



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

December 16, 2014 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-382

v.

Franklin Fire District No. 2 (Somerset)
Custodian of Record

At the December 16, 2014 public meeting, the Government Records Council (“Council”) considered the December 9, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council should accept said decision Honorable Linda M. Kassekert’s, Administrative Law Judge, findings concluding that “. . . the [original] Custodian willfully and knowingly violated his obligations under OPRA . . .” and that “. . . [t]he [Complainant] is entitled to a total of \$14,598 in reasonable counsel fees, plus \$385.05 in costs . . .” with the following modifications:

1. Because this is the original Custodian’s second (2nd) violation within the last ten (10) years, the penalty assessed is \$2,500. N.J.S.A. 47:1A-11; Carter, GRC 2011-124 *et seq.*
2. The original Custodian must remit payment from his own personal funds made payable to the Treasurer of the State of New Jersey, to the GRC within twenty (20) days from receipt of the Council’s Order.

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 16th Day of December, 2014



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: December 17, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 16, 2014 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-382

v.

**Franklin Fire District No. 2 (Somerset)²
Custodial Agency**

Records Relevant to Complaint: E-mail copies of warrants dispersed to Network Blade, LLC, for the budget years 2007 through 2011.

Custodian of Record: Pelham Stewart³

Request Received by Custodian: December 8, 2011

Response Made by Custodian: December 13, 2011

GRC Complaint Received: December 22, 2011

Background

July 23, 2013 Council Meeting:

At its July 23, 2013 public meeting, the Council considered the July 16, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has complied with the Council's May 28, 2013 Interim Order because the Custodian provided to the Complainant the responsive records and provided certified confirmation of same to the Executive Director within the required five (5) business days.
2. The evidence submitted as part of the reconsideration suggests that the original Custodian knew the records the Complainant sought existed and failed to acknowledge or provide same in response to the OPRA request at issue. Therefore, the original Custodian's actions may have been intentional and deliberate, with

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA), and Walter M. Luers, Esq., of the Law Offices of Walter M. Luers (Clinton, NJ). Mr. Luers submitted notice of appearance on July 30, 2013.

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ). Previously represented by Eric M. Perkins, Esq. (Skillman, NJ).

³ The original Custodian of Record was William Klieber.

knowledge of their wrongfulness. As such, a fact-finding hearing is necessary for a determination of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Thus, this complaint should be referred to the Office of Administrative Law. Additionally, for purposes of administrative ease, this complaint should be referred to the OAL for a determination of reasonable prevailing party attorney's fees since the Complainant is a prevailing party. See N.J.S.A. 47:1A-6; Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ... justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Procedural History:

On July 26, 2013, the Council distributed its Interim Order to all parties. On September 10, 2013, the complaint was transmitted to the Office of Administrative Law ("OAL"). On September 25, 2014, the Honorable Linda M. Kassekert, Administrative Law Judge ("ALJ"), issued an Initial Decision in this matter.⁴

Analysis

Administrative Law Judge's Initial Decision

The ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties. "The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), *certif. denied* 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." Cavalieri v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

⁴ On October 30, 2014, the GRC requested a forty-five (45) day extension of the statutory period, or until December 24, 2014, to accept, reject or modify the ALJ's Initial Decision. Same was granted on November 3, 2014.

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." Id. at 443. Additionally, the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

Further, OPRA provides 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 of \$1,000 for an initial violation, \$2,500 for a second violation that occurs within 10 years of an initial violation, and \$5,000 for a third violation that occurs within 10 years of an initial violation. This penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.), and the rules of court governing actions for the collection of civil penalties. The Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section.

N.J.S.A. 47:1A-11.

Previously, in Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-124 *et seq.*, the Council referred the complaint to the OAL for a hearing to resolve the facts, a determination of whether the original Custodian knowingly and willfully violated OPRA and a determination of prevailing party attorney's fees. On July 8, 2013, the OAL rendered an Initial Decision accepting a fully executed Settlement Agreement ("Agreement"). Therein, the original Custodian admitted to knowingly and willfully violating OPRA and agreed to pay a \$1,000 civil penalty "out of his personal funds."⁵ The settlement did not include terms barring the original Custodian's admission and payment of the civil penalty from being dispositive in subsequent complaint proceedings.

In the matter currently before the Council, the ALJ issued an Order on August 8, 2014 and an Initial Decision on September 25, 2014. The Order, dated August 8, 2014, addressed the issue of whether the original Custodian knowingly and willfully violated OPRA. Therein, set forth in full as "Exhibit A," the ALJ concluded that:

[The Complainant] has met his burden of proof by a preponderance of the credible evidence that the [original] Custodian's conduct in failing to provide the information that was the subject of the OPRA request was knowing and willful.

⁵ The GRC received said payment made payable to the State of New Jersey Treasury on June 25, 2014.

I therefore find that [the Complainant] has met his burden of establishing that the [original] Custodian willfully and knowingly violated his obligations under OPRA, and I **ORDER** that, as the prevailing party, [the Complainant] is entitled to attorney's fees. I hereby **ORDER** that [the Complainant] provide a certification of counsel fees within ten [(10)]days from the date of this Order. [Franklin Fire District No. 2] shall have ten days to respond.

The Initial Decision, dated September 25, 2014, addressed the issue of prevailing party attorney's fees. Therein, set forth in full as "Exhibit B," the ALJ concluded that:

The [Complainant] is entitled to a total of \$14,598 in reasonable counsel fees, plus \$385.05 in costs. This calculation breaks down as follows:

LODESTAR: 41.5 hours x \$300/hour = \$12,450
+
CONTINGENCY FEE ENHANCEMENT: (.20 x \$300) x (40.6 - 4.8) = \$2,148
+
COSTS: \$385.05

TOTAL: \$14,983.05

I **ORDER** that, as the prevailing party, [the Complainant] is entitled to \$14,598 in reasonable counsel fees plus \$385.05 in costs, for a total of \$14,983.05.

Here, the ALJ fairly summarized the testimony and evidence, explaining how she weighed the proofs before her and explaining why she credited, or discredited, certain testimony. The ALJ's conclusions are clearly aligned and consistent with those credibility determinations. As such, the GRC is satisfied that it can ascertain which testimony the ALJ accepted as fact, and further, finds that those facts provide a reasonable basis for the ALJ's conclusions.

Therefore, the Council should accept said decision Honorable Linda M. Kassekert's, ALJ, findings concluding that ". . . the [original] Custodian willfully and knowingly violated his obligations under OPRA . . ." and that ". . . [t]he [Complainant] is entitled to a total of \$14,598 in reasonable counsel fees, plus \$385.05 in costs . . ." with the following modifications:

1. Because this is the original Custodian's second (2nd) violation within the last ten (10) years, the penalty assessed is \$2,500. N.J.S.A. 47:1A-11; Carter, GRC 2011-124 *et seq.*
2. The original Custodian must remit payment from his own personal funds and made payable to the Treasurer of the State of New Jersey, to the GRC within twenty (20) days from receipt of the Council's Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council should accept said decision Honorable Linda M. Kassekert's, Administrative Law Judge, findings concluding that ". . . the [original] Custodian willfully and knowingly violated his

obligations under OPRA . . .” and that “. . . [t]he [Complainant] is entitled to a total of \$14,598 in reasonable counsel fees, plus \$385.05 in costs . . .” with the following modifications:

1. Because this is the original Custodian’s second (2nd) violation within the last ten (10) years, the penalty assessed is \$2,500. N.J.S.A. 47:1A-11; Carter, GRC 2011-124 *et seq.*
2. The original Custodian must remit payment from his own personal funds and made payable to the Treasurer of the State of New Jersey, to the GRC within twenty (20) days from receipt of the Council’s Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resources Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

December 9, 2014



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. GRC 13327-13

AGENCY DKT. NO. 2011-382

JEFF CARTER,

Petitioner,

v.

FRANKLIN FIRE DISTRICT NO. 2

(SOMERSET),

Respondent.

Walter M. Luers, Esq., for petitioner

Dominic P. DiYanni, Esq., for respondent

BEFORE **LINDA M. KASSEKERT, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves alleged violations of the Open Public Records Act (OPRA). Petitioner, Dr. Jeff Carter, filed a complaint on December 22, 2011, with the Government Records Council (GRC) alleging that William Kleiber, a fire commissioner and the custodian of records (Custodian) for respondent, Franklin Fire District No. 2, failed to properly respond to his requests beginning on December 8, 2011 (GRC Complaint Number 2011-382). Petitioner requested that respondent provide information regarding "warrants" approved relating to a certain vendor doing business

with the fire district. On January 17, 2012, the Custodian filed the Statement of Information, indicating that respondent did not have any documents known as a “warrant.” On July 15, 2013, petitioner submitted a certification to the GRC disputing the Custodian’s contention that respondent did not use “warrants.” On February 26, 2013, the GRC issued a final decision against petitioner and held that no “warrants” existed. On March 12, 2013, the petitioner filed a motion for reconsideration.

On May 28, 2013, the GRC issued an Interim Order in this matter, granting reconsideration and determining that the Custodian had failed to meet his burden of proving a lawful denial of access. The GRC ordered that the Custodian comply and disclose the requested information within five business days. The GRC issued a final decision in this matter on July 23, 2013, and determined that the Custodian knew that the warrants existed, that he did not provide them, and that his conduct may have been knowing and willful. The Order deferred the determination as to whether the Custodian knowingly and willfully violated OPRA, and transmitted this matter to the Office of Administrative Law, where it was filed on September 16, 2013, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A hearing was held on June 3, 2014. The parties submitted posting-hearing briefs on June 23, 2014, and the record was closed on that date. however, the record was reopened on August 8, 2014, for the purpose of entertaining counsel fees.

TESTIMONY

For Petitioner

Dr. Jeff Carter

The petitioner testified that he is currently an assistant professor at Centenary College. Prior to this, he was a police officer. He also served as an elected member and treasurer of his fire district (Fire District No. 1). He stated that in this capacity he was familiar with requirements pertaining to fire districts. On December 8, 2011, he

sent an OPRA request to respondent, with a copy to Eric Perkins, Esq., via email, requesting information in the form of “warrants” for a vendor known as “Network Blade.” (P-1.) The date range for the request was budget years 2007, 2008, 2009, 2010 and 2011. The petitioner stated that pursuant to N.J.S.A. 40A:14-89, “warrant” is a term for a financial distribution. Other terms that may be used include “check” or “voucher.” On December 13, 2011, he received a response from Sandy Accardi, who served as the part-time clerk for the respondent. (P-3.¹) The response stated²:

Mr. Carter:

The Board of Fire Commissioners, Fire District No. 2 does not utilize “Warrants.” If you could be more specific on what you are looking for, I’m sure the Board would be more than willing to assist you.

The petitioner responded to Ms. Accardi on Wednesday, December 14, 2011, as follows:

Ms. Accardi:

I understand that “warrants” are statutorily required for any disbursements made by the District to its vendors. I also understand that immediate access of responsive records is obligatory under the OPRA. If the records custodian is unclear on his responsibilities, perhaps he can contact the GRC, which can provide him with *free* guidance in this matter.

Thank you.

On December 15, 2011, Eric Perkins, who was the attorney representing the respondent, responded to the petitioner via an email that stated:

¹ The chain of emails is contained in Exhibit P-3.

² All excerpts of memos, letters and other documents have been typed verbatim into this decision. It should be assumed that any typographical, grammatical and spelling errors are the products of the respective authors of these materials. Therefore, terms such as sic have not been utilized. Emphasis, including language that is **bolded**, was provided by the author of the document.

Mr. Carter: The Board of Fire Commissioners does not use any document which we describe as a "Warrant." You have already requested and received copies of all documents that are used to approve and pay bills or invoices in the Board's payment process with respect to Network Blade. You have also recently requested and been provided with copies of the Board's annual audits. Please note that Board's payment practices are reviewed annually by our auditor. If the auditor had any issue with the payment practices it would be noted in the audit. You will note that the auditor has not commented on payment practices in any of the audits.

The petitioner responded to Mr. Perkins on December 16, 2011. The email stated:

Mr. Perkins:

Commissioner Kleiber recently certified that no "purchase orders" or "vouchers" exist for complaint numbers 2011-124, 2011-125, 2011-126, and 2011-127 now pending before the GRC. In the OPRA request subject to your reply, which has nothing to do with the aforementioned GRC complaints, I requested the "warrants" that are statutorily required for disbursements the District made to Network Blade. More specifically, N.J.S.A. 40A:14-89 sets forth that, "Moneys shall be disbursed by warrants signed by a majority of the board." Therefore, is it the records custodian's position, and your position as the Board's legal counsel, that the Board has disbursed public funds *contrary* to the requirements of N.J.S.A. 40A:14-89?

Please clarify your denial of my present OPRA requests because the only records I've previously received from the Board for Network Blade—via the aforementioned GRC complaints; not the present OPRA request—were "invoices" that bore no signatures, let alone signatures from ". . . a **majority of the board**" as statutorily required.

I await your clarification.

On December 16, 2011, the petitioner received an email from Sandy Accardi that stated:

Mr. Carter:

Please find attached the OPRA information you have requested regarding Network Blade Warrants. If we can be of further assistance please don't hesitate to contact us.

Thank you.

Also on December 16, 2011, he received an email sent through the email address of Sandy Accardi that was from the Custodian, which stated:

Mr. Carter:

After researching your latest request the Board came across two (2) invoices regarding Network Blade that you requested previously.

Thank you.

On December 18, 2011, the petitioner sent an email to the records Custodian (via Ms. Accardi's email) and Mr. Perkins. The email stated:

1. I specifically requested "Complete copies of all "warrants," **including attachments.**" However there were **no** "attachments" in the 25 records you provided. Since any attachments to the records you provided are clearly immediate access records under the OPRA, I will accept responsive records by 5:00 p.m. on Monday December 19, 2011 before pursuing your denial for failing to provide them.

2. Although N.J.S.A. 40A:14-89 sets forth that, "Moneys shall be disbursed by warrants signed by a majority of the board" **none** of the 25 records you provided contain signatures from ". . . a majority of the board."

3. I am specifically seeking warrants that bear signatures from "**. . . a majority of the board**" as statutorily required, **including any attachments to those warrants.** If, however, it is your position that the Board has disbursed

public funds *contrary* to the requirements of N.J.S.A. 40A:14-89 and that no responsive records exist for my OPRA request, then please clearly state such in your denial or provide all responsive records.

I await your response.

On December 19, 2011, the Custodian, through Ms. Accardi's email address, responded:

Mr. Carter:

The invoices for Network Blade from March 2008 to January 2011 were previously email to you on March 15, 2011.

Attached please find Network Blade invoices form April 2011 to November 2011.

If the board could be of further assistance please don't hesitate to contact us.

Thank you.

On December 22, 2011, petitioner filed a Denial of Access Complaint with the GRC. (P-4.) On January 14, 2012, the respondent filed its response with the GRC (P-5), stating that it did not use "warrants."

On February 26, 2013, the GRC issued a final decision with respect to the petitioner's December 22, 2011, complaint. In its decision, the GRC concluded that because the Custodian certified in his Statement of Information that no "warrants" existed and the petitioner failed to submit any evidence to refute the Custodian's certification, the custodian did not unlawfully deny access to the requested information. The GRC also declined to determine that "warrants" are "immediate access" records, because "warrants" are not identified under N.J.S.A. 47:1A-5(e) as such. As a result, the GRC determined that the Custodian lawfully denied access to the records because they did not exist, and petitioner was not a prevailing party entitled to an award of reasonable attorney's fees pursuant to the OPRA.

The petitioner filed for reconsideration on March 12, 2013, based on new evidence. The petitioner argued that the Custodian had provided proof that the respondent, in a December 27, 2012, email response, had provided information with respect to Legal Service “warrants.” The petitioner had requested that the Custodian provide warrants for legal services dated March 19, 2012, to December 15, 2012.

Ms. Accardi’s email response dated December 27, 2012, contained copies of checks, purchase order vouchers and legal statements for professional services rendered, which date from March 19, 2012, to December 15, 2012. An unsigned letter was included with the package that stated:

Dear Mr. Carter:

The Board of Fire Commissioners does not use Warrants, but the checks are co-signed by three (3) Commissioners in satisfaction of the statutes. The December checks have not been posted as of yet as soon as they are received they will be forwarded to you.

Thank you.

In his request for reconsideration, petitioner argued that this information, which included copies of checks signed by three fire commissioners and the detailed legal statements, proved that the Custodian was aware that the records existed, which satisfied the statute.

At its May 28, 2013, meeting, the GRC rescinded its February 26, 2012, Final Decision and issued an Interim Order. (P-7.) The GRC did not determine that the information submitted by the petitioner was “new evidence.” However, the GRC determined that “the Complainant has submitted indisputable proof that the records sought in the subject OPRA request existed.” The GRC amended the February 26, 2012, decision as follows:

The Custodian failed to bear his burden of proving a lawful denial of access to the required “warrants” because the Complainant has proven that the FFD maintains records

reasonably classified as “warrants” bearing the signatures of three (3) Commissioners. N.J.S.A. 47:1A-6. Thus, the Custodian must disclose all responsive records to the Complainant.

Further, the Interim Order provided that the Custodian shall disclose the requested information, with appropriate redactions, within five business days from the receipt of the GRC’s Interim Order, and simultaneously provide certified confirmation of compliance to the GRC executive director.

On July 12, 2013, the GRC issued its Final Decision in this matter.³ At that point the Custodian had complied, and had provided the records, with confirmation to the executive director, within five business days. The GRC determined that the petitioner was the prevailing party, and stated that the evidence submitted as part of the reconsideration suggested that the original Custodian knew that the records the complainant sought existed. The complaint was referred to the OAL for a determination as to whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access. Additionally, the matter was referred to the OAL for a determination of reasonable prevailing-party attorney’s fees.

On cross-examination, the petitioner indicated that he was a commissioner and a treasurer at Franklin Township Fire District No. 1, which had used a payment-voucher system requiring three commissioners to sign in order to pay bills. The district used purchases orders, requisitions, invoices from vendors, and checks to effectuate payment of bills. He agreed that he had only asked for warrants in his December 8, 2011, email to Sandy Accardi (P-1), and had not asked for purchase orders or invoices. He agreed that purchase order vouchers for Network Blade were sent to him via email on December 16, 2011 (R-1), and Network Blade invoices from April 2011 to November 2011 were emailed to him on December 19, 2011 (R-2). The petitioner agreed that the vendor in this matter, Network Blade, was the Democratic Party chairperson for Franklin Township. He did not know that copies of checks would have satisfied the warrant requirement; if he had, he would have requested them.

For Respondent

Commissioner William Kleiber

Commissioner Kleiber serves as a commissioner and treasurer for Franklin Township Fire District No. 2. The commissioner position is an elected position, and he has served in this capacity for twenty years. On December 8, 2011, he was the Custodian of Records. He no longer services in this capacity. There is only one part-time employee for the fire district, Sandy Accardi, who works in the district office. One of her duties is to assist in responding to OPRA requests. She forwarded these requests to the district's counsel. Mr. Kleiber was notified about the petitioner's OPRA request of December 8, 2011 (P-1), but he did not understand what was being requested. He did not write the response (P-3), it was written by Sandy Accardi on behalf of the district's counsel. He stated that he contacted the GRC, and the GRC told him to contact the complainant to get a better definition for a "warrant," but he still did not understand what a warrant was. He stated that if he had had a document called a "warrant" he would have provided it. He was asked if there were prior OPRA requests for warrants, and he responded that he did not know. He was asked if he signed the January 14, 2012, GRC Statement of Information Form (P-5), which he agreed he did, and if, at that time, he had any knowledge of what a "warrant" was. He maintained that he did not know.

Commissioner Kleiber identified R-1, a December 16, 2011, email from Sandy Accardi to the petitioner, with a copy to Eric Perkins. Attached to the email is a series of purchase order vouchers for Network Blade dated from June 7, 2008, to September 10, 2011. The email stated:

Please find attached the OPRA information you have requested regarding Network Blade Warrants. If we can be of further assistances please don't hesitate to contact us.

³ The Final Decision was part of the transmittal from the GRC in this matter.

Commissioner Kleiber next identified R-2, a December 19, 2011, email sent by him through Sandy Accardi's email to the petitioner. The email is again copied to the district's counsel. Again, attached to the email are invoices for Network Blade. These invoices are dated from April 18, 2011, to September 1, 2011. However, the accompanying email stated:

The invoices for Network Blade from March 2008 to January 2011 were previously email to you on March 15, 2011.

Attached please find Network Blade invoices from April 2011 to November 2011.

If the board could be of further assistance please don't hesitate to contact us.

Commissioner Kleiber indicated that when he received the December 18, 2011, email from the petitioner he still could not determine what the petitioner wanted. Once the petitioner filed the Denial of Access Complaint (P-4) and the respondent filed its response, the NJ GRC Statement of Information Form dated January 14, 2012 (P-5), he did not do anything else.

As to the GRC's first decision in this matter that was rendered on February 26, 2013, he stated he was no longer the Custodian, as of March 12, 2013, so he was not doing anything pertaining to this issue. This was a period of transition. He did not intentionally or deliberately withhold documents, and he does not believe his actions were in violation of OPRA.

On cross-examination, he stated that he never read the OPRA law. He read some of the emails that were sent in December 2011, but does not recall if he responded. He indicated that he did not access Sandy Accardi's email. The December 16, 2011, email was written by Sandy at his direction and she signed it on his behalf. He stated that 90–95 percent of these requests were delegated to Ms. Accardi, with the district's counsel handling the remaining requests. He was asked if he had read the Denial OF Access Complaint, and he responded, "honestly, no." He forwarded it to the district's counsel. He was not aware a response was required; a response was not filed

on his behalf. He did not know that the fire district was required to respond to the GRC; he later became aware, but does not remember when. He agreed that he had signed the response, P-5. He does not recall when he learned of the GRC decision; he became aware at a later time. He did not check his email on a regular basis, perhaps once a week on average, because he had to go into the fire district office in order to access it. He does not recall reading the statute regarding warrants. He does not recall sending out emails in response to petitioner's OPRA request. He did search his emails for discovery when he received notice of the hearing. He does recall reading an email from Sandy Accardi to petitioner dated December 13, 2011 (P-3), but does not recall when. He agreed that the district used purchase order vouchers and checks to make payments. He stated that he authorized the payment of the vouchers attached to the email from Sandy Accardi to petitioner dated December 16, 2011 (R-1).

Mr. Kleiber identified a Settlement Agreement dated July 8, 2013, by the Honorable John F. Russo, Jr., ALJ (P-8). That matter dealt with a request by the petitioner for records related to Network Blade purchase orders and vouchers dated between January 1, 2007, and December 31, 2010. The matter was transmitted to the OAL as a contested case on June 20, 2012. The agreement was signed by Pelham Stewart, the current Records Custodian, on behalf of the fire district, and by the petitioner, Dr. Carter. In the agreement, Mr. Kleiber agreed to personally pay a fine of \$1,000 and admitted that he knowingly and willfully violated OPRA. Mr. Kleiber has not yet paid the fine.

FACTUAL DISCUSSION

Based on the testimony and the exhibits provided, the following is found as **FACT:**

1. At times relevant to this matter, William Kleiber served as the Records Custodian for Franklin Township Fire District No. 2. He was replaced effective March 12, 2013.

2. On December 8, 2011, the petitioner sent an OPRA request to the Custodian through Ms. Accardi, the part-time clerk, requesting copies of “warrants,” including attachments, for budget years 2007, 2008, 2009, 2010, and 2011 for a company known as Network Blade.

3. On December 13, 2011, Ms. Accardi responded that the district did not utilize “warrants,” and asked that the petitioner be specific as to what he was looking for.

4. On December 14, 2011, the petitioner responded, and indicated that “warrants” were statutorily required, and suggested that if the Custodian were unclear on the definition of a “warrant,” he could contact the GRC.

5. On December 15, 2011, Eric Perkins, Esq., the district’s counsel, responded, and indicated that the fire commissioners did not use any document described as a “warrant,” and that the petitioner had been provided with copies of all documents that are used to approve and pay bills or invoices.

6. On December 16, 2011, Ms. Accardi provided the petitioner with information regarding the request. The petitioner alleged that this information was not responsive.

7. On December 16, 2011, the Custodian provided two additional invoices regarding Network Blade.

8. On December 18, 2011, the petitioner responded to the Custodian and Mr. Perkins, indicating that there were no attachments to the warrants provided to him. The petitioner cited the applicable statute and asked that the Custodian respond by 5:00 p.m. on Monday, December 19, 2011, otherwise he would pursue filing with the GRC.

9. On December 19, 2011, the Custodian provided invoices for Network Blade from March 2008 to January 2011 and April 2011 to November 2011.

10. On December 22, 2011, petitioner filed a Denial of Access Complaint with the GRC with respect to the Network Blade warrants.

11. On January 14, 2012, the Custodian filed a response with the GRC indicating that the petitioner had twice been advised that the district did not use any document entitled "warrant."

12. On February 26, 2013, the GRC issued a Final Decision with respect to the petitioner's December 22, 2011, complaint, determining that the Custodian lawfully denied access to the records because they did not exist, and petitioner was not a prevailing party entitled to an award of reasonable attorney's fees pursuant to OPRA.

13. On March 12, 2013, petitioner filed for reconsideration with the GRC, citing a December 27, 2012, response from the respondent providing information regarding checks and statements for legal payments made by the district.

14. On May 28, 2013, the GRC issued an Interim Order determining that reconsideration of the petitioner's complaint should be granted, as the petitioner had proven that the district maintains records reasonably classified as "warrants." The Order also required the Custodian to disclose the requested information, with appropriate redactions, within five business days from the receipt of the GRC's Interim Order, and simultaneously provide certified confirmation of compliance to the GRC executive director.

15. On July 23, 2013, the GRC issued a Final Decision determining that the Custodian knew that the records existed and failed to acknowledge or provide them pursuant to the petitioner's request. The GRC transmitted the matter to the OAL for a determination as to whether the Custodian's conduct was knowing and willful and whether the petitioner should be awarded reasonable prevailing-party attorney's fees.

LEGAL DISCUSSION

The Open Public Records Act, N.J.S.A. 47:1A-1 et seq., known as “OPRA,” provides:

The Legislature finds and declares it to be the public policy of this State that

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public’s right of access;

all government records shall be subject to public access unless exempt from such access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order

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

N.J.S.A. 47:1A-1.1 defines “Government record” or “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 in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof.

The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

N.J.S.A. 47:1A-5(g) provides:

A request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically or otherwise conveyed to the appropriate custodian. A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record. If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record. If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.

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

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 which shall be heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or

in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L.2001, c.404 (C.47:1A-7).

N.J.S.A. 47:1A-11(a) provides:

A public official, officer, employee or custodian who knowingly and willfully violates P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty of \$1,000 for an initial violation, \$2,500 for a second violation that occurs within 10 years of an initial violation, and \$5,000 for a third violation that occurs within 10 years of an initial violation. This penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.), and the rules of court governing actions for the collection of civil penalties. The Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section.

Appropriate disciplinary proceedings may be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

In this matter, the GRC determined on July 23, 2013, in its Final Decision that the Records Custodian knew that the warrants existed, that he did not provide them, and that his conduct may have been knowing and willful. The Order deferred the determination as to whether the Records Custodian knowingly and willfully violated OPRA and transmitted the matter to the OAL for a determination as to this and applicable attorney's fees.

"Knowing and Willful"

The standard for imposing a monetary penalty upon a public official who violates OPRA by unreasonably denying access to government records requires a finding that such violation was both "knowing and willful." N.J.S.A. 47:1A-11. These terms are not defined within the OPRA statute. Their meaning can best be understood by reference

to other legislation that uses these terms. The following discussion of the issue is taken from Haelig v. Seaside Heights Business Improvement District, GRC 173-06, Initial Decision (October 31, 2006), <<http://njlaw.rutgers.edu/collections/oal/>>:

[I]n Executive Comm'n on Ethical Stds. v. Salmon, 295 N.J. Super. 86 (App. Div. 1996) ("Executive Comm'n"), an ethics case brought against a sitting Commissioner of the Board of Public Utilities, the Executive Commission on Ethical Standards sought Commissioner Salmon's removal on the grounds that he had acted in "willful and continuous disregard of his ethical obligations." The Appellate Division spoke about the subject of "willful" misconduct.

....

In the absence of a definition of the term "willful" contained in the Conflicts of Interest Law or the BPU Code of Ethics, the ECES looked to cases arising under section 255 of the Federal Fair Labor Standards Act (FLSA), 29 U.S.C.A. § 255(a), particularly Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1971), cert. denied, 409 U.S. 948, 93 S. Ct. 292, 34 L. Ed.2d 219 (1972). In Jiffy June, an infraction of the FLSA was deemed to be willful when the employer changed employees' rates of pay with knowledge that the FLSA was applicable to its operations. The final order of the ECES failed to recognize that the Jiffy June standard of willful conduct was specifically rejected by the United States Supreme Court in McLaughlin v. Richland Shoe Co., 486 U.S. 128, 134, 108 S. Ct. 1677, 1682, 100 L. Ed.2d 115, 123 (1988), where the Court said the Jiffy June standard "is not supported by the plain language of the statute (FLSA), we readily reject it."

The Jiffy June standard was criticized by the United States Supreme Court as permitting "a finding of willfulness to be based on nothing more than negligence, or, perhaps, on a completely good faith but incorrect assumption" that the challenged conduct was lawful. Id. at 135, 108 S. Ct. at 1682, 100 L. Ed. 2d at 124.

The meaning of "willful" was defined by the McLaughlin Court as follows:

In common usage the word “willful” is considered synonymous with such words as “voluntary,” “deliberate,” and “intentional”. . . . The word “willful” is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent.

[Id. at 133, 108 S. Ct. at 1681, 100 L. Ed. 2d at 123 (citations omitted).]

This court is not bound by an agency’s interpretation of a statute. See Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 93, 312 A.2d 497 (1973). We reject the Jiffy June standard as no longer persuasive.

In Fielder v. Stonack, 141 N.J. 101, 125, 661 A.2d 231 (1995), the New Jersey Supreme Court dealt with the meaning of the phrase “willful misconduct” in the context of a police pursuit. The police officer who collided with an innocent motorist could not be exonerated under the applicable statute if his conduct constituted “willful misconduct.” In holding that willful misconduct in the context of a police pursuit means “the knowing failure [of a police officer] to follow specific orders[.]” id. at 126, 661 A.2d 231, the Court noted that the phrase “willful misconduct” is not immutably fixed but takes its meaning from the context and purpose of its use. Id. at 125, 661 A.2d 231. The Court further said:

Although willful misconduct need not involve the actual intent to cause harm . . . there must be some knowledge that the act is wrongful. . . . “Willful misconduct” is the commission of a forbidden act with actual (not imputed) knowledge that the act is forbidden. [Fielder, supra, 141 N.J. at 124, 661 A.2d 231.]

Although the Fielder court formulated its “willful” standard expressly for police-chase scenarios, we find its reasoning to be pertinent in the context of ethics violations. Both scenarios deal with possible malfeasance of a person charged with protection of the public. Cases in the criminal context define the word “willful” as signifying an intentional execution of an unlawful plan which has been conceived and

deliberated upon. See, e.g., State v. DiPaolo, 34 N.J. 279, 295, 168 A.2d 401 (1961), cert. denied, 368 U.S. 880, 82 S. Ct. 130, 7 L. Ed.2d 80 (1961).

....

The evident purpose of N.J.S.A. 52:13D-21(i) is to delineate the penalties for those found guilty of violating any provision of the Conflicts of Interest Law or Codes of Ethics promulgated pursuant to such Law. Two levels of penalties are established depending upon the degree of culpability of the ethics offender. The initial or lower level, in addition to fines, permits an offender to “be suspended from his office or employment for a period not in excess of 1 year.” The second or more severe level permits an offender to be removed from his office or employment and barred from holding any public office or employment for a period not exceeding five years after crossing a threshold finding that the conduct of the offender constitutes a “willful and continuous disregard” of the ethics laws.

Thus, the structure and plain language of N.J.S.A. 52:13D-21(i) contemplate that a distinction be made with respect to the degree of culpability of the ethics offender. By reserving the more severe level of punishment for offenders whose conduct constitutes a “willful and continuous disregard” of the ethics laws, the Legislature intended to and did draw a distinction between those offenders whose conduct was merely negligent, heedless, or unintentional even though the offender was aware of the ethics laws. By drawing such distinction, it is clear that the Legislature intended to reject a finding of willfulness for conduct that was merely negligent, heedless, or unintentional. Consequently, the Jiffy June standard, which permits a finding of willfulness based upon nothing more than negligence or, perhaps, upon a completely good faith but incorrect assumption, was not within the contemplation of the Legislature as expressed by the plain language of the statute.

The legislative use of the words “continuous disregard” in conjunction with the word “willful” conveys the intention that something more than mere negligence, inattention, or heedlessness is required for conduct to constitute a “willful and continuous disregard” of the ethics laws. Accordingly, we

determine that conduct, to be considered willful under N.J.S.A. 52:13D-21(i), must be intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless, or unintentional.

In Alston v. City of Camden, 168 N.J. 170, the Supreme Court said

Plaintiff contends that the trial court erred in instructing the jury that willful misconduct “does not include and is above what you might understand to be gross negligence or recklessness.” Citing Fielder, supra, 141 N.J. at 124, 661 A.2d 231, plaintiff argues that this Court has long recognized that one who acts with the knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, commits an act of willful misconduct.

In Fielder, supra, this Court held that “in the context of a police officer’s enforcement of the law, including the pursuit of a fleeing vehicle, willful misconduct is ordinarily limited to a knowing violation of a specific command by a superior, or a standing order, that would subject that officer to discipline.” 141 N.J. at 125, 661 A.2d 231. “More particularly, willful misconduct in a police vehicular chase has two elements: 1) disobeying either a specific lawful command of a superior or a specific lawful standing order and 2) knowing of the command or standing order, knowing that it is being violated and, intending to violate it.” Id. at 126, 661 A.2d 231.

This Court was careful to note that it did “not presume to define willful misconduct in any context other than police vehicular pursuit under 5-2b(2).” Id. at 125, 661 A.2d 231. That is because “[l]ike many legal characterizations, willful misconduct is not immutably defined but takes its meaning from the context and purpose of its use.” Id. at 124, 661 A.2d 231. This Court did note, however, that “[p]rior decisions have suggested that willful misconduct is the equivalent of reckless disregard for safety.” Ibid. “It is more than an absence of ‘good faith.’” Ibid. (quoting Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294–95, 473 A.2d 554 (Law Div. 1983)).

We conclude that the trial court’s instruction that willful misconduct required something between simple

negligence and the intentional infliction of harm was not improper. It is clear that willful misconduct requires “much more” than mere negligence. Fielder, supra, 141 N.J. at 124, 661 A.2d 231. It also is clear that willful misconduct will fall somewhere on the continuum between simple negligence and the intentional infliction of harm. Id. at 123, 661 A.2d 231 (citing Foldi v. Jeffries, 93 N.J. 533, 549, 461 A.2d 1145 (1983)).

The GRC determined in its Interim and Final Orders that the Records Custodian had failed to provide the records, based on the fact that the Legal Services warrants were provided on December 27, 2012. The GRC seeks in this proceeding to determine whether the refusal was willful and knowing.

Petitioner, who bears the burden of proof in this matter, argues that the Custodian knowingly and willfully violated OPRA. Petitioner argues that the Custodian was “aware of the petitioner’s OPRA request but did nothing to respond to it; did not search for responsive records, did not read the petitioner’s GRC complaint or any of his filings; relied on part-time administrative staff and outside counsel to do his job for him; never read the OPRA statute; and, has done absolutely nothing to comply with his obligations under OPRA.”

It is apparent that Mr. Kleiber was not the right person to serve as the Records Custodian for Franklin Township Fire District No. 2. He was an elected fire commissioner, a part-time position. He admitted that he never read the OPRA statute. In this matter, he did not read the complaint and filings. He admitted that he delegated up to 95 percent of the OPRA requests received by the district to Ms. Accardi and the remaining 5 percent were given to the district’s counsel to handle. There is no issue that he was negligent in his duties as the Records Custodian for the fire district. The issue here is whether his actions in denying petitioner the information requested pursuant to OPRA were willful and knowing.

Petitioner made a thorough request for certain information regarding payments to a company called Network Blade. He took the trouble to provide a copy of the statute

and additional information about what he was seeking. The fire district's counsel, Eric Perkins, was copied on each of these requests and even responded directly to the petitioner, indicating that the fire district did not use "warrants." The petitioner also responded to Mr. Perkins and provided clarification. Although the fire district did not use the term "warrant," it was required by statute to pay the bills through a process whereby three of the five fire commissioners signed a document, in this case a check, approving payment. The petitioner had made this request before, regarding other records, so this terminology was not new or unfamiliar. The Records Custodian's conduct and the conduct of the fire district counsel, to whom he delegated this request, in maintaining that there were no warrants and then in providing information that was not responsive to the petitioner's request, was more than "negligent, heedless or unintentional." As pointed out by petitioner's counsel, a check does not have to say "check" on it for one to know it is a check. Petitioner's request for the documents used to pay bills that were signed by three commissioners, as required by statute, regardless of what those documents were called, is certainly not that complex that the custodian or his counsel should not have been able to determine what it was that the petitioner was looking for. Moreover, the Records Custodian indicated in his testimony that he had been a fire commissioner for twenty years and his district's treasurer for upwards of ten to fifteen years. He was not new to this process. As a result, based on the totality of the circumstances, it is clear to me that his conduct in responding to this OPRA request was intentional and deliberate.

As a result, I **CONCLUDE** that petitioner has met his burden of proof by a preponderance of the credible evidence that the Records Custodian's conduct in failing to provide the information that was the subject of the OPRA request was knowing and willful.

ORDER

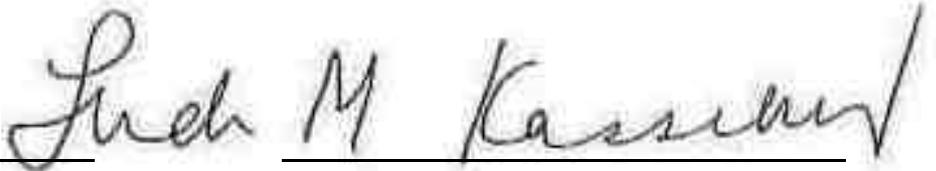
I therefore find that petitioner has met his burden of establishing that the Records Custodian willfully and knowingly violated his obligations under OPRA, and I **ORDER** that, as the prevailing party, petitioner is entitled to attorney's fees. I hereby

ORDER that petitioner provide a certification of counsel fees within ten days from the date of this Order. Respondent shall have ten days to respond.

This order may be reviewed by **GOVERNMENT RECORDS COUNCIL** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

August 8, 2014

DATE

A handwritten signature in black ink, appearing to read "Linda M. Kassekert", written over a horizontal line.

LINDA M. KASSEKERT, ALJ

/lam

LIST OF WITNESSES

For Petitioner:

Dr. Jeff Carter

For Respondent:

William Kleiber

LIST OF EXHIBITS

For Petitioner:

- P-1 Email from Jeff Carter to Sandy Accardi, dated December 8, 2011
- P-2 N.J.S.A. 40A:14-89
- P-3 Email from Sandy Accardi to Jeff Carter, dated December 13, 2011
- P-4 NJ GRC Denial of Access Complaint, filed December 22, 2011
- P-5 NJ GRC Statement of Information Form, dated January 14, 2012
- P-6 Email from Sandy Accardi to Jeff Carter, dated December 27, 2012
- P-7 Interim Order of GRC, dated May 28, 2013
- P-8 Settlement Agreement, dated July 8, 2013

For Respondent:

- R-1 Email from Sandy Accardi to Jeff Carter, dated December 16, 2011
- R-2 Email from Sandy Accardi to Jeff Carter, dated December 19, 2011



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. GRC 13327-13

AGENCY DKT. NO. 2011-382

JEFF CARTER,

Petitioner,

v.

FRANKLIN FIRE DISTRICT NO. 2

(SOMERSET),

Respondent.

Walter M. Luers, Esq., for petitioner

Dominic P. DiYanni, Esq., for respondent

Record Closed: August 29, 2014

Decided: September 25, 2014

BEFORE **LINDA M. KASSEKERT, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves alleged violations of the Open Public Records Act (OPRA). Petitioner, Dr. Jeff Carter (petitioner), filed a complaint on December 22, 2011, with the Government Records Council (GRC) alleging that William Kleiber, a fire commissioner and the custodian of records (Custodian) for respondent, Franklin Fire District No. 2, failed to properly respond to his requests beginning on December 8, 2011 (GRC

Complaint Number 2011-382). Petitioner requested that respondent provide information regarding “warrants” approved relating to a certain vendor doing business with the fire district. On January 17, 2012, the Custodian filed the Statement of Information, indicating that respondent did not have any documents known as a “warrant.” On July 15, 2013, petitioner submitted a certification to the GRC disputing the Custodian’s contention that respondent did not use “warrants.” On February 26, 2013, the GRC issued a final decision against petitioner and held that no “warrants” existed. On March 12, 2013, the petitioner filed a motion for reconsideration.

On May 28, 2013, the GRC issued an Interim Order in this matter, granting reconsideration and determining that the Custodian had failed to meet his burden of proving a lawful denial of access. The GRC ordered that the Custodian comply and disclose the requested information within five business days. The GRC issued a final decision in this matter on July 23, 2013, and determined that the Custodian knew that the warrants existed, that he did not provide them, and that his conduct may have been knowing and willful. The Order deferred the determination as to whether the Custodian knowingly and willfully violated OPRA, and transmitted this matter to the Office of Administrative Law, where it was filed on September 16, 2013, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A hearing was held on June 3, 2014. The parties submitted post-hearing briefs on June 23, 2014, and the record was closed on that date. The parties requested that I make a determination on whether the respondent had knowingly and willfully denied the petitioner access to the records he requested. That Order, which is attached and incorporated herein as C-1, was issued on August 8, 2014, and the record was reopened on August 8, 2014, for the purpose of entertaining counsel fees.

On August 18, 2014, petitioner submitted a brief (and attorney’s certification) on the issue of counsel fees. On August 29, 2014, respondent filed a responsive brief. The record was closed again on August 29, 2014.

Reasonable Counsel Fees

Petitioner's attorneys are seeking \$13,890 in reasonable counsel fees, a contingency enhancement of \$6,090, and costs of \$383.05. The respondent does not object to either the itemization or the hourly rate as to Walter Luers, Esq. However, respondent contests both the itemization and the rate ascribed to John Bermingham, Esq. Respondent also objects to petitioner's request for a contingency enhancement on the lodestar.

The Open Public Records Act's fee-shifting provision states, "[a] requestor who prevails in any proceeding shall be entitled to a reasonable counsel fee." N.J.S.A. 47:1A-6. Without the fee-shifting provision, "the ordinary citizen would be waging a quixotic battle against a public entity vested with almost inexhaustible resources. By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight." New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr., 185 N.J. 137, 153 (2005) (hereinafter "NJDPM").

Under a State fee-shifting statute, such as OPRA's N.J.S.A. 47:1A-6, the first step in the fee-setting process is to determine the "lodestar"—the number of hours reasonably expended multiplied by a reasonable hourly rate. Rendine v. Pantzer, 141 N.J. 292, 334–35 (1995). The court should not passively accept the submissions of counsel in determining the lodestar amount, but rather "evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application." Id. at 355.

In calculating the lodestar, the initial focus should be the number of hours reasonably expended in the litigation. Singer v. State, 95 N.J. 487, 499 (1984). The most important factor in calculating the number of hours reasonably spent is the actual results obtained by the attorney. Ibid. Where a "prevailing" plaintiff has succeeded on only some of his claims for relief, "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." Id.

at 500 (quoting Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40, 52 (1983)). However, courts have rejected a mathematical approach comparing total issues to total issues prevailed upon. NJDPM, supra, 185 N.J. at 154. “[T]he fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.’ Hensley, supra, 461 U.S. at 435, 103 S. Ct. at 1940, 76 L. Ed. 2d at 52. Because ‘the critical factor is the degree of success obtained,’ Silva, supra, 267 N.J. Super. at 556, 632 A.2d 291, ‘[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee,’ Hensley, supra, 461 U.S. at 435, 103 S. Ct. at 1940, 76 L. Ed. 2d at 52.” Ibid.

In the OPRA context, a qualitative analysis should be conducted that weighs such factors as the number of documents received versus the number of documents requested, and whether the purpose of OPRA was vindicated by the litigation. Id. at 155. In addition to weighing the success of the claim, hours that are not reasonably expended should be excluded. Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, supra, 461 U.S. at 434, 103 S. Ct. at 1939–40, 76 L. Ed. 2d at 51. “Hours that are not properly billed to one’s client also are not properly billed to one’s adversary pursuant to statutory authority.” Ibid. (quoting Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980)). Thus, no compensation is due under a fee-shifting statute for nonproductive time.

The second focus in the calculation of the lodestar mandates that the court determine “the reasonableness of the hourly rate of ‘the prevailing attorney in comparison to rates “for similar services by lawyers of reasonably comparable skill, experience, and reputation” in the community.” Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372, 387 (2009) (citation omitted). It is also “appropriate to consider that any costs imposed on a governmental entity are ultimately borne by the public.” Kieffer v. High Point Reg’l High Sch., No. A-1737-09 (App. Div. December 28, 2010), <<http://njlaw.rutgers.edu/collections/courts/>>. In Kieffer, the court recognized that a public entity was involved and the amount that the public entity paid its own attorneys was half of the rate sought by the plaintiff’s counsel. By making an award halfway between the defendants’ hourly rate for attorney services and that of plaintiff’s attorney,

the Kieffer court found that the trial judge properly exercised his discretion in adjusting the hourly rate downward.

Once the lodestar has been calculated, a fee enhancement may be appropriate when a prevailing party has faced a substantial risk of nonpayment in its attempt to secure the release of a government record. NJDPM, supra, 185 N.J. at 157. Enhanced fee awards should not be awarded as a matter of course—every case will depend upon its facts. Ibid. Ordinarily, the facts of an OPRA case will not warrant enhancement of the lodestar because the economic risk in securing access to a particular government record will be minimal. Ibid. “[I]n a ‘garden variety’ OPRA matter, if a person’s request for a traffic or tax record is denied, resulting in an action that forces the custodian to promptly produce the record, enhancement will likely be inappropriate.” Ibid. However, “unusual” circumstances may justify an upward adjustment. Ibid. For example, in NJPMD, the Court found that the facts justified an upward departure because the matter was taken on contingency, risk of failure was high because the Department of Corrections asserted a blanket claim of privilege, and the documents sought related to an issue of signal public importance—capital punishment by lethal injection. The Court stated that the enhancement “ordinarily should range between five and fifty-percent of the lodestar fee, with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar.” Ibid. (quoting Rendine, supra, 141 N.J. at 343).

In Rivera v. Office of the County Prosecutor, 2012 N.J. Super. Unpub. LEXIS 2752 (2012), the court awarded Mr. Luers a 25 percent contingency fee enhancement, where the matter involved a novel issue of first impression (whether the names of individuals with psychiatric difficulties subjected to the use of force by a police officer should be released pursuant to OPRA). The court also determined that the matter was of public importance, although not rising to the level of that in NJDPM, because the matter involved civilian investigation into the use of physical force in arrest. The risk of failure was high, the court found, because the Department of Corrections claimed a blanket privilege of confidentiality.

In Renna v. County of Union, No. A-1811-10 (App. Div. 2012), <<http://njlaw.rutgers.edu/collections/courts/>>, the trial court awarded a 35 percent enhancement because there had been no published case law on point, and the case required a balancing of different factors. The Appellate Division remanded, concluding that these factors alone do not justify a 35 percent enhancement. The court pointed to recent case law, Walker v. Guiffre, 209 N.J. 124 (2012), where the Court reaffirmed New Jersey's commitment to contingency enhancements and discussed six guidelines for determining whether a contingency enhancement is appropriate, and if so, what the amount should be. 209 N.J. at 140–41. First, a court must examine whether the relief is primarily equitable in nature, such that the attorneys face no prospect of a large damages award. Id. at 138. Second, a court must examine whether the attorney who took the case on contingency was able to mitigate the risk in some way. Id. at 139. Third, a court must examine whether “other economic risks were aggravated by the contingency of payment.” Ibid. Finally, “[c]ourts may also consider such questions as the strength of the claim, proof problems, and the likelihood of success,” because these operate as disincentives to success. Ibid.

I. Lodestar Analysis

Based on the foregoing, the analysis begins with a determination of the hours reasonably expended in this litigation, taking into consideration the results achieved. Petitioner's attorney, Walter M. Luers, has certified that he spent 32.8 hours working on the case, and that his associate, John Bermingham, spent 13.5 hours on the case. (Pet. Luers Cert., ¶ 3(1)(a), Ex. 2, 3.) The District argues that because Mr. Bermingham handled the matter while it was pending before the GRC, and Mr. Luers took over when the matter was transferred to the OAL, Mr. Bermingham's billing entries after the matter arrived at the OAL amount to “monitoring” and are therefore duplicative. Because some of the hours expended appear to be “redundant, or otherwise unnecessary,” they should be struck pursuant to Hensley. The District has suggested that the following entries be struck:

Date of entry	Hours	Services Rendered
7/30/2013	.2	Review communications from co-counsel, W. Luers
9/24/2013	1	Review discovery requests
9/24/2013	.2	Review communications from co-counsel, W. Luers, regarding discovery
11/15/2013	.2	Review communication between co-counsel and client regarding OAL conference-call hearing
3/28/2014	.2	Review communication from OAL regarding Notice of Hearing on 5/2/2014
3/30/2014	.5	Review file and add billing entries for GRC 2011-382
4/4/2014	.5	Review communications between W. Luers and client regarding case
6/20/2014	.5	Review communications between W. Luers and client regarding case
6/23/2014	.5	Review communications between W. Luers and client regarding case
8/1/2014	1.5	Review transcript of recorded hearing
TOTAL <u>PROPOSED</u> HOURS THAT SHOULD BE SUBTRACTED	5.3	
TOTAL HOURS THAT SHOULD BE SUBTRACTED	4.8	

All the entries indicated by the District are duplicative, with the exception of the March 30, 2014, entry for “review[ing] file and add[ing] billing entries for GRC 2011-382.” The District has objected to this entry on grounds that it is an administrative task. However, because a central legal issue in this matter is calculating reasonable counsel fees, this entry appears to be a reasonable expenditure of Mr. Bermingham’s time. Therefore, Mr. Bermingham’s total expended hours should be reduced from 13.5 hours

to 8.7 hours. Thus, the total number of hours reasonably spent in this litigation is 41.5 hours (32.8 by Mr. Luers and 8.7 by Mr. Bermingham). Because petitioner was completely successful in obtaining the relief sought, this number does not warrant any downward adjustment.

The next step in calculating the lodestar is to determine the reasonable hourly rate. Mr. Luers and Mr. Bermingham have each charged a rate of \$300 per hour. (Pet. Luers Cert., ¶3(3).) The District has argued that this rate is too high for Mr. Bermingham, based on the fact that he has only been admitted to practice law in New Jersey since 2010 and has less experience than Mr. Luers. However, the GRC has previously approved this rate as reasonable for Mr. Bermingham. (Ibid. (citing Carter v. Franklin Fire Dist. No. 2, GRC Complaint No. 2011-228 (awarding \$300/hour to Mr. Bermingham)).) In light of the extensive case law cited by Mr. Luers in his brief, this appears to be a reasonable hourly fee for attorneys in OPRA matters generally in this area. See, e.g., O'Boyle v. Borough of Longport, ATL-L-002294-09 (Pet. Luers Cert., Ex. 7); Lebbing v. Middlesex Cnty. Clerk's Office, MID-L-009878-06 (affirmed in per curiam opinion) (Id. Ex. 9 at ¶ 7). Therefore, the total lodestar amount may be calculated as follows:

$$\$300 \times 41.5 = \$12,450$$

II. Contingency Fee Enhancement

Petitioner is also seeking a contingency enhancement on 13.5 hours of Mr. Bermingham's time, and on 27.1 hours of Mr. Luers's time (the hours expended before petitioner prevailed, for a total of 40.6 hours), at a rate of \$150 per hour. This amounts to a contingency enhancement at 50 percent of the lodestar. This enhancement is sought on grounds that, first, there was no prospect for the counsel to be compensated by payment of a percentage of damages, because the relief obtained was equitable. Also, there was no way for petitioner's attorneys to mitigate the risk, because OPRA matters are routinely taken on contingency because OPRA is a fee-shifting statute. Finally, petitioner argues that it is a high burden of proof to establish

that a records custodian knowingly and willfully violated OPRA, and, therefore, the matter was unusually difficult.

Although petitioner's counsel took some risk in accepting the case on a contingency basis, the difficulty and complexity of the litigation does not seem comparable to that in NJDPM or even Rivera. The issue of whether a records custodian knowingly and willfully withheld records is common in GRC matters. Thus, this matter does not seem "unusual" or novel enough to justify a departure from the 20–35 percent enhancement recommended for ordinary OPRA matters. The relief sought in this matter was equitable in nature, therefore, some sort of enhancement is appropriate. Additionally, petitioner's attorneys were unable to mitigate the risk of nonpayment for services, because OPRA is a fee-shifting statute, and the client thus would not have paid up front. Petitioner's attorney concedes, however, that commitment to this case did not preclude him from working for fee-paying clients. Therefore, other economic risks were not aggravated by the contingency of payment. Finally, regarding the strength of the claim, proof problems, and the likelihood of success, this matter appears to be a garden-variety OPRA claim. The matter does not seem to be as difficult as that in Rivera, where a blanket privilege was asserted. Additionally, unlike Rivera, this matter does not involve a novel issue. Therefore, a contingency fee enhancement of 20 percent should be awarded. Because 4.8 hours were struck as duplicative, this amounts to a total enhancement of 20 percent of \$300, or \$60 dollars per hour, multiplied by a total of 35.8 (40.6 - 4.8) hours. The total enhancement should be \$2,148.

CONCLUSION

The petitioner is entitled to a total of \$14,598 in reasonable counsel fees, plus \$385.05 in costs. This calculation breaks down as follows:

LODESTAR: 41.5 hours x \$300/hour = \$12,450

+

CONTINGENCY FEE ENHANCEMENT: $(.20 \times \$300) \times (40.6 - 4.8) = \$2,148$

+

COSTS: \$385.05

TOTAL: \$14,983.05

ORDER

As I previously determined that petitioner has met his burden of establishing that the Custodian willfully and knowingly violated his obligations under OPRA, I **ORDER** that, as the prevailing party, petitioner is entitled to \$14,598 in reasonable counsel fees plus \$385.05 in costs, for a total of \$14,983.05.

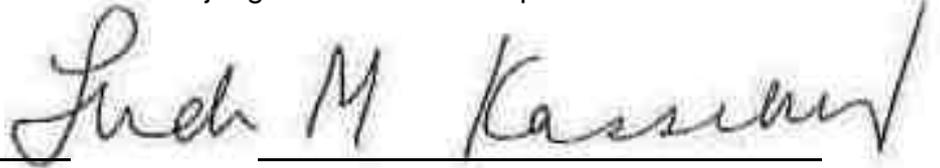
I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, which by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 25, 2014

DATE



LINDA M. KASSEKERT, ALJ

Date Received at Agency:

Date Mailed to Parties:
/lam

LIST OF WITNESSES

For Petitioner:

Dr. Jeff Carter

For Respondent:

William Kleiber

LIST OF EXHIBITS

For the Court:

C-1 Order issued August 8, 2014

For Petitioner:

- P-1 Email from Jeff Carter to Sandy Accardi, dated December 8, 2011
- P-2 N.J.S.A. 40A:14-89
- P-3 Email from Sandy Accardi to Jeff Carter, dated December 13, 2011
- P-4 NJ GRC Denial of Access Complaint, filed December 22, 2011
- P-5 NJ GRC Statement of Information Form, dated January 14, 2012
- P-6 Email from Sandy Accardi to Jeff Carter, dated December 27, 2012
- P-7 Interim Order of GRC, dated May 28, 2013
- P-8 Settlement Agreement, dated July 8, 2013

For Respondent:

- R-1 Email from Sandy Accardi to Jeff Carter, dated December 16, 2011
- R-2 Email from Sandy Accardi to Jeff Carter, dated December 19, 2011