



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

October 30, 2018 Government Records Council Meeting

Libertarians for Transparent Government
Complainant

Complaint No. 2016-261

v.

Town of Kearny (Hudson)
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 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 30th 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: November 1, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Council Staff
October 30, 2018 Council Meeting**

**Libertarians for Transparent Government¹
Complainant**

GRC Complaint No. 2016-261

v.

**Town of Kearny (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the closed session minutes for Town of Kearny ("Town") Council meetings dated March 8, 2011; October 9, 2012; August 6, 2013; June 10, 2014; and September 8, 2015.³

Custodian of Record: Patricia Carpenter

Request Received by Custodian: May 10, 2016; June 6, 2016

Response Made by Custodian: May 17, 2016; June 10, 2016

GRC Complaint Received: September 19, 2016

Background

August 28, 2018 Council Meeting:

At its August 28, 2018 public meeting, the Council considered the August 21, 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 June 26, 2018 Interim Order because she responded in the extended time frame disclosing those close session minutes responsive to the conditional portion of the Complainant's June 6, 2016 OPRA request. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian's initial response to both OPRA requests was insufficient because she failed to include a date certain as part of her time frame extensions. N.J.S.A. 47:1A-5(i). The Custodian also unlawfully denied access to the three (3) most recent set of closed session minutes sought in the Complainant's June 6, 2016 OPRA request. The

¹ Represented by Ted M. Rosenberg, Esq. (Moorestown, NJ).

² Represented by Gregory J. Castano, Esq., and Michelle F. Spencer, Esq., of Castano, Quigley, LLC (Fairfield, NJ)

³ The Complainant requested additional records that are not at issue in this complaint.

Custodian also failed to comply fully with the Council's May 22, 2018 Interim Order. However, the Custodian lawfully denied access to handwritten notes of each of the five (5) meetings sought in both OPRA requests. N.J.S.A. 47:1A-6. Also, the Custodian complied with the Council's June 26, 2018 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's May 22 and June 26, 2018 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus 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 Custodian disclosed the three (3) sets of closed session minutes required to be disclosed in accordance with the conditional portion of the Complainant's June 6, 2016 OPRA request. Further, the relief ultimately achieved had a basis in law. 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 August 29, 2018, the Council distributed its Interim Order to all parties. On August 24, 2018, Custodian's Counsel e-mailed the Government Records Council ("GRC") advising that the parties had reached an agreement. Counsel noted that the Town Mayor and Council would consider approval for the payment at its September 25, 2018 meeting. On September 28, 2018, the GRC sought an update as to whether payment was approved.

On October 2, 2018 Custodian's Counsel confirmed via e-mail, which was copied to Complainant's Counsel, that the Town Mayor and Council approved the settlement payment at its September 25, 2018 meeting. Counsel further stated that the payment would take about a week to process and send to Complainant's Counsel. Counsel also requested that Complainant's Counsel advise by the end of the week whether he received the payment. On October 15, 2018, Complainant's Counsel confirmed receipt of payment.

Analysis

Prevailing Party Attorney's Fees

At its August 28, 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 August 29, 2018, the Council distributed its Interim Order to all parties. The parties had until close of business on September 27, 2018 to inform the Council as to whether they reached a settlement. On September 24, 2018, Custodian's Counsel advised that an agreement had been reached and that the Town Mayor and Town Council were expected to approve payment at their September 25, 2018 meeting. On October 2, 2018, Counsel confirmed that payment was approved at the Town meeting and should be delivered by the end of the week. On October 15, 2018, Complainant's Counsel confirmed receipt of payment.

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: Frank F. Caruso
Communications Specialist/Resource Manager

October 23, 2018



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

August 28, 2018 Government Records Council Meeting

Libertarians for Transport Government
Complainant

Complaint No. 2016-261

v.

Town of Kearny (Hudson)
Custodian of Record

At the August 28, 2018 public meeting, the Government Records Council (“Council”) considered the August 21, 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 June 26, 2018 Interim Order because she responded in the extended time frame disclosing those close session minutes responsive to the conditional portion of the Complainant’s June 6, 2016 OPRA request. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian’s initial response to both OPRA requests was insufficient because she failed to include a date certain as part of her time frame extensions. N.J.S.A. 47:1A-5(i). The Custodian also unlawfully denied access to the three (3) most recent set of closed session minutes sought in the Complainant’s June 6, 2016 OPRA request. The Custodian also failed to comply fully with the Council’s May 22, 2018 Interim Order. However, the Custodian lawfully denied access to handwritten notes of each of the five (5) meetings sought in both OPRA requests. N.J.S.A. 47:1A-6. Also, the Custodian complied with the Council’s June 26, 2018 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s May 22 and June 26, 2018 Interim Orders, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus 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 Custodian disclosed the three (3) sets of closed session



minutes required to be disclosed in accordance with the conditional portion of the Complainant's June 6, 2016 OPRA request. Further, the relief ultimately achieved had a basis in law. 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 28th Day of August, 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: August 29, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
August 28, 2018 Council Meeting**

**Libertarians for Transparent Government¹
Complainant**

GRC Complaint No. 2016-261

v.

**Town of Kearny (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the closed session minutes for Town of Kearny (“Town”) Council meetings dated March 8, 2011; October 9, 2012; August 6, 2013; June 10, 2014; and September 8, 2015.³

Custodian of Record: Patricia Carpenter

Request Received by Custodian: May 10, 2016; June 6, 2016

Response Made by Custodian: May 17, 2016; June 10, 2016

GRC Complaint Received: September 19, 2016

Background

June 26, 2018 Council Meeting:

At its June 26, 2018 public meeting, the Council considered the June 19, 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 failed to comply fully with the Council’s May 22, 2018 Interim Order. Specifically, although the Custodian responded in the extended time frame providing certified confirmation of compliance to the Council Staff, she failed to provide to the Complainant the sets of minutes required in the Order.
2. Providing the Custodian a final opportunity to comply is consistent with past case law. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016). Such an opportunity comes with a recommended alteration to the Order based on the Custodian’s own admissions that she had to also transcribe the May 8, 2012 prior to disclosing them. As such, the current Custodian shall locate and disclose the **three (3) sets of closed session minutes**

¹ Represented by Ted M. Rosenberg, Esq. (Moorestown, NJ).

² Represented by Gregory J. Castano, Esq., and Michelle F. Spencer, Esq., of Castano, Quigley, LLC (Fairfield, NJ)

³ The Complainant requested additional records that are not at issue in this complaint.

available for disclosure prior to June 6, 2016. The records provided must be the transcribed, approved minutes that reflect the three (3) most recent minutes and that existed prior to June 6, 2016.

3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule, R. 1:4-4,⁴ to the Council Staff.⁵**
4. 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.
5. 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 June 28, 2018, the Council distributed its Interim Order to all parties. On July 5, 2018, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she transcribed minutes upon receipt of the Order and was disclosing same to the Complainant. The Custodian noted that the newly transcribed minutes were submitted to the Mayor and Council for approval at the Town's July 17, 2018 meeting.

On August 1, 2018, the Government Records Council ("GRC") e-mailed the Custodian confirming that it received the Custodian's compliance submission. The GRC stated that a review of said submission revealed a continued misunderstanding of the Council's Orders. The GRC noted that in hopes of curing the confusion, it was providing a more detailed explanation of those records the Custodian was required to disclose. The GRC also stated that, based on the Town's good faith attempts to comply, it would renew the five (5) business day compliance time frame through August 8, 2018.

On August 8, 2018, Custodian's Counsel e-mailed the seeking an extension of time to comply with the Council's Order. On the same day, the GRC responded granting the extension through August 14, 2018. On August 14, 2018, the Custodian again responded to the Council's Interim Order. Therein, the Custodian certified that she was providing to the Complainant three (3) sets of minutes in accordance with the Order.

⁴ "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."

⁵ 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.

Analysis

Compliance

At its June 26, 2018 meeting, the Council ordered the Custodian to locate and disclose the three (3) sets of closed session minutes available for disclosure prior to June 6, 2016. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule, R. 1:4-4, to the Council Staff. On June 28, 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 July 6, 2018.

On July 5, 2018, the fourth (4th) business day after receipt of the Council's Order, the Custodian responded to the Order disclosing minutes that she transcribed as a result of the Order. Upon receipt and review of the compliance submission, the GRC determined that there appeared to remain some misunderstanding as to how the Custodian was supposed to comply with the Order. Thus, the GRC provided the Custodian a more thorough explanation of the Order and renewed the time frame to comply through August 8, 2018. Following an extension of time, the Custodian responded on August 14, 2018 disclosing to the Complainant the three (3) sets of minutes reasonably responsive to the conditional portion of his June 6, 2016 OPRA request. The Custodian also simultaneously provided certified confirmation of compliance to the Council Staff. Based on the forgoing, the GRC is satisfied that the Custodian met her obligation to comply with the Council's Order.

Therefore, the Custodian complied with the Council's June 26, 2018 Interim Order because she responded in the extended time frame disclosing those close session minutes responsive to the conditional portion of the Complainant's June 6, 2016 OPRA request. Further, the Custodian simultaneously provided certified confirmation 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)).

In the matter before the Council, the Custodian's initial response to both OPRA requests was insufficient because she failed to include a date certain as part of her time frame extensions. N.J.S.A. 47:1A-5(i). The Custodian also unlawfully denied access to the three (3) most recent set of closed session minutes sought in the Complainant's June 6, 2016 OPRA request. The Custodian also failed to comply fully with the Council's May 22, 2018 Interim Order. However, the Custodian lawfully denied access to handwritten notes of each of the five (5) meetings sought in both OPRA requests. N.J.S.A. 47:1A-6. Also, the Custodian complied with the Council's June 26, 2018 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (*quoting* Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (*quoting* Black's

Law Dictionary 1145 (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. 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 failed to respond to (2) OPRA requests after initially extending the time frame on an open-ended basis. Following the filing of this complaint and submission of the Statement of Information, the Custodian disclosed minutes for the five (5) meetings specifically identified in both of the Complainant’s OPRA requests. The Custodian also disclosed minutes as part of a conditional portion of the Complainant’s June 6, 2016 OPRA request. The Custodian explained in her response that she had to transcribe and submit for approval all minutes that were provided.

After reviewing the evidence of record in this complaint, the Council found that the Custodian was not required to disclose any minutes not in existence when the OPRA requests were submitted. Libertarians, GRC 2016-261 (Interim Order dated May 22, 2018) at 6. Based on this, the Council ordered the Custodian to disclose minutes responsive to the conditional portion of the Complainant's June 6, 2016 OPRA request that existed prior to that date. Thereafter, the Custodian attempted to comply by transcribing and creating new minutes. The Council rejected the Custodian's attempted compliance but provided her another opportunity to comply. Libertarians, GRC 2016-261 (Interim Order dated June 26, 2018) at 5. After a second attempt, the Custodian was able to comply the Council's June 26, 2018 Order. Based on the Council's Orders 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 May 22 and June 26, 2018 Interim Orders, 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 three (3) sets of closed session minutes required to be disclosed in accordance with the conditional portion of the Complainant's June 6, 2016 OPRA request. 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 June 26, 2018 Interim Order because she responded in the extended time frame disclosing those close session minutes responsive to the conditional portion of the Complainant's June 6, 2016 OPRA request. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian's initial response to both OPRA requests was insufficient because she failed to include a date certain as part of her time frame extensions. N.J.S.A. 47:1A-5(i). The Custodian also unlawfully denied access to the three (3) most recent set of closed session minutes sought in the Complainant's June 6, 2016 OPRA request. The Custodian also failed to comply fully with the Council's May 22, 2018 Interim Order. However, the Custodian lawfully denied access to handwritten notes of each of the five (5) meetings sought in both OPRA requests. N.J.S.A. 47:1A-6. Also, the Custodian complied with the Council's June 26, 2018 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive

element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's May 22 and June 26, 2018 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus 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 Custodian disclosed the three (3) sets of closed session minutes required to be disclosed in accordance with the conditional portion of the Complainant's June 6, 2016 OPRA request. Further, the relief ultimately achieved had a basis in law. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

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

August 21, 2018



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 26, 2018 Government Records Council Meeting

Libertarians for Transparent Government
Complainant

Complaint No. 2016-261

v.

Town of Kearny (Hudson)
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the June 19, 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 failed to comply fully with the Council’s May 22, 2018 Interim Order. Specifically, although the Custodian responded in the extended time frame providing certified confirmation of compliance to the Council Staff, she failed to provide to the Complainant the sets of minutes required in the Order.
2. Providing the Custodian a final opportunity to comply is consistent with past case law. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016). Such an opportunity comes with a recommended alteration to the Order based on the Custodian’s own admissions that she had to also transcribe the May 8, 2012 prior to disclosing them. As such, the current Custodian shall locate and disclose the **three (3) sets of closed session minutes available for disclosure prior to June 6, 2016**. The records provided must be the transcribed, approved minutes that reflect the three (3) most recent minutes and that existed prior to June 6, 2016.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Council Staff.²**

¹ "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."

² 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.



4. 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.
5. 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 26th Day of June, 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: June 28, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting**

**Libertarians for Transparent Government¹
Complainant**

GRC Complaint No. 2016-261

v.

**Town of Kearny (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the closed session minutes for Town of Kearny (“Town”) Council meetings dated March 8, 2011; October 9, 2012; August 6, 2013; June 10, 2014; and September 8, 2015.³

Custodian of Record: Patricia Carpenter

Request Received by Custodian: May 10, 2016; June 6, 2016

Response Made by Custodian: May 17, 2016; June 10, 2016

GRC Complaint Received: September 19, 2016

Background

May 22, 2018 Council Meeting:

At its May 22, 2018 public meeting, the Council considered the May 15, 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. Although the Custodian timely responded in writing to the Complainant’s two (2) OPRA requests, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. N.J. Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008), because she failed to provide a date certain upon which she would respond to the Complainant. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).
2. The Custodian lawfully denied access to the handwritten notes of the five (5) closed session minutes because they were exempt from disclosure as “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-6; O’Shea, 391

¹ Represented by Ted M. Rosenberg, Esq. (Moorestown, NJ).

² Represented by Gregory J. Castano, Esq., and Michelle F. Spencer, Esq., of Castano, Quigley, LLC (Fairfield, NJ)

³ The Complainant requested additional records that are not at issue in this complaint.

N.J. Super. 534; Hardwick, GRC 2007-164. Further, the Custodian was under no obligation to provide the minutes after she transcribed them from her handwritten notes. See Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012).

3. The Custodian unlawfully denied access to two (2) sets of closed session minutes responsive to the Complainant's June 6, 2016 OPRA request. N.J.S.A. 47:1A-6; Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order April 29, 2014). Specifically, the Custodian was required to disclose minutes from the three (3) prior meetings where those minutes could be disclosed: the Custodian only disclosed one relevant record. Instead, the Custodian provided a set of minutes not previously in existence and merely stated that she could not locate another set of minutes. Thus, the Custodian must locate and disclose closed session minutes for two (2) meetings (excluding the May 8, 2012 minutes already disclosed) that existed and could be disclosed prior to receipt of the June 6, 2016 OPRA request.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Council Staff.⁵**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On May 24, 2018, the Council distributed its Interim Order to all parties. On May 29, 2018, the Custodian sought an extension of time to comply with the Council's Order. On May 31, 2018, the Government Records Council ("GRC") granted an extension until June 8, 2018.

On June 8, 2018, the Custodian responded to the Council's Interim Order attaching Custodian Counsel's letter brief. The Custodian certified that at the time of her appointment, the Town's closed session minutes were in complete disarray. The Custodian affirmed that minutes were missing and handwritten notes for other meetings could not be located. The Custodian affirmed that, on many occasions, she conducted a search for and was unable to locate any

⁴ "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."

⁵ 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.

handwritten notes or composed minutes for the March 25, 2008 meeting. The Custodian certified that she located handwritten notes for the May 8, 2012 and April 9, 2013 closed session meetings, transcribed minutes, and disclosed them to the Complainant “as soon as they became public records.” The Custodian certified that she provided the Complainant all records responsive to the subject OPRA requests.

In the attached letter brief, Custodian’s Counsel contended that the GRC erred in its Order by requiring the Custodian to disclose additional records based on the “conditional” portion of the Complainant’s June 6, 2016 OPRA request. Counsel stated that the request sought the same minutes as the May 10, 2016 OPRA request with a caveat: “[i]f none of the minutes requested in [No.] 1 through [No.] 4 above are disclosed, then please send . . . minutes from the three most recently held Town Council closed sessions *for which minutes can be disclosed in part or whole.*” (Emphasis added). Counsel contended that the Council’s Order “bespeaks a misunderstanding” because the “if” condition never went in effect. Counsel provided a Merriam-Webster definition of the word “if” and noted that New Jersey’s courts have found that the word was one of “condition.” Gifford v. Thorn, 9 N.J. Eq. 702, 731 (1855). Counsel contended that once the Custodian disclosed all responsive minutes to the Complainant, the conditional portion of the June 6, 2016 OPRA request was nullified and the GRC should not have addressed it.

Counsel further argued that because the Complainant received the records requested at the time they became subject to disclosure, he cannot be considered a prevailing party. Counsel argued that there is no precedent supporting the Complainant’s contention that he was a prevailing party even though records were not disclosable at the time of his OPRA request. Further, Counsel noted that, as part of the Statement of Information (“SOI”), the Custodian provided a date certain on which she would provide responsive records and did so by that date.⁶

Analysis

Compliance

At its May 22, 2018 meeting, the Council ordered the Custodian to disclose two (2) sets of closed session minutes that existed prior to the June 6, 2016 OPRA request and could be disclosed. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to the Council Staff. On May 24, 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 June 1, 2018.

On May 29, 2018, the second (2nd) business day after receipt of the Council’s Order, the Custodian sought an extension of the compliance time frame, which the GRC granted until June 8, 2018. On June 8, 2018, the Custodian responded to the Council’s Order. Therein, the Custodian

⁶ On June 12, 2018, the GRC contacted Custodian’s Counsel to clarify whether the Town’s submission was meant to be a request for reconsideration. Counsel subsequently clarified via e-mail that the submission was intended to be a response to the Order, but she included a completed “Request for Reconsideration” form in the instance that the GRC treated it as such. After review, the GRC e-mailed the parties on June 15, 2018 advising that it would treat the Town’s submission as a response to the Order (as opposed to a request for reconsideration).

certified that she provided all minutes originally requested, as well as minutes for the May 8, 2012 and April 9, 2013 meetings, in November 2016. The Custodian further certified that she could not locate the March 25, 2008 minutes or handwritten notes, and thus could not provide them. Additionally, as part of an attached letter brief, Counsel asserted that a misunderstanding occurred regarding the Complainant's June 6, 2016 "conditional" request item. Counsel argued that the item never went into effect because the Custodian disclosed the other minutes requested.

In determining whether the Custodian complied, the GRC must look to the timeliness of the response and whether said response complied with the Council's Order. To quickly address the timeliness issue, the Custodian sought an extension during the compliance time frame. The GRC said extension until June 8, 2018, and the Custodian conformed by submitting certified confirmation of compliance on that date.

Notwithstanding the timeliness of the Custodian's response, she failed to successfully comply with the Council's Order because the response did not comply with the Order. Instead, the Custodian reasserted arguments made in the SOI regarding the disclosability of the records sought in the subject OPRA requests. Custodian's Counsel also submitted a letter brief arguing that a misunderstanding led to the Council rendering an erroneous decision. While the GRC does agree that a misunderstanding appears to have occurred, the Council is not the bearer of that misunderstanding.

In her brief, Counsel stated that she agreed with the factual record as follows. First, the Custodian could not provide the five (5) sets of minutes requested in either OPRA request because they did not exist "as public records" at the time of receipt of those requests. Second, the Custodian disclosed the five (5) sets of minutes in November 2016 once they became public records. Third, the Custodian disclosed two (2) additional sets of minutes, allegedly in conformity with the conditional portion of the June 6, 2016 OPRA request, which she had to transcribe prior to disclosure. Finally, the Custodian did not disclose minutes for the March 25, 2008 minutes because she could not locate either the finalized minutes or handwritten notes. Counsel thus argued that the conditional portion of the June 6, 2016 OPRA request was never in effect because of disclosures that occurred over five (5) months after the Complainant's June 6, 2016 OPRA request, approximately two (2) months after the Denial of Access Complaint, and one (1) month after the Custodian filed the SOI.

Contrary to Custodian Counsel's above assertions, the facts directly support the Council's decision requiring the Custodian to disclose closed session minutes in accordance with the conditional portion of the June 6, 2016 OPRA request. Counsel seems to contend that because the five (5) sets of minutes were disclosed five (5) months after the fact, the conditional portion should have been ignored by the Custodian and the Council. However, the Custodian and Counsel have repeatedly admitted that the five (5) sets of minutes sought in both the May 10 and June 6, 2016 OPRA requests were not "public records" when the Custodian received the request. As stated in the conditional portion of June 6, 2016 OPRA request, "[i]f none of the minutes requested in [No.] 1 through [No.] 4 above are disclosed . . ." the Complainant sought access to ". . . minutes from the three most recently held Town Council closed sessions for which minutes can be disclosed in part or whole." It is absolutely clear that the Custodian, who could not have provided minutes that did not exist, should have provided the three (3) sets of closed session minutes that were

disclosable as of June 6, 2017. Instead, the Custodian responded over five (5) months later providing multiple sets of minutes that she continued to contend did not exist when receiving the Complainant's two (2) OPRA requests.

Ultimately, the Council's decision here is consistent with Paff, GRC 2010-307 and Delbury, 2013-240. The Custodian was unable to provide the five (5) sets of responsive minutes at the time of the request. Thus, the conditional portion of the June 6, 2016 OPRA request clearly went into effect. It should be noted that even though the Town is arguing that the conditional portion of the request was never in effect, the Custodian still provided minutes in an attempt to satisfy it. However, the GRC reiterates that this disclosure came months after receipt of the OPRA request and subsequent Denial of Access Complaint.

Therefore, the Custodian failed to comply fully with the Council's May 22, 2018 Interim Order. Specifically, although the Custodian responded in the extended time frame providing certified confirmation of compliance to the Council Staff, she failed to provide to the Complainant the sets of minutes required in the Order.

In the past, the GRC has provided custodians a "final opportunity to disclose [records required to be disclosed] and/or provide comprehensive arguments as to why same are not subject to disclosure." See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016) at 4. In Carter, the custodian submitted compliance in response to the Council's September 29, 2015 Interim Order. However, in reviewing that compliance, it became evident that it was incomplete. Specifically, several attachments were not disclosed and the custodian did not provide an explanation for the nondisclosure. The Council thus held that the custodian did not comply fully with the its Order and provided him "a 'final opportunity' to comply. Carter, GRC 2014-218 (citing Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated April 28, 2015) at 7).

Here, the GRC must first note that the Custodian's certified confirmation of compliance has revealed none of the minutes, including those provided in response to the conditional portion of the June 6, 2016 OPRA request, existed and were disclosable at that time. This admission indicates that the Custodian failed in total to adhere to the conditional portion of the June 6, 2016 OPRA request. Specifically, the Custodian was required to identify three (3) sets of closed session minutes available at the time that she received the Complainant's June 6, 2016 OPRA request and disclose them. However, the Custodian failed to do so. Instead, the Custodian pointed to post-complaint disclosures and the fact that she could not find minutes for the March 25, 2008 meeting. If minutes could not be located, or had to be transcribed and approved by the Town, they were not responsive to the Complainant's June 6, 2016 OPRA request because they were not "government records" subject to disclosure. See Libertarians, GRC 2016-261 at 5.

Accordingly, providing the Custodian a final opportunity to comply is consistent with past case law. See Carter, GRC 2014-218. Such an opportunity comes with a recommended alteration to the Order based on the Custodian's own admissions that she had to also transcribe the May 8, 2012 prior to disclosing them. As such, the current Custodian shall locate and disclose the **three (3) sets of closed session minutes available for disclosure prior to June 6, 2016**. The records

provided must be the transcribed, approved minutes that reflect the three (3) most recent minutes and that existed prior to June 6, 2016.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian failed to comply fully with the Council's May 22, 2018 Interim Order. Specifically, although the Custodian responded in the extended time frame providing certified confirmation of compliance to the Council Staff, she failed to provide to the Complainant the sets of minutes required in the Order.
2. Providing the Custodian a final opportunity to comply is consistent with past case law. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016). Such an opportunity comes with a recommended alteration to the Order based on the Custodian's own admissions that she had to also transcribe the May 8, 2012 prior to disclosing them. As such, the current Custodian shall locate and disclose the **three (3) sets of closed session minutes available for disclosure prior to June 6, 2016**. The records provided must be the transcribed, approved minutes that reflect the three (3) most recent minutes and that existed prior to June 6, 2016.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁷ to the Council Staff.⁸**

⁷ "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."

⁸ 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.

4. 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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

June 19, 2018



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

May 22, 2018 Government Records Council Meeting

Libertarians for Transparent Government
Complainant

Complaint No. 2016-261

v.

Town of Kearny (Hudson)
Custodian of Record

At the May 22, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 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. Although the Custodian timely responded in writing to the Complainant’s two (2) OPRA requests, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008), because she failed to provide a date certain upon which she would respond to the Complainant. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).
2. The Custodian lawfully denied access to the handwritten notes of the five (5) closed session minutes because they were exempt from disclosure as “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-6; O’Shea, 391 N.J. Super. 534; Hardwick, GRC 2007-164. Further, the Custodian was under no obligation to provide the minutes after she transcribed them from her handwritten notes. See Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012).
3. The Custodian unlawfully denied access to two (2) sets of closed session minutes responsive to the Complainant’s June 6, 2016 OPRA request. N.J.S.A. 47:1A-6; Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order April 29, 2014). Specifically, the Custodian was required to disclose minutes from the three (3) prior meetings where those minutes could be disclosed: the Custodian only disclosed one relevant record. Instead, the Custodian provided a set of minutes not previously in existence and merely stated that she could not locate another set of minutes. Thus, the Custodian must locate and disclose closed session minutes for two (2) meetings (excluding the May 8, 2012 minutes already disclosed) that existed and could be disclosed prior to receipt of the June 6, 2016 OPRA request.



4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Council Staff.²**
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 22nd Day of May, 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: May 24, 2018

¹ "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."

² 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
May 22, 2018 Council Meeting**

**Libertarians for Transparent Government¹
Complainant**

GRC Complaint No. 2016-261

v.

**Town of Kearny (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the closed session minutes for Town of Kearny (“Town”) Council meetings dated March 8, 2011; October 9, 2012; August 6, 2013; June 10, 2014; and September 8, 2015.³

Custodian of Record: Patricia Carpenter

Request Received by Custodian: May 10, 2016; June 6, 2016

Response Made by Custodian: May 17, 2016; June 10, 2016

GRC Complaint Received: September 19, 2016

Background⁴

Request and Response:

On May 10, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 16, 2016, the Custodian responded in writing advising that additional time was required “for processing minutes.” The Custodian further noted that she would notify the Complainant via e-mail when the responsive minutes became available.

On June 6, 2016, the Complainant submitted a second (2nd) Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Complainant noted therein that he had previously requested the same records and was told an extension was necessary. The Complainant noted that a nearly a month had elapsed since the extension without a response. The Complainant also added the following alternative request item:

¹ Represented by Ted M. Rosenberg, Esq. (Moorestown, NJ).

² Represented by Gregory J. Castano, Esq., of Castano, Quigley, LLC (Fairfield, NJ)

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ 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.

If none of the minutes requested . . . are disclosable, then please send [Complainant] the minutes from the last three most recently held Town Council closed sessions for which minutes can be disclosed in whole or in part.

On June 10, 2016, the Custodian responded in writing stating that additional time to process the OPRA request was required. On the same day, the Complainant e-mailed the Custodian advising that she was supposed to provide a date certain on which she would respond. The Complainant sought said date at that time.

Denial of Access Complaint:

On September 19, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian violated OPRA by twice failing to provide a date certain on which she would respond to the his two (2) OPRA requests. See “Handbook for Records Custodians (Fifth Edition – January 2011)” at 17. The Complainant argued that even if no responsive minutes existed, the Custodian was required to respond that no records existed. The Complainant contended that the Custodian instead took the open-ended extensions and failed to respond over the last three (3) months.

The Complainant further argued that even should it turn out that no records existed, he should still be considered a prevailing party entitled to an award of attorney’s fees. The Complainant contended that the Custodian’s vague response did not provide him with enough “information [or] the opportunity to effectively advocate [its] position and assess whether or not [it] had a cognizable claim to the records pursuant to OPRA.” Paff v. Twp. of Stafford, et al, Docket No. OCN-L-852-15 at 5. See also Kelley v. Borough of Riverdale, et al, Docket No. MRS-L-524-14 at 7.

The Complainant thus requested the Council: 1) order the Custodian to identify all records not yet disclosed in response to both OPRA requests; 2) order disclosure of those records; 3) order the Custodian to provide a redaction index in accordance with Paff v. N.J. Dep’t of Labor, 379 N.J. Super. 346, 354 (App. Div. 2005), where applicable; and 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

Statement of Information:

On October 20, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s second (2nd) OPRA request on June 6, 2016. The Custodian certified that no search was required because she maintained handwritten notes. The Custodian certified that she responded in writing on June 10, 2016 obtaining additional time to respond to the OPRA request.⁵

The Custodian certified that she did not disclose the responsive minutes because they only existed as handwritten notes. The Custodian thus asserted that minutes were not available at the time that she received the second (2nd) OPRA request. The Custodian contended that staffing

⁵ The Custodian did not address the Complainant’s May 10, 2016 OPRA request in the SOI.

reductions resulted in a delay in producing formal minutes from the handwritten notes.⁶ The Custodian averred that due to a positive change in the Town's financial condition, she could expect to provide the responsive minutes by November 15, 2016.

Additional Submissions:

On October 31, 2016, Complainant's Counsel submitted a letter brief responding to the SOI. Therein, Counsel argued that the Custodian failed to address the alternative request item from Complainant's second (2nd) OPRA request. Counsel noted that the added item should have been addressed if none of the originally requested minutes were disclosable. Counsel thus alleged that the SOI was incomplete and should be returned, as the GRC previously did in Paff v. Cnty. of Salem, GRC Complaint No. 2015-342 (Interim Order dated April 25, 2017).

On November 15, 2016, the Custodian e-mailed Complainant's Counsel disclosing the five (5) sets of closed session minutes (without redactions) requested in the Complainant's two (2) OPRA requests. The Custodian also disclosed a sixth (6th) set of closed session minutes for May 8, 2012. Finally, the Custodian stated that closed session minutes for March 25, 2008, which were prepared by the former Town Clerk, could not be located. The Custodian notes that she would continue to search for them. Finally, the Custodian stated that the April 9, 2013 closed session minutes were still being prepared.

On November 22, 2016, the Custodian e-mailed Complainant's Counsel disclosing the April 9, 2013 closed session minutes.

Analysis

Sufficiency of Response

OPRA provides that a custodian may have an extension of time to respond to a complainant's OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008), the custodian responded in writing seeking an extension of time to respond to said request. However, the custodian failed to provide a date certain upon which the requested records would be provided. The Council held that the custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i).

Here, the Custodian responded in writing to both the Complainant's May 10 and June 6, 2016 OPRA requests advising that additional time would be required to "process" the requested minutes. However, in neither response did the Custodian provide a date certain on which she would respond. As noted in Hardwick, the Custodian's failure to provide a date certain resulted in a violation of N.J.S.A. 47:1A-5(i).

⁶ The Custodian noted that Clerk's Office staffing reductions negatively impacted many of its essential duties.

Therefore, although the Custodian timely responded in writing to the Complainant's two (2) OPRA requests, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick, GRC 2007-164, because she failed to provide a date certain upon which she would respond to the Complainant. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).

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.

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative [("ACD")] material." N.J.S.A. 47:1A-1.1. Regarding handwritten notes, both the courts and the GRC have decided cases regarding handwritten notes. First, in O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007),⁷ the complainant requested handwritten notes of an closed session meeting. The New Jersey Superior Court, Appellate Division held that:

We reject [complainant's] contention that the Secretary's handwritten notes, jotted down as a memory aid to assist in preparing the formal minutes, are public records merely because they were 'made' by a government official. Under that rationale any Board member's personal handwritten notes, taken during a meeting to assist the member to recall what occurred, would be a public record because the member might arguably refer to them later in reviewing the Secretary's draft of the formal minutes. Taken further, every yellow-sticky note penned by a government official to help him or her remember a work-related task would be a public record. Such absurd results were not contemplated or required by OPRA.

[Id. at 538.]

Additionally, in Hardwick, GRC 2007-164 the GRC held that:

[B]ecause no official meeting minutes exist for the requested staff meetings and the personal notes of the attendees, which are responsive to the request, are informal memory aids, said records are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and [O'Shea]. Therefore, because the Custodian provided a lawful basis for the denial of access at the time of the denial, the Custodian has met his burden of proving a lawful denial of access to the personal notes of the meeting attendees pursuant to N.J.S.A. 47:1A-6.

[Id. at 12.]

⁷ Appealed from O'Shea v. West Milford Bd. of Educ., GRC Complaint No. 2004-96 (April 2006).

Here, both the Complainant's May 10, and June 6, 2016 OPRA requests sought access to closed session minutes for five (5) specific dates. Further, in the June 6, 2016 OPRA request, the Complainant provided an alternative to the five (5) sets of minutes: "if none of the minutes . . . are disclosed, then please send [Complainant] the minutes from the three most recently held Town Council closed sessions for which minutes can be disclosed in whole or part." In the SOI, the Custodian certified that she could not provide responsive minutes because they had not yet been transcribed from handwritten notes at the time that she received the Complainant's June 6, 2016 (2nd) OPRA request. However, the Custodian did not address the alternative option the Complainant supplied in his June 6, 2016 OPRA request. The Custodian also noted that she would be in a position to disclose records by November 15, 2016.

Thereafter, on November 15, 2016, the Custodian disclosed minutes for all five (5) closed session dates. Additionally, the Custodian disclosed another set of minutes from May 8, 2012. The Custodian also advised that she could not locate minutes from the March 25, 2008 meeting and that minutes for the April 9, 2013 closed session were still being prepared. On November 22, 2016, the Custodian disclosed April 9, 2013 closed session minutes to the Complainant.

Regarding the five (5) sets of minutes sought by the Complainant in both OPRA requests, the evidence of record here is consistent with the facts present in O'Shea, 391 N.J. Super. 534, and Hardwick, GRC 2007-164. It is clear that only handwritten notes and not formal minutes existed. Further, it logically follows that if the Custodian only possessed handwritten notes at the time of the Complainant's June 6, 2016 OPRA request, she also possessed only those handwritten notes at the time she received the May 10, 2016 OPRA request. Thus, the Custodian's handwritten notes, an informal memory aid, were not subject to disclosure in response to either OPRA request because they constituted ACD material. N.J.S.A. 47:1A-1.1. Further, the Custodian was under no obligation to provide handwritten notes as a substitute for the formal, approved minutes at the time of either request because they constituted ACD material pursuant to O'Shea. Finally, the Custodian was also not required to disclose the formal minutes once they came into existence after submission of both OPRA requests. See Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012) (holding that a custodian was not obligated to disclose meeting minutes once approved if they not approved at the time of the OPRA request).

Accordingly, the Custodian lawfully denied access to the handwritten notes of the five (5) closed session minutes because they were exempt from disclosure as ACD material. N.J.S.A. 47:1A-6; O'Shea, 391 N.J. Super. 534; Hardwick, GRC 2007-164. Further, the Custodian was under no obligation to provide the minutes after she transcribed them from her handwritten notes. See Paff, GRC 2010-307.

Notwithstanding the forgoing, the Complainant also included in his June 6, 2016 OPRA request the alternative disclosure option: minutes from the three (3) most recent closed sessions where minutes could be disclosed. As noted above, the Custodian did not address this item in her SOI. However, the Custodian subsequently addressed the item in her November 15, and 22, 2016 responses. Therein, the Custodian disclosed one (1) set of closed session minutes, but then advised that one set could not be located and another was not yet prepared for disclosure. The Custodian ultimately disclosed a second set of minutes on November 22, 2016, but never disclosed a third (3rd) set of minutes.

In Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order April 29, 2014), one of the complainant's request items sought the "[l]ast four (4) . . . Health Department Inspection Reports . . ." The custodian disclosed four (4) reports; however, one of those reports post-dated submission of the OPRA request. The Council held that the custodian may have unlawfully denied access to a fourth (4th) report, reasoning that:

[N]ot only did a record not exist at the time of the request, but also this inspection was completed after the submission of same. Just as OPRA does not require a custodian to provide records that did not exist at the time of a request nor allow for on-going requests, the fourth (4th) report cited as responsive could not have possibly been responsive to this OPRA request. Thus, Mr. Nielsen should have disclosed the last four (4) completed reports. Although he disclosed three (3) reports already, he failed to disclose a fourth (4th) completed report to the Complainant.

[Id. at 7.]

In reviewing the Complainant's June 6, 2016 alternative and applying them to the evidence of record here, the GRC concludes that the Custodian unlawfully denied access to that portion of the OPRA request for the reasons cited in Delbury, GRC 2013-240. Specifically, it is established that the Custodian did not have to disclose handwritten meeting notes or the formal minutes if they came into existence after receipt of the subject OPRA requests. The Complainant was also clear in his June 6, 2016 OPRA request that if the Custodian could not disclose any of the five (5) sets of minutes, he sought access to minutes from the most recent three (3) meetings that could "be disclosed.

While the Custodian eventually provided one (1) set of those alternative minutes on November 15, 2016, she provided a second (2nd) set of minutes on November 22, 2016 although they had not been transcribed prior to submission of either OPRA request. Further, the Custodian advised the Complainant that a third (3rd) set of minutes could not be located, but they would continue to search for them. To date, there is no evidence in the record suggesting that those minutes were located and disclosed or that the Custodian provided minutes from another date in their stead. Thus, and similar to Delbury, the Custodian did not fully respond to the alternate portion of the request and thus unlawfully denied access to two (2) sets of closed session minutes.

Accordingly, the Custodian unlawfully denied access to two (2) sets of closed session minutes responsive to the Complainant's June 6, 2016 OPRA request. N.J.S.A. 47:1A-6; Delbury, GRC 2013-240. Specifically, the Custodian was required to disclose minutes from the three (3) prior meetings where those minutes could be disclosed: the Custodian only disclosed one relevant record. Instead, the Custodian provided a set of minutes not previously in existence and merely stated that she could not locate another set of minutes. Thus, the Custodian must locate and disclose closed session minutes for two (2) meetings (excluding the May 8, 2012 minutes already disclosed) that existed and could be disclosed prior to receipt of the June 6, 2016 OPRA request.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated

OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. Although the Custodian timely responded in writing to the Complainant's two (2) OPRA requests, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008), because she failed to provide a date certain upon which she would respond to the Complainant. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).
2. The Custodian lawfully denied access to the handwritten notes of the five (5) closed session minutes because they were exempt from disclosure as "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-6; O'Shea, 391 N.J. Super. 534; Hardwick, GRC 2007-164. Further, the Custodian was under no obligation to provide the minutes after she transcribed them from her handwritten notes. See Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012).
3. The Custodian unlawfully denied access to two (2) sets of closed session minutes responsive to the Complainant's June 6, 2016 OPRA request. N.J.S.A. 47:1A-6; Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order April 29, 2014). Specifically, the Custodian was required to disclose minutes from the three (3) prior meetings where those minutes could be disclosed: the Custodian only disclosed one relevant record. Instead, the Custodian provided a set of minutes not previously in existence and merely stated that she could not locate another set of minutes. Thus, the Custodian must locate and disclose closed session minutes for two (2) meetings (excluding the May 8, 2012 minutes already disclosed) that existed and could be disclosed prior to receipt of the June 6, 2016 OPRA request.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**

redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁸ to the Council Staff.⁹

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

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

May 15, 2018

⁸ "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."

⁹ 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.