



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

June 30, 2020 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2016-95

v.

City of Trenton (Mercer)
Custodian of Record

At the June 30, 2020 public meeting, the Government Records Council (“Council”) considered the June 23, 2020 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 accept the Honorable Elia A. Pelios’, Administrative Law Judge, May 19, 2019 Initial Decision approving the Settlement Agreement signed by the parties, or their representatives, ordering the parties to comply with the settlement terms and further determining that these proceedings be concluded.

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 June 2020

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: July 2, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 30, 2020 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2016-95

v.

**City of Trenton (Mercer)²
Custodial Agency**

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

1. The City of Trenton's ("City") Internal Affairs ("IA") Summary forms that mirror those in "Appendix S" of the Attorney General's Guidelines ("Guidelines") submitted to the Mercer County Prosecutor's Office ("MCPO") from January 2013 through the date of the request.
2. The six (6) most recently released reports to the public summarizing the allegations received and investigations conducted for the relevant time frame.
3. The six (6) most recently released reports to the public that give a brief synopsis of all complaints where a fine or suspension of ten (10) days or more was assessed to an employee.
4. The three (3) most recent "Brady letters" on file that: a) were directed to defendants and their attorneys; b) were made by any law enforcement agency (including but not limited to the MCPO; and c) notified those defendants and/or their attorneys that an employee, including but not limited to a police officer, had been untruthful.

Custodian of Record: Richard K. Kachmar³
Request Received by Custodian: November 9, 2015
Response Made by Custodian: December 10, 2015
GRC Complaint Received: April 1, 2016

Background

January 31, 2019 Council Meeting:

At its January 31, 2019 public meeting, the Council considered the January 29, 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, found that:

¹ Represented by C.J. Griffin, Esq., of Pashman, Stein, P.C. (Hackensack, NJ).

² Represented by John Morelli, Esq. (Trenton, NJ). Previously represented by Walter D. Denson, Esq. (Trenton, NJ) and Lori E. Caughman, Esq. (Trenton, NJ) before him.

³ The current Custodian of Record is Dwayne M. Harris.

1. Sgt. Durlacher and/or the current Custodian failed to comply with the Council's October 30, 2018 Interim Order. Specifically, Mr. Murray sought an extension of time to respond, which the GRC granted. However, the City provided no further response to the Council's Order.
2. "The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's October 30, 2018 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.
3. The original Custodian's failure to timely respond to the request resulted in "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, Ms. Allen and Sgt. Durlacher's collective response was insufficient. N.J.S.A. 47:1A-5(g). Further, the original Custodian unlawfully denied access to certain responsive records. N.J.S.A. 47:1A-6. Also, Sgt. Durlacher and/or the current Custodian failed to properly comply with either the Council's November 14, 2017, or October 30, 2018, Interim Orders. While Ms. Allen's actions do not appear to rise to a knowing and willful violation, it is possible that Sgt. Durlacher's, as well as the original and current Custodians' actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law for a determination of whether any of these three (3) individuals knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
4. Pursuant to the Council's November 14, 2017 and October 30, 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 Council twice ordered disclosure of those records sought in the Complainant's OPRA request. While Sgt. Durlacher did disclose some of those records on December 4, 2017, the Council ordered additional disclosures on October 30, 2018. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. For administrative ease, the Office of Administrative Law should determine the total amount of the award of reasonable attorney's fees.

Procedural History:

On February 4, 2019, the Council distributed its Interim Order to all parties. On May 3, 2019, the complaint was transmitted to the Office of Administrative Law ("OAL"). On May 19, 2020, the Honorable Elia A. Pelios, Administrative Law Judge ("ALJ") issued an Initial Decision as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, the ALJ “. . . **CONCLUDE[D]** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms of the settlement, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.”

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council accept the Honorable Elia A. Pelios', Administrative Law Judge, May 19, 2019 Initial Decision approving the Settlement Agreement signed by the parties, or their representatives, ordering the parties to comply with the settlement terms and further determining that these proceedings be concluded.

Prepared By: Frank F. Caruso
Executive Director

June 23, 2020



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 31, 2019 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2016-95

v.

City of Trenton (Mercer)
Custodian of Record

At the January 31, 2019 public meeting, the Government Records Council (“Council”) considered the January 29, 2019 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. Sgt. Durlacher and/or the current Custodian failed to comply with the Council’s October 30, 2018 Interim Order. Specifically, Mr. Murray sought an extension of time to respond, which the GRC granted. However, the City provided no further response to the Council’s Order.
2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s October 30, 2018 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.
3. The original Custodian’s failure to timely respond to the request resulted in “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, Ms. Allen and Sgt. Durlacher’s collective response was insufficient. N.J.S.A. 47:1A-5(g). Further, the original Custodian unlawfully denied access to certain responsive records. N.J.S.A. 47:1A-6. Also, Sgt. Durlacher and/or the current Custodian failed to properly comply with either the Council’s November 14, 2017, or October 30, 2018, Interim Orders. While Ms. Allen’s actions do not appear to rise to a knowing and willful violation, it is possible that Sgt. Durlacher’s, as well as the original and current Custodians’ actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law for a determination of whether any of these three (3) individuals knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.



4. Pursuant to the Council's November 14, 2017 and October 30, 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 Council twice ordered disclosure of those records sought in the Complainant's OPRA request. While Sgt. Durlacher did disclose some of those records on December 4, 2017, the Council ordered additional disclosures on October 30, 2018. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. For administrative ease, the Office of Administrative Law should determine the total amount of the award of reasonable attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 31st Day of January, 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: February 4, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
January 31, 2019 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2016-95

v.

**City of Trenton (Mercer)²
Custodial Agency**

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Custodian of Record: Richard K. Kachmar³

Request Received by Custodian: November 9, 2015

Response Made by Custodian: December 10, 2015

GRC Complaint Received: April 1, 2016

Background

October 30, 2018 Council Meeting:

At its October 30, 2018 public meeting, the Council considered the October 23, 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 Represented by C.J. Griffin, Esq., of Pashman, Stein, P.C. (Hackensack, NJ).

² Represented by John Morelli, Esq. (Trenton, NJ). Previously represented by Walter D. Denson, Esq. (Trenton, NJ) and Lori E. Caughman, Esq. (Trenton, NJ) before him.

³ The current Custodian of Record is Dwayne M. Harris.

1. Sgt. Durlacher failed to comply fully with the Council's November 14, 2017 Interim Order. Specifically, Sgt. Durlacher provided compliance, to include at least two (2) reports that were responsive to the Complainant's OPRA request, and included certified confirmation of compliance within the extended time frame. However, the evidence of record strongly suggests that she did not provide all records that existed or that could be created in accordance with Paff v. Twp. of Galloway, 227 N.J. 24 (2016).
2. Pursuant to Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016), the Council is giving the Custodian/Sgt. Durlacher a final opportunity to provide the following outstanding records:
 - OPRA request item No. 1: "Table 3 – Court Dispositions" for the first three (3) quarters of 2015.
 - OPRA request item Nos. 2 and 3: 2nd half of 2012, both halves of 2013, and both halves of 2014.

Should any of the above records not exist because the information cannot be aggregated and produced as a report from "IA Pro," the Custodian/Sgt. Durlacher must certify to this fact. Additionally, for OPRA request item Nos. 2 and 3, should certain of the above records not exist, the Custodian/Sgt. Durlacher must locate previous reports in existence to fulfill the requirement of disclosing the six (6) most recent reports.

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, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Council Staff.⁶**
4. The Council defers analysis of whether the Custodian, Ms. Allen, and/or Detective Durlacher 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.

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "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."

⁶ 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.

Procedural History:

On October 31, 2018, the Council distributed its Interim Order to all parties. On November 1, 2018, Assistant Municipal Attorney Julie Murray sought an extension through November 16, 2018, which the Government Records Council (“GRC”) granted.

On December 5, 2018, Complainant’s Counsel e-mailed the GRC asking if the City responded to the Order. On December 10, 2018, the GRC replied that it had not received any such submissions.

Analysis

Compliance

At its October 30, 2018 meeting, the Council ordered Sgt. Durlacher and/or the Custodian to provide those records that were identified as outstanding or submit a certification if they could not be produced. The Council further ordered either individual to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, 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 8, 2018.

On November 1, 2018, the first (1st) business day after receipt of the Council’s Order, Ms. Murray sought an extension until November 16, 2018, which the GRC granted. The GRC received no further communications from the City after November 1, 2018.

Therefore, Sgt. Durlacher and/or the current Custodian failed to comply with the Council’s October 30, 2018 Interim Order. Specifically, Mr. Murray sought an extension of time to respond, which the GRC granted. However, the City provided no further response to the Council’s Order.

Council’s October 30, 2018 Interim Order is Enforceable

“The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s October 30, 2018 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.

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)).

Here, the original Custodian’s failure to timely respond to the request resulted in “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, Ms. Allen and Sgt. Durlacher’s collective response was insufficient. N.J.S.A. 47:1A-5(g). Further, the original Custodian unlawfully denied access to certain responsive records. N.J.S.A. 47:1A-6. Also, Sgt. Durlacher and/or the current Custodian failed to properly comply with either the Council’s November 14, 2017, or October 30, 2018, Interim Orders. While Ms. Allen’s actions do not appear to rise to a knowing and willful violation, it is possible that Sgt. Durlacher’s, as well as the original and current Custodians’ actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law (“OAL”) for a determination of whether any of these three (3) individuals knowingly and willfully violated OPRA and unreasonably denied 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.]

In the matter currently before the Council, the Complainant sought, among other relief, the disclosure of outstanding records that existed. In its November 14, 2017 Interim Order, the Council ordered such disclosure. In response, the City provided to the Complainant additional records not previously provided. However, the Complainant submitted a rebuttal to the City’s compliance that suggested additional records could be disclosed. Thus, in its October 30, 2018 Order, the Council required additional disclosures. Although the Sgt. Durlacher or the current Custodian have not responded to that Order, the facts herein support a conclusion that the Custodian is a prevailing party entitled to attorney’s fees.

Accordingly, pursuant to the Council’s November 14, 2017 and October 30, 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 Council twice ordered disclosure of those records sought in the Complainant’s OPRA request. While Sgt. Durlacher did disclose some of those records on December 4, 2017, the Council ordered additional disclosures on October 30, 2018. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. For administrative ease, the OAL should determine the total amount of the award of reasonable attorney’s fees.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. Sgt. Durlacher and/or the current Custodian failed to comply with the Council’s October 30, 2018 Interim Order. Specifically, Mr. Murray sought an extension of time to respond, which the GRC granted. However, the City provided no further response to the Council’s Order.
2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s October 30, 2018 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.
3. The original Custodian’s failure to timely respond to the request resulted in “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, Ms. Allen and Sgt. Durlacher’s collective response was insufficient. N.J.S.A. 47:1A-5(g). Further, the original Custodian unlawfully denied access to certain responsive records. N.J.S.A.

47:1A-6. Also, Sgt. Durlacher and/or the current Custodian failed to properly comply with either the Council's November 14, 2017, or October 30, 2018, Interim Orders. While Ms. Allen's actions do not appear to rise to a knowing and willful violation, it is possible that Sgt. Durlacher's, as well as the original and current Custodians' actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law for a determination of whether any of these three (3) individuals knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

4. Pursuant to the Council's November 14, 2017 and October 30, 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 Council twice ordered disclosure of those records sought in the Complainant's OPRA request. While Sgt. Durlacher did disclose some of those records on December 4, 2017, the Council ordered additional disclosures on October 30, 2018. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. For administrative ease, the Office of Administrative Law should determine the total amount of the award of reasonable attorney's fees.

Prepared By: Frank F. Caruso
Acting Executive Director

January 29, 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
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INTERIM ORDER

October 30, 2018 Government Records Council Meeting

John Paff
Complainant

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v.

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Custodian of Record

At the October 30, 2018 public meeting, the Government Records Council (“Council”) considered the October 23, 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. Sgt. Durlacher failed to comply fully with the Council’s November 14, 2017 Interim Order. Specifically, Sgt. Durlacher provided compliance, to include at least two (2) reports that were responsive to the Complainant’s OPRA request, and included certified confirmation of compliance within the extended time frame. However, the evidence of record strongly suggests that she did not provide all records that existed or that could be created in accordance with Paff v. Twp. of Galloway, 227 N.J. 24 (2016).
2. Pursuant to Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016), the Council is giving the Custodian/Sgt. Durlacher a final opportunity to provide the following outstanding records:
 - OPRA request item No. 1: “Table 3 – Court Dispositions” for the first three (3) quarters of 2015.
 - OPRA request item Nos. 2 and 3: 2nd half of 2012, both halves of 2013, and both halves of 2014.

Should any of the above records not exist because the information cannot be aggregated and produced as a report from “IA Pro,” the Custodian/Sgt. Durlacher must certify to this fact. Additionally, for OPRA request item Nos. 2 and 3, should certain of the above records not exist, the Custodian/Sgt. Durlacher must locate previous reports in existence to fulfill the requirement of disclosing the six (6) most recent reports.

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, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Council Staff.³

4. The Council defers analysis of whether the Custodian, Ms. Allen, and/or Detective Durlacher 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 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: October 31, 2018

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ 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**

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

**John Paff¹
Complainant**

GRC Complaint No. 2016-95

v.

**City of Trenton (Mercer)²
Custodial Agency**

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

1. The City of Trenton's ("City") Internal Affairs ("IA") Summary forms that mirror those in "Appendix S" of the Attorney General's Guidelines ("Guidelines") submitted to the Mercer County Prosecutor's Office ("MCPO") from January 2013 through the date of the request.
2. The six (6) most recently released reports to the public summarizing the allegations received and investigations conducted for the relevant time frame.
3. The six (6) most recently released reports to the public that give a brief synopsis of all complaints where a fine or suspension of ten (10) days or more was assessed to an employee.
4. The three (3) most recent "Brady letters" on file that: a) were directed to defendants and their attorneys; b) were made by any law enforcement agency (including but not limited to the MCPO; and c) notified those defendants and/or their attorneys that an employee, including but not limited to a police officer, had been untruthful.

Custodian of Record: Richard K. Kachmar³
Request Received by Custodian: November 9, 2015
Response Made by Custodian: December 10, 2015
GRC Complaint Received: April 1, 2016

Background

November 14, 2017 Council Meeting:

At its November 24, 2017 public meeting, the Council considered the November 8, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

¹ Represented by C.J. Griffin, Esq., of Pashman, Stein, P.C. (Hackensack, NJ).

² Represented by Walter D. Denson, Esq. (Trenton, NJ). Previously represented by Lori E. Caughman, Esq. (Trenton, NJ).

³ The current Custodian of Record is Dwayne M. Harris.

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Ms. Allen and Detective Durlacher's collective response was sufficient to the extent that it addressed each requested item as required in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). However, their collective response was ultimately insufficient because both failed to provide a specific lawful basis for access to records responsive to item Nos. 2 and 3. Therefore, Ms. Allen and Detective Durlacher violated OPRA pursuant to N.J.S.A. 47:1A-5(g). See DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
3. The Custodian may have unlawfully denied access to additional records responsive to item Nos. 1 and 3, as well as records responsive to item No. 2. N.J.S.A. 47:1A-1.1. Thus, the Custodian must either, 1) disclose all records responsive to the Complainant's OPRA request that have not yet been provided; 2) certify to whether the City's non-disclosure of all responsive records is permitted under the Supreme Court's decision in Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017); and/or 3) certify to the non-existence of any remaining records. Due to the fact that Detective Durlacher assisted in responding to this OPRA request, the GRC is also requesting that she provide a legal certification supporting the Custodian's compliance.
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 Executive Director.⁵**
5. The Council defers analysis of whether the Custodian, Ms. Allen, and/or Detective Durlacher 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.

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.

Procedural History:

On November 16, 2017, the Council distributed its Interim Order to all parties. On November 22, 2017, original Counsel to the Custodian sought an extension of time to comply with the Council's Order. Counsel noted that the Custodian was no longer with the City, Dina Aarons was out on longer term leave, and Sergeant ("Sgt.") Alexis Durlacher was out of the office until November 27, 2017. On the same day, the Government Records Council ("GRC") granted an extension until December 4, 2017.

On December 4, 2017, Sgt. Durlacher responded to the Council's Interim Order. Sgt. Durlacher certified that she was the individual that sent records to the Clerk's Office for disclosure in response to the subject OPRA request. Sgt. Durlacher certified that the Police Department did not "make all requested information available to the public" and; therefore, no additional records existed at the time of that the Complainant submitted the subject OPRA request.

Sgt. Durlacher also affirmed that the City did not maintain the information contained in the missing reports in a manner that would allow for a basic computer query. Sgt. Durlacher thus averred that the City would thus need to perform research and compile new reports. Sgt. Durlacher certified that she included as an attachment all records that exist as of December 4, 2017.

On December 8, 2017, Complainant's Counsel submitted a letter brief to the GRC attaching the Complainant's legal certification. Therein, Counsel argued that Sgt. Durlacher's certification failed to adhere to the Council's Order in total. Counsel first contended that Sgt. Durlacher's statements were as vague as the original Custodian's initial response. Further, Counsel asserted that Sgt. Durlacher's generalized statements fail to provide additional information on the timing of providing records to the Clerk's Office, whether all records provided were disclosed, and to which request items those records corresponded. Counsel also questioned Sgt. Durlacher's statements about the non-existence of records. Specifically, Counsel asserted that the certification did not address whether and when records were made or whether the City possessed responsive data, just not in report form.

Next, Counsel argued that Sgt. Durlacher failed to address whether non-disclosure was consistent with Paff, 227 N.J. 24, 2017 N.J. LEXIS 680 (2016). Counsel contended that instead, Sgt. Durlacher vaguely stated that information was not kept in a manner allowing for a computer query. Counsel countered that Paff clearly required agencies to disclose electronic information even if a query were required to generate it. Counsel stated that, to this end, a 2011 court decision indicates that the City used a database called "IA Pro" to track internal affairs records. See White v. City of Trenton, 2011 U.S. Dist. LEXIS 148335 (D.N.J. Dec. 27, 2011) at 37. Counsel also stated that "IA Pro" listed the City as a client on its website.⁶ Counsel noted that "IA Pro" included a "[c]reate-your-own' report and query builders [that] provide ad hoc reporting and analysis."⁷ Counsel contended that based on the forgoing, it was clear that the City possessed all data contained in the requested reports and had the ability to produce such via "IA Pro." Counsel further contended that the Attorney General's IA Policy required the City to disclose the requested

⁶ <http://www.iapro.com/clients/> (accessed May 23, 2018).

⁷ <http://www.iapro.com/products/iapro/> (accessed May 23, 2018).

information to the public. Counsel thus argued that the City was required to disclose the information to the Complainant regardless of whether they failed to generate reports.

In closing, Counsel contended that the City could not avoid disclosure of mandatory reports simply because they failed to generate them. Counsel asserted that the way the City responded to the Complainant's OPRA request was "haphazard and unlawful." Further, Counsel asserted that the Complainant was already a prevailing party because the City disclosed at least one additional responsive record previously not disclosed. Counsel requested that the GRC require Sgt. Durlacher to submit a new certification and disclose all responsive records, even if they existed in the form of electronically stored data. Counsel noted that this disclosure should include the tables accompanying the 2015 Appendix S reports.

In his legal certification, the Complainant affirmed that he organized the 51-page disclosure by adding Bates stamps to determine whether the City fully responded to the Council's Order.⁸ The Complainant affirmed that he identified sixteen (16) pages that were provided twice as part of Sgt. Durlacher's response. The Complainant affirmed that after removing the duplicate pages, he was left with 35 "unique" pages.

The Complainant certified that of those 35 pages, 21 pages provided clearly represented "Appendix S" forms as follows:

- All three (3) "Appendix S" tables for 2013 with no distinction between "sworn officers" and "civilian employees" were provided.
- All three (3) "Appendix S" tables for 2014 with a distinction between "sworn officers" and "civilian employees" were provided
- Only Table 1 and 2 of "Appendix S" reports covering the first three (3) quarters of 2015 with no distinction between "sworn officers" and "civilian employees" were provided.
- Only Table 1 and 2 of "Appendix S" reports covering the first three (3) quarters of 2017 were provided.

The Complainant certified that he compared the compliance disclosure to the initial disclosure and found that all were already provided, except for the 2017 reports. The Complainant noted that his OPRA request was submitted on October 21, 2015; thus, the 2017 reports were not responsive to the subject OPRA request. The Complainant further affirmed that the only outstanding report responsive to OPRA request item No. 1 not disclosed was "Table 3 – Court Dispositions" for the first three (3) quarters of 2015.

The Complainant averred that in order to understand OPRA request item Nos. 2 and 3, it was important to understand "Requirement 10" of the Attorney General's procedures requiring the creation of certain reports. The Complainant certified that "Requirement 10" provided that agencies create an annual report summarizing allegations received and investigations concluded, as well as more detailed, periodic reports where the complaints resulted in a fine or suspension of ten (10) days or more. The Complainant noted that "Requirement 10" expressly stated that these reports be made available to the public. The Complainant also noted that neither report should be

⁸ The Complainant also noted that OPRA request item No. 4 was not part of his Denial of Access Complaint.

confused with the “Appendix S” reports responsive to item No. 1. To this end, the Complainant certified that he arranged 13 of the remaining 14 pages⁹ disclosed and found that the only reports not previously provided were those from the first half of 2015. The Complainant noted that multiple reports provided fell outside the scope of his request.

Thus, the Complainant certified that the annual and periodic reports still outstanding in accordance with OPRA request item Nos. 2 and 3 were those covering the 2nd half of 2012, both halves of 2013, and both halves of 2014. The Complainant averred that should any of the reports above not exist, then the 1st half 2012 summary disclosed as part of Sgt. Durlacher’s compliance would sufficient as one of the six (6) responsive reports for OPRA request item No. 3, but not item No. 2.

Analysis

Compliance

At its November 14, 2017 meeting, the Council ordered the Custodian to 1) disclose all records responsive to the Complainant’s OPRA request that have not yet been provided; 2) certify to whether the City’s non-disclosure of all responsive records is permitted under the Supreme Court’s decision in Paff, 227 N.J. 24, 2017 N.J. LEXIS 680; and/or 3) certify to the non-existence of any remaining records. Moreover, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to the Executive Director. The Council also sought a legal certification from Sgt. Durlacher as part of compliance. On November 16, 2017, 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 27, 2017.

On November 22, 2017, the fourth (4th) business day after receipt of the Council’s Order, original Custodian’s Counsel sought an extension of time, which the GRC granted through December 4, 2017. On December 4, 2017, Sgt. Durlacher timely provided her response to the Council’s Order. Therein, Sgt. Durlacher disclosed several reports and certified that no additional reports existed. Sgt. Durlacher averred that the City did not make all requested information available to the public and that the missing information was not maintained in a way that allowed for the creation of responsive reports. On December 8, 2017, Complainant’s Counsel refuted the allegations by arguing that the City used “IA Pro,” which gave it the capability to make said reports. Further, the Complainant provided a certification detailing all records provided and identifying those he believed remained outstanding.

Upon review of the parties’ submissions, the GRC is persuaded that successful compliance was not achieved. Sgt. Durlacher provided compliance in a timely manner based on an extension. However, Sgt. Durlacher provided multiple records that were either not responsive or duplicate pages of the same records. Sgt. Durlacher further failed to provide a more detailed explanation of whether the missing reports could be generated from “IA Pro.” In all, the evidence of record indicates that Sgt. Durlacher did not provide multiple reports responsive to the OPRA request.

⁹ The Complainant discarded one of the pages, which was a duplicate of the January 1, 2012 through June 30, 2012 “[IA] Summary Report.”

Further, considering Complainant Counsel's submission regarding the City's use of "IA Pro," it is reasonable to believe that the City would have been able to produce the missing reports in accordance with Paff. That is unless the information sought was not maintained in "IA Pro" because it was not physically inputted into the program.

Therefore, Sgt. Durlacher failed to comply fully with the Council's November 14, 2017 Interim Order. Specifically, Sgt. Durlacher provided compliance, to include at least two (2) reports that were responsive to the Complainant's OPRA request, and included certified confirmation of compliance within the extended time frame. However, the evidence of record strongly suggests that she did not provide all records that existed or that could be created in accordance with Paff, 227 N.J. 24.

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 Sgt. Durlacher's certified confirmation of compliance included multiple reports post-dating the OPRA request. It appears that she provided these reports to satisfy the Complainant's requests for the "six" most recent reports corresponding with OPRA request item Nos. 2 and 3. When faced with similar situations, the Council's decisions have always supported that records coming into existence after submission of an OPRA request were not responsive and need not be provided. See Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order April 29, 2014) (holding that because one of the four disclosed reports post-dated the request, same was not responsive and the custodian was required to disclose a report in existence prior to submission of the request); Libertarians for Transparent Gov't v. Town of Kearny (Hudson), GRC Complaint No. 2016-261 (Interim Order dated May 22, 2018) (holding that the custodian was required to locate and disclose the most recent executive session minutes created and approved prior to submission of the subject OPRA request).

While Sgt. Durlacher certified that no additional records exist and same could not be produced by a basic computer query, Complainant and Complainant's Counsel have provided contrary evidence suggesting that "IA Pro" allowed the City to produce said reports. The Complainant also included a certification detailing the records he believed were still outstanding. The GRC finds Complainant's counterarguments persuasive and will order a second certification from Sgt. Durlacher. Similar to Carter, it is clear that compliance was incomplete. An additional order should ensure that the City provides Complainant with all responsive records subject to disclosure and explain whether other records otherwise responsive no longer exist.

Accordingly, pursuant to Carter, GRC 2014-218, the Council is giving the Custodian/Sgt. Durlacher a final opportunity to provide the following outstanding records:

- OPRA request item No. 1: “Table 3 – Court Dispositions” for the first three (3) quarters of 2015.
- OPRA request item Nos. 2 and 3: 2nd half of 2012, both halves of 2013, and both halves of 2014.

Should any of the above records not exist because the information cannot be aggregated and produced as a report from “IA Pro,” the Custodian/Sgt. Durlacher must certify to this fact. Additionally, for OPRA request item Nos. 2 and 3, should certain of the above records not exist, the Custodian/Sgt. Durlacher must locate previous reports in existence to fulfill the requirement of disclosing the six (6) most recent reports.

Knowing & Willful

The Council defers analysis of whether the Custodian, Ms. Allen, and/or Detective Durlacher 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. Sgt. Durlacher failed to comply fully with the Council’s November 14, 2017 Interim Order. Specifically, Sgt. Durlacher provided compliance, to include at least two (2) reports that were responsive to the Complainant’s OPRA request, and included certified confirmation of compliance within the extended time frame. However, the evidence of record strongly suggests that she did not provide all records that existed or that could be created in accordance with Paff v. Twp. of Galloway, 227 N.J. 24 (2016).
2. Pursuant to Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016), the Council is giving the Custodian/Sgt. Durlacher a final opportunity to provide the following outstanding records:
 - OPRA request item No. 1: “Table 3 – Court Dispositions” for the first three (3) quarters of 2015.
 - OPRA request item Nos. 2 and 3: 2nd half of 2012, both halves of 2013, and both halves of 2014.

Should any of the above records not exist because the information cannot be aggregated and produced as a report from "IA Pro," the Custodian/Sgt. Durlacher must certify to this fact. Additionally, for OPRA request item Nos. 2 and 3, should certain of the above records not exist, the Custodian/Sgt. Durlacher must locate previous reports in existence to fulfill the requirement of disclosing the six (6) most recent reports.

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, if applicable. Further, the Custodian shall simultaneously deliver¹⁰ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹¹ to the Council Staff.¹²**
4. The Council defers analysis of whether the Custodian, Ms. Allen, and/or Detective Durlacher 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

October 23, 2018

¹⁰ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

¹¹ "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."

¹² 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
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

November 14, 2017 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2016-95

v.

City of Trenton (Mercer)
Custodian of Record

At the November 14, 2017 public meeting, the Government Records Council (“Council”) considered the November 8, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Ms. Allen and Detective Durlacher’s collective response was sufficient to the extent that it addressed each requested item as required in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). However, their collective response was ultimately insufficient because both failed to provide a specific lawful basis for access to records responsive to item Nos. 2 and 3. Therefore, Ms. Allen and Detective Durlacher violated OPRA pursuant to N.J.S.A. 47:1A-5(g). See DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
3. The Custodian may have unlawfully denied access to additional records responsive to item Nos. 1 and 3, as well as records responsive to item No. 2. N.J.S.A. 47:1A-1.1. Thus, the Custodian must either, 1) disclose all records responsive to the Complainant’s OPRA request that have not yet been provided; 2) certify to whether the City’s non-disclosure of all responsive records is permitted under the Supreme Court’s decision in Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017); and/or 3) certify to the non-existence of any remaining records. Due to the fact that Detective



Durlacher assisted in responding to this OPRA request, the GRC is also requesting that she provide a legal certification supporting the Custodian's compliance.

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 Executive Director.²**
5. The Council defers analysis of whether the Custodian, Ms. Allen, and/or Detective Durlacher 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 14th Day of November, 2017

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 16, 2017

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 Executive Director
November 14, 2017 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2016-95

v.

**City of Trenton (Mercer)²
Custodial Agency**

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

1. The City of Trenton's ("City") Internal Affairs ("IA") Summary forms that mirror those in "Appendix S" of the Attorney General's Guidelines ("Guidelines") submitted to the Mercer County Prosecutor's Office ("MCPO") from January 2013 through the date of the request.
2. The six (6) most recently released reports to the public summarizing the allegations received and investigations conducted for the relevant time frame.
3. The six (6) most recently released reports to the public that give a brief synopsis of all complaints where a fine or suspension of ten (10) days or more was assessed to an employee.
4. The three (3) most recent "Brady letters" on file that: a) were directed to defendants and their attorneys; b) were made by any law enforcement agency (including but not limited to the MCPO; and c) notified those defendants and/or their attorneys that an employee, including but not limited to a police officer, had been untruthful.

Custodian of Record: Richard K. Kachmar
Request Received by Custodian: November 9, 2015
Response Made by Custodian: December 10, 2015
GRC Complaint Received: April 1, 2016

Background³

Request and Response:

On October 21, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On November 7, 2015,⁴ the

¹ Represented by C.J. Griffin, Esq., of Pashman, Stein, P.C. (Hackensack, NJ).

² Represented by Lori E. Caughman, Esq. (Trenton, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Complainant faxed the Custodian a copy of the subject OPRA request seeking a status update and stating that he had not received a response. On November 29, 2015, the Complainant e-mailed the Custodian, advising that he transmitted the subject OPRA request twice and still had not received a response.

On December 10 2015, the twentieth (20th)⁵ business day after receipt of the OPRA request, Diadina Allen responded in writing on behalf of the Custodian, providing two (2) .pdf files and advising “[t]his file is now closed!”

On December 21, 2015, the Complainant faxed a notice to Ms. Allen, acknowledging that he had received her e-mail with attachments. The Complainant stated that the first (1st) .pdf (3 pages) was a copy of his OPRA request. The Complainant further stated that the second (2nd) .pdf (17 pages) contained several records and a cover letter from Detective Alexis Durlacher regarding the request. The Complainant stated that the records appeared to be responsive to request item No. 1. Further, the Complainant stated that Detective Durlacher advised that no records responsive to item No. 4 exist. However, the Complainant averred that the records provided were not responsive to item No. 2 and that only one of the records was responsive to item No. 3.

Regarding item No 2, the Complainant stated that, although Ms. Allen might believe that the records sought are the same as “Appendix S” provided in response to item No. 1, they are not the same. The Complainant stated that he included a copy of a report received from another municipality as an example of the records sought in item No. 2. Regarding item No. 3, the Complainant stated that he only received one (1) of the six (6) most recent reports sought. The Complainant requested that Ms. Allen provide clarification as to the existence of any additional records and/or a lawful basis for denial, if applicable.

Denial of Access Complaint:

On April 1, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian violated OPRA by failing to respond within seven (7) business days. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). The Complainant argued that he submitted his OPRA request to Ms. Allen because the Custodian previously advised him to do so; however, the City never responded. The Complainant stated that he resubmitted his request on November 7, 2015, but the City ultimately did not respond until December 10, 2017. The Complainant argued that even if the City were to argue that they did not receive his initial OPRA request, the City still failed to respond to his November 7, 2015 refiling.

The Complainant next argued that the City insufficiently responded, resulting in his inability to determine whether he received all records responsive to his OPRA request. The Complainant stated that Ms. Allen’s e-mail attached a .pdf containing twenty-seven pages of records, inclusive of Detective Durlacher’s memorandum. The Complainant stated that the first

⁴ November 7, 2015 was a Saturday.

⁵ This calculation accounted for Veterans’ Day, Thanksgiving, and the day after Thanksgiving, which are official holidays in the City of Trenton.

(1st) page after the memorandum was titled “[IA] Summary Report – January 1, 2012 through June 30, 2012.” The Complainant stated that the remaining pages were “Appendix S” records.

Regarding requested item No. 1, the Complainant asserted that he believed he received all responsive records. However, the Complainant asserted that Ms. Allen did not identify whether the attached records related to this request item.

Regarding requested item No. 2, the Complainant contended that Ms. Allen failed to provide any responsive records. The Complainant asserted that beyond one (1) IA Summary Report (responsive to item No. 3) in the .pdf file, the remaining pages were not responsive because they did not correspond to “Appendix S” of the Guidelines. The Complainant thus argued that the Custodian failed to provide records responsive to item No. 2.

Regarding requested item No. 3, the Complainant stated the item sought the six (6) most recent reports, identified in the Guidelines as “Appendix U.” The Complainant asserted that Ms. Allen only disclosed one (1) IA Summary report and was thus incomplete. The Complainant argued that if the reports were issued semi-annually, the City should have disclosed five (5) additional reports.

The Complainant thus requested that the GRC: 1) determine that the City violated OPRA by failing to provide all responsive records; 2) direct the Custodian to provide a sufficient response to him; 3) order the Custodian to disclose those outstanding records that exist, with redactions if applicable; and 4) determine that he is a prevailing party entitled to an award of reasonable attorney’s fees.

Statement of Information:

On April 29, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on November 9, 2017. The Custodian certified that his office reviewed the OPRA request and forwarded it to the appropriate department. The Custodian certified that the subsequent department compiled and produced records for disclosure. The Custodian certified that, on his behalf, Ms. Allen responded in writing on December 10, 2015, providing all responsive records that existed to the Complainant via e-mail.

The Custodian certified that the City did not provide certain records because they did not exist. The Custodian also asserted that disclosing any additional information would require him to create a record. The Custodian argued that he was not required to perform such a task in accordance with the Appellate Division’s decision in Paff v. Galloway Twp., 444 N.J. Super. 495 (App. Div. 2016).

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records

within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Complainant argued that the Custodian failed to respond timely to his OPRA request. The Complainant noted that he resubmitted his OPRA request on November 7, 2015, after not receiving a response and that the City did not respond until December 10, 2017. The Complainant contended that, even if the City asserted that it did not receive his original OPRA request, it was clear that a "deemed" denial still occurred. The Custodian's SOI supports the Complainant's latter argument. Specifically, the Custodian did not address whether the City received the Complainant's initial OPRA request. However, the Custodian did certify that he received the OPRA request on November 9, 2015, and did not respond until twenty (20) business days later. Thus, even if the Custodian did not receive the initial OPRA request, the evidence still supports that he failed to respond timely upon receipt of the resubmitted OPRA request.

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

Sufficiency of Response

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

Further, OPRA provides that if a "custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . . on the request form and promptly return it to the requestor.*" N.J.S.A. 47:1A-5(g)(emphasis added). The Council has held that for a denial of access to be in compliance with OPRA, it must be specific and sufficient to prove that a custodian's denial is authorized by OPRA. See DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Lear, III v. City of Cape May (Cape May), GRC Complaint No. 2014-426 (Interim Order dated November 17, 2015).

⁶ A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

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.

Here, on behalf of the Custodian, Ms. Allen responded in writing via e-mail on December 10, 2015, attaching responsive records and stating “[t]his file is now closed!” The file included a memorandum from Detective Durlacher, which provides the response “[s]ee attached” to item Nos. 1 through 3. In the Denial of Access Complaint, the Complainant argued that the response was insufficient because he could not determine whether all responsive records were provided. Notwithstanding, the Complainant then argued that Ms. Allen failed to provide records responsive to item No. 2 and only partially responded to item No. 3.

Initially, a review of the response provides that, in the most basic form, Ms. Allen addressed each of the four (4) request items through Detective Durlacher’s cover letter. Such an action is in line with the Council’s decision in Paff, GRC 2007-272.

However, it also was readily apparent that records responsive to item No. 2 and five (5) of the six (6) reports sought in item No. 3 were not included in the response. At that time, neither Ms. Allen nor Detective Durlacher provided a specific lawful basis for not providing records. The Custodian would later argue in the SOI that the City only provided those records it maintained. The Custodian also asserted that the agency was not required to create records per Paff, 444 N.J. Super. 495. Thus the SOI response insinuated that the City was, in fact, denying access to certain records. The City’s failure, through Ms. Allen and/or Detective Durlacher, to offer a specific lawful basis for denying access to records per D’Appolonio, GRC 2008-62 that resulted in an insufficient response.

Accordingly, Ms. Allen and Detective Durlacher’s collective response was sufficient to the extent that it addressed each requested item as required in Paff, GRC 2007-272. However, their collective response was ultimately insufficient because both failed to provide a specific lawful basis for access to records responsive to item Nos. 2 and 3. Therefore, Ms. Allen and Detective Durlacher violated OPRA pursuant to N.J.S.A. 47:1A-5(g). See D’Appolonio, GRC 2008-62.

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.

In the instant complaint, the Complainant asserted that he could not tell whether he received all records responsive to item No. 1 based on the City’s insufficient response. Further, the Complainant contended that the City failed to provide him with records responsive to item No. 2 of his request. Finally, the Complainant argued that he only received one (1) of the five (5) records sought in item No. 3. In the SOI, the Custodian certified that the City provided all records that existed. Further, the Custodian argued that any additional information sought would

require the Custodian to create a record, which he is not required to do per Paff v. Galloway Twp., 444 N.J. Super. 495 (App. Div. 2016).

However, the City's disclosure of records brings into question whether additional records existed and could have been provided. Regarding item No. 1, the City provided all three (3) tables of Appendix S for 2013 and 2014. Yet, the City only provided each quarterly Appendix S report for 2015 comprised of two (2) tables.

Regarding item Nos. 2 and 3, the City only provided one (1) report (responsive to item No. 3). The Custodian subsequently argued that he would have had to create new records to fulfill the remainder of the Complainant's OPRA request, which he was not required to do per Paff, 444 N.J. Super. 495.

While the Custodian's reliance on Paff, might have been correct at the time, it does not reflect the subsequent history of that case. In Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017), the Supreme Court determined that an agency's electronically stored information is a "government record" under OPRA, unless otherwise exempt. The Court accepted plaintiff's appeal from the Appellate Division's decision that the defendant municipality was not required to coalesce basic information into an e-mail log and disclose same. The Appellate Court had reached its conclusion by determining that such an action was akin to creating a record, which OPRA did not require (notwithstanding that the e-mail log would have taken a few key strokes to create). The Supreme Court reversed and remanded, holding that basic e-mail information stored electronically is a "government record" under OPRA, unless an exemption applies to that information. The Court reasoned that:

A document is nothing more than a compilation of information -- discrete facts and data. By OPRA's language, information in electronic form, even if part of a larger document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.

...

With respect to electronically stored information by a municipality or other public entity, we reject the Appellate Division's statement that "OPRA only allows requests for records, not requests for information." Paff, 444 N.J. Super. at 503, (*quoting* [Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005)]). That position cannot be squared with OPRA's plain language or its objectives in dealing with electronically stored information.

Id. at 24, 28.

Based on the foregoing, the GRC cannot conclude that the Custodian provided all records that existed. This conclusion is steered by the inconsistencies in disclosure of the Appendix S forms responsive to item No. 1, the fact that the City disclosed at least one (1) records responsive

to item No. 3, and the Custodian's reliance on Paff, 444 N.J. Super. 495 in arguing that he was not obligated to provide "information . . . that would require the City to create a document."

Accordingly, the Custodian may have unlawfully denied access to additional records responsive to item Nos. 1 and 3, as well as records responsive to item No. 2. N.J.S.A. 47:1A-1.1. Thus, the Custodian must either: 1) disclose all records responsive to the Complainant's OPRA request that have not yet been provided; 2) certify to whether the City's non-disclosure of all responsive records is permitted under the Supreme Court's decision in Paff, 2017 N.J. LEXIS 680; and/or 3) certify to the non-existence of any remaining records. Because Detective Durlacher assisted in responding to the OPRA request, the GRC is also requesting that she provide a legal certification supporting the Custodian's compliance.

Knowing & Willful

The Council defers analysis of whether the Custodian, Ms. Allen, and/or Detective Durlacher 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 Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Ms. Allen and Detective Durlacher's collective response was sufficient to the extent that it addressed each requested item as required in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). However, their collective response was ultimately insufficient because both failed to provide a specific lawful basis for access to records responsive to item Nos. 2 and 3. Therefore, Ms. Allen and Detective Durlacher violated OPRA pursuant to N.J.S.A. 47:1A-5(g). See DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).

3. The Custodian may have unlawfully denied access to additional records responsive to item Nos. 1 and 3, as well as records responsive to item No. 2. N.J.S.A. 47:1A-1.1. Thus, the Custodian must either, 1) disclose all records responsive to the Complainant's OPRA request that have not yet been provided; 2) certify to whether the City's non-disclosure of all responsive records is permitted under the Supreme Court's decision in Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017); and/or 3) certify to the non-existence of any remaining records. Due to the fact that Detective Durlacher assisted in responding to this OPRA request, the GRC is also requesting that she provide a legal certification supporting the Custodian's compliance.
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 1:4-4,⁷ to the Executive Director.⁸**
5. The Council defers analysis of whether the Custodian, Ms. Allen, and/or Detective Durlacher 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

November 8, 2017

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.