



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 24, 2018 Government Records Council Meeting

Carey Italiano
Complainant

Complaint No. 2017-110

v.

County of Salem
Custodian of Record

At the April 24, 2018 public meeting, the Government Records Council (“Council”) considered the April 17, 2018 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 close this matter because the Complainant failed to comply with the Council’s Interim Order by submitting an application for attorney’s fees within the prescribed time frame. N.J.A.C. 5:105-2.13.

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 24th Day of April, 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: April 26, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
April 24, 2018 Council Meeting**

**Carey Italiano¹
Complainant**

GRC Complaint No. 2017-110

v.

**County of Salem²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail or on flash drive of the following records:

1. Fully executed minutes for March 15, 2017 and April 5, 2017.
2. Fully executed resolutions for March 15 and April 5, 2017.
3. Freeholder recordings for March 1, 2017, March 15, 2017 and April 5, 2017.
4. Resolutions appointing the Clerk of the Board, Bond Counsel, Auditor, HR Director, Engineer, County Counsel from 2007 to April 12, 2017.

Custodian of Record: Curtis Harker

Request Received by Custodian: April 12, 2017

Response Made by Custodian: April 12, 2017

GRC Complaint Received: May 10, 2017

Background

January 30, 2018 Council Meeting:

At its January 30, 2018 public meeting, the Government Records Council (“Council”) considered the January 23, 2018 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. 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).

¹ Represented by Scott Kramme, Esq. (Elmer, NJ).

² Represented by Michael Mulligan, Esq., (Camden, NJ).

2. The Custodian certified that he disclosed the records responsive to request items numbered 1 through 4 to the Complainant on May 19, 2017, and that he disclosed the records responsive to request items numbered 8 through 13 to the Complainant on May 22, 2017. The Custodian also certified that he disclosed request item number 6 to the Complainant on May 23, 2017. Therefore, because the Custodian certified that he disclosed all of the existing records responsive to the Complainant's request, the GRC declines to order disclosure of said records.
3. The Custodian did not unlawfully deny access to the records responsive to request items numbered 5 and 7 because he twice certified that such records were not located and the meetings presumed not recorded. Further, the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian failed in a timely manner to grant access, deny access, seek clarification or request an extension of time, he did belatedly disclose all of the existing records requested by the Complainant. Additionally, the evidence of record militates toward organizational problems rather than conscious wrongdoing on the Custodian's part. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
5. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Teeters*, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. *Mason*, 196 N.J. 51. Specifically, the Custodian commenced disclosure of the responsive records seven (7) business days after the complaint was filed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is 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 February 1, 2018, the Council distributed its January 30, 2018 Interim Order to all parties. Because the Complainant was determined to be a prevailing party, entitled to an award of attorney's fees, the Council's Order required the parties to negotiate an amount for reasonable attorney's fees to be paid to the Complainant within twenty (20) business days following the effective date of the Order. In the event that no such fee agreement was reached, the Complainant's Counsel was required to submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Analysis

Compliance

The Council found that the Complainant was a prevailing party and ordered the parties to negotiate an agreement for attorney's fees to be paid to the Complainant within twenty (20) business days following the effective date of the Council's January 30, 2018 Interim Order. Therefore the deadline to notify the GRC of any agreement was February 28, 2018. If the parties could not reach a fee agreement, the Order required the Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. As such, the deadline date for the Complainant's Counsel to submit a fee application to the GRC was March 28, 2018. To date, the Council has received neither a fee agreement nor an application for an award of attorney's fees.

Therefore, this matter should be closed because the Complainant failed to comply with the Council's Interim Order by submitting an application for attorney's fees within the prescribed time frame. N.J.A.C. 5:105-2.13.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council close this matter because the Complainant failed to comply with the Council's Interim Order by submitting an application for attorney's fees within the prescribed time frame. N.J.A.C. 5:105-2.13.

Prepared By: John E. Stewart

April 17, 2018



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 30, 2018 Government Records Council Meeting

Carey Italiano
Complainant

Complaint No. 2017-110

v.

County of Salem
Custodian of Record

At the January 30, 2018 public meeting, the Government Records Council (“Council”) considered the January 23, 2018 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. 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. The Custodian certified that he disclosed the records responsive to request items numbered 1 through 4 to the Complainant on May 19, 2017, and that he disclosed the records responsive to request items numbered 8 through 13 to the Complainant on May 22, 2017. The Custodian also certified that he disclosed request item number 6 to the Complainant on May 23, 2017. Therefore, because the Custodian certified that he disclosed all of the existing records responsive to the Complainant’s request, the GRC declines to order disclosure of said records.
3. The Custodian did not unlawfully deny access to the records responsive to request items numbered 5 and 7 because he twice certified that such records were not located and the meetings presumed not recorded. Further, the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian failed in a timely manner to grant access, deny access, seek clarification or request an extension of time, he did belatedly disclose all of the existing records requested by the Complainant. Additionally, the evidence of record militates toward organizational problems rather than conscious wrongdoing on the Custodian’s part. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful



violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian commenced disclosure of the responsive records seven (7) business days after the complaint was filed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is 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 30th Day of January, 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: February 1, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Carey Italiano¹
Complainant**

GRC Complaint No. 2017-110

v.

**County of Salem²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail or on flash drive of the following records:

1. Fully executed minutes for March 15, 2017 and April 5, 2017.
2. Fully executed resolutions for March 15 and April 5, 2017.
3. Freeholder recordings for March 1, 2017, March 15, 2017 and April 5, 2017.³
4. Resolutions appointing the Clerk of the Board, Bond Counsel, Auditor, HR Director, Engineer, County Counsel from 2007 to April 12, 2017.

Custodian of Record: Curtis Harker

Request Received by Custodian: April 12, 2017

Response Made by Custodian: April 12, 2017

GRC Complaint Received: May 10, 2017

Background⁴

Request and Response:

On April 12, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 12, 2017, the day of said request, the Custodian responded in writing informing the Complainant, “I have received your OPRA request and will begin to fulfill it.”

¹ Represented by Scott Kramme, Esq. (Elmer, NJ).

² Represented by Michael Mulligan, Esq., (Camden, NJ).

³ The Complainant stated in the OPRA request that he will provide a flash drive for the requested recordings.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On May 10, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on April 12, 2017, she requested the above-mentioned records from the Custodian. The Complainant further asserts that on April 12, 2017, the Custodian responded in writing informing her that he had received the request and would begin to fulfill it. The Complainant states that it is now well beyond the seven business day time period.

Statement of Information:

On May 23, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 12, 2017, and responded in writing on April 12, 2017. The Custodian certifies that the records listed in the following table are responsive to the request:

REQUEST ITEM NUMBER	RECORD	DATE DISCLOSED⁵
1	Approved minutes for the March 15, 2017, meeting.	May 19, 2017
2	Approved minutes for the April 5, 2017, meeting.	May 19, 2017
3	Fully-executed resolutions for the March 15, 2017 meeting.	May 19, 2017
4	Fully-executed resolutions for the April 5, 2017 meeting.	May 19, 2017
5	Recording of the March 1, 2017 meeting.	No such record.
6	Recording of the March 15, 2017 meeting.	Awaiting flash drive.
7	Recording of the April 5, 2017 meeting.	No such record.
8	Resolutions dated 2007 to present appointing Clerk of the Board.	No date indicated.
9	Resolutions dated 2007 to present appointing Bond Counsel.	No date indicated.
10	Resolutions dated 2007 to present appointing Auditor.	No date indicated.
11	Resolutions dated 2007 to present appointing HR Director.	No date indicated.
12	Resolutions dated 2007 to present appointing Engineer.	No date indicated.
13	Resolutions dated 2007 to present appointing County Counsel.	No date indicated.

⁵ The Custodian certified that all records were disclosed in unredacted form.

In Item #8 of the SOI, the Custodian certified that all of the requested *documents* were disclosed on May 19, 2017.⁶ In Item #9 of the SOI, the Custodian certified that he was still awaiting a flash drive in order to disclose the recording of a March 15, 2017 meeting. The Custodian further certified that no meeting recordings for March 1, and April 5, 2017 could be located on any available recording device. The Custodian affirmed that those meetings were presumed not recorded.

The Custodian certifies that his late response to the Complainant was due to an OPRA backlog caused by his duties as both OPRA Custodian and Clerk of the Board, as well as the loss of his secretary. The Custodian opines that this Denial of Access Complaint will prompt the stabilization of additional resources and allow for timely OPRA responses in the future.

Additional Submissions:

Due to the discrepancy in the SOI as to whether all of the responsive records were disclosed, the GRC e-mailed the Custodian's Counsel on December 4, 2017, in order to obtain a clarifying certification from the Custodian. On December 13, 2017, the Custodian forwarded a certification to the GRC averring that "to the best of [his] knowledge" he disclosed to the Complainant a recording of the March 15, 2017 meeting on May 23, 2017.⁷ The Custodian also confirmed in the certification that he disclosed records responsive to request items numbered 8 through 13 to the Complainant on May 22, 2017. The Custodian also re-certified that no recordings for the March 1, and April 5, 2017 meetings existed because they could not be located on any available recording device and presumably did not record.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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).⁸ 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 Custodian received the Complainant's OPRA request on April 12, 2017, and on that same date he informed the Complainant in writing that he would begin fulfilling the request. The Custodian did not grant access, deny access, seek clarification, or request an extension of time.

⁶ On December 13, 2017, the Custodian amended the disclosure date for items numbered 8 through 13.

⁷ This disclosure was confirmed with the Complainant during a telephone conversation on January 18, 2018.

⁸ 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.

Further, the evidence of record reveals that the Custodian did not commence disclosure of any responsive records until May 19, 2017, which is over five weeks later.

Therefore, 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.

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.

The Custodian certified that he disclosed the records responsive to request items numbered 1 through 4 to the Complainant on May 19, 2017, and that he disclosed the records responsive to request items numbered 8 through 13 to the Complainant on May 22, 2017. The Custodian also certified that he disclosed request item number 6 to the Complainant on May 23, 2017. Therefore, because the Custodian certified that he disclosed all of the existing records responsive to the Complainant's request, the GRC declines to order disclosure of said records.

The Custodian twice certified that request items numbered 5 and 7 are nonexistent. These items are alleged recordings of a March 1, 2017 meeting, and an April 5, 2017 meeting, respectively. For these items, the Custodian certified that they could not be located on any available recording device and were presumed not recorded.

In Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

As such, the Custodian did not unlawfully deny access to the records responsive to request items numbered 5 and 7 because he twice certified that such records were not located and the meetings presumed not recorded. Further, the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See* Pusterhofer, GRC 2005-49.

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, although the Custodian failed in a timely manner to grant access, deny access, seek clarification or request an extension of time, he did belatedly disclose all of the existing records requested by the Complainant. Additionally, the evidence of record militates toward organizational problems rather than conscious wrongdoing on the Custodian’s part. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney’s Fees

OPRA provides that:

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51

(2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. The Supreme Court also 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.

The Complainant filed the instant complaint because four (4) weeks had lapsed since she submitted her OPRA request, and the Custodian had not fulfilled the request as promised. Finally, seven (7) business days after the Complainant filed the complaint, the Custodian commenced disclosure of the requested records. Thus, the evidence of record reveals that the Complainant is a prevailing party, who 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. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian commenced disclosure of the responsive records seven (7) business days after the complaint was filed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian'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. The Custodian certified that he disclosed the records responsive to request items numbered 1 through 4 to the Complainant on May 19, 2017, and that he disclosed the records responsive to request items numbered 8 through 13 to the Complainant on May 22, 2017. The Custodian also certified that he disclosed request item number 6 to the Complainant on May 23, 2017. Therefore, because the Custodian certified that he disclosed all of the existing records responsive to the Complainant's request, the GRC declines to order disclosure of said records.
3. The Custodian did not unlawfully deny access to the records responsive to request items numbered 5 and 7 because he twice certified that such records were not located and the meetings presumed not recorded. Further, the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

4. Although the Custodian failed in a timely manner to grant access, deny access, seek clarification or request an extension of time, he did belatedly disclose all of the existing records requested by the Complainant. Additionally, the evidence of record militates toward organizational problems rather than conscious wrongdoing on the Custodian's part. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian commenced disclosure of the responsive records seven (7) business days after the complaint was filed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is 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: John E. Stewart

January 23, 2018