February 18, 2016 letter brief that no lawful basis was necessary because the redactions were self-explanatory. Custodian’s Counsel argued that each redaction was demarcated by the words “home address” or in obvious places on the records. Custodian’s Counsel also asserted that the courts already addressed obvious redactions, holding that no *in camera* review would be necessary in such an instance. See Paff, 379 N.J. Super. at 355.

The GRC, however, is not persuaded that the obvious nature of the redactions alleviated the Custodian of her obligation to provide a specific lawful basis for those redactions. Moreover, the Court’s holding in Paff is specific to the Council’s obligation to review records *in camera* where it cannot determine whether the asserted basis for denial, in part or whole, actually applied to the record. While it is true here that the home address redactions are obvious and no *in camera* review is likely necessary, the Custodian was still required to provide a specific lawful basis for those redactions and failed to do so.

Accordingly, the Custodian’s response was legally insufficient under OPRA because she failed to provide a written response that sets forth a detailed and lawful basis for each redaction. N.J.S.A. 47:1A-5(g), Paff, GRC 2007-209. See also Scheeler, GRC 2014-143. The GRC declines to address whether the Custodian properly redacted home addresses because the Complainant did not take issue with the actual redactions.

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

⁹ However, the Custodian did later provide specific citations to the law in the SOI.

“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.

Initially, the GRC notes that it will not address the pay stub records based on Custodian Counsel and Ms. St. Angelo’s submissions supporting that the records provided were the records responsive to OPRA request item No. 1.

OPRA request item No. 2

Here, on January 6, 2016, the Custodian provided to the Complainant one (1) vendor history report from 2015 and two (2) 2014 vouchers. The Custodian also noted that she could not provide reports for the years 2008 through 2012 because the Borough had moved to a new financial system. The Custodian did not address why she did not disclose vendor reports for 2013 or 2014. On June 19, 2017, Complainant’s Counsel raised the question of whether the Custodian provided all responsive records based on theft allegations levied against the Custodian. Thereafter, in an August 21, 2017 legal certification, the Borough CFO provided additional reports for all years 2008 through 2014.

The evidence of record here is devoid of a lawful or valid basis by which the Custodian could have denied access to the additionally disclosed records at the time of her January 6, 2016 response. For that reason, the GRC finds that the Custodian unlawfully denied access to those additional records and should have disclosed same as part of her initial disclosure.

Accordingly, the Custodian unlawfully denied access to responsive vendor history reports for years 2008 through the 2014. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of said records because the CFO disclosed same to the Complainant on August 21, 2017, as part of her legal certification sent to all parties.

OPRA request item No. 5

OPRA defines a “government record” as:

[A]ny paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file . . . or that has been received* in the course of his or its official business by any officer[.]

Here, on January 6, 2016, the Custodian denied access to the Complainant’s OPRA request item No. 5, asserting that continuing education certificates were “not available.” In her February 10, 2016 rebuttal letter, Complainant’s Counsel argued that the Custodian should have disclosed certificates because N.J.S.A. 40A:9-133.3 and N.J.S.A. 40A:9-133.10 require that those certificates be provided to LGS. In her February 18, 2016 response, the Custodian’s Counsel argued that the certificates were not “government records” for purposes of OPRA. Rather, the Custodian’s Counsel argued that the Custodian personally maintained certificates for her license renewal, for which she personally pays. Further, Custodian’s Counsel stated that the

Borough did not require the Custodian to maintain her certificates on file; thus, none were maintained. Mr. Hall subsequently certified on August 15, 2017, that the Borough did not maintain any of the Custodian's CEU records.

In applying the arguments of both parties solely to OPRA's definition of a "government record," the GRC finds that the Custodian lawfully denied access to her certificates. Specifically, the Borough does not "make, maintain, or [keep] on file . . . or [receive]" the Custodian's certificates in the course of official business. N.J.S.A. 47:1A-1.1. Thus, the evidence of record supports that the Custodian's continuing education records are personal records not falling within the definition of a "government record." Further, although classes may be required for the Custodian to remain in good standing as a Registered Municipal Clerk ("RMC"), the record evidencing such standing is the RMC certificate. N.J.S.A. 40A:9-133.3. Further, Counsel's understanding of the law is incorrect: N.J.S.A. 40A:9-133.10 does not expressly require an RMC to submit continuing education certificates to LGS as part of its renewal application; the statute only requires "proof of having earned at least 2.0 continuing education units." Id. Finally, even if LGS were to require submission of the certificates, then LGS (and not the Borough) would receive and maintain the responsive records.

Accordingly, the Custodian has borne her burden of proving that she lawfully denied access to her personal continuing education certificates because they do not fall within the definition of a "government record" for purposes of OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. *See also* Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2007-193 (April 2009) (holding that the plumbing inspector's construction official application is not a "government record" for purposes of OPRA).

The GRC notes that this conclusion should be narrowly construed to instances where municipalities are not requiring municipal clerks to submit CEU certificates in the course of official business. Thus, the instant case would certainly be distinguishable were an agency to require an employee to maintain or keep on file CEU training certificates or other records associates with those trainings (*i.e.* reimbursements, time sheet entries, *etc.*).

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)).

Here, the Custodian failed to respond timely to the Complainant’s OPRA request, thus resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian’s response was insufficient because she failed to provide the specific lawful basis for redactions made to the responsive records. N.J.S.A. 47:1A-5(g). The Custodian also denied access to multiple vendor history reports. N.J.S.A. 47:1A-6. However, the Custodian ultimately provided a number of responsive records on January 6, 2016. Additionally, the Custodian lawfully denied access to copies of her continuing education course records because they are not “government records” as defined under OPRA. Further, and notwithstanding the unrelated allegations against her, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney’s Fees

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he 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.

In the instant matter, the Custodian initially sought, albeit untimely, a thirty (30) day extension on November 24, 2015, to comply with the Complainant's OPRA request. On December 14, 2015, within the time frame of the first (1st) extension, the Complainant filed the instant complaint (and neglected to provide a copy to the Custodian) to contest the reasonableness of the Custodian's extension. Thereafter, on December 28, 2015, the Custodian sought a second (2nd) thirty (30) day extension. The GRC sent the SOI request to the Custodian on December 30, 2015, which was the first time the Custodian received a copy of the Denial of Access Complaint. On January 6, 2016, well within the time frame of the second (2nd) extension, the Custodian disclosed records responsive to requested items Nos. 1, 2, 6, 7, 8, and 9. Further, the Custodian advised that no records existed (or were available) for item Nos. 3, 4, and 5. However, on August 21, 2017, the CFO disclosed to the Complainant several vendor history reports that the Custodian had not previously disclosed.

The first issue here is whether the instant complaint was the causal nexus for the Custodian's response on January 6, 2016. In the SOI, the Custodian argued that there was no causal link between her response and the complaint because she always intended to provide records. Further, the Custodian argued that her extension requests and explanations for those extensions proved that the complaint was not the catalyst for her response. Conversely, Complainant's Counsel argued in her SOI rebuttal that the complaint was indeed the catalyst for disclosure. Complainant's Counsel contended that the Custodian's ultimate response was two (2) weeks after the expiration of the first (1st) extension and one (1) week after the GRC served the complaint and SOI request on the Custodian. However, Complainant's Counsel also ignored the Custodian's second (2nd) request for an extension as part of her argument.

The applicable evidence regarding the Custodian's initial disclosure support that this complaint was not the causal nexus for her January 6, 2016 response. Specifically, the Custodian sought the first (1st) extension before the filing of the complaint. Subsequent to the filing of the complaint, a copy of which Complainant's Counsel neglected to send to the Borough, the Custodian sought a second (2nd) extension on December 28, 2015. This is significant because the Custodian did not receive the GRC's complaint notification and SOI request until December 30, 2015, after she sought the second (2nd) extension. Contrary to Complainant Counsel's SOI rebuttal assertions, the evidence of record supports the Custodian's intent to respond without the filing of this complaint.

However, the second issue here is whether the complaint resulted in disclosure of all responsive vendor reports. In response to the Complainant Counsel's June 19, 2017 letter, the CFO disclosed additional vendor history reports responsive to OPRA request item No. 2. The Custodian had not previously provided those reports on January 6, 2016. In fact, the Custodian responded at that time, advising that vendor history reports were not available between 2008 and 2012. The applicable evidence regarding the vendor history reports henceforth supports that this complaint was the causal nexus for disclosure; thus, the Complainant has partially achieved the desired result with respect to OPRA request item No. 2.

Accordingly, the Complainant has partially 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 regarding OPRA request item No. 2. Mason, 196 N.J. 51. Specifically, the CFO disclosed additional vendor history reports because of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is 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 did not timely respond 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).
2. The Custodian's response was legally insufficient under OPRA because she failed to provide a written response that sets forth a detailed and lawful basis for each redaction. N.J.S.A. 47:1A-5(g), Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008). See also Scheeler v. Borough of West Cape May (Cape May), GRC Complaint No. 2014-143 (Interim Order dated April 28, 2015). The GRC notes that it declines to address whether the Custodian properly redacted home addresses because the Complainant did not take issue with the actual redactions.
3. The Custodian unlawfully denied access to responsive vendor history reports for years 2008 through the 2014. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of said records because the Chief Financial Officer disclosed same to the Complainant on August 21, 2017, as part of her legal certification sent to all parties.
4. The Custodian has borne her burden of proving that she lawfully denied access to her personal continuing education certificates because they do not fall within the definition of a "government record" for purposes of OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. See also Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2007-193 (April 2009) (holding that the plumbing inspector's construction official application is not a "government record" for purposes of OPRA).
5. The Custodian failed to respond timely to the Complainant's OPRA request, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

Further, the Custodian's response was insufficient because she failed to provide the specific lawful basis for redactions made to the responsive records. N.J.S.A. 47:1A-5(g). The Custodian also denied access to multiple vendor history reports. N.J.S.A. 47:1A-6. However, the Custodian ultimately provided a number of responsive records on January 6, 2016. Additionally, the Custodian lawfully denied access to copies of her continuing education course records because they are not "government records" as defined under OPRA. Further, and notwithstanding the unrelated allegations against her, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

6. The Complainant has partially 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 regarding OPRA request item No. 2. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Chief Financial Officer disclosed additional vendor history reports because of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is 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

September 19, 2017