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Commissioner

FINAL DECISION

January 27, 2026 Government Records Council Meeting

John Paff
Complainant
v.
City of Jersey City (Hudson)
Custodian of Record

Complaint No. 2023-252

At the January 27, 2026, public meeting, the Government Records Council ("Council") considered the January 20, 2026, Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the portions of the Complainant's OPRA request seeking a settlement agreement and salary information. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to these portions of the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e); Scheeler v. Galloway Twp., 2017 N.J. Super. Unpub. LEXIS 2847 (App. Div. 2017); and Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013). See also Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).

2. The Custodian did not bear his burden of proof that he timely responded to the non-immediate access portion of Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to that portion of the 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 thereof 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 dated October 31, 2007). However, the GRC declines to order disclosure because the Custodian did so on November 2, 2023.

3. The Custodian committed an "immediate access" violation and a "deemed" denial of access. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed to the Complainant the responsive records on November 2, and 3, 2023. Further, the Custodian and other employees of the City

provided a set of detailed certified statements supporting that the violations resulted from a confluence of internal technological errors, and human error. Additionally, the evidence of record does not indicate that the Custodian's violation 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.

4. 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, 71 (2008). Specifically, the filing of this complaint prompted the City to revisit the request and determine that it had not properly responded based on a confluence of internal technological errors, and human error. This review resulted in disclosure, which was the relief sought by the Complainant. 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.**

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 27th Day of January 2026

John A. Alexy, 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 2, 2026

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
January 27, 2026 Council Meeting

John Paff[1] **GRC Complaint No. 2023-252**
Complainant

v.

City of Jersey City (Hudson)[2]
Custodial Agency

Records Relevant to Complaint: Copies of:

1. Settlement Agreement or Release that resolved Pagan v. Rivera, Docket No. HUD-L-0501-19.
2. Officer Eduardo Rivera's "name, title, position, most recent annual salary, length of service, date of separation and the reason therefor" per N.J.S.A. 47:1A-10.

Custodian of Record: Sean Gallagher
Request Received by Custodian: July 6, 2023
Response Made by Custodian: July 18, 2023; August 1, 2023; August 21, 2023; September 7, 2023; September 22, 2023; October 6, 2023; November 2, 2023, November 3, 2023
GRC Complaint Received: October 16, 2023

Background[3]

Request and Response:

On July 6, 2023, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On the same day, the City of Jersey City ("City") acknowledged receipt of the OPRA request. On July 18, 2023, the eighth (8th) business day after receipt of the OPRA request, Clerk Alexandra Durso responded in writing on behalf of the Custodian stating that the City was conducting a search and needed to extend the response time frame "two [(2)] additional weeks" to process the OPRA request. On the same day, the Complainant confirmed the extension through August 1, 2023.

[1] Represented by C.J. Griffin, Esq., of Pashman, Stein, Walder, Hayden, P.C. (Hackensack, NJ).
[2] Represented by Jeremy Jacobsen, Esq., Assistant Corporation Counsel (Jersey City, NJ). Previously represented by John McKinney, Esq., Assistant Corporation Counsel (Jersey City, NJ).
[3] The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

On August 1, 2023, Ms. Durso responded in writing stating that the City continued to conduct a search and extending the response time frame another two (2) weeks to process the OPRA request. On August 21, 2023, Ms. Durso responded in writing extending the response time frame an additional two (2) weeks for the reasons previously given. On September 3, 2023, the Complainant responded objecting to the extension because "[t]his is a simple request." The Complainant also noted that a settlement agreement is a contract subject to "immediate access." The Complainant stated that, if the City intended to take any further extensions, they should "articulate the exact reason why this is taking so long." On September 7, 2023, Ms. Durso responded in writing again extending the response time frame two (2) additional weeks. On September 22, 2023, Ms. Durso responded in writing extending the response time frame two (2) additional weeks. On October 6, 2023, Ms. Durso responded in writing extending the response time frame two (2) additional weeks.

Denial of Access Complaint:

On October 16, 2023, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant first argued that the Custodian violated N.J.S.A. 47:1A-5(e) per Scheeler v. Galloway Twp., 2017 N.J. Super. Unpub. LEXIS 2847 (App. Div. 2017), by failing to respond immediately to the request for the settlement agreement and for Officer Rivera's salary. The Complainant asserted that, although the City acknowledged receipt of the OPRA request on July 6, 2023, it did not provide an immediate formal response granting access, denying access, requesting an extension of time, or seeking clarification as required by Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-175 (September 2011).

The Complainant next argued that the City's initial response was untimely by one (1) business day and it continued to take extensions over his objections. The Complainant contended that the Custodian's failure to timely respond resulted in a "deemed" denial of access pursuant to N.J.S.A. 47:1A-5(i)(1).

The Complainant then argued that the Custodian's automatic extensions violated OPRA. The Complainant noted that the Council has permitted custodians to take extensions when they are sought within the statutory time frame. The Complainant also noted that the Council determined in Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014), that extensions should be reasonable. The Complainant contended that the City not only failed to extend the time frame immediately for a portion of the subject OPRA request but also failed to timely take the first extension and subsequently did not re-extend the time frame before the expiration of each prior extension. The Complainant asserted that, as a result, nearly 100 days passed since he submitted his OPRA request, and still the City has failed to disclose responsive records.

The Complainant then contended that the City's actions here present a pattern of conduct indicative of a knowing and willful violation of OPRA. The Complainant argued that the request was simple, and that there is no dispute the records sought are subject to disclosure. The Complainant argued that, notwithstanding these facts, the Custodian has continued to delay disclosure through untimely and unreasonable automatic extensions.

The Complainant thus requested that the Council: 1) order disclosure of responsive records; 2) hold that the Custodian violated OPRA's "immediate" access and other statutory response periods; 3) hold that the Custodian knowingly and willfully violated OPRA and is subject to the civil penalty; and 4) find that the Complainant is a prevailing party entitled to award of attorney's fees under N.J.S.A. 47:1A-6.

Supplemental Response:

On November 2, 2023, Ms. Durso responded in writing providing information responsive to OPRA request item No. 2 and advising that the OPRA request was considered closed. Later that day, the Complainant e-mailed the City stating that he did not have the ability to download the Settlement Agreement.

On November 3, 2023, the original Custodian's Counsel, e-mailed Complainant's Counsel stating that the City disclosed the records at issue in this complaint the day before and asked whether the Complainant would withdraw the complaint. Complainant's Counsel responded stating that no settlement agreement was attached to the response to OPRA request item No. 2. Original Custodian's Counsel e-mailed Complainant's Counsel stating that access permissions in the City's OPRA portal needed to be changed but were not. Counsel stated that he reset the portal and was attaching the Release and authorizing resolution to his e-mail. Original Custodian's Counsel subsequently e-mailed the Complainant reiterating the permissions issue and asking the Complainant to sign back into the portal as the issue was fixed.

Statement of Information:

On November 22, 2023, the Custodian filed a Statement of Information ("SOI") attaching a legal certification from Ms. Durso, original Custodian's Counsel, and Information Technology Director Bernadette Kucharczuk. The Custodian certified that he received the Complainant's OPRA request on July 6, 2023. The Custodian certified that the Law Department and his office located the responsive resolution, settlement agreement, and employee information. The Custodian certified that Ms. Durso began manually obtaining extensions after not hearing from either office. The Custodian affirmed that unbeknownst to Ms. Durso, original Custodian's Counsel was not receiving her messages between each extension stemming from an e-mail account rule-based filter. See Durso Cert., § 3, Counsel Cert., § 8. The Custodian affirmed that, upon receipt of this complaint on November 2, 2023, he immediately contacted the Law Department to resolve the issue. The Custodian certified that he ultimately responded in writing through Ms. Durso and original Custodian's Counsel on November 2, and 3, 2023 disclosing the responsive records.

The Custodian stated that he was aware that salary information was considered an "immediate access" record and that settlement agreements were required to be disclosed without redactions. The Custodian nevertheless argued that the City's delay in responding was due to a confluence of internal technological errors, human error, and the Complainant's failure to contact his office by telephone.

The Custodian first argued that original Custodian's Counsel never received any communications regarding this OPRA request due to an e-mail rule issue and first became aware

of the OPRA request and issue on November 2, 2023. Counsel Cert. § 2, 8. The Custodian contended that the delay resulted in part from the fact that: 1) Ms. Durso misidentified original Custodian's Counsel as the Law Department OPRA liaison, who was actually Kim Nieves, and 2) Counsel had in place an e-mail rule sending Ms. Durso's e-mails to a general mailbox he did not normally review. Counsel Cert. § 7; 8. The Custodian next argued that, while Ms. Durso was manually responding through the City's OPRA portal, she "missed" the Complainant's September 3, 2023 e-mail rejecting any further extensions. Durso Cert. § 4.

The Custodian, citing Grieco v. Borough of Haddon Heights, 449 N.J. Super. 513, 521 (October 19, 2015), and Burke v. Ocean Cnty., 2013 N.J. Super. Unpub. LEXIS 2844 (App. Div. 2013), contended that New Jersey courts have suggested requestors take appropriate action to address clerical oversights, such as making a telephone call. The Custodian averred that the City received 4,672 OPRA requests to date, which represents a voluminous number of requests and associated communications for which human error can occur on occasion. The Custodian stated that five (5) of those requests resulted in complaints and Complainant's Counsel is representing a plaintiff in two (2) of those. The Custodian argued that assuming the Complainant did not know who to call to cure the issue presented here, Complainant's Counsel certainly would have known who to contact and could have counselled her client accordingly. The Custodian argued that, instead, the Complainant acted in contravention of the cooperative spirit of OPRA by filing this complaint. The Custodian thus contended that the complaint should be denied due to the Complainant's "failure to cooperate with the City in good faith as envisioned in OPRA."

The Custodian finally argued that the Complainant is not a prevailing party here because the City did not change its conduct as a result of the complaint. The Custodian argued that, instead, it always intended to disclose the responsive records, and that the errors occurring here were inadvertent. The Custodian argued that the City has demonstrated the veracity of this statement by satisfying the subject OPRA request in total on the day it became aware of this complaint. The Custodian thus argued that the Complainant is not entitled to prevailing party attorney's fees.

Additional Submissions:

On December 7, 2023,[4] Complainant's Counsel submitted a rebuttal to the SOI. Therein, Counsel argued that this complaint should not be dismissed, that the Custodian conceded the City disclosed records because of this complaint, and that and the Complainant is a prevailing party. Counsel contended that the SOI "makes excuses" that did not justify the violations of OPRA present herein. Counsel noted that those violations include violation of the "immediate access" provision, unilateral extensions, and the City's failure to adhere to those extensions.

Counsel asserted that the Custodian has admitted he was aware that salary information and settlement agreements are "immediate access" items. Counsel argued that the Custodian does not include in his SOI any indication that the City intended to respond immediately. Counsel argued that SOI is also devoid of any communications between Ms. Durso and original Custodian's Counsel urging disclosure. Counsel further argued that Custodian neglected to justify multiple failures to comply with its own extensions.

[4] The GRC granted an extension of time through December 7, 2023, for Complainant's Counsel to file an SOI reply.

Counsel further contended that the City's actions here are not isolated but are evidence of pattern and practice of violating OPRA. Counsel attached to his brief certifications from two (2) other individuals and other examples of the City engaging in actions similar to those alleged here. Counsel argued that these are "*some* examples" of the pattern, but that the City was in an advantageous position because only it knows how often it has engaged in timeliness violations.

Counsel additionally contended that the Complainant is a prevailing party entitled to an award of attorney's fees. Counsel argued that the City attempted to shift burden to the Complainant to contact it via phone to cure its own internal issues, which is contrary to the court's statements in ACLU v. Div. of Criminal Justice, 435 N.J. Super. 533, 536-537 (App. Div. 2014) (expressing distress with the law division's placement of "'onus' on the requestor to clarify or engage in negotiation with the custodian as a jurisdictional prerequisite to instituting legal action . . . ."). Counsel noted that the Complainant did contact the City in writing, objecting to any further extensions. Counsel contended that the facts here are distinguishable from Grieco, which Counsel characterized as "a non-binding Law Division case," because the custodian there accidently failed to include one (1) record as part of her disclosure. Counsel argued that here, the Custodian failed to disclose anything pre-complaint but instead violated OPRA's timeliness violations and admitted to disclosing the responsive records because of this complaint. Counsel thus argued that the evidence supports that this complaint brought about a change in the City's conduct.

Counsel requested that the GRC: 1) determine that the City violated OPRA; 2) refer the matter to the Office of Administrative Law to allow the Complainant the ability to "explore the scope of the City's non-compliance with OPRA's deadlines and prove a pattern and practice;" and 3) award prevailing party attorney's fees.

On December 12, 2023, Custodian's Counsel submitted a sur-reply first arguing that the City did not violate OPRA because the disclosed resolution was available on its website before he even filed the subject OPRA request. Counsel, citing Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 618 (App. Div. 2008), contended that the Custodian was not denied access as a matter of law because the resolution was already publicly available.

Counsel next contended that Complainant's Counsel failed to set forth a basis for this complaint to result in the GRC findings that the Custodian knowingly and willfully violated OPRA. Counsel argued that the Council is currently tasked with determining whether the City knowingly and willfully violated OPRA in relation to the subject OPRA request. Counsel argued that the City has produced sworn statements on the miscommunication issue and that the SOI reply contains no evidence refuting them. Counsel argued that, instead, the SOI reply contained limited facts that do not comport with the "reality" of the 5,000 OPRA requests received by the City each year. Counsel contended that it would be unsurprising that an agency receiving that many OPRA requests would seek extensions, utilize standardized responses, and occasionally miss deadlines. Counsel contended that none of the forgoing rises to the threshold necessary for a knowing and willful violation to apply in this complaint.

Counsel finally reiterated the City's objection to Complainant's Counsel position that the Complainant is a prevailing party. Counsel further stressed that the Complainant received the responsive records and would not have needed to file a complaint had he simply called the City.

Counsel contended that Grieco is applicable here and that ACLU is distinguishable because the section cited by Complainant's Counsel actually applies to the shifting of the "onus" in a situation where an agency denies access absent a valid, lawful basis. Counsel contended that, here, the Complainant sent a single e-mail that was not seen by the City and made no other attempts to follow up prior to filing this complaint. Counsel further contended that the Complainant while confirming he received the responsive records, has admitted his goal here is to "teach the City a lesson." Counsel further argued that instead of cooperating with City after disclosure, the Complainant caused the City to have to file a "superfluous" SOI. Counsel argued this is exactly the type of litigation that Grieco discouraged.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).[5] 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 dated October 31, 2007).

Settlement Agreements and Salary

OPRA provides that "[i]mmediate access ordinarily shall be granted to . . . contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e).

Barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).[6] See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. N.J. Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007) (holding the custodian was obligated to notify the complainant immediately as to the status of "immediate access" records). Additionally, the Council has held that custodians have "an obligation to immediately" respond to immediate access items within a larger OPRA request either granting access, denying access,

[5] 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.

[6] OPRA lists immediate access records as "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e). The Council has also determined that invoices are "immediate access" records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

seeking clarification, or requesting an extension time. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013).

In Scheeler, 2017 N.J. Super. Unpub. LEXIS 2847,[7] the Appellate Division was tasked with determining whether the GRC properly held that no unlawful denial to two (2) OPRA requests seeking a settlement agreement occurred. As part of that review, the court held that a settlement release was subject to "immediate access" under OPRA:

> "[C]ontracts . . . are ordinarily to be provided immediately" in response to an OPRA request, Mason v. City of Hoboken, 196 N.J. 51, 65 (2008) (citing N.J.S.A. 47:1A-5(e)). Because the statute does not define the term "contract," we give the term its "generally accepted meaning, according to the approved usage of the language." N.J.S.A. 1:1-1. Contract is defined as a "legally enforceable agreement between two or more parties" or a "writing or document containing such an agreement." Webster's II New College Dictionary, 245 (1999).
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> . . . .
>
> The Release created contractual rights between the parties. Under the Release, Bonanni agreed to dismiss his lawsuit and release all claims against Galloway in exchange for the monies he received. And although Galloway did not execute the document, the Release granted Galloway an enforceable contractual right precluding Bonanni's assertion of any future claims. In other words, the Release was a contract between the parties even though it was signed only by Bonanni. See Domanske v. Rapid-American Corp., 330 N.J. Super. 241, 246 (App. Div. 2000) (finding "a release is merely a form of contract"). The Release was a contract that satisfied one of the conditions of the settlement agreement and was a government record encompassed by complainant's requests for the "settlement agreement."
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> [Id. at 15-17.]

In the instant complaint, the Complainant submitted his OPRA request seeking in part "immediate access" records, namely a settlement agreement and "salary" on July 6, 2023. The City acknowledged receipt on the same day, but the Custodian did not respond through Ms. Durso until July 18, 2023, the eighth (8th) business day after receipt of the OPRA request, obtaining an extension. Additional extensions were timely taken through October 20, 2023. On October 16, 2023, the Complainant filed the instant complaint arguing that the Custodian violated N.J.S.A. 47:1A-5(e) by failing to disclose the requested settlement agreement and salary information immediately. Ms. Durso and the Custodian's Counsel ultimately disclosed responsive records on November 2, and 3, 2023. In the SOI, the Custodian acknowledged that he knew settlement agreements were subject to disclosure and salaries were considered "immediate access" items under OPRA.

[7] On appeal from Scheeler, Jr. v. Galloway Twp. (Atlantic), GRC Complaint No. 2015-01, *et seq.* (Final Decision dated January 26, 2016).

Upon review, the GRC finds that Ms. Durso's response on behalf of the Custodian was not "immediate" as required by OPRA and explained in Kohn, GRC 2011-330. As in Kohn, the subject OPRA request here sought "immediate access" items within a larger request. Thus, the Custodian had an obligation to respond to those portions of the request immediately and the evidence of record supports that he failed to do so.

Accordingly, the Custodian did not bear his burden of proof that he timely responded to the portions of the Complainant's OPRA request seeking a settlement agreement and salary information. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to these portions of the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e); Scheeler, Jr., 2017 N.J. Super. Unpub. LEXIS 2847; Kohn, GRC 2011-330. See also Cody, GRC 2005-98; Herron, GRC 2006-178.

Remaining OPRA request items

Having addressed the "immediate access" portions of the Complainant's OPRA request, the GRC now turns to the remainder of the request. As noted above, the Custodian, through Ms. Durso, did not respond to the OPRA request until the eighth (8th) business day after receipt thereof. The Custodian did not dispute this fact in the SOI; thus, a finding that a "deemed" denial occurred here is appropriate.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the non-immediate access portion of Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to that portion of the 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 thereof pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the GRC declines to order disclosure because the Custodian did so on November 2, 2023.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly and 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. 1983)); and 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)).

Initially, the GRC addresses Complainant Counsel's introduction of other potential violations committed by the City not at issue here and whether they should warrant a finding of a knowing and willful violation here. This argument insinuates that the GRC should decide the knowing and willful issue on a compounding basis supported by other requestor experiences unrelated to a specific Denial of Access Complaint filing. The Council notes that, at the outset of OPRA it created the "Matrix," a list used to track custodians whom the Council found to commit repeat violations of OPRA for purposes of assessing "knowing and willful" violations. However, the Council unanimously voted to discontinue the "Matrix" list at its November 10, 2005 meeting because "the statutory language of the OPRA allows for penalties based on a Custodian's knowing and willful violation of the OPRA 'under the totality of the circumstances' for a particular complaint, not multiple complaints. Based on that fact, it was determined that the time matrix could not be used given the statutory language or requirements for assessing penalties for knowing and willful violations . . . ." See Paff v. Cumberland Cnty. Sheriff's Office, GRC Complaint No. 2005-159 (January 2006) (citing Renna v. Cnty. of Union, GRC Complaint No. 2005-89 (October 2005)). See also Percella v. City of Bayonne (Hudson), GRC Complaint No. 2020-73 (May 2021). Thereafter, the GRC has routinely addressed the knowing and willful analysis within the framework of each individual complaint and the facts presented therein. The GRC will continue to do so here without weighing the impact of other experiences set forth in Complainant Counsel's SOI reply.

In the matter before the Council, the Custodian committed an "immediate access" violation and a "deemed" denial of access. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed to the Complainant the responsive records on November 2 and 3, 2023. Further, the Custodian and other employees of the City provided a set of detailed certified statements supporting that the violations resulted from a confluence of internal technological errors, and human error. Additionally, the evidence of record does not indicate that the Custodian's violation 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 Appellate Division 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, 71 (2008), the 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." (quoting Buckhannon Bd. & Care Home v. W. Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . . ." Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

> OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed $500.00."

N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a **prevailing party**; and (2) eliminate the $500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76.]

The Court 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, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

In this matter, the facts are not in dispute. The Complainant submitted his OPRA request, received written extension requests, of which he objected to On September 3, 2023, and ultimately filed this complaint seeking disclosure on October 16, 2023, after receipt of a sixth (6th) extension of time. Thereafter, on November 2, and 3, 2023, the Custodian disclosed to the Complainant the responsive records. In the SOI, the Custodian contended that the Complainant was not a prevailing party because of a confluence of internal technological errors, and human error, as well as because the Complainant did not call the City. The Custodian cited to Grieco, 449 N.J. Super. 513 and Burke, 2013 N.J. Super. Unpub. LEXIS 2844, in support of the position that the Complainant failed to engage in cooperative action to avoid unnecessary litigation. The parties subsequently traded replies arguing the merits of their position on the fee issue.

Having carefully reviewed the facts and arguments here, the GRC is compelled to find that the Complainant is a prevailing party entitled to an award of attorney's fees because this complaint was the causal nexus for disclosure. Specifically, while the City extended the time frame with apparent intent to eventually disclose the responsive records, it was the complaint filing that spurned the City to identify and correct the issues certified to in the SOI. Absent this complaint filing, there is no way to know how many more extensions the City would take or how long the Complainant would have to wait for disclosure of the requested records.

The Custodian's reliance on Grieco and Burke is misplaced here. In those cases, neither plaintiff made any attempt to contact defendants prior to initiating their action in Superior Court. Here, however, the Complainant did e-mail Ms. Durso on September 3, 2023, objecting to an extension, advising that the records sought were subject to "immediate access," and requesting that any further extensions contain a basis therefor. That Ms. Durso may not have seen that e-mail does not suggest a failure of cooperation by the Complainant. Further, the lack of a phone call does not minimize the Complainant's effort to contact the City prior to filing this complaint. Instead, the Custodian engaged in pure speculation that a phone call would have alerted the City to the issues encountered in this OPRA request. Ultimately, it was this complaint that energized the City into action, which resulted not in more extensions but disclosure.

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 filing of this complaint prompted the City to revisit the request and determine that it had not properly responded based on a confluence of internal technological errors, and human error. This review resulted in disclosure, which was the relief sought by the Complainant. 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 Custodian did not bear his burden of proof that he timely responded to the portions of the Complainant's OPRA request seeking a settlement agreement and salary information. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to these portions of the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e); Scheeler v. Galloway Twp., 2017 N.J. Super. Unpub. LEXIS 2847 (App. Div. 2017); and Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013). See also Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).

2. The Custodian did not bear his burden of proof that he timely responded to the non-immediate access portion of Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to that portion of the 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 thereof 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 dated October 31, 2007). However, the GRC declines to order disclosure because the Custodian did so on November 2, 2023.

3. The Custodian committed an "immediate access" violation and a "deemed" denial of access. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed to the Complainant the responsive records on November 2, and 3, 2023. Further, the Custodian and other employees of the City provided a set of detailed certified statements supporting that the violations resulted

from a confluence of internal technological errors, and human error. Additionally, the evidence of record does not indicate that the Custodian's violation 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.

4. 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, 71 (2008). Specifically, the filing of this complaint prompted the City to revisit the request and determine that it had not properly responded based on a confluence of internal technological errors, and human error. This review resulted in disclosure, which was the relief sought by the Complainant. 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
Executive Director

January 20, 2026[8]

[8] This complaint was prepared for adjudication at the Council's July 29, 2025 meeting, but could not be adjudicated due to lack of quorum.