



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

November 4, 2009 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2008-192

v.

Long Hill Township Board of Education (Morris)
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 2009 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 refusal to fulfill the Complainant’s OPRA request until the Complainant submitted each request on a separate OPRA request form, with the exception of the requested agenda since the Custodian disclosed said record to the Complainant on the second (2nd) business day following receipt of the Complainant’s request, is an unreasonable limitation on access pursuant to N.J.S.A. 47:1A-1, Kushner v. Township of West Milford, GRC Complaint No. 2004-111 (October 2004) and Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007). The Council declines to order the Custodian to disclose the remaining request items because the Custodian certified that he provided the Complainant access to said records on August 29, 2008. However, it should be noted that the Custodian was not obligated to provide access to the June 2008 enrollment report because said report did not exist at the time of the Complainant’s OPRA request. *See* Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007).
2. Although the Custodian placed an unreasonable limitation on access to portions of the Complainant’s OPRA request by refusing to fulfill said requests until the Complainant resubmitted them on separate OPRA request forms, there may be some circumstances in which a custodian may require a requestor to submit separate OPRA request forms, such as if the request is extremely voluminous as discussed in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Vessio v. NJ Department of Community Affairs, Division of Fire



Safety, GRC Complaint No. 2007-63 (May 2007), and Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007). As such, it is concluded that 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.

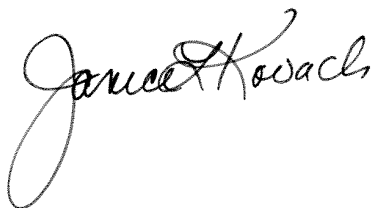
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian disclosed the remaining records to the Complainant and abolished his policy of requiring separate OPRA request forms for multiple request items. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Specifically, all limitations on access shall be construed in favor of the public pursuant to N.J.S.A. 47:1A-1. Here, the Custodian placed an unreasonable limitation on the Complainant's right of access by requiring the Complainant to submit separate OPRA request forms for multiple request items. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 4th Day of November, 2009



Robin Berg Tabakin, Chair
Government Records Council

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



Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: November 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 4, 2009 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2008-192

v.

**Long Hill Township Board of Education (Morris)²
Custodian of Records**

Records Relevant to Complaint:

1. The agenda and attachments for the Long Hill Township Board of Education meeting dated June 23, 2008, via e-mail.
2. The meeting minutes, in draft form if not already approved, for the open and closed sessions of the Long Hill Township Board of Education meetings dated May 12, 2008 and May 26, 2008, via e-mail.
3. Documents detailing the enrollment for the month of June 2008, via e-mail.

Request Made: June 18, 2008

Response Made: June 30, 2008 and August 29, 2008

Custodian: John Esposito

GRC Complaint Filed: August 27, 2008³

Background

June 18, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

June 20, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. The Custodian discloses the requested agenda dated June 23, 2008. Additionally, the Custodian attaches a blank OPRA request form and asks the Complainant to submit a separate OPRA request form for each additional item requested.

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² No legal representation listed on record.

³ The GRC received the Denial of Access Complaint on said date.

June 20, 2008

E-mail from Complainant to Government Records Council (“GRC”). The Complainant states that he has been told by a custodian that he must submit a separate OPRA request form for unrelated request items. The Complainant asks if this is a requirement under OPRA.

June 20, 2008

E-mail from GRC to Complainant. The GRC states that OPRA does not contain any provision that requires requestors to submit separate OPRA request forms for each record requested.

June 27, 2008

E-mail from Complainant to Custodian. The Complainant states that the GRC confirmed that OPRA does not contain any requirement regarding the filing of separate OPRA request forms for multiple request items. The Complainant asks the Custodian to release the requested records.

June 30, 2008

E-mail from Custodian to Complainant. The Custodian states that although there is no requirement under OPRA that individual request items must be submitted on separate OPRA request forms, such is the district’s procedure when requestors seek access to multiple unrelated records. The Custodian states that without said procedure in place, a requestor could submit a request with twenty (20) enumerated items, which would be difficult to track and impossible to fulfill within the statutorily required time period. The Custodian also states that the district’s procedure allows the district to keep track of the number and type of OPRA requests received, as well as the amount of time spent on each request. The Custodian states that he will respond to the Complainant once he resubmits his OPRA request on separate request forms.

June 30, 2008

E-mail from Complainant to Custodian. The Complainant asserts that the district’s policy does not comply with OPRA. The Complainant asks the Custodian to indicate on the OPRA request form the Custodian’s legal basis for the denial of access to this OPRA request.

July 2, 2008

E-mail from Complainant to Custodian. The Complainant states that he has not received any records requested. The Complainant also states that he has not received his OPRA request form with the Custodian’s legal basis for the denial of access.

July 2, 2008

E-mail from Custodian to Complainant. The Custodian contends that he responded to the Complainant in a timely fashion and provided the Complainant access to the requested agenda. The Custodian states that the Complainant must complete separate OPRA request forms for multiple unrelated records. The Custodian attaches a blank OPRA request form and states that he will fulfill the Complainant’s request once he resubmits it as requested.

July 2, 2008

E-mail from Complainant to Custodian. The Complainant states that there is no OPRA requirement that requestors must complete a separate form for multiple request items. The Complainant states that he will file a Denial of Access Complaint with the GRC.

August 27, 2008

Denial of Access Complaint filed with the GRC with the following attachments:

- E-mail from Complainant to GRC dated June 20, 2008
- E-mail from GRC to Complainant dated June 20, 2008
- E-mail from Custodian to Complainant dated June 30, 2008
- E-mail from Complainant to Custodian dated June 30, 2008
- E-mail from Complainant to Custodian dated July 2, 2008
- E-mail from Custodian to Complainant dated July 2, 2008
- E-mail from Complainant to Custodian dated July 2, 2008

The Complainant states that he submitted his OPRA request on June 18, 2008. The Complainant states that the Custodian refused to release the requested records until the Complainant submitted his request on separate OPRA request forms.

The Complainant contends that there is no requirement under OPRA that requestors must complete separate OPRA request forms for each record requested. The Complainant states that OPRA requires requests to be in writing, on an agency's official request form, and delivered to the Custodian. The Complainant contends that requiring requestors to complete separate request forms operates as a barrier to public access to government records.

Additionally, the Complainant contends that the Custodian knowingly and willfully violated OPRA because the Custodian received the GRC's e-mail in which the GRC confirmed that OPRA does not contain any requirement that separate requests must be submitted on separate forms, yet the Custodian declined to change his position.

The Complainant requests the following relief from the GRC:

1. An order compelling the Custodian to release all records requested to the Complainant;
2. A declaration that the Custodian unlawfully denied access to the Complainant's request by refusing to fulfill said requests unless the Complainant submitted separate request forms;
3. A declaration that the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances; and
4. An award of reasonable prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6.

Further, the Complainant does not agree to mediate this complaint.

August 29, 2008

Letter from Custodian to GRC. The Custodian states that it is no longer the district's policy to require separate OPRA request forms for each record requested. The Custodian states that this procedure was originally put into place to assist the district with tracking and filling OPRA requests. However, the Custodian states that the district has put other internal procedures in place to assist in this regard.

Additionally, the Custodian asserts that he did not knowingly and willfully deny access to the Complainant's OPRA request. The Custodian states that he provided access to the requested agenda on June 20, 2008. The Custodian also states that the requested enrollment information was not available in report form due to changes in personnel.

The Custodian requests that the GRC dismiss this complaint. The Custodian contends that the district is now in compliance with the provisions of OPRA.

September 5, 2008

Letter from Complainant's Counsel to GRC. Counsel contends that the Custodian's letter to the GRC dated August 29, 2008 is an insufficient response to this complaint. Counsel states that the Custodian's letter was not certified and was not sent in connection with any Statement of Information. Additionally, Counsel states that the Custodian failed to indicate whether the district's alleged policy was in writing, when it changed and why it changed. Counsel also states that the Custodian failed to indicate why he refused to change his policy after receiving the GRC's e-mail which indicated that OPRA does not contain any requirements that requestors must file separate OPRA requests when seeking multiple records.

Counsel contends that the Custodian's refusal to respond to the Complainant's OPRA request resulted in a "deemed" denial and his refusal to change his policy after receiving the GRC's e-mail constitutes a knowing and willful violation. Additionally, Counsel asserts that the Custodian's statement that "the Long Hill Township School District now would be deemed to be fully compliant with the provisions of [OPRA]" is an admission that the district's prior policy violated it. Counsel requests that the GRC proceed with the investigation of this matter.

September 5, 2008

Letter from Custodian to GRC. The Custodian states that the intention of his letter to the GRC dated August 29, 2008 was an attempt to expedite this complaint by informing the GRC that the procedures to which the Complainant objects have been terminated by the district.

The Custodian requests that the GRC acknowledge that the district meets all requirements under OPRA by no longer requiring requestors to submit separate OPRA request forms, and acknowledge that the district's allowance of multiple requests on one OPRA request form is deemed to have addressed the Complainant's Denial of Access Complaint.

September 18, 2008

Request for the Statement of Information ("SOI") sent to the Custodian.

September 24, 2008

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 18, 2008
- Custodian's response to the Complainant's OPRA request dated June 20, 2008
- E-mail from Complainant to Custodian dated June 27, 2008
- E-mail from Complainant to GRC dated June 20, 2008
- E-mail from GRC to Complainant dated June 20, 2008
- E-mail from Custodian to Complainant dated June 30, 2008
- E-mail from Complainant to Custodian dated June 30, 2008
- E-mail from Complainant to Custodian dated July 2, 2008
- E-mail from Custodian to Complainant dated July 2, 2008
- E-mail from Complainant to Custodian dated July 2, 2008
- Letter from Custodian to GRC dated August 29, 2008
- Letter from Custodian to GRC dated September 5, 2008
- A sample OPRA request submitted by another requestor

The Custodian certifies that he received the Complainant's OPRA request on June 18, 2008. The Custodian certifies that he responded to the Complainant's request on June 20, 2008 when he provided the Complainant with a copy of the requested agenda and a copy of another OPRA request form for the Complainant to resubmit for each additional request item.

The Custodian certifies that the district is relatively small and there are only two (2) people working in his office. The Custodian certifies that because the district received almost 100 OPRA requests from one (1) requestor within an eighteen (18) month period, the district developed procedures for processing OPRA requests. The Custodian states that the other requestor often files OPRA requests that contain unrelated items on the same OPRA request form. The Custodian asserts that OPRA requests containing multiple unrelated items are difficult to research and respond to in a timely manner. The Custodian certified that in an effort to track requests and determine if some common request items should be posted to the district's website for ease of access, the district began requiring separate OPRA request forms when requestors sought access to multiple, unrelated records. However, the Custodian certifies that this procedure has been discontinued. Additionally, the Custodian states that the Complainant received all records responsive in August 2008.

The Custodian also certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM") no records responsive to the Complainant's OPRA request were destroyed.

November 11, 2008

Complainant Counsel's response to the Custodian's SOI. The Complainant's Counsel asserts that the Custodian's SOI supports the Complainant's claim that the district's policy of requiring a separate OPRA request form for each record sought is an at-will policy that could be reinstated at any time absent an order from the GRC. Counsel contends that the Custodian's SOI also supports the Complainant's claim that the

Custodian knowingly and willfully violated OPRA because he knew the GRC's position regarding the separate OPRA request form issue and failed to adhere to said policy. Further, Counsel states that the Complainant attempted to resolve this issue with the Custodian prior to the filing of this Denial of Access Complaint. Counsel states that the Custodian only changed his policy after the Complainant acquired an attorney.

July 24, 2009

Letter from GRC to Custodian. The GRC asks the Custodian to provide a legal certification indicating the following:

1. The date on which the Custodian provided the Complainant with the records responsive to his OPRA request;
2. Whether the requested open and closed session meeting minutes dated May 12, 2008 and May 26, 2008 were prepared and approved by the governing body at the time of the Complainant's June 18, 2008 OPRA request; and
3. Whether any records responsive to the Complainant's request for "documents detailing enrollment for the month of June" existed at the time of the Complainant's OPRA request.

July 31, 2009

Custodian's Certification. The Custodian certifies that he provided the Complainant access to the requested June 23, 2008 agenda via e-mail on June 20, 2008. The Custodian certifies that he provided the Complainant with the May 2008 minutes and June 2008 enrollment numbers on August 29, 2008.

Additionally, the Custodian certifies that the Complainant's OPRA request incorrectly dates the requested meeting minutes. The Custodian certifies that the correct dates are May 5, 2008 and May 19, 2008. The Custodian certifies that the Board of Education ("BOE") approved the May 5, 2008 minutes on May 19, 2008, and the BOE approved the May 19, 2008 minutes on June 8, 2008.

Further, the Custodian certifies that the documents detailing enrollment for the month of June were not available at time of the Complainant's OPRA request. The Custodian certifies that June reports are typically not created until September, when the secretaries return from summer vacation. However, the Custodian certifies that he provided the Complainant with the source data (which is used to create the enrollment report) on August 29, 2008.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*... any limitations on the right of access accorded by [OPRA] shall be construed

in favor of the public's right of access..." (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* ... or *that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

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

In this instant complaint, the Custodian certified that he received the Complainant's OPRA request on June 18, 2008. The Custodian certified that he provided a written response on June 20, 2008 in which he provided access to the requested agenda. However, the Complainant states that the Custodian refused to release the additional requested records until the Complainant submitted his requests on separate OPRA request forms. The Custodian certified that because the district received almost 100 OPRA requests from one (1) requestor within an eighteen (18) month period, the district developed procedures for processing OPRA requests. The Custodian asserts that OPRA requests containing multiple unrelated items are difficult to research and respond to in a timely manner. The Custodian certified that in an effort to track requests and determine if some common request items should be posted to the district's website for ease of access, the district began requiring separate OPRA request forms when requestors sought access to multiple, unrelated records. However, the Custodian certifies that this procedure has been discontinued. Additionally, the Custodian states that the Complainant received all records responsive on August 29, 2008.

OPRA is silent regarding how many individual request items may be submitted on one (1) OPRA request form. However, we look to prior GRC decisions and court cases for more guidance on the issue.

Specifically, in Kushner v. Township of West Milford, GRC Complaint No. 2004-111 (October 2004), the Complainant made an OPRA request for certain records and was told that the Township was developing a protocol for the release of records of

that type. Four months after the Complainant's OPRA request, the Custodian sent the Complainant a request form for the records and a release of liability form to be completed. The Council found that the Township erred in handling the request, and determined that the Township did not provide any basis in law or fact that the special request form and release of liability were permitted under OPRA.

Additionally, in Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007), the Complainant submitted three (3) separate OPRA requests, as required by the Custodian, for access to construction files. The Complainant alleged that the Office of the Construction Official required him to complete another form titled "Records Review Request Form." The Council held that:

"[a]s in Kushner, *supra*, the Custodian has failed to provide a basis in law or fact that requires requestors to fill out separate forms for each record requested. Likewise, there is nothing in OPRA which allows a Custodian's internal agency practice to inhibit a requestor's access to government records. See Renna v. County of Union, GRC Complaint 2004-136 (August 2005). The Custodian has failed to adhere to the spirit of the law by forcing the Complainant to fill out a separate OPRA request form for each record requested."

Further, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Custodian failed to address each request item in his response to the Complainant's OPRA request. The Council held that:

"[a]lthough the Custodian responded in writing to the Complainant's August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g."

However, the New Jersey Superior Court has provided more clarification as to what constitutes a reasonable OPRA request. In New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the Appellate Division determined that a five (5) page, thirty nine (39) paragraph OPRA request for records bore no resemblance to the record request envisioned by the Legislature, which is one submitted on a form that "provide[s] space for . . . a *brief description of the record sought.*" N.J.S.A. 47:1A-5.f. (Emphasis added.)

Regarding a similar voluminous records request in Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), the Council ruled that based upon the Appellate Division's decision in New Jersey Builders Association, *supra*, the Complainant's voluminous request – a thirteen (13) paragraph request for numerous records, was not a valid OPRA request because it bears no resemblance to the record request envisioned by the Legislature, which is one submitted on a form that "provide[s] space for ... a brief description of the record sought."

Further, in Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007), the Council held that “based upon the Appellate Division’s decision in New Jersey Builders Association, *supra*, the Complainant’s voluminous October 30, 2006 OPRA request, a seven (7) page, fifty nine (59) paragraph request for numerous records spanning twelve (12) years, may not be a valid OPRA request because it seems to bear no resemblance to the record request envisioned by the Legislature, which is one submitted on a form that ‘provide[s] space for . . . a brief description of the record sought.’ *Id.* at 179.”

In this instant complaint, the Complainant sought access to four (4) records on one (1) OPRA request form: a meeting agenda; two (2) sets of meeting minutes; and a June 2008 enrollment report. The Complainant’s request does not meet the voluminous nature of the OPRA requests addressed in New Jersey Builders Association, *supra*, Vessio, *supra*, or Caggiano, *supra*. Thus, it is not unreasonable for a requestor to seek access to four (4) records on one (1) OPRA request form. Additionally, OPRA provides that “any limitations on the right of access . . . shall be construed in favor of the public’s right of access.” N.J.S.A. 47:1A-1. In this instance, requiring the Complainant to submit a separate OPRA request form is not construed in favor of the public’s right of access. Quite the opposite, this practice provides a road block for a requestor to gain access to government records.

Therefore, the Custodian’s refusal to fulfill the Complainant’s OPRA request until the Complainant submitted each request on a separate OPRA request form, with the exception of the requested agenda since the Custodian disclosed said record to the Complainant on the second (2nd) business day following receipt of the Complainant’s request, is an unreasonable limitation on access pursuant to N.J.S.A. 47:1A-1, Kushner, *supra*, and Dittrich, *supra*. The Council declines to order the Custodian to disclose the remaining request items because the Custodian certified that he provided the Complainant access to said records on August 29, 2008. However, it should be noted that the Custodian was not obligated to provide access to the June 2008 enrollment report because said report did not exist at the time of the Complainant’s OPRA request. *See Donato v. Borough of Emerson*, GRC Complaint No. 2005-125 (March 2007).

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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.

The Complainant contends that the Custodian knowingly and willfully violated OPRA because the Custodian received the GRC’s e-mail in which the GRC confirmed that OPRA does not contain any requirement that separate request items must be submitted on separate OPRA request forms, yet the Custodian declined to change his position.

The Custodian certified that because the district received almost 100 OPRA requests from one (1) requestor within an eighteen (18) month period, the district developed procedures for processing OPRA requests. The Custodian asserts that OPRA requests containing multiple unrelated items are difficult to research and respond to in a timely manner. The Custodian certified that in an effort to track requests and determine if some common request items should be posted to the district’s website for ease of access, the district began requiring separate OPRA request forms when requestors sought access to multiple, unrelated records. However, the Custodian certifies that this procedure has been discontinued.

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 (Berg); 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 this instant complaint, it is undisputed that the Custodian was aware of the GRC’s position that OPRA does not contain a provision that requires separate OPRA request forms for multiple request items since the Custodian included the GRC’s e-mail to the Complainant in his SOI. It is also undisputed that the Custodian did not change his policy of requiring separate OPRA request forms after receiving the GRC’s e-mail. In fact, the Custodian did not change his position until after the Complainant filed this Denial of Access Complaint.

However, as discussed in NJ Builders, *supra*, Vessio, *supra*, and Caggiano, *supra*, there may be some instances in which an OPRA request is so voluminous that it would be best served for the request to be submitted on separate OPRA request forms. This is not

the case in this instant complaint since the Complainant sought access to only four (4) records.

Therefore, although the Custodian placed an unreasonable limitation on access to portions of the Complainant's OPRA request by refusing to fulfill said requests until the Complainant resubmitted them on separate OPRA request forms, there may be some circumstances in which a custodian may require a requestor to submit separate OPRA request forms, such as if the request is extremely voluminous as discussed in NJ Builders, supra, Vessio, supra, and Caggiano, supra. As such, it is concluded that 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.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable 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/she 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.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected

an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

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 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, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon 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 court in Mason, *supra*, at 76, held that "requestors 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)."

In this instant complaint, the Custodian refused to fulfill portions of the Complainant's OPRA request until the Complainant submitted separate OPRA request forms for each enumerated request item. The Complainant sought the guidance of the GRC, and in turn, the GRC informed the Complainant that OPRA does not contain any such requirement. The Complainant notified the Custodian of the GRC's guidance in an attempt to change the Custodian's position on the matter. The Custodian did not change his position. After the Complainant engaged in reasonable efforts to resolve the matter on his own, the Complainant sought legal counsel and filed this Denial of Access Complaint. After the filing of this complaint (within two (2) business days), the Custodian disclosed all records responsive and abolished his policy of requiring separate OPRA request forms for multiple request items.

Pursuant to Teeters, *supra*, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian disclosed the remaining records to the Complainant and abolished the policy of requiring separate OPRA request forms for multiple request items. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Specifically, all limitations on access shall be construed in favor of the public pursuant to N.J.S.A. 47:1A-1. Here, the Custodian placed an unreasonable limitation on the Complainant's right of access by requiring the Complainant to submit separate OPRA request forms for multiple request items. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's refusal to fulfill the Complainant's OPRA request until the Complainant submitted each request on a separate OPRA request form, with the exception of the requested agenda since the Custodian disclosed said record to the Complainant on the second (2nd) business day following receipt of the Complainant's request, is an unreasonable limitation on access pursuant to N.J.S.A. 47:1A-1, Kushner v. Township of West Milford, GRC Complaint No. 2004-111 (October 2004) and Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007). The Council declines to order the Custodian to disclose the remaining request items because the Custodian certified that he provided the Complainant access to said records on August 29, 2008. However, it should be noted that the Custodian was not obligated to provide access to the June 2008 enrollment report because said report did not exist at the time of the Complainant's OPRA request. *See* Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007).
2. Although the Custodian placed an unreasonable limitation on access to portions of the Complainant's OPRA request by refusing to fulfill said requests until the Complainant resubmitted them on separate OPRA request forms, there may be some circumstances in which a custodian may require a requestor to submit separate OPRA request forms, such as if the request is extremely voluminous as discussed in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), and Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007). As such, it is concluded that 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. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian disclosed the remaining records to the Complainant and abolished his policy of requiring separate OPRA request forms for multiple request items. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Specifically, all limitations on access shall be construed in favor of the public pursuant to N.J.S.A. 47:1A-1. Here, the Custodian placed an unreasonable limitation on the Complainant's right of access by requiring the Complainant to submit separate OPRA request forms for multiple request items. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-

6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

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Approved By: Catherine Starghill, Esq.
Executive Director

October 21, 2009