



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

September 26, 2017 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2016-19

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). However, the Council need not order disclosure of the requested records because the Custodian disclosed the records to the Complainant on February 5, 2016. *See also* Byrnes v. Twp. of Teaneck (Bergen), GRC Complaint No. 2014-83 (October 2014)(finding a “deemed” denial of access but not ordering disclosure because the records were provided during the pendency of the complaint).
2. 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). However, the Custodian ultimately provided all responsive records on February 5, 2016. Further, 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 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.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of



Hoboken, 196 N.J. 51 (2008). Specifically, the evidence of record supports that the Custodian intended to respond by providing access to the responsive records prior to the filing of the complaint. Therefore, the Complainant is not a prevailing party and is not entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 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 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 29, 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. 2016-19

v.

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

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

1. Every advertised tax sale notice displaying the advertisement date published in the local newspaper per N.J.S.A. 54:5-19, *et seq.*, for 2015.
2. Every tax sale notice for delinquent charges mailed to Block 44, Lot 23, indicating the date of notice for 2015.
3. Final list of properties that went into actual tax sale in 2015.
4. Sign-in sheets of lien holders who participated in the 2015 tax sale.
5. Every completed bidder sheet of lien holders that successfully purchased a tax sale certificate in 2015.
6. Every completed W-9 form submitted to the Tax Collector from lien holders in the 2015 tax sale.
7. Money order, bank cashier check, or certified check that was used to purchase the tax sale certificate on Block 44, Lot 23.
8. Tax sale certificates (front and back pages) issued by the Borough of Washington (“Borough”) for the 2015 tax sale.
9. Every recorded tax sale certificate (front and back pages) submitted to the tax sale certificate holder after recording with the County for the 2015 tax sale pursuant to N.J.S.A. 54:5-51.
10. Every affidavit submitted to the Tax Department for “sub scant” taxes and delinquent charges for Block 44, Lot 23 by the lien holder.
11. Redemption work sheet(s) for Block 44, Lot 23.

Custodian of Record: Kristine Blanchard

Request Received by Custodian: November 12, 2015

Response Made by Custodian: November 24, 2015

GRC Complaint Received: January 14, 2016

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers (Clinton, NJ).

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

Background³

Request and Response:

On November 12, 2015, the Complainant submitted an Open Public Records Act (“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 her 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 4, 2015, to fulfill his OPRA request.

On December 10, 2015, the Complainant e-mailed the Custodian, demanding that she begin disclosing records, noting that she already had thirty (30) days to do so. The Complainant stated that the Custodian could start with the records relevant to Block 44, Lot 23 because they should be in the property file. On the same day, the Custodian e-mailed a letter to the Complainant, providing an explanation for her extension of time. Therein, the Custodian stated that the Borough is small and that 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.

On December 28, 2015, the Custodian responded in writing, seeking an additional thirty (30) days to allow her to gather the responsive records.

Denial of Access Complaint:

On January 14, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian’s request for an extension of time was unreasonable, especially given that none of the responsive records were archived or stored off-site. The Complainant also contended that no evidence in the record suggests that his OPRA request was voluminous. Specifically, the Complainant asserted that the records are focused on a 2015 Tax Sale of a single property that he identified by block and lot number. The Complainant alleged that no viable excuse exists to support a sixty (60) day extension of time. The Complainant also noted that he makes no claim regarding the W-9 forms.

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.

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

The Complainant thus requested that the GRC: 1) order the Custodian to disclose all responsive records; 2) determine whether the Custodian knowingly and willfully violated OPRA per N.J.S.A. 47:1A-11; 3) determine that the Complainant is a prevailing party and is entitled to an award of reasonable attorney's fees; and 4) award any further relief as the GRC might deem appropriate.

Supplemental Response:

On January 29, 2016, the Custodian e-mailed the Complainant, seeking an additional two (2) weeks to allow her to gather the responsive records.

On February 5, 2016, the Custodian responded in writing, providing records responsive to the Complainant's OPRA request. The Custodian noted that no records responsive to OPRA request item No. 2 exist because the Borough does not maintain mailed delinquency notices. Additionally, the Custodian stated that social security numbers and tax identification numbers were redacted where applicable in accordance with N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-1.1, and N.J.S.A. 47:1A-5(a).

Statement of Information:

On February 23, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on November 12, 2016.⁵ The Custodian certified that she responded in writing on November 24, 2015, and again on December 28, 2015, seeking a total of sixty (60) additional days to respond to the subject OPRA request. The Custodian certified that the extension was necessary because the Municipal Clerk's Office had very limited staff, she received four (4) other OPRA requests from the Complainant in a short time frame, and she had received the subject OPRA request during the holiday season. Further, the Custodian affirmed that she was absent from work in January 2016 due to a family medical situation and that there was also significant snowstorm in January.

The Custodian admitted that her initial response was not within seven (7) business days due to an inadvertent miscalculation. The Custodian certified that she ultimately responded on February 5, 2016, disclosing 250 pages of responsive records (with minor redactions for personal information in accordance with N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-1.1, and N.J.S.A. 47:1A-5(a)). Further, the Custodian affirmed that the Complainant made no indication that her response was deficient.

The Custodian contended that the Complainant submitted this OPRA request, in tandem with the other four (4) OPRA requests, as a form of harassment after inappropriately interacting with Borough officials about a tax lien issue. The Custodian argued that she reasonably sought extensions for the reasons noted above. More specifically, the Custodian affirmed that she is the only full-time employee in the Clerk's Office and serves as both Municipal Clerk and Borough

⁵ On June 22, 2017, the Complainant's Counsel sent an e-mail to the GRC, noting that the Custodian submitted an unsigned SOI. On September 12, 2017, the GRC left a voicemail for the Custodian's Counsel regarding the SOI. On September 13, 2017, on behalf of the Custodian's Counsel, Tara St. Angelo, Esq., forwarded a signed copy of the SOI, advising that she inadvertently sent the wrong version to the GRC in February 2016.

Manager. Further, the Custodian stated that Complainant had submitted five (5) OPRA requests between November 10, and November 17, 2015, all of which combined contained multiple items and, in some instances, spanned a number of years. The Custodian also certified that the subject OPRA request required coordination with the part-time Borough Tax Collector, who is only in the office one afternoon a week. The Custodian noted that she had additional work obligations in November and December, as well as an unexpected medical obligation in December 2015 and January 2016. The Custodian affirmed that those obligations, along with a major weather event, led to her being either out of work or consumed with her official duties during much of the extended time periods.

Moreover, the Custodian contended that her conduct did not constitute a knowing and willful violation. The Custodian argued that 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). The Custodian also contended that the additional extensions were necessary for the aforementioned reasons. The Custodian asserted that the record reflects that a small municipality, operating with a small staff, acted in good faith to respond within the framework of its limited resources.

The Custodian further argued that the facts support that the Complainant should be denied prevailing party attorney's fees. The Custodian contended that she had no knowledge of the instant complaint until February 5, 2016, because the Complainant did not copy the Borough on the initial filing and she had overlooked the GRC's initial SOI request e-mail sent on January 28, 2016, due to a combination of circumstances as discussed above. The Custodian thus asserted that the instant complaint was not the catalyst for her February 5, 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 is supported by her continued extension e-mails and that she did not know of the complaint until after the fact. The Custodian averred that the Borough always intended to provide responsive records; thus, there was no causal nexus between this complaint and her disclosure on February 5, 2016. See Wolosky v. Twp. of Stillwater (Sussex), GRC Complaint No. 2009-22 (September 2011).⁶

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.

⁶ On May 13, 2016, the Custodian's Counsel requested that the instant complaint be consolidated with Wolosky v. Borough of Washington (Warren), GRC Complaint Nos. 2016-19, 2016-29, and 2016-30 (currently pending adjudication). The GRC has 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 finds that consolidation is not appropriate due to the number of requested items, submissions, issues, and differences in the Complainant's representation.

Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁷ 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).

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. However, once she did respond, she sought three (3) extensions and finally disclosed to the Complainant all responsive records to the Complainant on February 5, 2016.

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. However, the Council need not order disclosure of the requested records because the Custodian disclosed the records to the Complainant on February 5, 2016. *See also* Byrnes v. Twp. of Teaneck (Bergen), GRC Complaint No. 2014-83 (October 2014)(finding a "deemed" denial of access but not ordering disclosure because the records were provided during the pendency of the complaint).

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 extension.

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

⁷ 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.

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). However, the Custodian ultimately provided all responsive records on February 5, 2016. Further, 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 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 matter before the Council, the Custodian initially sought, albeit untimely, a thirty (30) day extension to comply with the Complainant’s OPRA request. Thereafter, on December 28, 2015, the Custodian sought a second thirty (30) day extension. On January 14, 2016, within the time frame of the second (2nd) extension, the Complainant filed the instant complaint (and did not copy the Custodian) to contest the reasonableness of the Custodian’s extensions. Finally, on

January 29, 2016, the Custodian sought two (2) additional weeks and responded shortly thereafter on February 5, 2016, by disclosing all responsive records.

At issue here is whether the complaint was the causal nexus for the Custodian's final disclosure on February 5, 2016. In reviewing all applicable evidence, it is clear that the Custodian intended to respond by disclosing records, regardless of the filing of the complaint. The Custodian sought sixty (60) days of extensions, both of which straddled the filing of the complaint. In the SOI, she certified that was not aware of the complaint at the time that she sought her last extension of two (2) weeks on January 29, 2016. Further, the evidence supports that her February 5, 2016, response did not prompt a change in her actions; rather, the Custodian satisfied the OPRA request as a logical result of her three (3) extensions. For those reasons, the GRC finds that the evidence supports that the complaint was not the catalyst for the Custodian's intended disclosure and that no causal nexus exists here. Thus, the Complainant is not a prevailing party and is not entitled to an award of reasonable attorney's fees.

Accordingly, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. at 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 51. Specifically, the evidence of record supports that the Custodian intended to respond by providing access to the responsive records prior to the filing of the complaint. Therefore, the Complainant is not a prevailing party and is not entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

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). However, the Council need not order disclosure of the requested records because the Custodian disclosed the records to the Complainant on February 5, 2016. See also Byrnes v. Twp. of Teaneck (Bergen), GRC Complaint No. 2014-83 (October 2014) (finding a "deemed" denial of access but not ordering disclosure because the records were provided during the pendency of the complaint).
2. 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). However, the Custodian ultimately provided all responsive records on February 5, 2016. Further, 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 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.

3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the evidence of record supports that the Custodian intended to respond by providing access to the responsive records prior to the filing of the complaint. Therefore, the Complainant is not a prevailing party and is not entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

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

September 19, 2017