



## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

101 SOUTH BROAD STREET

PO BOX 819

TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

### FINAL DECISION

#### August 29, 2017 Government Records Council Meeting

Lisa A. Tilton  
(d/b/a Galloway Township News)  
Complainant

Complaint No. 2016-97

v.

City of Cape May (Cape May)  
Custodian of Record

At the August 29, 2017 public meeting, the Government Records Council (“Council”) considered the August 22, 2017 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 it dismisses 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 29<sup>th</sup> Day of August, 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: August 31, 2017**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
August 29, 2017 Council Meeting**

**Lisa A. Tilton  
(Doing Business as Galloway Township News)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-97**

**v.**

**City of Cape May (Cape May)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of legal bills, to include purchase orders, invoices, and detail billings, relevant to Scheeler v. City of Cape May (no docket number included) from August 1, 2015, to the date of the request.

**Custodian of Record:** Patricia Harbora<sup>3</sup>  
**Request Received by Custodian:** February 24, 2016  
**Response Made by Custodian:** February 29, 2016  
**GRC Complaint Received:** April 4, 2016

**Background**

**June 27, 2017 Council Meeting:**

At its June 27, 2017 public meeting, the Council considered the June 20, 2017 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. The current Custodian complied with the Council's May 23, 2017 Interim Order because she responded in the prescribed time frame providing the responsive invoice to the Complainant electronically (via e-mail to Complainant's Counsel) at the "actual cost" of \$0.00 and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although original Custodian failed to bear her burden of proving that there was an "actual cost" associated with electronic delivery of the responsive invoices, the

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Frank L. Corrado, Esq., of Barry, Corrado & Grassi, P.C. (Wildwood, NJ). Previously represented by Louis A. DeLollis, Esq., of Monzo, Catanese, Hillegass, P.C. (Cape May Court House, NJ)

<sup>3</sup> The original Custodian of Record was Louis Cummiskey. Ms. Harbora became the Custodian of Record during the pendency of this complaint.

current Custodian timely complied with the Council's May 23, 2017 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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. In accordance with the Council's May 23, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters 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 current Custodian disclosed the responsive invoices electronically (to Complainant's Counsel via e-mail) at the "actual cost" of \$0.00. 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 June 29, 2017, the Council distributed its Interim Order to all parties. On July 27, 2017, the Complainant's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the fee issue was amicably resolved and that Government Records Council "may close the [complaint]."

#### Analysis

##### Prevailing Party Attorney's Fees

At its June 27, 2017 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 June 29, 2017, the Council distributed its Interim Order to all parties; thus, the Custodian's response was due by close of business on July 27, 2017. On that day, the Complainant's Counsel notified the GRC that the parties had reached a settlement on fees.

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 Executive Director respectfully recommends that the Council 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

August 22, 2017



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**INTERIM ORDER**

**June 27, 2017 Government Records Council Meeting**

Lisa A. Tilton  
(dba Galloway Township News)  
Complainant  
v.  
City of Cape May (Cape May)  
Custodian of Record

Complaint No. 2016-97

At the June 27, 2017 public meeting, the Government Records Council (“Council”) considered the June 20, 2017 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:

1. The current Custodian complied with the Council’s May 23, 2017 Interim Order because she responded in the prescribed time frame providing the responsive invoice to the Complainant electronically (via e-mail to Complainant’s Counsel) at the “actual cost” of \$0.00 and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although original Custodian failed to bear her burden of proving that there was an “actual cost” associated with electronic delivery of the responsive invoices, the current Custodian timely complied with the Council’s May 23, 2017 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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. In accordance with the Council’s May 23, 2017 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters 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 current Custodian disclosed the responsive invoices electronically (to Complainant’s Counsel via e-mail) at the “actual cost” of \$0.00. 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 27<sup>th</sup> Day of June, 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: June 29, 2017**

**STATE OF NEW JERSEY  
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**Supplemental Findings and Recommendations of the Executive Director  
June 27, 2017 Council Meeting**

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**Request Received by Custodian:** February 24, 2016  
**Response Made by Custodian:** February 29, 2016  
**GRC Complaint Received:** April 4, 2016

**Background**

**May 23, 2017 Council Meeting:**

At its May 23, 2017 public meeting, the Council considered the May 16, 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. The Custodian failed to bear her burden of proving that the proposed fee of \$1.80 for electronic disclosure of the responsive bills represented the “actual cost” to produce them. N.J.S.A. 47:1A-6; Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order April 8, 2010). The Custodian must therefore disclose the responsive records at the “actual cost,” which is \$0.00 because there is no justified cost associated with electronic disclosure.

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Frank L. Corrado, Esq., of Barry, Corrado & Grassi, P.C. (Wildwood, NJ). Previously represented by Louis A. DeLollis, Esq., of Monzo, Catanese, Hillegass, P.C. (Cape May Court House, NJ)

<sup>3</sup> The original Custodian of Record was Louis Cummiskey. Ms. Harbora became the Custodian of Record during the pendency of this complaint.

2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup>**
3. 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.
4. 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, 2017, the Council distributed its Interim Order to all parties. On May 30, 2017, the current Custodian sent the responsive records to the Complainant's Counsel via e-mail at the "actual cost" of \$0.00. On June 1, 2017, the Government Records Council ("GRC") received the current Custodian's response to the Council's Interim Order. Therein, the current Custodian certified that she complied with the Council's Order by disclosing the responsive invoices to the Complainant electronically (via e-mail to Complainant's Counsel) without cost.

#### Analysis

#### Compliance

At its May 23, 2017 meeting, the Council ordered the original Custodian to disclose all responsive invoices electronically at the "actual cost" of \$0.00 and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 24, 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 original Custodian's response was due by close of business on June 1, 2017.

On May 30, 2017, the current Custodian disclosed the responsive invoices to the Complainant electronically (via e-mail to Complainant's Counsel) at the "actual cost" of \$0.00. On June 1, 2017, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the GRC received the current Custodian's certified confirmation of compliance, memorializing her disclosure.

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<sup>4</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>5</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Therefore, the current Custodian complied with the Council's May 23, 2017 Interim Order because she responded in the prescribed time frame by providing the responsive invoice to the Complainant via e-mail at the "actual cost" of \$0.00 and simultaneously providing certified confirmation of compliance to the Executive Director.

### **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)).

Although the original Custodian failed to bear her burden of proving that there was an "actual cost" associated with electronic delivery of the responsive invoices, the current Custodian timely complied with the Council's May 23, 2017 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties, Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.”

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and

(2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

In the matter before the Council, the Complainant filed this complaint disputing the proposed fee of \$1.80 for electronic delivery of invoices. In the Statement of Information, the original Custodian argued that the proposed fee represented the “actual cost” because the City did not maintain the invoices electronically and needed to make copies before scanning them. The Council disagreed, reasoning that the original Custodian provided no evidence that copies were necessary, especially in the face of her admittance to the Complainant that the invoices did not contain redactions. Thus, in its May 23, 2017 Interim Order, the Council required disclosure of the responsive invoices electronically at no cost. The current Custodian fully complied with the Council’s Order on June 1, 2017, by way of certified confirmation of compliance affirming that she disclosed the invoices to the Complainant electronically (via e-mail to Complainant’s Counsel) without cost on May 30, 2017. Based on the foregoing, the evidence of record supports that the Complainant is a prevailing party entitled to an award of attorney’s fees.

Accordingly, in accordance with the Council’s May 23, 2017 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the current Custodian disclosed the responsive invoices electronically (to Complainant’s Counsel via e-mail) at the “actual cost” of \$0.00. 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 Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's May 23, 2017 Interim Order because she responded in the prescribed time frame providing the responsive invoice to the Complainant electronically (via e-mail to Complainant's Counsel) at the "actual cost" of \$0.00 and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although original Custodian failed to bear her burden of proving that there was an "actual cost" associated with electronic delivery of the responsive invoices, the current Custodian timely complied with the Council's May 23, 2017 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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. In accordance with the Council's May 23, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters 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 current Custodian disclosed the responsive invoices electronically (to Complainant's Counsel via e-mail) at the "actual cost" of \$0.00. 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

June 20, 2017



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CHRIS CHRISTIE  
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INTERIM ORDER

May 23, 2017 Government Records Council Meeting

Lisa A. Tilton d.b.a Galloway Township News  
Complainant

Complaint No. 2016-97

v.

City of Cape May (Cape May)  
Custodian of Record

At the May 23, 2017 public meeting, the Government Records Council (“Council”) considered the May 16, 2017 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:

1. The Custodian failed to bear her burden of proving that the proposed fee of \$1.80 for electronic disclosure of the responsive bills represented the “actual cost” to produce them. N.J.S.A. 47:1A-6; Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order April 8, 2010). The Custodian must therefore disclose the responsive records at the “actual cost,” which is \$0.00 because there is no justified cost associated with electronic disclosure.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**
3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party, pending the Custodian’s compliance with the Council’s Interim Order.

<sup>1</sup> “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



Interim Order Rendered by the  
Government Records Council  
On The 23<sup>rd</sup> Day of May, 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: May 24, 2017**

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May 23, 2017 Council Meeting**

**Lisa A. Tilton**  
**(Doing Business as Galloway Township News)<sup>1</sup>**  
**Complainant**

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**Custodian of Record:** Louis Cummiskey  
**Request Received by Custodian:** February 24, 2016  
**Response Made by Custodian:** February 29, 2016  
**GRC Complaint Received:** April 4, 2016

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

**Request and Response:**

On February 24, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 29, 2016, the third (3<sup>rd</sup>) business day after receipt of the OPRA request, the Custodian responded in writing, stating that she located “26 documents [at] \$.05 for a total of \$1.80.” The Custodian also noted that she did not yet have bills for February and January 2016. On the same day, the Complainant requested the records be provided electronically via e-mail in .pdf format.

On February 29, 2016, the Custodian e-mailed the Complainant, stating that the responsive records were not kept electronically and would need to be removed from storage, copied, and scanned. The Custodian stated that the City of Cape May (“City”) was legally entitled to charge a copy cost for disclosure. On the same day, the Complainant responded, stating that custodians were not allowed to charge when disclosing records electronically. The Complainant requested that the Custodian immediately disclose all responsive records

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Louis A. DeLollis, Esq., of Monzo, Catanese, Hillegass, P.C. (Cape May Court House, NJ).

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

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electronically at no cost. The Complainant alternatively requested that the Custodian provide her a statutory authority for the charge.

On March 2, 2016, the Complainant e-mailed the Custodian to request confirmation that she would not disclose responsive records without payment of \$1.80. The Complainant noted that she would consider no response a denial of access. On the same day, the Custodian responded, reiterating that the City was allowed to charge a copy cost when records were not stored electronically. N.J.S.A. 47:1A-5. The Custodian further stated that she was not denying access but that she would not disclose the records until the Complainant remitted the appropriate cost. On the same day, the Complainant responded, asserting that the Custodian interpreted OPRA incorrectly and directed her to the Government Records Council's ("GRC") "Custodian's Handbook" (Fifth Edition – January 2011) at 22 and "OPRA Alert" Volume 3, Issue 1 (September 2010) to support her assertion. The Complainant stated that, should the Custodian not immediately disclose the responsive records electronically at no cost, she would be forced to litigate the request and seek a knowing and willful violation.

On March 3, 2016, the Custodian e-mailed the Complainant, stating that she would disclose the responsive records electronically once she received the Complainant's payment. On March 7, 2016, the Complainant e-mailed the Custodian to ask whether she was imposing a fee due to redactions present in responsive records. On March 8, 2016, the Custodian responded, stating that she did not redact any records and had already provided justification for the charge. The Custodian noted that she also "clearly" indicated the number of pages copied and the cost per page.

#### Denial of Access Complaint:

On April 4, 2016, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant argued that the Custodian unlawfully imposed a charge for electronic delivery of records. The Complainant argued that OPRA specifically requires disclosure of "electronic records and non-printed" material to be free of charge, unless supplies are needed. N.J.S.A. 47:1A-5(b); Livecchia v. Borough of Mt. Arlington, 421 N.J. Super. 24, 39 (App. Div. 2011).<sup>4</sup> The Complainant contended that the Custodian imposed a copying cost without justification for making copies to scan the responsive records, even though no redactions were at issue. The Complainant requested that the Council: 1) determine that the Custodian's proposed copy cost was unlawful; 2) require disclosure of the responsive records without charge; and 3) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

#### Statement of Information:

On May 6, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on February 24, 2016. The Custodian affirmed that she needed to go to the City's Finance Department's storage section, locate responsive records, remove the responsive pages from storage, make copies, replace the originals in the correct place in storage, and then scan the copies. The Custodian certified that

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<sup>4</sup> On appeal from Livecchia v. Borough of Mt. Arlington (Morris), GRC Complaint No. 2008-80 (Interim Order dated April 8, 2010).

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she responded in writing on February 29, 2016, advising that she would disclose the responsive records upon payment of \$1.80 in copying costs. The Custodian certified that the Complainant refused to pay the requisite cost.

The Custodian argued that she did not unlawfully deny access to the responsive records. The Custodian argued that the Complainant misinterpreted N.J.S.A. 47:1A-5(b) by insinuating that there is no cost for disclosure of records via e-mail. The Custodian argues that OPRA only provides for no cost of access to “electronic records and non-printed materials . . . .” Id. The Custodian contended that the responsive records here were not kept electronically but are held in paper copies by the City’s Finance Department. The Custodian argued that a plain reading of OPRA supports the proposed copying cost associated with records not kept electronically.<sup>5</sup>

The Custodian asserted that the Council has previously held that a custodian could withhold disclosure of records until a requestor remitted payment. *See Santos v. NJ State Parole Bd.*, GRC Complaint No. 2004-74 (August 2004); *Cuba v. Northern State Prison*, GRC Complaint No. 2004-146 (February 2005). The Custodian asserted that those decisions apply here, claiming that she was not required to disclose records until the Complainant remitted payment. The Custodian asserted that, based on the foregoing, the complaint should be dismissed.

#### Additional Submissions:

On September 2, 2016, the Complainant’s Counsel submitted a rebuttal to the SOI. Therein, the Complainant’s Counsel argued that the GRC should disregard item No. 12 because it contained uncertified statements, presumably “drafted by [c]ounsel,” that are not considered evidence (*citing Gonzalez v. Ideal Tile Importing Co., Inc.*, 371 N.J. Super. 349, 358 (App. Div. 2004)(*aff’d* 184 N.J. 415 (2005)).<sup>6</sup> The Complainant’s Counsel argued that, even if the GRC accepts the statements in item No. 12, the Custodian failed to prove that a cost was necessary. Specifically, the Complainant’s Counsel asserted that the Custodian failed to show why she needed to make copies of the responsive records before scanning them. Further, the Complainant’s Counsel noted that the responsive records did not require redaction, nor did the Custodian argue that the originals would be damaged or destroyed during the scanning process. The Complainant’s Counsel thus requested that the GRC reject the Custodian’s “pedantic barrier” to scanned copies of attorney bills.

On September 9, 2016, Custodian’s Counsel e-mailed the GRC, requesting that it not consider Complainant Counsel’s rebuttal because it was filed four (4) months after the SOI.

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<sup>5</sup> The Custodian asserted that she consulted the GRC about the appropriateness of the charge. According to the Complainant, the GRC purportedly “agreed that said fee was appropriate.” The GRC has no record of the consultation. Notwithstanding, the GRC always informs custodians submitting inquiries that information provided by the GRC is guidance, does not constitute legal advice or a final decision, and that “[t]he GRC cannot tell [a custodian] exactly how to respond to an official OPRA records request because [the custodian’s] response must depend on the specific facts of the records request.”

<sup>6</sup> The GRC notes that a custodian certifies to the truthfulness of all statements (including those in item No. 12) when signing the SOI in accordance with New Jersey Court Rules R. 1:4-4.

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## Analysis

### Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Regarding copying costs for records, OPRA provides that:

Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be:

\$ 0.05 per letter size page or smaller, and  
\$ 0.07 per legal size page or larger.

*Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs . . . .*

N.J.S.A. 47:1A-5(b) (emphasis added).

Regarding disclosure of records electronically, the GRC has typically determined that the cost of providing records electronically is \$0.00. *See* McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (Interim Order dated April 8, 2010)(holding that the custodian could not charge for electronic disclosure of records). For instance, in Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order April 8, 2010), the custodian charged the complainant \$7.50 to scan and e-mail records. The Council held that because the “custodian does not provide any evidence to support his assertion that \$7.50 is the actual cost of scanning and e-mailing records . . . the custodian’s charge . . . is a violation of N.J.S.A. 47:1A-5(b).”

Notwithstanding the foregoing, the Council has previously decided differently when the facts supported that a custodian could prove that the agency incurred an “actual cost” when providing records electronically. By way of example, in Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order dated May 24, 2011), the custodian charged the complainant \$6.00 for eight (8) pages of redacted minutes.<sup>7</sup> The Council addressed the “actual cost” issue, holding that “because the custodian had to make paper copies of the requested records in order to redact the requested minutes prior to providing same electronically, the

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<sup>7</sup> At the time of Paff, GRC 2010-09, OPRA provided that copying fees for printed matter “shall not exceed the following: first page through tenth page, \$0.75 per page; eleventh page to twentieth page, \$0.50 per page; all pages over twenty, \$0.25 per page . . . .” N.J.S.A. 47:1A-5(b).

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custodian's charge of \$6.00 for the cost of copying the records to perform redactions . . . is warranted . . . ." Id. at 17.

In the matter currently before the Council, the Complainant contended that the Custodian's charge of \$1.80 was unlawful and requested that the GRC require the Custodian to disclose records without cost. The Complainant noted that the Custodian did not redact any of the records, and thus there was no justification for charging a copying cost. With no justification, the Custodian argued in the SOI that she properly charged the copying cost because she had to make copies of the responsive records prior to scanning them, with no additional justification. The Custodian also argued that the charge was lawful because the records were not already "electronic records" that are subject to no charge under N.J.S.A. 47:1A-5(b); rather, the records were stored in hardcopy only.

After reviewing all evidence and arguments, the GRC is satisfied that the Custodian's charge for electronic delivery of records was unlawful. Specifically, as in Paff, GRC 2009-102, the Custodian provided no proof that she needed to make copies of records before scanning them for disclosure. Further, and distinguishable from Paff, GRC 2010-09, the Custodian confirmed to the Complainant via e-mail on March 8, 2016, that she did not need to redact the responsive bills. The evidence in the record also supports that the Custodian had the capability to scan records within her office, which negated the possibility of any additional "actual cost" that the City may have incurred.

Accordingly, the Custodian failed to bear her burden of proving that the proposed fee of \$1.80 for electronic disclosure of the responsive bills represented the "actual cost" to produce them. N.J.S.A. 47:1A-6; Paff, GRC 2009-102. The Custodian must therefore disclose the responsive records at the "actual cost," which is \$0.00 because there is no justified cost associated with electronic disclosure.

### **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 Executive Director respectfully recommends the Council find that:

1. The Custodian failed to bear her burden of proving that the proposed fee of \$1.80 for electronic disclosure of the responsive bills represented the "actual cost" to produce them. N.J.S.A. 47:1A-6; Paff v. Gloucester City (Camden), GRC Complaint No.

2009-102 (Interim Order April 8, 2010). The Custodian must therefore disclose the responsive records at the “actual cost,” which is \$0.00 because there is no justified cost associated with electronic disclosure.

2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>8</sup> to the Executive Director.<sup>9</sup>**
3. 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.
4. 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  
Communication Specialist/Resource Manager

May 16, 2017

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<sup>8</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>9</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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