



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

January 30, 2008 Government Records Council Meeting

John Paff

Complaint No. 2007-72

Complainant

v.

Township of Toms River (formerly Dover) (Ocean)

Custodian of Record

At the January 30, 2008 public meeting, the Government Records Council ("Council") considered the January 23, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that the denial of access to the requested letter was authorized by law pursuant to N.J.S.A. 47:1A-6 by not seeking clarification of the request. See Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2006).
2. The Custodian did not unlawfully deny access to the requested resolutions for September 26, 2006 or October 24, 2006 since he has certified that such records were not prepared and approved prior to the Complainant's OPRA request.
3. The Custodian unlawfully denied access to the requested minutes and resolutions of the September 12, 2006 meeting and failed to bear his burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
4. The access sought by the Complainant came about due to the Complainant's filing of a Denial of Access Complaint and as such, 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 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Thus, this complaint should be referred to the Office of Administrative law for the determination of reasonable prevailing party attorney's fees.



5. While the Custodian provided the Complainant with the September 12, 2006 meeting minutes, including the resolution on March 29, 2007, within the Custodian's Statement of Information, which was one hundred and two (102) business days following the date of the Complainant's OPRA request, the Custodian has not carried his burden of proving a lawful denial of access to the September 12, 2006 meeting minutes and resolutions at the time the request was made. Therefore, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 30th Day of January, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: February 4, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2008 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2007-72

v.

**Township of Toms River (formerly known as Dover)(Ocean)²
Custodian of Records**

Records Relevant to Complaint:

1. Letter from the Township of Dover similar to the November 17, 2005 letter from the NJ Sports and Exposition Authority sent to the Mayor of the City of Vineland.³
2. Any and all resolutions passed during the September 12, 2006, September 26, 2006 and October 24, 2006 council meetings that authorized a closed or executive meeting in accordance with N.J.S.A. 10:4-13.⁴

Request Made: October 27, 2006

Response Made: November 2, 2006

Custodian: J. Mark Mutter/ Cindy Asay

GRC Complaint Filed: February 22, 2007

Background

October 27, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant's request for the records relevant to this complaint listed above was not on an official OPRA request form.⁵

November 2, 2006

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that the Complainant's request regarding item #1 referenced above is not a request for a specific document; therefore, the request is not compliant with OPRA. The Custodian also states that at the present time, minutes of the closed or executive meetings do not exist as they have not yet been prepared and

¹ Represented by Drew K. Murray, Esq. (Pompton Plains, NJ).

² Represented by Alison L. Davis, Esq. (Toms River, NJ).

³ The Complainant attached a copy of this letter and a newspaper article with his OPRA request letter.

⁴ The Complainant also requested additional records which are not subject to this Denial of Access Complaint.

⁵ The Complainant stated in his letter that he was not able to locate the Township's OPRA form on their website and specified that his request was pursuant to OPRA.

approved. The Custodian further states that she is attaching a resolution responsive to item #2 of the records relevant to the complaint listed above which authorizes a nonpublic meeting in accordance with N.J.S.A. 10:4-13.

February 22, 2007

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request letter dated October 27, 2006
- Letter from the NJ Sports and Exposition Authority (“NJSEA”) sent to Vineland dated November 17, 2005
- Newspaper article dated September 21, 2006
- Letter from the Custodian to the Complainant dated November 2, 2006
- Copy of the resolution that the Custodian provided in response to item #2 of the records relevant to complaint listed above.

The Complainant asserts that he submitted his OPRA request letter via facsimile on October 27, 2006 attaching a letter from the NJSEA sent to the Mayor of the City of Vineland dated November 17, 2005. The Complainant also asserts that the Custodian responded to his request in writing on November 2, 2006 and attached a blank form of resolution which is employed by the township council when it wishes to exclude the public from a meeting in accordance with N.J.S.A. 10:4-13. The Complainant further asserts that as of the date on his Denial of Access Complaint he has not received any further correspondence from the Custodian.

Letter from the Township of Dover similar to the November 17, 2005 letter from the NJ Sports and Exposition Authority sent to the Mayor of the City of Vineland.

The Complainant notes that the Custodian’s response stated that the Complainant’s request was not for a specific document and therefore is not compliant with OPRA. The Complainant also states that OPRA does not require record custodians to conduct research among records for a requestor and correlate data from various government records in the custodian’s possession. The Complainant contends that it is difficult to see how he could have more clearly identified the document being sought in response to item #1 of the records relevant to this complaint. The Complainant further contends that he identified the author and the recipient of the requested letter and even provided a copy of a similar letter sent to another municipality.

The Complainant asserts that since his request was clear, the Custodian was under a duty to either provide access to the record sought or to cite a legal basis why it was exempt from disclosure. The Complainant also asserts that because the Custodian did neither, he has violated OPRA. Therefore, the Complainant requests that the GRC find that the Custodian violated OPRA and order the Custodian to either provide the Complainant with access to the requested letter or provide a lawful basis for denial.

Any and all resolutions passed during the September 12, 2006, September 26, 2006 and October 24, 2006 council meetings that authorized a closed or executive meeting in accordance with N.J.S.A. 10:4-13.

The Complainant contends that in response to item #2 of the records relevant to this complaint, the Custodian provided him with a partially unreadable copy of a blank form of “Resolution” and referred to it as the resolution which authorizes a nonpublic meeting in accordance with N.J.S.A. 10:4-13. The Complainant also contends that he did not request the blank form of resolution that the township uses: he requested copies of the actual resolutions that were passed in advance of any closed or executive meeting held by the township council on September 12, 2006, September 26, 2006 and October 24, 2006. The Complainant further contends that the requested resolutions would contain the general nature of any topics that were actually discussed in such meetings and of course such topics are not included within the blank form that the Custodian provided.

Therefore, the Complainant requests that the GRC find that the Custodian violated OPRA and order the Custodian to either provide the Complainant with access to the requested resolutions or provide a lawful basis for denial.

Additionally, the Complainant asserts that in an effort to deter the improper withholding of public records by government agencies, OPRA expressly provides for the mandatory award of counsel fees in the event that the request is initially denied, relief is pursued before the GRC or Superior Court, the requestor prevails in that litigation. The Complainant also asserts that OPRA mandates that a requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6. The Complainant further asserts that the award of counsel fees in this case is even more appropriate given the Appellate Division’s holding in Teeters v. Division of Youth and Family Services, 387 N.J. Super. 423 (App.Div. 2006). Therefore, the Complainant requests that the GRC award him with reasonable attorney fees to be paid by Toms River Township.

March 13, 2007

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

March 21, 2007

Request for the Statement of Information sent to the Custodian.

March 29, 2007

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Letter from the Custodian to the Complainant dated November 2, 2006
- Letter from the NJ Sports and Exposition Authority (“NJSEA”) sent to Vineland dated May 30, 2006
- Meeting Minute Update Table for 2006
- Meeting minutes dated September 12, 2006
- Meeting minutes dated September 26, 2006

The Custodian certifies that the Complainant's faxed letter requesting records was received on Friday, October 27, 2006 and by hard copy on Monday, October 30, 2006. The Custodian also certifies that she completed the response on Thursday, November 2, 2006 and provided the Complainant with a response via first class mail on Friday, November 3, 2006.

The Custodian asserts that a letter from NJSEA to Mayor Paul C. Bush dated May 30, 2006 is the only document found which appears to be similar to the sample letter that the Complainant provided with his request. The Custodian also asserts that the request was not specific, so the document was not provided to the Complainant because it may or may not have been responsive to the request. The Custodian further asserts that he cannot be held responsible for interpreting a nonspecific, sample-based request.

The Custodian certifies that he provided the Complainant with the requested resolution and a cover letter dated November 2, 2006. The Custodian also certifies that he is now attaching the September 12, 2006 and September 26, 2006 meeting minutes that were not previously provided because they had not been previously approved at the time of the request. The Custodian further certifies that to date, the October 24, 2006 minutes have yet to be prepared and approved; therefore, the minutes still do not exist.

Further, the Custodian states that the balance of the resolution, providing specificity of items to be discussed, if any, would have been placed on the record orally at the time of the meeting. The Custodian also states that as indicated in the November 2, 2006 response to the Complainant, the minutes of the closed session do not exist as they have not yet been prepared and approved.

2006 Minutes Update

Meeting Date	Type of Meeting	Approved On
1/2/06	Reorganization Meeting	1/24/06
1/10/06	Regular Council Meeting	
1/24/06	Regular Council Meeting	3/14/06
2/14/06	Regular Council Meeting	3/14/06
2/28/06	Regular Council Meeting	4/11/06
3/14/06	Regular Council Meeting	9/12/06
3/28/06	Regular Council Meeting	12/13/06
4/11/06	Regular Council Meeting	10/10/06
4/25/06	Regular Council Meeting	5/9/06
5/9/06	Regular Council Meeting	5/23/06
5/23/06	Regular Council Meeting	7/25/06
5/30/06	Regular Council Meeting	6/13/06
6/13/06	Regular Council Meeting	7/25/06
6/20/06	Special Council Meeting	6/27/06
6/27/06	Regular Council Meeting	9/26/06
7/6/06	Special Council Meeting	7/25/06
7/11/06	Regular Council Meeting	7/25/06

7/25/06	Regular Council Meeting	
8/8/06	Regular Council Meeting	3/13/06
8/22/06	Regular Council Meeting	3/27/06
9/12/06	Regular Council Meeting	10/24/06
9/26/06	Regular Council Meeting	11/14/06
10/10/06	Regular Council Meeting	1/23/07
10/24/06	Regular Council Meeting	
11/14/06	Regular Council Meeting	12/27/06
11/28/06	Regular Council Meeting	1/23/07
12/12/06	Regular Council Meeting	
12/27/06	Regular Council Meeting	

May 11, 2007

The Complainant’s Response to the Custodian’s SOI. The Complainant asserts that the Custodian provided the GRC and the Complainant with a copy of a letter dated May 30, 2006 from the NJSEA to the Mayor of Toms River Township, yet the Custodian maintains that the Complainant’s original request was not specific enough to constitute as a valid request. The Complainant also asserts that since the Custodian was able to produce the correct record, the Custodian’s claim that the request was not specific enough is undermined.

The Complainant contends that he requested any and all resolutions passed during the September 12, 2006, September 26, 2006 and October 24, 2006 council meetings that authorized a closed or executive meeting in accordance with N.J.S.A. 10:4-13. The Complainant also contends that among the documents attached to the SOI he received pages 1 and 92 from the September 12, 2006 public meeting minutes: page 92 contains part of what appears to be a formal resolution that authorized a closed or executive meeting held on that date. The Complainant further contends that he also received pages 1, 74 and 75 from the September 26, 2006 public meeting minutes: page 74 contains the full text of a formal resolution that authorized a closed or executive meeting held on that date.

The Complainant asserts that attached to the SOI he was provided a “Minute Update” table which indicated that the minutes of the September 12, 2006 public meeting were approved on October 24, 2006, the minutes of the September 26, 2006 public meeting were approved on November 14, 2006, and the minutes of the October 24, 2006 public meeting had not been approved as of the table’s most recent update of March 27, 2007. The Complainant also asserts that in section 9 of the SOI the Custodian stated that the attached approved minutes of the Township Council for the Meeting of September 12, 2006 and September 26, 2006, were not previously provided because they had not previously been approved. The Complainant further asserts that the Custodian stated in the SOI that to date, the minutes requested by the Complainant for meeting date October 24, 2006 have yet to be prepared or approved and, therefore, still do not exist, consistent with the Records Custodian’s original November 2, 2006 response.

The Complainant contends that there are two (2) mis-statements in the Custodian's arguments. First, according to the Custodian's "Minute Update" table, the minutes, and thus the closed session resolution, from the September 12, 2006 meeting were approved on October 24, 2006, which is prior to the Complainant's OPRA request dated October 27, 2006 and the Custodian's November 2, 2006 response letter. The Complainant also contends that because of this, the Custodian's statement that the minutes of the September 12, 2006 meeting had not been previously approved is incorrect. Second, the Custodian's original November 2, 2006 response did not state that the public meeting minutes had yet to be prepared and approved. Rather, the November 2, 2006 response stated that the minutes of the closed or executive meeting did not exist since they have not yet been prepared and approved. The Complainant further contends that the November 2, 2006 response is silent as to whether the public meeting minutes and the resolutions contained in them exist.

The Complainant asserts that the Custodian's own statements and omissions, as contained within the SOI, show evidence of two (2) violations of OPRA as follows:

1. The requested closed session resolution that was embodied in the September 12, 2006 public meeting minutes should have been produced because those minutes were in existence prior to receipt of the Complainant's request.
2. The Custodian now claims that he was unable on November 2, 2006 to provide the Complainant with the closed session resolutions passed during the September 26, 2006 meeting because the public minutes from those meeting did not exist at the time the Custodian responded to the OPRA request. If that is true, the Custodian was under a duty to inform the Complainant of the reason why the request for September 26, 2006 and October 24, 2006 resolutions were being denied pursuant to N.J.S.A. 47:1A-5.g.

The Complainant also asserts that the Custodian should have informed him in the November 2, 2006 response letter that the requested resolutions did not exist except in the public minutes for the specific meeting which have yet to be prepared and approved, but since he failed to give a specific basis for the denial, the Custodian violated OPRA. The Complainant further asserts that the Custodian has yet to inform him or the GRC as to whether or not the requested closed session resolutions exist in a form other than within the public meeting minutes.

The Complainant contends that the Custodian's index table submitted as item 9 of the SOI does not include any information regarding the closed session resolutions. The Complainant also contends that it is clear that two (2) of the requested records, the NJSEA's May 30, 2006 letter and the September 12, 2006 closed or executive meeting resolution, were wrongfully denied on November 2, 2006 and were disclosed to the Complainant as a direct result of this complaint. The Complainant further contends that this complaint was the catalyst that effected the production of these records and cites to Teeters v. Div. of Youth & Family Servs., 387 N.J. Super. 423 (App. Div. 2006) certif. denied, 189 N.J. 426 (2007); therefore, the Complainant states that he should be awarded counsel fees.

May 24, 2007

The Custodian's Response to the Complainant's Response to the SOI. The Custodian states that the Complainant has made allegations that two (2) documents of his request were improperly denied by the Township. The Custodian also states that the Complainant attached to his original OPRA request a letter from the NJSEA to the Mayor of the City of Vineland dated November 17, 2005 and requests a copy of any similar letter from the Authority received by Toms River. The Custodian further states that the Complainant's request did not include a time frame or department.

The Custodian contends that the Complainant provided a much more detailed and specific description of the document which he was originally seeking in his Denial of Access Complaint, that description included a time frame that such a letter could potentially be located within the Township's records. The Custodian contends that after utilizing the time frame offered in the Complainant's Denial of Access Complaint, the Custodian was able to locate a record (that is, the May 30, 2006 letter from the NJSEA to the Mayor of Toms River Township) which is potentially similar to that which the Complainant was seeking. The Custodian further contends that in good faith, the Complainant was provided with this letter when the Custodian responded to the GRC's SOI; however, the Custodian maintains that the Complainant's original request was not specifically identifiable and, therefore, not compliant with OPRA requirements. The Custodian cites Michael Bent v. Township of Stafford, 381 N. J. Super. 30; (October 21, 2005) and MAG Entrn't, LLC v. Div. of Alcoholic Beverage Control 375 N.J. Super. 534 (App. Div. 2005).

The Custodian asserts that the Complainant originally sought resolutions authorizing council closed or executive meetings for three (3) specific meeting dates which were the three (3) meetings immediately preceding the date of the OPRA request. The Custodian also asserts that at the time of the request, a general form of the "resolution" was readily available for release and was provided in compliance with the OPRA time frame. The Custodian further asserts that the exact verbiage in the form that was provided to the Complainant is the form of resolution which is read in to the record and is subject to a voice vote by the council at each meeting.

The Custodian contends that he maintains that the general form of resolution provided to the Complainant was responsive to the OPRA request; however, in good faith, the Custodian provided the Complainant with the entire meeting minutes for the relevant council meeting with the SOI because they were now available in typed format. The Custodian also contends that within these meeting minutes, the Complainant can see the same verbatim resolution authorizing the closed or executive meeting. The Custodian further contends that the Complainant has no basis for claiming prejudice in being provided a duplicate copy of that with which he has already been provided.

The Custodian asserts that the Complainant's request for a similar letter to a sample provided was an improper request as it was not sufficiently specific, and the Complainant has no basis for his complaint because the request for the resolutions has been fulfilled to the extent that the resolution read of the record for the pertinent meeting was provided in a timely fashion to the Complainant. The Custodian also asserts that the Township should not be required to pay any counsel fees since the Township has met all

of its obligations under OPRA, has performed in good faith while maintaining its original objections, and has provided even further documentation.

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...*” (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. 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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

Letter from the Township of Dover similar to the November 17, 2005 letter from the NJ Sports and Exposition Authority sent to the Mayor of the City of Vineland.

In this complaint, the Complainant provided the Custodian with a letter from the NJSEA to the Mayor of the City of Vineland as a sample of the letter that he was requesting from the Township of Toms River. In the Custodian’s initial response on November 2, 2006, the Custodian stated that the Complainant’s request was not for a specific document. However, within the Custodian’s SOI, he provided the Complainant with a letter from NJSEA to the Mayor of the City of Dover similar to the letter that the Complainant originally sent with his request as a sample, even though the Custodian cites to Michael Bent v. Township of Stafford, 381 N. J. Super. 30; (October 21, 2005) and MAG Entrn’t, LLC v. Div. of Alcoholic Beverage Control 375 N.J. Super. 534 (App.

Div. 2005) and holds his original position that the request was not specifically identifiable. The Custodian later stated that the letter could not be provided to the Complainant originally due to the Complainant's lack of including a time frame or department with his original request, which the Custodian stated that he received in the Complainant's Denial of Access Complaint; therefore, the record became identifiable.

The evidence of record shows that the record requested by the Complainant and exemplified by the sample letter provided to the Custodian with the OPRA request was identifiable because sufficient identifiable information was provided and enabled the Custodian to disclose the requested document to the Complainant. Even though the Custodian asserts that the Denial of Access Complaint provided more details, it does not appear that the Denial of Access Complaint stated anything more than the Custodian would have found within the sample letter that the Complainant actually provided with his OPRA request.

Additionally, if the Custodian believed that the request was not specifically identifiable, he should have sought clarification of the request from the Complainant pursuant to the prior GRC decision, Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2006). There, the Council found that there was no denial of access to records because the Custodian did properly respond to the requests in writing within the statutorily required seven (7) business days, indicating to the Complainant that clarification was necessary but did not receive a response in return from the Complainant.

The Custodian did not bear his burden of proof that the denial of access to the requested letter was authorized by law pursuant to N.J.S.A. 47:1A-6 by not seeking clarification of the request. See Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2006).

Any and all resolutions passed during the September 12, 2006, September 26, 2006 and October 24, 2006 council meetings that authorized a closed or executive meeting in accordance with N.J.S.A. 10:4-13.

Within the Custodian's response to the Complainant's OPRA request, the Custodian indicated to the Complainant that the closed or executive meeting minutes for the requested months do not exist, but provided the Complainant with a general resolution that authorized a nonpublic meeting in accordance with N.J.S.A. 10:4-13. The Custodian later provided the Complainant with meeting minutes which included the requested resolutions for September 12, 2006 and September 26, 2006 within his SOI submission to the GRC on March 29, 2007, which was one hundred and two (102) business days following the date of the Complainant's OPRA request. The Custodian also certified that he could not provide the Complainant with these records because as he originally stated in response to the Custodian's OPRA request, the minutes had not been prepared and approved prior to the Complainant's OPRA request, and certifies that the October 24, 2006 minutes still have yet to be prepared and approved.

Therefore, the Custodian did not unlawfully deny access to the requested resolutions for September 26, 2006 or October 24, 2006 since he has certified that such records were not prepared and approved prior to the Complainant's OPRA request.

However, according to the Meeting Minute Update Table that the Custodian provided to the GRC within his SOI submission, the meeting minutes for the September 12, 2006 meeting were approved on October 24, 2006, which is prior to the date of the Complainant's OPRA request. Therefore, the Custodian unlawfully denied access to the resolutions of the September 12, 2006 meeting. N.J.S.A. 47:1A-6.

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 N.J.S.A. 47:1A-1 et. seq., 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.

In the complaint before the Council, the Complainant requested that the Council find that the Custodian violated OPRA and order the Custodian to either provide the Complainant with access to the requested letter or a lawful basis for the denial. The Complainant also requested that the Council order the Custodian to either provide the Complainant with access to the requested resolutions or provide a lawful basis for the denial. Prior to this complaint being adjudicated by the Council, the Custodian provided the Complainant with the requested letter and the resolutions for the September 12, 2006 and September 26, 2006 open Council meeting minutes.

Therefore, the access sought by the Complainant came about due to the Complainant's filing of a Denial of Access Complaint and as such, 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 and Teeters, supra. Thus, this complaint should be referred to the Office of Administrative law for the determination of reasonable prevailing party attorney's fees.

Whether the delay in access to the requested records rises to the level of a knowing and willful violation of OPRA?

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 under the totality of the circumstances. Specifically OPRA states:

“...[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 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 (App. Div. 1996) at 107).

The evidence of record indicates that the Custodian violated OPRA by failing to seek clarification for the requested letter pursuant to Cody, *supra*. The evidence of record also indicates that the Custodian failed to provide the Complainant with a lawful basis of denial for the September 12, 2006 closed or executive meeting minutes and resolutions because the Meeting Minute Update Table indicates that the minutes were approved on October 24, 2006, which is prior to the date of the Complainant's OPRA request.

While the Custodian provided the Complainant with the September 12, 2006 meeting minutes including the resolution on March 29, 2007 within the Custodian's Statement of Information, which was one hundred and two (102) business days following the date of the Complainant's OPRA request, the Custodian has not carried out his burden of proving a lawful denial of access to the September 12, 2006 meeting minutes and resolutions at the time the request was made. Therefore, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that the denial of access to the requested letter was authorized by law pursuant to N.J.S.A. 47:1A-6 by not seeking clarification of the request. See Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2006).
2. The Custodian did not unlawfully deny access to the requested resolutions for September 26, 2006 or October 24, 2006 since he has certified that such records were not prepared and approved prior to the Complainant's OPRA request.
3. The Custodian unlawfully denied access to the requested minutes and resolutions of the September 12, 2006 meeting and failed to bear his burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
4. The access sought by the Complainant came about due to the Complainant's filing of a Denial of Access Complaint and as such, 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 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Thus, this complaint should be referred to the Office of Administrative law for the determination of reasonable prevailing party attorney's fees.

5. While the Custodian provided the Complainant with the September 12, 2006 meeting minutes, including the resolution on March 29, 2007, within the Custodian's Statement of Information, which was one hundred and two (102) business days following the date of the Complainant's OPRA request, the Custodian has not carried his burden of proving a lawful denial of access to the September 12, 2006 meeting minutes and resolutions at the time the request was made. Therefore, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By:

Tiffany L. Mayers
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

January 23, 2008