



**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**

**February 26, 2019 Government Records Council Meeting**

Libertarians for Transparent Government  
Complainant

Complaint No. 2016-214

v.

Borough of Westwood (Bergen)  
Custodian of Record

At the February 26, 2019 public meeting, the Government Records Council (“Council”) considered the February 19, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of February, 2019

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, 2019**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Council Staff  
February 26, 2019 Council Meeting**

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

**GRC Complaint No. 2016-214**

v.

**Borough of Westwood (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

Regarding Theresa Carabetta v. Borough, Docket No. BER-L-7564-14, electronic copies via e-mail of:

1. The most recently amended civil complaint filed by the Plaintiff or, if there are no amendments, the original civil complaint.
2. The settlement agreement(s) related to the above; or
3. All informal agreements, draft agreements, correspondence, e-mails, *etc.*, related to the case that discloses settlement amounts and/or settlement terms.

**Custodian of Record:** Karen Hughes

**Requests Received by Custodian:** July 18, 2016

**Response Made by Custodian:** July 19, 2016

**GRC Complaint Received:** August 2, 2016

**Background**

**December 18, 2018 Council Meeting:**

At its December 18, 2018 public meeting, the Council considered the December 11, 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 Custodian complied with the Council's October 30, 2018 Interim Order, because she responded within the prescribed time frame disclosing the records and simultaneously provided certification of compliance to the Council Staff.

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<sup>1</sup> Represented by Ted. M. Rosenberg, Esq. (Moorestown, NJ).

<sup>2</sup> Represented by Russell R. Huntington, of Huntington Bailey LLC (Westwood, NJ).

2. The Custodian unlawfully denied access to the requested settlement agreement. However, the Custodian lawfully denied access to the requested informal or draft agreements, as well as e-mail correspondence. N.J.S.A. 47:1A-6. Also, the Custodian located and provided the settlement agreement to the Complainant in accordance with the Council's October 30, 2018 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the actions of the Custodian 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 October 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 Custodian disclosed the requested settlement agreement to the Complainant in accordance with the Council's Interim Order. 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.**

#### Procedural History:

On December 19, 2018, the Council distributed its Interim Order to all parties. On January 24, 2019 the Government Records Council ("GRC") e-mailed the parties advising that the deadline to notify the GRC of a fee settlement had expired on January 18, 2019, and therefore requested a fee application from Complainant's Counsel.

On February 8, 2019, Complainant's Counsel e-mailed the GRC, with copy to Custodian's Counsel, informing that the Borough of Westwood ("Borough") agreed to a fee settlement.

#### Analysis

##### Prevailing Party Attorney's Fees

At its December 18, 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's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On December 19, 2018, the Council distributed its Interim Order to all parties. The parties had until close of business on January 18, 2019 to inform the Council as to whether they reached a settlement. On February 8, 2019, Complainant's Counsel advised that an agreement had been reached.

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

### **Conclusions and Recommendations**

The Council Staff 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 Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado  
Staff Attorney

February 19, 2019



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

December 18, 2018 Government Records Council Meeting

Libertarians for Transparent Government  
Complainant

Complaint No. 2016-214

v.

Borough of Westwood (Bergen)  
Custodian of Record

At the December 18, 2018 public meeting, the Government Records Council (“Council”) considered the December 11, 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, finds that:

1. The Custodian complied with the Council’s October 30, 2018 Interim Order, because she responded within the prescribed time frame disclosing the records and simultaneously provided certification of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the requested settlement agreement. However, the Custodian lawfully denied access to the requested informal or draft agreements, as well as e-mail correspondence. N.J.S.A. 47:1A-6. Also, the Custodian located and provided the settlement agreement to the Complainant in accordance with the Council’s October 30, 2018 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the actions of the Custodian 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 October 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 Custodian disclosed the requested settlement agreement to the Complainant in accordance with the Council’s Interim Order. 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.**

Interim Order Rendered by the  
Government Records Council  
On The 18<sup>th</sup> Day of December, 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: December 19, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
December 18, 2018 Council Meeting**

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

**GRC Complaint No. 2016-214**

**v.**

**Borough of Westwood (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

Regarding Theresa Carabetta v. Borough, Docket No. BER-L-7564-14, electronic copies via e-mail of:

1. The most recently amended civil complaint filed by the Plaintiff or, if there are no amendments, the original civil complaint.
2. The settlement agreement(s) related to the above; or
3. All informal agreements, draft agreements, correspondence, e-mails, *etc.*, related to the case that discloses settlement amounts and/or settlement terms.

**Custodian of Record:** Karen Hughes

**Requests Received by Custodian:** July 18, 2016

**Response Made by Custodian:** July 19, 2016

**GRC Complaint Received:** August 2, 2016

**Background**

**October 30, 2018 Council Meeting:**

At its October 30, 2018 public meeting, the Council considered the October 23, 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, found that:

1. The Custodian may have unlawfully denied access to Item Nos. 1 & 2 of the Complainant's July 18, 2016 OPRA request. N.J.S.A. 47:1A-6; Burnett v. Gloucester, 415 N.J. Super. 506, 517 (App. Div. 2010). The Custodian shall reach out to the Joint Insurance Fund to locate and provide any responsive records. Should the Custodian

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<sup>1</sup> Represented by Ted. M. Rosenberg, Esq. (Moorestown, NJ).

<sup>2</sup> Represented by Russell R. Huntington, of Huntington Bailey LLC (Westwood, NJ).

Libertarians for Transparent Government v. Borough of Westwood (Bergen), 2016-214 – Supplemental Findings and Recommendations of the Council Staff

obtain such records, the Custodian shall provide them to the Complainant.

2. With respect to informal or draft agreements, the Custodian did not unlawfully deny access to Item No. 3 of the Complainant's OPRA request. N.J.S.A. 47:1A-6. Draft or informal agreements between the parties satisfy the requirements to qualify for protection under the deliberative process privilege via N.J.S.A. 47:1A-1.1. Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 90-91 (App. Div. 2018); O'Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006).
3. With respect to e-mails or correspondence, Item No. 3 of the Complainant's OPRA request is invalid because they fail to seek identifiable government records. MAG Entm't, LLC v. Div. Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).
4. **The Custodian shall comply with item #1 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 Rules, R. 1:4-4,<sup>3</sup> to the Council Staff.<sup>4</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.

#### Procedural History:

On October 31, 2018, the Council distributed its Interim Order to all parties. On November 5, 2018, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she located the requested settlement agreement and disclosed same to the Complainant.

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<sup>3</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>4</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.

Libertarians for Transparent Government v. Borough of Westwood (Bergen), 2016-214 – Supplemental Findings and Recommendations of the Council Staff



## Analysis

### Compliance

At its October 30, 2018 meeting, the Council ordered the Custodian to search for records pertaining to a settlement agreement and if found, to disclose same to the Complainant, as well as submit certified confirmation of compliance to the Council Staff. On October 31, 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 November 5, 2018.

On November 5, 2018, the Custodian provided the Council Staff with evidence demonstrating she provided the Complainant with the requested record, as well as a certified confirmation of compliance.

Therefore, the Custodian complied with the Council's October 30, 2018 Interim Order, because she responded within the prescribed time frame disclosing the records and simultaneously provided certification of compliance to the 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)).

The Custodian unlawfully denied access to the requested settlement agreement. However, the Custodian lawfully denied access to the requested informal or draft agreements, as well as e-mail correspondence. N.J.S.A. 47:1A-6. Also, the Custodian located and provided the settlement

agreement to the Complainant in accordance with the Council's October 30, 2018 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the actions of the Custodian 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.]

Here, the Complainant filed the instant complaint after the Custodian denied access to the Complainant’s OPRA request. Following the filing of this complaint and submission of the Statement of Information, the Custodian disclosed a settlement agreement specifically identified in the Complainant’s OPRA request, as ordered by the Council in its October 30, 2018 Interim Order. Based upon the Council’s Order and the Custodian’s compliance, it is clear that the Complainant prevailed here and is entitled to an award of attorney’s fees.

Therefore, pursuant to the Council’s October 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 Custodian disclosed the requested settlement agreement to the Complainant in accordance with the Council’s Interim Order. 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 Custodian complied with the Council's October 30, 2018 Interim Order, because she responded within the prescribed time frame disclosing the records and simultaneously provided certification of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the requested settlement agreement. However, the Custodian lawfully denied access to the requested informal or draft agreements, as well as e-mail correspondence. N.J.S.A. 47:1A-6. Also, the Custodian located and provided the settlement agreement to the Complainant in accordance with the Council's October 30, 2018 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the actions of the Custodian 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 October 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 Custodian disclosed the requested settlement agreement to the Complainant in accordance with the Council's Interim Order. 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: Samuel A. Rosado  
Staff Attorney

December 11, 2018



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

October 30, 2018 Government Records Council Meeting

Libertarians for Transparent Government  
Complainant

Complaint No. 2016-214

v.

Borough of Westwood (Bergen)  
Custodian of Record

At the October 30, 2018 public meeting, the Government Records Council (“Council”) considered the October 23, 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 may have unlawfully denied access to Item Nos. 1 & 2 of the Complainant’s July 18, 2016 OPRA request. N.J.S.A. 47:1A-6; Burnett v. Gloucester, 415 N.J. Super. 506, 517 (App. Div. 2010). The Custodian shall reach out to the Joint Insurance Fund to locate and provide any responsive records. Should the Custodian obtain such records, the Custodian shall provide them to the Complainant.
2. With respect to informal or draft agreements, the Custodian did not unlawfully deny access to Item No. 3 of the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Draft or informal agreements between the parties satisfy the requirements to qualify for protection under the deliberative process privilege via N.J.S.A. 47:1A-1.1. Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83, 90-91 (App. Div. 2018); O’Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006).
3. With respect to e-mails or correspondence, Item No. 3 of the Complainant’s OPRA request is invalid because they fail to seek identifiable government records. MAG Entm’t, LLC v. Div. Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).
4. **The Custodian shall comply with item #1 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 Rules, R. 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 October, 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: October 31, 2018**

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<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  
October 30, 2018 Council Meeting**

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

**GRC Complaint No. 2016-214**

v.

**Borough of Westwood (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

Regarding Theresa Carabetta v. Borough, Docket No. BER-L-7564-14, electronic copies via e-mail of:

1. The most recently amended civil complaint filed by the Plaintiff or, if there are no amendments, the original civil complaint.
2. The settlement agreement(s) related to the above; or
3. All informal agreements, draft agreements, correspondence, e-mails, *etc.*, related to the case that discloses settlement amounts and/or settlement terms.

**Custodian of Record:** Karen Hughes

**Requests Received by Custodian:** July 18, 2016

**Response Made by Custodian:** July 19, 2016

**GRC Complaint Received:** August 2, 2016

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

**Request and Response:**

On July 18, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 19, 2016, the Custodian responded in writing via e-mail, stating that the case at issue was handled by the Joint Insurance Fund (“JIF”) on behalf of the Borough of Westwood (“Borough”), and to file an OPRA request directly with them.

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<sup>1</sup> Represented by Ted. M. Rosenberg, Esq. (Moorestown, NJ).

<sup>2</sup> Represented by Russell R. Huntington, of Huntington Bailey LLC (Westwood, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

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### Denial of Access Complaint:

On August 2, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that in accordance with Burnett v. Gloucester, 415 N.J. Super. 506, 517 (App. Div. 2010), the Custodian was obligated to search for and obtain responsive records from its attorneys, insurers, or other agents when responding to an OPRA request. Thus, the Complainant contended that the Custodian was obligated to obtain the requested records from JIF rather than directing the Complainant to file an OPRA request directly with JIF.

### Statement of Information:

On September 2, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 18, 2016. The Custodian certified that she reviewed the file pertaining to the litigation and determined that none of the records contained therein were not responsive to the request. The Custodian certified that she responded in writing on July 19, 2016, advising the Complainant that she was not the custodian of the records sought, and provided the e-mail address where an OPRA request can be made to JIF.

The Custodian contended that N.J.S.A. 47:1A-5(h) directs anyone who receives an OPRA request to forward it to the custodian or to direct the requestor to the proper records custodian. The Custodian asserted that she interpreted the law to mean that transfer of a request to the proper custodian is required within an agency, i.e. an OPRA request received by a municipality’s tax collector would forward the request to the municipality’s custodian. Here, the Custodian certified that JIF handled the litigation at issue on behalf of the Borough. The Custodian also certified that JIF was a public agency under N.J.S.A. 47:1A-1.1, and received OPRA requests directly. Thus, the Custodian argued that it would better serve the Complainant to be redirected to the custodian in charge of the records being sought.

The Custodian contended that the alternative would delay production of the records, and would hold her accountable without knowing whether JIF produced all available records. The Custodian asserted that the GRC’s “Frequently Asked Questions” located on its website confirms the understanding that since JIF is a public agency with its own custodian, then an OPRA request for records under its control or custody must be submitted directly. The Custodian therefore concluded that she did not violate OPRA.

## Analysis

### 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.



Original/Amended Civil Complaint & Settlement Agreement(s)

In Burnett, the court determined that the defendant was required to obtain settlement agreements from its insurance broker. 415 N.J. Super. at 517. The court's decision largely fell on the fact that there was no question that the broker was working on behalf of the defendants to execute settlement agreements. Id. at 513. The court noted that it previously held that while insurance brokers or outside counsel are third parties, "they nonetheless bind the county as principle, and the agreements are made on its behalf." Id. In determining that defendants had an obligation to obtain responsive records from the insurance broker, the court noted that the facts there differed from those in Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 38-39 (App. Div. 2005)<sup>4</sup> (holding that plaintiff made no showing that the defendant was required to obtain records located outside its agency).

In the current matter, the facts parallel those presented in Burnett. In her SOI, the Custodian stated that JIF handled the litigation at issue on behalf of the Borough. Although JIF itself a public agency, its relationship with the Borough was the same as the private insurers and/or outside counsel in Burnett. Thus, the Borough is bound by the agreements made and maintained by JIF on their behalf, and the Custodian had an obligation to obtain responsive records from JIF, instead of requiring the Complainant to file an OPRA request directly.

Therefore, the Custodian may have unlawfully denied access to Item Nos. 1 & 2 of the Complainant's July 18, 2016 OPRA request. N.J.S.A. 47:1A-6; Burnett, 415 N.J. Super. at 517. The Custodian shall reach out to JIF to locate and provide any responsive records. Should the Custodian obtain such records, the Custodian shall provide them to the Complainant.

Informal/Draft Agreements

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. 2007) (certif. denied, 193 N.J. 292 (2007)).<sup>5</sup> In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The court held that:

The GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

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<sup>4</sup> Affirming Bent v. Stafford Police Dep't, GRC Complaint No. 2004-78 (October 2004)

<sup>5</sup> On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

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The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (aff'd, 24 N.J. 139 (1957)).

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

In O’Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either the statute nor the courts have defined the terms ... “advisory, consultative, or deliberative” in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).

In Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div.), certif. denied, 233 N.J. 484 (2018), the Appellate Division discussed the deliberative process privilege at length regarding a request for draft meeting minutes, stating:

The applicability of the deliberative process privilege is government by a two-prong test. The judge must determine both that a document is (1) “pre-decisional,” meaning it was “generated before the adoption of an agency’s police or decision;” and (2) deliberative, in that it “contain[s] opinions, recommendations, or advice about agency policies.” [Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. at 276 (quoting Integrity, 165 N.J. at 83)]. If a document stratifies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

Regarding the first prong, the court stated that “a draft is not a final document. It has been prepared for another person or persons’ editing and eventual approval.” Id. at 90. Therefore, the

court held that by their very nature, draft meeting minutes are pre-decisional since they are subject to revision and not yet approved for public release. Id. at 90-91.

Regarding the second prong, the court held that “the document must be shown to be closely related to the ‘the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.’” [Ciesla v. N.J. Dep’t of Health & Sr. Servs., 429 N.J. Super. 127, 138 (App. Div. 2012) (quoting McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 619-20 (App. Div. 2010). Id. at 91. The court found that the requested draft minutes, as compiled by the writer in attendance at the meeting, were subject to additions, suggestions, and other edits from the members of the public body. Id. Thus, the draft minutes satisfied the second prong of the test. Id. at 92.

Here, the Complainant explicitly sought “informal” and/or “draft” agreements between the parties to the litigation under Item No. 3 of their OPRA request. Therefore, the records sought satisfy the first prong of the test. Libertarians, 453 N.J. Super. at 90. As to the second prong, an informal or draft settlement agreement is and can be subject to change by the parties. Furthermore, such documents invariably reflect upon whether or not Borough will approve of the settlement as a matter of policy, as well as any revisions suggested that would better reflect the public policy goals of the Borough in the litigation. Therefore, the informal and/or draft settlement agreements satisfy the second prong of the test. Id. at 91.

Therefore, with respect to informal or draft agreements, the Custodian did not unlawfully deny access to Item No. 3 of the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Draft or informal agreements between the parties satisfy the requirements to qualify for protection under the deliberative process privilege via N.J.S.A. 47:1A-1.1. Libertarians, 453 N.J. Super. at 90-91; O’Shea, GRC 2004-93.

### Correspondence/E-mails

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.”* N.J.S.A. 47:1A-1.

[MAG Entm’t, LLC v. Div. Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the

Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). See also Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);<sup>6</sup> N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007).

Additionally, the GRC established criteria deemed necessary to specifically identify an e-mail communication in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). In Elcavage, the Council determined that “[i]n accordance with MAG, *supra*, and its progeny, in order to specifically identify an e-mail the OPRA request must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) identification of the sender and/or the recipient thereof.” Id. The Council also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

With respect to the Complainant’s request for e-mails and correspondence, it identifies the subject matter as the Complainant stated that the e-mails should contain the settlement amount or settlement terms pertaining to the subject litigation. However, the request fails to identify the specific date or range of dates during which the correspondence and/or e-mails were transmitted.

Therefore, with respect to e-mails or correspondence, Item No. 3 of the Complainant’s OPRA request is invalid because it fails to seek identifiable government records. MAG, 375 N.J. Super. 534 at 546; Bent, 381 N.J. Super. 30 at 37; N.J. Builders Ass’n, 390 N.J. Super. 166 at 180; Elcavage, GRC 2009-07; Armenti, GRC 2009-154.

### **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

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<sup>6</sup> Affirming Bent v. Stafford Police Dep’t, GRC Complaint No. 2004-78 (October 2004).  
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Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Custodian may have unlawfully denied access to Item Nos. 1 & 2 of the Complainant's July 18, 2016 OPRA request. N.J.S.A. 47:1A-6; Burnett v. Gloucester, 415 N.J. Super. 506, 517 (App. Div. 2010). The Custodian shall reach out to the Joint Insurance Fund to locate and provide any responsive records. Should the Custodian obtain such records, the Custodian shall provide them to the Complainant.
2. With respect to informal or draft agreements, the Custodian did not unlawfully deny access to Item No. 3 of the Complainant's OPRA request. N.J.S.A. 47:1A-6. Draft or informal agreements between the parties satisfy the requirements to qualify for protection under the deliberative process privilege via N.J.S.A. 47:1A-1.1. Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 90-91 (App. Div. 2018); O'Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006).
3. With respect to e-mails or correspondence, Item No. 3 of the Complainant's OPRA request is invalid because they fail to seek identifiable government records. MAG Entm't, LLC v. Div. Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).
4. **The Custodian shall comply with item #1 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 Rules, R. 1:4-4,<sup>7</sup> to the Council Staff.<sup>8</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.

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<sup>7</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>8</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.

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Prepared By: Samuel A. Rosado  
Staff Attorney

October 23, 2018