



State of New Jersey  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

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

Libertarians for Transparent Government  
Complainant

Complaint No. 2016-193

v.

Summit Public Schools (Union)  
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council (“Council”) considered the March 20, 2018 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, finds that:

1. The Custodian has borne his burden of proof that he timely responded to the Complainant’s OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-6. Therefore, no “deemed” denial as it related to the twelve (12) business day extension occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. 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 extending the time frame prior to the filing of the complaint and disclosing records thereafter. 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 27<sup>th</sup> Day of March, 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 29, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Libertarians for Transparent Government<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-193**

**v.**

**Summit Public Schools (Union)<sup>2</sup>  
Custodial Agency**

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

1. The most recently amended civil complaint filed by plaintiff in S.B. v. Summit City Bd. of Educ., Docket No. 2:15-cv-07133 or the original complaint if no amendments were filed.
2. The agreement(s) setting forth the settlement terms and amount, also known as a settlement agreement.
3. If no settlement agreement responsive to item No. 2 above exists, informal agreements, drafts agreements, or correspondence between the Summit Public Schools (“SPS”) and plaintiff indicating the settlement terms and amounts.

**Custodian of Record:** Louis J. Pepe  
**Request Received by Custodian:** June 29, 2016  
**Response Made by Custodian:** July 7, 2016  
**GRC Complaint Received:** July 11, 2016

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

**Request and Response:**

On June 25, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 7, 2016, the Custodian responded in writing stating that an extension of time until July 25, 2016 was necessary “based on anticipated availability.” Further, the Custodian stated that the Complainant needed to submit a completed OPRA request form.

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<sup>1</sup> Represented by Richard M. Gutman, Esq. (Montclair, NJ).

<sup>2</sup> Represented by Brandon R. Crooker, Esq., of Comegno Law Group, P.C. (Moorestown, NJ).

<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.

### Denial of Access Complaint:

On July 11, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s response on two points. The Complainant first took issue with the extension, arguing that OPRA did not allow a custodian to unilaterally take an extension of time unless records were “in storage or archived.” N.J.S.A. 47:1A-5(i). Rather, the Complainant argued that the responsive records here were neither; he asserted that the Custodian acknowledged they were held by the SPS’s attorney. The Complainant thus argued that the Custodian violated OPRA by failing to receive the Complainant’s agreement prior to taking a lengthy extension.

The Complainant next contended that the Custodian unlawfully required him to submit his OPRA request on SPS’s official OPRA request form. The Complainant asserted that his OPRA request was valid per Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009).

### Supplemental Submissions:

On July 22, 2016, the Custodian responded to the Complainant’s OPRA request disclosing the most recent civil complaint responsive to item No. 1 via e-mail. The Custodian also disclosed a draft, unfiled settlement agreement responsive to item Nos. 2/3. The Custodian requested that the Complainant confirm that he was withdrawing this complaint.

On July 28, 2016, Custodian’s Counsel e-mailed Complainant’s Counsel stating that he believed this complaint was moot because the Custodian provided records to the Complainant on July 22, 2016. Custodian’s Counsel thus requested that Complainant’s Counsel advise whether he would be withdrawing this complaint. On July 29, 2016, Complainant’s Counsel responded to Custodian’s Counsel via e-mail. Therein, Counsel stated that the disclosure prompted the Complainant to withdraw his portion of the complaint regarding SPS’s “requirement” to submit an official OPRA request form. However, Counsel stated that the Complainant still intended to receive a decision from the GRC regarding the unilateral extension of time.

On August 1, 2016, Custodian’s Counsel sent a letter to Complainant’s Counsel. Therein, Counsel stated that the Custodian properly obtained an extension to respond per relevant statutory provisions and case law. N.J.S.A. 47:1A-5(i); N.J. Builders Ass’n v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180-81 (App. Div. 2007) (holding that when a custodian “advise[s]” a requestor of the date certain on which he/she will respond, that date “becomes the deadline for compliance . . .”). Counsel stated that the Custodian timely responded in writing providing a date certain on which he would respond. Counsel noted that the extension was necessary because the parties discussed the wording of the agreement and finalized it after close of business on July 20, 2016. Counsel further noted that the Custodian disclosed the responsive records two (2) business days later, and prior to the expiration of the extended time frame. Counsel thus argued that this complaint was moot. Further, Counsel argued that even if the GRC were to find a violation, no harm existed from the *de minimis* nature of this issue.<sup>4</sup>

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<sup>4</sup> Custodian’s Counsel also stated that this letter shall serve as notice under NJ Court Rules, R. 1:4-8 requesting that the Complainant withdraw its “frivolous” law suit filed in bad faith. N.J.S.A. 2A:15-59.1. Counsel further stated that failure to withdraw this complaint could result in SPS seeking sanctions against the Complainant.

### Statement of Information:

On August 1, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on June 27, 2016. The Custodian affirmed that he initially responded to the Complainant on July 6, 2016<sup>5</sup> stating that an extension of time until July 25, 2016 would be necessary “based on anticipated availability.” The Custodian certified that he subsequently responded in writing on July 22, 2016 disclosing all responsive records to the Complainant. The Custodian noted that following July 22, 2016, he and Counsel both requested that the Complainant withdraw this complaint as moot to no avail.

The Custodian reiterated Custodian Counsel’s August 1, 2016 position that he properly extended the time frame and did not violate OPRA. N.J.S.A. 47:1A-5(i); N.J. Builders, 390 N.J. Super. at 180-81. The Custodian contended that this matter was moot because no controversy existed. Betancourt v. Trinitas Hosp., 415 N.J. Super. 301, 311 (App. Div. 2010); Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976).<sup>6</sup>

### Additional Submissions:

On August 5, 2016, the Complainant’s Counsel submitted a letter brief to the GRC rebutting the SOI. Therein, Counsel reiterated that he withdrew the use of the official form issue from consideration.

However, Counsel argued that disclosure of the records did not end the inquiry on the extension of time issue. Counsel thus disagreed that this complaint was moot because a finding that SPS violated OPRA would deter them from unilaterally taking extensions in the future. Counsel also noted that this complaint is not moot due to the capability of repetition. See Libertarian Party of Cent. NJ v. Murphy, 384 N.J. Super. 136, 140 (App. Div. 2006)(a dispute over OPRA copying costs was not mooted when the responsive records were later accessible for free on the agency’s website).

Complainant’s Counsel stated that in its original OPRA request, Complainant expressed the pressing need for this information due to its newsworthy value over time. Counsel argued that notwithstanding, the Custodian took an extension. Counsel contended that the extension fell outside of the following exceptions to the statutory seven (7) business day response time frame: “immediate” access; anonymous requestors without contact information; substantial disruption of agency operations; requestors agreeing to waive the time frame; and records in storage, archived, or in use. Counsel contended that the Custodian misapplied OPRA because he took an extension without the records being “in storage or archived” or in use. N.J.S.A. 47:1A-5(i). Counsel argued that the Custodian instead took an extension simply to attempt to locate responsive records and determine whether applicable exemptions apply.

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<sup>5</sup> It should be noted that the Custodian’s letter was dated July 6, 2016; however, the letter was sent to the Complainant by e-mail only on July 7, 2016.

<sup>6</sup> The Custodian asserted that the SPS reserved its right to submit a prevailing party fee application to the GRC if it prevailed here. The GRC notes that OPRA’s fee shifting provision only applies to complainants represented by an attorney. N.J.S.A. 47:1A-6.

Counsel asserted that the Custodian should have determined whether records existed and were disclosable within the seven (7) business day time frame. Additionally, Counsel asserted that the Custodian was required to provide within seven (7) business days the agreement if in existence (in final or draft form) at the time of the OPRA request. Counsel further asserted that the Custodian should have responded that no settlement agreement (in final or draft form) existed if that was the case at the time of the Complainant's OPRA request. Counsel also noted that OPRA request item No. 3 provided for disclosure of alternative records containing agreement terms and amounts, but the Custodian ignored this and sought an extension of time anyway. Counsel argued that either way, the Custodian's action of extending the time frame to await the creation of a record or finalized version was unlawful. Counsel thus contended that the Custodian violated OPRA by: 1) not informing the Complainant that the responsive records were in storage, archived, or in use within seven (7) business days; and 2) identifying each record and informing the Complainant whether access was granted or denied in the same time frame.

### Analysis

#### Timeliness

Initially, the GRC notes that the parties have disagreed as to whether disclosure on July 22, 2016 rendered this complaint moot. Notwithstanding that the Custodian provided access to records, the Complainant filed this complaint for the purposes of determining whether the extension was unlawful. As noted in Libertarian, 384 N.J. Super. 140, "although plaintiffs have obtained access to the actual records requested, the legal question raised remains viable . . ." Id. (citation omitted). Here, the legal question of the extension remains; thus, the GRC will proceed with its analysis.

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).

In Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant's request on the fourth (4<sup>th</sup>) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not agree to the custodian's request for an extension of time. The Council stated that:

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<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 Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Dep't of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2<sup>nd</sup>) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that “because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i).”

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6<sup>th</sup>) business day following receipt of the Complainant's OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian's request for an extension of time [to a specific date] to respond to the Complainant's OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant's OPRA request. The Council concluded that because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the Custodian properly requested the extension pursuant to OPRA. In rendering the decision, the Council cited as legal authority Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010); O'Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); and Starkey v. N.J. Dep't of Transportation, GRC Complaint Nos. 2007-315 through 317 (February 2009).

Although extensions are rooted in well-settled case law, the Council need not unquestioningly find valid every request for an extension containing a clear deadline. In Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014), the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a “deemed” denial of access, the Council looked to what is “reasonably necessary.”

In the instant matter, the Custodian timely responded seeking an extension of twelve (12) business days to respond to the Complainant's OPRA request. At that time, the Custodian stated that the extension was necessary "based on anticipated availability."

The Complainant's OPRA request sought essentially two (2) items comprising of: 1) the original or most recently amended civil complaint in S.B., Docket No. 2:15-cv-07133; and 2) the settlement agreement or, alternatively, informal or draft agreements, or correspondence indicating the settlement terms and amounts. The Custodian extended the response time once and ultimately responded on July 22, 2016 disclosing the most recent civil complaint and a draft, unfiled settlement agreement totaling twelve (12) pages. As noted above, a requestor's approval is not required for a valid extension. The GRC notes, however, that the Complainant did not object to the Custodian's extension of time prior to filing this complaint.

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. The GRC must next consider the amount of time the custodian already had to respond to the request. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.<sup>8</sup>

The evidence of record indicates that the Custodian received this OPRA request, which was not overly complex, while the parties were still composing the settlement agreement. The Custodian averred in the SOI that the extended response time frame was needed due to the pending availability of the records. From the Custodian's receipt of the Complainant's OPRA request, he initially sought twelve (12) business days. Thus, the Custodian sought, in addition to the original seven (7) business days, a little over two (2) weeks. It appears obvious from the evidence of record that the Custodian sought the extension for all items in an attempt to provide a record responsive to item Nos. 2/3. Further, the GRC does not believe that twelve (12) business days was unreasonable given the circumstances of this complaint. Specifically, the evidence of record supports that the Custodian intended to disclose a settlement agreement undergoing review and discussion; thus, he sought the extension to afford time for the agreement to be committed to writing.

While Complainant's Counsel argued that extensions are only for records stored, in archive, or in use, the Council's long-standing precedent on extensions above is more permissive. Notwithstanding, the fact that the agreement was still being created during the extension period certainly qualifies as "in use." Further, Complainant Counsel's August 5, 2016 argument that the possible settlement has "newsworthy value" is of no moment; OPRA does not restrict a custodian from obtaining an extension solely on a "newsworthy" basis. Thus, the record sufficiently proved that the extension here was warranted.

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<sup>8</sup> "Extenuating circumstances" could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency's need to reallocate resources to a higher priority due to *force majeure*.



Accordingly, the Custodian has borne his burden of proof that he timely responded to the Complainant's OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-6. Therefore, no "deemed" denial as it related to the twelve (12) business day extension occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

Finally, the GRC agrees with Complainant's Counsel that if the settlement agreement did not exist at the time of OPRA request, the appropriate response was that no records existed. See Driscoll v. Sch. Dist. of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008) (holding that the custodian was not required to disclose a record that came into existence after denying access because no record existed at the time the OPRA request was submitted). Further, the GRC notes that the Custodian ultimately produced a draft document, which was otherwise exempt under OPRA,<sup>9</sup> as soon as it came into existence in order to comply here. See Ciesla v. N.J. Dep't of Health & Senior Servs., 429 N.J. Super. 127, 140 (App. Div. 2012); Anonymous v. Ocean City Historic Pres. Comm'n, GRC Complaint No. 2015-02 (June 30, 2015); Steelman v. City of Summit Parking Serv. Agency (Union), GRC Complaint No. 2015-140 (January 2016).

### **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

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<sup>9</sup> Unlike the facts in Scheeler, Jr. v. Galloway Twp., 2017 N.J. Super. Unpub. LEXIS 2847 (App. Div. 2017), the agreement here was not fully composed until July 20, 2016. Thus, this case is distinguishable from Scheeler, Jr.

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 filed the instant complaint contending that the Custodian’s extension was unreasonable. The Complainant filed during the extended time frame, within which the Custodian disclosed records on July 22, 2016. The GRC has recommended that no violation occurred because the extension request was warranted and reasonable.

Thus, the only remaining issue affecting the prevailing party fee determination is whether the complaint was the causal nexus for the Custodian's disclosure on July 22, 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 a twelve (12) business day extension that straddled the filing of the complaint. Shortly thereafter, the Custodian disclosed records within the extended time frame. The GRC notes that one of those records was a draft settlement that the SPS was actively working on during the pendency of the extension and this complaint. For these 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 extending the time frame prior to the filing of the complaint and disclosing records thereafter. 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 Council Staff respectfully recommends the Council find that:

1. The Custodian has borne his burden of proof that he timely responded to the Complainant's OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-6. Therefore, no "deemed" denial as it related to the twelve (12) business day extension occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. 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 extending the time frame prior to the filing of the complaint and disclosing records thereafter. 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

March 20, 2018