



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**April 26, 2016 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2015-71

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the April 19, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s February 4, 2015 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing, 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 has borne his burden of proof that he lawfully denied access to Ms. Lih’s time sheets because he (as well as Ms. Lih) certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian’s failure to respond to the Complainant’s OPRA request within the statutorily mandated time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the requested records because none existed. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. The Complainant has not 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 does not exist between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City



of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian lawfully denied access to Ms. Lih's time sheets because no records exist. Therefore, the Complainant is not 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

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 26<sup>th</sup> Day of April, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 2, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 26, 2016 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-71**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of Arlene Lih’s time sheets for each position held in the Borough of South Bound Brook (“Borough”) from September 20, 2014, through January 30, 2015.<sup>3</sup>

**Custodian of Record:** Donald E. Kazar  
**Request Received by Custodian:** February 5, 2015  
**Response Made by Custodian:** February 18, 2015  
**GRC Complaint Received:** March 13, 2015

**Background<sup>4</sup>**

**Request and Response:**

On February 4, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 5, 2015, the Complainant re-sent the subject OPRA request to the Custodian, stating that his initial request was “bounced.” On February 7, 2015, a Saturday, the Complainant asked the Custodian to confirm receipt of the OPRA request because he received undeliverable notices in several other e-mails.

On February 18, 2015, the eighth (8<sup>th</sup>) business day after receipt of the OPRA request,<sup>5</sup> the Custodian responded in writing, seeking additional time until February 26, 2015, to respond to the Complainant’s OPRA request. On March 2, 2015, the second (2<sup>nd</sup>) business day after the extended time frame had expired, the Custodian responded to the Complainant, stating that no

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> 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.

<sup>5</sup> The Borough observed President’s Day, a federal holiday, on February 16, 2015.

responsive records exist. The Custodian noted that Ms. Lih no longer “provided time sheets to this office.”

On March 10, 2015, the Complainant sought clarification of the Custodian’s response, which he believed was “misleading.” The Complainant stated that the Custodian was required to locate responsive records regardless of whether Ms. Lih currently submitted time sheets to another Borough employee. The Complainant thus asked the Custodian to confirm whether his official position was that no records exist. The Complainant provided the Custodian until March 11, 2015, to respond, notwithstanding the fact that the Custodian already exceeded the extended time frame.

#### Denial of Access Complaint:

On March 13, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond timely to his OPRA request. The Complainant acknowledged that he resent his request to the Custodian on February 5, 2015, based on an error with his initial e-mail. The Complainant asserted that the last day for the Custodian to respond was February 17, 2015, and that he did not respond to the Custodian’s February 18, 2015 request for an extension of time because it was a day late.

The Complainant contended that the Custodian, who is well versed in the statutory response time based on numerous prior GRC decisions against him, knowingly and willfully failed to respond timely to the subject OPRA requests. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-204 *et seq.* (Interim Order dated October 26, 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-233 (Interim Order dated October 26, 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-160 *et seq.* (Final Decision dated September 25, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-161 *et seq.* (Interim Order dated August 28, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2012-143 (Interim Order dated May 28, 2013). The Complainant asserted that, notwithstanding the Custodian’s request for an extension of time, he still failed to respond until March 2, 2015. The Complainant also argued that the Custodian’s denial of access appeared to be unlawful because he only stated that no records were in his possession.

The Complainant contended that the Custodian’s misleading response represented a knowing and willful attempt to hide responsive records. The Complainant contended that the Custodian was not absolved of his obligation to obtain Ms. Lih’s time sheets simply because she no longer provided them directly to him. Further, the Complainant contended that the Custodian purposely failed to provide a response to his March 10, 2015 e-mail.

The Complainant stated that, given the Custodian’s twenty-four (24) years of service, attendance at various OPRA trainings, numerous guidance from the GRC, and dozens of Denial of Access Complaints, it is assumed that the Custodian is well-versed in OPRA. The Complainant contended that the facts here prove beyond a doubt that the Custodian knowingly and willfully denied access to the responsive records. N.J.S.A. 47:1A-11.

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

Statement of Information:

On March 31, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request subsequent to February 4, 2015. The Custodian certified that his search included discussing the OPRA request with Ms. Lih. The Custodian certified that he initially responded in writing on February 18, 2015, seeking an extension of time until February 26, 2015.

The Custodian certified that no records exist because Ms. Lih no longer kept time sheets.

Additional Submissions:

On August 6, 2015, the Complainant's Counsel submitted a letter brief to dispute that no records exist. Counsel asserted that the Borough's 2014 Personnel Policy required all individuals employed after September 22, 1986, which includes Ms. Lih, to submit payroll sheets. Counsel asserted that Ms. Lih was in violation of this policy if she no longer kept time sheets. Additionally, Counsel further argued that both the former and current Custodian's Counsel stated in letters from 2006 and 2009 to then-Police Commission James Murphy and the Complainant, respectively, that an employee's failure to keep a time sheet is illegal under the Fair Labor Standards Act ("FLSA"). Counsel noted that the Custodian was copied on both letters.

Counsel contended that both the Custodian and Custodian's Counsel are affirming that they are allowing Ms. Lih to commit an illegal act if Ms. Lih is no longer keeping time sheets as required per the Borough's policy and the FLSA. 29 USCS § 201, *et seq.* Counsel noted that Ms. Lih submitted time sheets until September 19, 2014, and that it is unsettling that Ms. Lih abruptly stopped submitting time sheets. Counsel asserted that the Custodian had an obligation to disclose any records memorializing Ms. Lih's time regardless of the record title. However, Counsel asserted that this theory seems implausible, given the Borough's policy uses the term "time sheet."

Finally Counsel contended that the Custodian's continued vague responses are purposeful. Counsel asserted that here, the Custodian employed a vague response indicating that he knowingly and willfully denied access to records: 1) not in his physical possession; 2) proving that he is allowing Ms. Lih to violate the Borough's established policy; or 3) not expressly titled "time sheets." Counsel further contended that the Custodian deliberately withholding Ms. Lih's time sheets is plausible. Specifically, Counsel stated that in 2009, the Complainant filed a "complaint" with the Borough regarding Ms. Lih's attendance based on time sheets he received pursuant to a previous OPRA request.

Counsel requested that the GRC refer this complaint to the Office of Administrative Law (“OAL”) for a fact-finding hearing for testimony of all witnesses and an impartial judgement. Counsel further asserted that the Custodian’s Counsel should recuse himself from this matter because he was a witness. Counsel contended that the GRC’s failure to refer this complaint to the OAL based on possible Borough policy and FLSA violations would be “a travesty of justice” and further violate the Complainant’s rights to access records under OPRA.

On March 28, 2016, the GRC sought additional information from the Custodian and Ms. Lih. Specifically, the evidence submitted by the parties raised questions as to the existence of time sheets in one or another form. The GRC requested that the Custodian and Ms. Lih submit legal certifications answering the following:

1. Whether Ms. Lih records her time attendance on another record (such as a Microsoft Outlook® calendar) not entitled “Time and Attendance Form.” Please provide supporting documentation where applicable.
2. Whether Ms. Lih submits some form of a time sheet to another supervisor (other than the Custodian) within the Borough of South Bound Brook? If not, what was the exact date that Ms. Lih was told she no longer had to submit time sheets to a supervisor? As noted above, please provide supporting documentation where applicable.

The GRC required the Custodian and Ms. Lih to submit their certifications by close of business on March 31, 2016.

On March 31, 2016, Ms. Lih responded to the GRC’s request for additional information. Therein, Ms. Lih certified that she advised the Custodian that she no longer wished to keep time and attendance records. Ms. Lih certified that she could not recount the exact date on which she advised the Custodian of such; however, it was prior to the subject OPRA request. Ms. Lih affirmed that she no longer kept any form of time and attendance sheet.<sup>6</sup>

## Analysis

### Timeliness

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

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<sup>6</sup> The GRC notes that the Custodian did not submit a legal certification.

<sup>7</sup> 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.

The Complainant filed this complaint, requesting that the GRC determine that the request at issue here was “deemed” denied. All available evidence herein regarding the Custodian’s receipt of and written response to the Complainant’s February 4, 2015 OPRA request indicates that he failed to respond timely. Specifically, he responded in writing on February 18, 2015, the eighth (8<sup>th</sup>) business day after receipt of the request.<sup>8</sup> Accordingly, the evidence supports that this request was “deemed” denied.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s February 4, 2015 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to this 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.

### **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.

The Council has previously found that, in light of a custodian’s certification that no records responsive to the request exist, no unlawful denial of access occurred. *See Pusterhofer v. N.J. Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005).

Here, the Custodian initially responded to the Complainant, informing that Ms. Lih did not provide timesheets. The Custodian subsequently certified to this fact in the SOI. Ms. Lih also certified to this fact on March 31, 2016, noting that she advised the Custodian that she would no longer submit any type of time sheet prior to the date of the subject OPRA request. Additionally, the Complainant failed to provide any evidence in the record to rebut the Custodian’s certification.<sup>9</sup>

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to Ms. Lih’s time sheets because he (as well as Ms. Lih) certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

### **Knowing & Willful**

OPRA states that “[a] public official, officer, employee or custodian who knowingly or

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<sup>8</sup> This calculation takes into account the President’s Day holiday, which fell on February 16, 2015. The GRC notes no evidence in the record to support additional time for holidays or inclement weather closings.

<sup>9</sup> In his August 6, 2015 letter brief, the Complainant’s Counsel alleged that Ms. Lih’s failure to make and maintain time sheets was illegal per both the Borough’s policies and the FLSA. However, the GRC has no statutory authority to determine whether a Custodian is in compliance with either federal statutes or an agency’s internal policy unrelated to OPRA. N.J.S.A. 47:1A-7(b); Conley v. NJ Dep’t of Corr., GRC Complaint No. 2014-269 (September 2015).

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)).

In this matter, the Custodian’s failure to respond to the Complainant’s OPRA request within the statutorily mandated time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the requested records because none existed. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Prevailing Party Attorney’s Fees**

OPRA provides that:

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

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

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



brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7<sup>th</sup> 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 Denial of Access Complaint to dispute the Custodian's denial of access to Ms. Lih's time sheets on the basis that same did not exist. However, the Custodian certified in the SOI that no records responsive existed. Ms. Lih also corroborated this fact in a legal certification on March 31, 2016. The GRC subsequently determined that the Custodian did not unlawfully deny access to the requested records because same did not exist; thus, the Complainant has not achieved the relief sought.

Therefore, the Complainant has not 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 does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian lawfully denied access to Ms. Lih's time sheets because no records exist. Therefore, the Complainant is not 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's February 4, 2015 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing, 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 has borne his burden of proof that he lawfully denied access to Ms. Lih's time sheets because he (as well as Ms. Lih) certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian's failure to respond to the Complainant's OPRA request within the statutorily mandated time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the requested records because none existed. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do

not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. The Complainant has not 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 does not exist between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian lawfully denied access to Ms. Lih’s time sheets because no records exist. Therefore, the Complainant is not 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

Prepared By: Frank F. Caruso  
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April 19, 2016