



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

**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**April 24, 2018 Government Records Council Meeting**

Talbot B. Kramer Jr., Esq.  
(o/b/o William Juliana)  
Complainant

Complaint No. 2016-113

v.

Township of Washington (Gloucester)  
Custodian of Record

At the April 24, 2018 public meeting, the Government Records Council (“Council”) considered the April 17, 2018 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 the Complainant 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 24<sup>th</sup> Day of April, 2018

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: April 26, 2018**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Council Staff  
April 24, 2018 Council Meeting**

**Talbot B. Kramer Jr., Esq.<sup>1</sup>  
(On Behalf of William Juliana)  
Complainant**

**GRC Complaint No. 2016-113**

v.

**Township of Washington (Gloucester)<sup>2</sup>  
Custodial Agency**

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

1. All documents relating to applications to be appointed to the Family and Community Services Board (“Board”) effective January 1, 2012 through the present.
2. All applications and other writings, including electronically stored information, relating to current Board members.
3. All documents relating to any stipends, payments, salaries, or other forms of compensation to any current Board member.
4. All Board minutes from January 1, 2012 to the present.
5. All writings related to any grants, payments, sponsorships, or other benefits conferred upon any entity, incorporated or not, by the Board from January 1, 2012 to the present.
6. All documents, manuals, newsletters, or other writings (hardcopy and electronic), relating to the Board’s mission and duties.
7. All correspondence to and from the Board from January 1, 2012 to the present.
8. All documentation of any votes, resolutions, or other actions of the Board from January 1, 2012.
9. All documents, electronic or “other writings,” relating to the selection and approval process for new Board appointees.
10. All documents or electronically stored information relating to the Board’s appointment process.
11. All documents relating to the duties of the person or persons charged with selecting and appointing Board members.
12. All documents or electronically stored information reflecting the composition of the Board from January 1, 2012 to the present.

---

<sup>1</sup> As noted in the caption, the Complainant represents Mr. Juliana.

<sup>2</sup> Represented by Stuart A. Platt, Esq. (Washington Township, NJ). Previously represented by Joe Alacqua, Esq. (Washington Township, NJ).

**Custodian of Record:** Jill S. McCrea<sup>3</sup>  
**Request Received by Custodian:** February 29, 2016  
**Response Made by Custodian:** March 17, 2016  
**GRC Complaint Received:** April 18, 2016

### Background

#### February 27, 2018 Council Meeting:

At its February 27, 2018 public meeting, the Council considered the February 20, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The current Custodian complied with the Council's January 30, 2018 Interim Order because he responded in the prescribed time frame fulfilling all requirements of the Order. Further, the current Custodian simultaneously provided certified confirmation of compliance to Council Staff.
2. The Custodian's failure to respond in the statutory time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Also, the Custodian's untimely response was insufficient because she failed to address each request item individually. Further, although the Custodian disclosed a number of records, the current Custodian's compliance revealed that additional records responsive to the OPRA request were not provided. For these additional records, the Custodian unlawfully denied access. N.J.S.A. 47:1A-6. However, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's January 30, 2018 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council ordered the Township to disclose records, which the current Custodian did on February 8, 2018. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees,**

---

<sup>3</sup> The current Custodian of Record is Leo F. Selb, Jr.

**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 March 1, 2018, the Council distributed its Interim Order to all parties. On April 2, 2018, the Complainant confirmed via e-mail, which was copied to Custodian's Counsel, that the fee issue was amicably resolved. The Complainant included as part of his e-mail a "Stipulation of Dismissal" executed by both parties.

Analysis

Prevailing Party Attorney's Fees

At its February 27, 2018 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 would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On March 1, 2018, the Council distributed its Interim Order to all parties; thus, the parties' response was due by close of business on April 2, 2018. On April 2, 2018, the Complainant confirmed via e-mail that the parties settled the fee issue and included a signed "Stipulation of Dismissal."

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

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

April 17, 2018



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**February 27, 2018 Government Records Council Meeting**

Talbot B. Kramer Jr., Esq.  
(o/b/o William Juliana)  
Complainant

Complaint No. 2016-113

v.

Township of Washington (Gloucester)  
Custodian of Record

At the February 27, 2018 public meeting, the Government Records Council (“Council”) considered the February 20, 2018 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council’s January 30, 2018 Interim Order because he responded in the prescribed time frame fulfilling all requirements of the Order. Further, the current Custodian simultaneously provided certified confirmation of compliance to Council Staff.
2. The Custodian’s failure to respond in the statutory time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Also, the Custodian’s untimely response was insufficient because she failed to address each request item individually. Further, although the Custodian disclosed a number of records, the current Custodian’s compliance revealed that additional records responsive to the OPRA request were not provided. For these additional records, the Custodian unlawfully denied access. N.J.S.A. 47:1A-6. However, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s January 30, 2018 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council ordered the Township to disclose records, which the current Custodian did on February 8, 2018. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based**

*New Jersey is an Equal Opportunity Employer • Printed on Recycled paper and Recyclable*



**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 27<sup>th</sup> Day of February, 2018

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: March 1, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
February 27, 2018 Council Meeting**

**Talbot B. Kramer Jr., Esq.<sup>1</sup>  
(On Behalf of William Juliana)  
Complainant**

**GRC Complaint No. 2016-113**

v.

**Township of Washington (Gloucester)<sup>2</sup>  
Custodial Agency**

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

1. All documents relating to applications to be appointed to the Family and Community Services Board (“Board”) effective January 1, 2012 through the present.
2. All applications and other writings, including electronically stored information, relating to current Board members.
3. All documents relating to any stipends, payments, salaries, or other forms of compensation to any current Board member.
4. All Board minutes from January 1, 2012 to the present.
5. All writings related to any grants, payments, sponsorships, or other benefits conferred upon any entity, incorporated or not, by the Board from January 1, 2012 to the present.
6. All documents, manuals, newsletters, or other writings (hardcopy and electronic), relating to the Board’s mission and duties.
7. All correspondence to and from the Board from January 1, 2012 to the present.
8. All documentation of any votes, resolutions, or other actions of the Board from January 1, 2012.
9. All documents, electronic or “other writings,” relating to the selection and approval process for new Board appointees.
10. All documents or electronically stored information relating to the Board’s appointment process.
11. All documents relating to the duties of the person or persons charged with selecting and appointing Board members.
12. All documents or electronically stored information reflecting the composition of the Board from January 1, 2012 to the present.

---

<sup>1</sup> As noted in the caption, the Complainant represents Mr. Juliana.

<sup>2</sup> Represented by Stuart A. Platt, Esq. (Washington Township, NJ). Previously represented by Joe Alacqua, Esq. (Washington Township, NJ).

**Custodian of Record:** Jill S. McCrea<sup>3</sup>  
**Request Received by Custodian:** February 29, 2016  
**Response Made by Custodian:** March 17, 2016  
**GRC Complaint Received:** April 18, 2016

### Background

#### January 30, 2018 Council Meeting:

At its January 30, 2018 public meeting, the Council considered the January 23, 2018 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian's response was insufficient because she failed to respond in writing to each individual request item. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. The Custodian may have unlawfully denied access to records responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian shall address each request item and identify which of those records provided correlate to which OPRA request item. The Custodian shall also disclose any outstanding records that exist but that were not initially provided to the Complainant. Finally, if records for a particular item do not exist, the Custodian must certify to this fact.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> to the Council Staff.<sup>5</sup>**

---

<sup>3</sup> The current Custodian of Record is Leo F. Selb, Jr.

<sup>4</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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



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

#### Procedural History:

On February 1, 2018, the Council distributed its Interim Order to all parties. On February 8, 2018, the Custodian e-mailed the Complainant a response addressing each request item and disclosing 216 pages of records.

On February 8, 2018, the current Custodian responded to the Interim Order. Therein, the Custodian certified that he was unable to identify those records previously provided by the Custodian because the Township did not maintain any documentation on the OPRA request. Notwithstanding, the current Custodian affirmed that he was responding to each individual item and disclosing over 200 pages of records. The current Custodian also included an item by item response identifying those records that applied to each. The current Custodian noted that he redacted telephone numbers and e-mail addresses from some of the records in accordance with the privacy interest exemption. N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009). Finally, the current Custodian certified that no records responsive to OPRA request item No. 1 existed.

#### Analysis

#### Compliance

At its January 30, 2018 meeting, the Council ordered the Custodian to address each OPRA request item identifying which records already disclosed were responsive. Further, the Council ordered the Custodian to disclose any outstanding records or identify whether any records existed for each item. Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to Council Staff. On February 1, 2018, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on February 8, 2018.

On February 8, 2018, the current Custodian sent the Complainant his response to the OPRA request via e-mail attaching a .pdf file containing over 200 pages of records. On the same day, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the current Custodian affirmed that he could not determine which documents were already provided because there was no record of the Custodian's original response on file. Further, the current Custodian certified that he responded to the OPRA request item by item disclosing records. Finally, the current Custodian certified that no records existed for OPRA request item No. 1.

Therefore, the current Custodian complied with the Council's January 30, 2018 Interim Order because he responded in the prescribed time frame fulfilling all requirements of the Order. Further, the current Custodian simultaneously provided certified confirmation of compliance to Council Staff.

### **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)).

In this matter, the Custodian's failure to respond in the statutory time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Also, the Custodian's untimely response was insufficient because she failed to address each request item individually. Further, although the Custodian disclosed a number of records, the current Custodian's compliance revealed that additional records responsive to the OPRA request were not provided. For these additional records, the Custodian unlawfully denied access. N.J.S.A. 47:1A-6. However, 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. Further, the Supreme Court expressed 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, an attorney representing a client, filed this complaint arguing that it was unclear whether the Custodian disclosed all responsive records. Specifically, the Complainant argued that the Custodian did not respond to each request item; rather, she simply disclosed a number of records. The Complainant asserted that some of the records seemed unresponsive and that the Custodian's response appeared incomplete. In the SOI, the Custodian vaguely certified that she disclosed records to the Complainant once they became available. After reviewing the facts of this complaint, the Council found that it could not verify whether all records were provided. Based on this, the Council ordered the Custodian to respond to each item disclosing records, certifying whether records were already provided, and/or certifying if no records existed. The current Custodian responded to the Interim Order addressing each request item and certifying that he disclosed over 200 pages of records to the Complainant. A review of the current Custodian's disclosure indicates that a number of new records were disclosed as part of compliance. Thus, this complaint was the causal nexus for said disclosure and the Complainant is a prevailing party entitled to a fee award.

Therefore, pursuant to the Council's January 30, 2018 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council ordered the Township to disclose records, which the current Custodian did on February 8, 2018. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

## Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The current Custodian complied with the Council's January 30, 2018 Interim Order because he responded in the prescribed time frame fulfilling all requirements of the Order. Further, the current Custodian simultaneously provided certified confirmation of compliance to Council Staff.
2. The Custodian's failure to respond in the statutory time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Also, the Custodian's untimely response was insufficient because she failed to address each request item individually. Further, although the Custodian disclosed a number of records, the current Custodian's compliance revealed that additional records responsive to the OPRA request were not provided. For these additional records, the Custodian unlawfully denied access. N.J.S.A. 47:1A-6. However, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's January 30, 2018 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council ordered the Township to disclose records, which the current Custodian did on February 8, 2018. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

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

February 20, 2018



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**January 30, 2018 Government Records Council Meeting**

Talbot B. Kramer Jr., Esq.  
(o/b/o William Juliana)  
Complainant

Complaint No. 2016-113

v.

Township of Washington (Gloucester)  
Custodian of Record

At the January 30, 2018 public meeting, the Government Records Council (“Council”) considered the January 23, 2018 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian’s response was insufficient because she failed to respond in writing to each individual request item. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. The Custodian may have unlawfully denied access to records responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. The Custodian shall address each request item and identify which of those records provided correlate to which OPRA request item. The Custodian shall also disclose any outstanding records that exist but that were not initially provided to the Complainant. Finally, if records for a particular item do not exist, the Custodian must certify to this fact.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**



**redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Council Staff.<sup>2</sup>**

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

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of January, 2018

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 1, 2018**

---

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

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
January 30, 2018 Council Meeting**

**Talbot B. Kramer Jr., Esq.<sup>1</sup>  
(On Behalf of William Juliana)  
Complainant**

**GRC Complaint No. 2016-113**

v.

**Township of Washington (Gloucester)<sup>2</sup>  
Custodial Agency**

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

1. All documents relating to applications to be appointed to the Family and Community Services Board (“Board”) effective January 1, 2012 through the present.
2. All applications and other writings, including electronically stored information, relating to current Board members.
3. All documents relating to any stipends, payments, salaries, or other forms of compensation to any current Board member.
4. All Board minutes from January 1, 2012 to the present.
5. All writings related to any grants, payments, sponsorships, or other benefits conferred upon any entity, incorporated or not, by the Board from January 1, 2012 to the present.
6. All documents, manuals, newsletters, or other writings (hardcopy and electronic), relating to the Board’s mission and duties.
7. All correspondence to and from the Board from January 1, 2012 to the present.
8. All documentation of any votes, resolutions, or other actions of the Board from January 1, 2012.
9. All documents, electronic or “other writings,” relating to the selection and approval process for new Board appointees.
10. All documents or electronically stored information relating to the Board’s appointment process.
11. All documents relating to the duties of the person or persons charged with selecting and appointing Board members.
12. All documents or electronically stored information reflecting the composition of the Board from January 1, 2012 to the present.

---

<sup>1</sup> As noted in the caption, the Complainant represents Mr. Juliana.

<sup>2</sup> Represented by Stuart A. Platt, Esq. (Washington Township, NJ). Previously represented by Joe Alacqua, Esq. (Washington Township, NJ).

Talbot B. Kramer, Jr., Esq. (On Behalf of William Juliana) v. Township of Washington (Gloucester), 2016-113 – Findings and Recommendations of the Council Staff



**Custodian of Record:** Jill S. McCrea  
**Request Received by Custodian:** February 29, 2016  
**Response Made by Custodian:** March 17, 2016  
**GRC Complaint Received:** April 18, 2016

### **Background**<sup>3</sup>

#### **Request and Response:**

On February 26, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 17, 2016, the thirteenth (13<sup>th</sup>) business day after receipt of the OPRA request, the Custodian responded in writing providing a number of records to the Complainant via e-mail.

#### **Denial of Access Complaint:**

On April 18, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to timely respond to the Complainant’s OPRA request. Additionally, the Complainant argued that the Custodian provided several records that were not responsive to the OPRA request in the form of ordinances, resolutions, and “Student Counseling” pamphlets. The Complainant also argued that the Custodian may not have disclosed all responsive meeting minutes, but that the response was unclear as to those records that did or did not exist.

#### **Statement of Information:**

On June 2, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on February 29, 2016. The Custodian certified that her search included sending the OPRA request to the Administration Department. The Custodian certified that she responded in writing on March 17, 2016 disclosing a number of records.

The Custodian contended that responsive records were not immediately available from the Administration Department. The Custodian asserted that she forwarded to the Complainant all records received from that Department upon receipt.

### **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.

---

<sup>3</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. Talbot B. Kramer, Jr., Esq. (On Behalf of William Juliana) v. Township of Washington (Gloucester), 2016-113 – Findings and Recommendations of the Council Staff

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>4</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).

The Complainant filed the instant complaint contending that the Custodian failed to timely respond to his OPRA request. In the SOI, the Custodian certified that she received the subject OPRA request on February 29, 2016 and did not respond until March 17, 2016, or thirteen (13) business days after receipt. Thus, the evidence of record supports that the Custodian failed to timely respond to the Complainant's OPRA request.

Accordingly, the Custodian did not bear her burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

### **Sufficiency of Response**

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that "[t]he Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g)."

Here, the Custodian responded to the Complainant's OPRA request providing a number of records. In the Denial of Access Complaint, the Complainant contended that the response equated to a "data dump" containing nonresponsive records. Further, the Complainant alleged that certain responsive meeting minutes appeared to be omitted, and that it was unclear whether records existed for a particular request item. In the SOI, the Custodian simply stated that she provided records to the Complainant after receiving them from the Administration Department.

In applying the Council's decision in Paff to the instant complaint, it is clear that the Custodian's response was insufficient. Specifically, the GRC cannot tell whether the Custodian provided records for each request item or whether no records for a particular item existed. Further, while it may be possible to match information contained in certain records with the request items, the Paff decision places a burden on the Custodian to address each item. It is simply not possible to make a determination on whether the Custodian provided all records that existed based on her initial response and subsequent brief explanation in the SOI.

---

<sup>4</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.  
Talbot B. Kramer, Jr., Esq. (On Behalf of William Juliana) v. Township of Washington (Gloucester), 2016-113 – Findings and Recommendations of the Council Staff

Accordingly, the Custodian's response was insufficient because she failed to respond in writing to each individual request item. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272.

### **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.

Initially, the GRC notes that a majority of the Complainant's OPRA request items seek "all documents," "writings," and/or "electronically stored information." These requests, in part or whole where applicable, are invalid on their face because they failed to seek identifiable records. *See* Donnelly v. NJ Office of the Governor, GRC Complaint No. 2014-91 (October 2014). However, in situations where a request was overly broad on its face but the custodian was able to locate records, the Council has followed Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), in determining that the request contained sufficient information for record identification. *See* Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (March 2011); Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2014-92 (September 2014). Here, the Custodian was clearly able to locate a number of records, notwithstanding that it is unclear to which exact OPRA request items they apply. Based on this, the GRC declines to determine the OPRA request is invalid and will proceed to addressing the Complainant's incomplete disclosure allegation.

The Complainant filed the instant complaint arguing that the Custodian's response appeared incomplete. In the SOI, the Custodian did not complete the document index. Instead, she provided the responsive e-mail (with attachments) that she sent to the Complainant. The Custodian also provided as part of the SOI a list of Board events. That list identified Board meeting months as January, April, September, and November. However, the Custodian provided minutes from multiple months and not just these specific months.

When viewed together, the above details certainly call into question whether the Custodian provided the Complainant all records that existed. The GRC reviewed all records provided in an attempt to answer this question and was unable to discern the response completeness. Further, the GRC's review indicated that it was unclear whether no records existed for certain items. For these reasons, the GRC cannot definitely determine whether the Custodian lawfully denied access to certain request items, or if she provided all records for certain items in a satisfactory manner.

Accordingly, the Custodian may have unlawfully denied access to records responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian shall address each request item and identify which of those records provided correlate to which OPRA request item. The Custodian shall also disclose any outstanding records that exist but that were not initially provided to the Complainant. Finally, if records for a particular item do not exist, the Custodian must certify to this fact.

### Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

### Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian's response was insufficient because she failed to respond in writing to each individual request item. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. The Custodian may have unlawfully denied access to records responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian shall address each request item and identify which of those records provided correlate to which OPRA request item. The Custodian shall also disclose any outstanding records that exist but that were not initially provided to the Complainant. Finally, if records for a particular item do not exist, the Custodian must certify to this fact.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> to the Council Staff.<sup>6</sup>**

---

<sup>5</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>6</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Talbot B. Kramer, Jr., Esq. (On Behalf of William Juliana) v. Township of Washington (Gloucester), 2016-113 – Findings and Recommendations of the Council Staff

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

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

January 23, 2018