



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**

**April 30, 2019 Government Records Council Meeting**

Libertarians for Transparent Government  
Complainant

Complaint No. 2017-1

v.

Cumberland Regional School District  
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council (“Council”) considered the April 23, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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

Final Decision Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of April 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: May 3, 2019**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Council Staff  
April 30, 2019 Council Meeting**

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

**GRC Complaint No. 2017-1**

**v.**

**Cumberland Regional School District<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

Regarding Samantha Bennett v. Cumberland Regional, Federal Docket No. 1:15-cv-06355, electronic copies via e-mail of:

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

**Custodian of Record:** Bruce D. Harbinson

**Requests Received by Custodian:** November 28, 2016

**Response Made by Custodian:** November 29, 2016

**GRC Complaint Received:** January 4, 2017

**Background**

**February 26, 2019 Council Meeting:**

At its February 26, 2019 public meeting, the Council considered the February 19, 2019 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. Because a custodian may not refuse a request for records made under OPRA which is in writing and clearly invokes OPRA, and because the evidence of record indicates that the Complainant's written request clearly invoked OPRA, the Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-5(g) and Renna v. Cnty. of Union, 407 N.J. Super. 230, 232 (App. Div. 2009). N.J.S.A. 47:1A-6.

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

<sup>2</sup> Represented by John G. Geppert, Jr., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

However, the GRC declines to order disclosure of responsive records because the Custodian did so on January 30, 2017.

2. The Custodian violated OPRA by improperly requiring the Complainant to submit his OPRA request on Cumberland’s official request form. N.J.S.A. 47:1A-5(g). However, the Custodian provided all requested records on January 30, 2017 as attached to his Statement of Information. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian disclosed the requested records as part of his Statement of Information submission. 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. at 432, and Mason, 196 N.J. at 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 February 28, 2019, the Council distributed its Interim Order to all parties. On March 19, 2019 the Government Records Council (“GRC”) was copied on an e-mail from Custodian’s Council to Complainant’s Counsel, indicating that the Cumberland Regional School District (“District”) had agreed to a fee payment and should be approved at the next meeting dated March 28, 2019. On April 3, 2019, Custodian’s Counsel confirmed with the GRC that the fee payment had been approved and a check was issued to Complainant’s Counsel.

### Analysis

#### Prevailing Party Attorney’s Fees

At its February 26, 2019 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 February 28, 2019, the Council distributed its Interim Order to all parties. The parties had until close of business on March 28, 2019 to inform the Council as to whether they reached a settlement. On March 19, 2019, Custodian's Counsel informed the GRC that a fee arrangement had been agreed to by the parties. On April 3, 2019, Custodian's Counsel notified the GRC that the fee agreement had been formally approved and payment had been sent to Complainant's Counsel.

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

### **Conclusions and Recommendations**

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

Prepared By: Samuel A. Rosado  
Staff Attorney

April 23, 2019



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

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

Libertarians for Transparent Government  
Complainant

Complaint No. 2017-01

v.

Cumberland Regional School District  
Custodian of Record

At the February 26, 2019 public meeting, the Government Records Council (“Council”) considered the February 19, 2019 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. Because a custodian may not refuse a request for records made under OPRA which is in writing and clearly invokes OPRA, and because the evidence of record indicates that the Complainant’s written request clearly invoked OPRA, the Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-5(g) and Renna v. Cnty. of Union, 407 N.J. Super. 230, 232 (App. Div. 2009). N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of responsive records because the Custodian did so on January 30, 2017.
2. The Custodian violated OPRA by improperly requiring the Complainant to submit his OPRA request on Cumberland’s official request form. N.J.S.A. 47:1A-5(g). However, the Custodian provided all requested records on January 30, 2017 as attached to his Statement of Information. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian disclosed the requested records as part of his Statement of Information submission. 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. at 432, and



**Mason, 196 N.J. at 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 26<sup>th</sup> Day of February, 2019

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 28, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
February 26, 2019 Council Meeting**

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

**GRC Complaint No. 2017-1**

v.

**Cumberland Regional School District<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

Regarding Samantha Bennett v. Cumberland Regional, Federal Docket No. 1:15-cv-06355, electronic copies via e-mail of:

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

**Custodian of Record:** Bruce D. Harbinson

**Requests Received by Custodian:** November 28, 2016

**Response Made by Custodian:** November 29, 2016

**GRC Complaint Received:** January 4, 2017

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

**Request and Response:**

On November 26, 2016 the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 29, 2016, Jacqueline Jackson (Ms. Jackson), on behalf of the Custodian, responded in writing stating that OPRA requests must be provided via Cumberland Regional School District’s (“Cumberland”) official request form.

**Denial of Access Complaint:**

On January 4, 2017, the Complainant filed a Denial of Access Complaint with the

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

<sup>2</sup> Represented by John G. Geppert, Jr., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

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

Libertarians for Transparent Government v. Cumberland Regional School District, 2017-1 – Findings and Recommendations of the Council Staff

Government Records Council (“GRC”). The Complainant asserted that his request complied with the requirements set forth in Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009), wherein they clearly identified that they were seeking records under OPRA.

The Complainant requested that the Council order the Custodian to identify the records that have not been located, and to provide them. The Complainant also requested that should any of the records require redactions, that they should be done in accordance with Paff v. N.J. Dep’t of Labor, 379 N.J. Super., 346, 354 (App. Div. 2005). The Complainant also requested the Council determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

#### Statement of Information:

On January 30, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on November 28, 2016. The Custodian certified that Ms. Jackson responded in writing on November 29, 2016, informing the Complainant that the OPRA request should be submitted via Cumberland’s request form.

The Custodian asserted that they did not receive any further communication from the Complainant beyond the November 29, 2016 correspondence. The Custodian stated that he therefore assumed that the Complainant was not pursuing the request any further.

The Custodian contended that had there been any follow up communications, he would have provided the Complainant with the requested records. The Custodian certified that the requested records were included as part of the SOI. The Custodian requested that a fee award not be granted to the Complainant.

#### Additional Submissions

On January 31, 2017, Custodian’s Counsel e-mailed the Complainant’s Counsel, requesting that the Complainant not pursue attorney’s fees, as the requested records were provided along with the SOI on January 30, 2017.

On February 6, 2017, Complainant’s Counsel responded, stating that his fees were modest, and noted that the GRC had recently held that the Town of Kearny violated OPRA on multiple counts.<sup>4</sup> On February 7, 2017, Custodian’s Counsel again requested that the Complainant not pursue an award for attorney’s fees.

### 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

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<sup>4</sup> The Complainant is referring to Paff (o/b/o Libertarians for Transparent Gov’t) v. Town of Kearny (Hudson), GRC Complaint No. 2016-94 (Interim Order dated January 31, 2017).  
Libertarians for Transparent Government v. Cumberland Regional School District, 2017-1 – Findings and Recommendations of the Council Staff



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 Renna, the Appellate Division held that although requestors shall continue to use public agencies’ OPRA request forms when making requests, “no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in N.J.S.A. 47:1A-5(f).” 407 N.J. Super. at 232. In effect, this permits requestors to write their own correspondence that requests records from a custodian, as long as the request properly invokes OPRA.

Furthermore, Renna held that “where the requestor fails to produce an equivalent writing that raises issues as to the nature or substance of the requested records, the custodian may require that the requestor complete the form generated by the custodian pursuant to N.J.S.A. 47:1A-5(g).” Id. The pertinent section of N.J.S.A. 47:1A-5(g) states that “a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.”

Here, Ms. Jackson, on behalf of the Custodian, requested that the Complainant use Cumberland’s official OPRA request form. However, in accordance with Renna, a custodian may not refuse a request for records made under OPRA so long as the request is in writing and clearly invokes OPRA. 407 N.J. Super. at 232. The evidence in the record indicates that the Complainant’s written correspondence clearly references OPRA, both on the heading and within the first paragraph, which states in part, “[t]his is our request under the Open Public Records Act (OPRA) . . . .”

Therefore, because a custodian may not refuse a request for records made under OPRA which is in writing and clearly invokes OPRA, and because the evidence of record indicates that the Complainant’s written request clearly invoked OPRA, the Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-5(g) and Renna, 407 N.J. Super. at 232. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of responsive records because the Custodian did so on January 30, 2017.

### **Knowing & Willful**

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]. . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the current matter, the Custodian violated OPRA by improperly requiring the Complainant to submit his OPRA request on Cumberland's official request form. N.J.S.A. 47:1A-5(g). However, the Custodian provided all requested records on January 30, 2017 as attached to his SOI. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Prevailing Party Attorney's Fees**

OPRA provides that:

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care

Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[196 N.J. at 73-76.]

The Court in Mason further held that:

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

[Id. at 76.]

Here, the Complainant filed the instant complaint after being told by Ms. Jackson to re-submit his request on an official form. Following the filing of this complaint, the Custodian disclosed the requested records simultaneously with his SOI.

After reviewing the evidence of record in this complaint, the Council found that the Custodian should not have required the Complainant to re-submit his request, and the Complainant did not need to follow up with the Custodian after the initial response. Based on the Custodian's production of responsive records, the Complainant prevailed here and is entitled to an award of attorney's fees.

Therefore, 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. at 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. at 51. Specifically, the Custodian disclosed the requested records as part of his SOI submission. 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. at 432, and Mason, 196 N.J. at 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. Because a custodian may not refuse a request for records made under OPRA which is in writing and clearly invokes OPRA, and because the evidence of record indicates that the Complainant's written request clearly invoked OPRA, the Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-5(g) and Renna v. Cnty. of Union, 407 N.J. Super. 230, 232 (App. Div. 2009). N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of responsive records because the Custodian did so on January 30, 2017.
2. The Custodian violated OPRA by improperly requiring the Complainant to submit his OPRA request on Cumberland's official request form. N.J.S.A. 47:1A-5(g). However, the Custodian provided all requested records on January 30, 2017 as attached to his Statement of Information. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian disclosed the requested records as part of his

Statement of Information submission. 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. at 432, and Mason, 196 N.J. at 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado  
Staff Attorney

February 19, 2019