



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

Jesse Wolosky  
Complainant

Complaint No. 2010-259

v.

Township of East Hanover (Morris)  
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 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 Complainant’s request is invalid under OPRA because it fails to specifically name identifiable individual senders and recipients and because the request requires research beyond the scope of a custodian’s duties pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).
2. The Custodian improperly required the Complainant to complete an official Township OPRA request form pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant’s e-mailed OPRA request clearly invoked OPRA and made clear the nature of the request.
3. Although the Custodian improperly required the Complainant to complete an official Township OPRA request form, the Complainant’s request is invalid under OPRA because it fails to specifically name identifiable individual senders and recipients and because the request requires research beyond the scope of a custodian’s duties. Accordingly, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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 28<sup>th</sup> Day of February, 2012

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary  
Government Records Council

**Decision Distribution Date: March 2, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 28, 2012 Council Meeting**

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-259**

v.

**Township of East Hanover (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

“A copy of each and every e-mail sent or received by the Municipal Clerk’s office to or from each and every other Municipal Clerk’s office in Morris County regarding Jesse Wolosky, his OPRA requests and/or OPRA matters from June 29, 2010 [until] September 3, 2010.”

**Request Made:** September 3, 2010

**Response Made:** September 9, 2010

**Custodian:** Paula Massaro

**GRC Complaint Filed:** September 27, 2010<sup>3</sup>

**Background**

**September 3, 2010**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA. The Complainant indicates that the preferred method of delivery is e-mail and that the records be placed in chronological order.

**September 9, 2010**

Custodian’s response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant’s OPRA request on the fourth (4<sup>th</sup>) business day following receipt of such request and attaches an official Township OPRA request form. The Custodian states that she was out of the office and received the Complainant’s OPRA request on September 7, 2010.

The Custodian asserts that her office adheres to OPRA and that pursuant to N.J.S.A. 47:1A-5.f., N.J.S.A. 47:1A-5.g., and Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), the Complainant must complete the attached official OPRA request form. The Custodian asserts that this e-mail is not a denial of the Complainant’s

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Elizabeth Valandingham, Esq., of O’Donnell McCord PC (Morristown, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

request, but the official request form is required because the Complainant's September 3, 2010 was in an e-mail that does not contain the requisite information set forth in N.J.S.A. 47:1A-5.f.

**September 10, 2010**

E-mail from the Custodian to the Complainant. The Custodian states that the Township does not possess any records that are responsive to the Complainant's OPRA request. The Custodian asserts that the Complainant may contact her if he has any additional information. The Custodian asserts that this does not constitute a denial of the Complainant's request.

**September 27, 2010**

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

- Complainant's OPRA request dated September 3, 2010
- Custodian's response to the OPRA request dated September 9, 2010
- A copy of the Township's OPRA request form
- Copies of e-mails disclosed by various Morris County Clerks<sup>4</sup>

Complainant's Counsel states that a comparison of the e-mails disclosed by other Morris County Clerks reveals that the Custodian is in possession of the requested e-mails and has refused to disclose them. Counsel argues that the Custodian's failure to disclose the requested e-mails constitutes a "deemed denial" pursuant to N.J.S.A. 47:1A-5.i.

Counsel requests that the GRC order the Custodian to disclose all of the responsive e-mails and the accompanying attachments. In addition, Counsel requests that the GRC find the Complainant to be a prevailing party pursuant to N.J.S.A. 47:1A-6 and award him a reasonable attorney's fee.

The Complainant does not agree to mediate this complaint.

**October 1, 2010**

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

**October 11, 2010**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 3, 2010
- Custodian's response to the OPRA request dated September 9, 2010
- E-mail from the Custodian to the Complainant dated September 10, 2010
- A copy of the Complainants Denial of Access Complaint dated September 27, 2010 with attachments

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<sup>4</sup> Complainant's Counsel states the attached e-mails are "contemporaneous" with the requested e-mails. The attached e-mails consist of over one hundred (100) e-mails obtained pursuant to separate OPRA requests and were submitted as evidence that the Custodian of the Township of East Hanover is in possession of all the responsive e-mails, but has submitted fewer than all of the responsive e-mails that exist.

The Custodian certifies that a search of the requested records reveals that there are no records that exist within the Township’s database that are responsive to the Complainant’s request. The Custodian argues that the Complainant’s arguments are disingenuous. The Custodian disputes the Complainant’s assertion that the Clerk withheld e-mail correspondence sent to the e-mail address easthanovertownshipclerk@easthanover.com. The Custodian asserts that the actual address is paulam@easthanovertownship.com and that the Complainant must know this because he has e-mailed the Township several times.

The Custodian argues that the Complainant is not entitled to attorney’s fees because the Complainant has already demonstrated he is in possession of the records he is actually seeking and that this lawsuit has no bearing upon the relief the Complainant is trying to achieve.

### **Analysis**

#### **Whether the Complainant’s records request is valid under OPRA?**

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. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the instant complaint, of issue is whether the Complainant's request for a "copy of each and every e-mail sent or received by the Municipal Clerk's office to or from each and every other Municipal Clerk in Morris County regarding Jesse Wolosky and/or his OPRA request from June 29, 2010 through September 3, 2010" is a valid request under OPRA. Here, the Complainant's request is invalid under OPRA because it requires the Custodian to perform research to locate and identify responsive records.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). As the court noted in invalidating MAG's request under OPRA:

"Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.* at 549.

The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>5</sup> the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."<sup>6</sup>

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court enumerated the responsibilities of a custodian and a requestor as follows:

"OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The

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<sup>5</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>6</sup> As stated in Bent, *supra*.

custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). *Research is not among the custodian's responsibilities.*" (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

Moreover, the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f 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." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)."

The test under MAG then, is whether a requested record is a *specifically identifiable* government record. If so, the record is disclosable, barring any exemptions to disclosure contained in OPRA. The GRC established the criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008). In Sandoval, the Complainant requested "e-mail...between [two individuals] from April 1, 2005 through June 23, 2006 [using seventeen (17) different keywords]." The Custodian denied the request, claiming that it was overly broad. The Council determined:

"The Complainant in the complaint now before the GRC requested specific e-mails *by recipient, by date range and by content*. Based on that information, the Custodian has identified [numerous] e-mails which fit the specific recipient and date range criteria Complainant requested." (Emphasis added.) *Id.*

In Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010), the Council examined what constitutes a valid request for e-mails under OPRA. The Council determined that:

*“In accord with MAG, supra, and its progeny, in order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof.”* (Emphasis in original). *Id.*

In the instant matter, although the Complainant’s request provided a specific range of dates in which the requested e-mails were transmitted, the request failed to name a specific identifiable sender and recipient: the request seeks e-mails from and to a specific *class* of employee (specifically, Morris County Municipal Clerks) and not individually named senders and recipients. See Elcavage, supra. In order for the Custodian to respond to this request, the Custodian would be required to evaluate all e-mails and letters in their database which contained the particular key words sought by the Complainant in order to determine whether the named recipients of such communications were Morris County Municipal Clerks. Such a request is not feasible, as Morris County itself has thirty-nine (39) municipalities and no specific employees were named in the Complainant’s request. Pursuant to Elcavage and MAG, it is not the Custodian’s duty to discern which e-mails in their database have been received by or sent to a Morris County Municipal Clerk. A search for the individual employees’ names and related e-mail addresses would constitute *research* that is not the statutory duty of a Custodian. Such a request is not in accordance with the requirements of MAG. Accordingly, the Complainant’s request is invalid.

Therefore, the Complainant’s request is invalid under OPRA because it fails to specifically name identifiable individual senders and recipients and because the request requires research beyond the scope of a custodian’s duties pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). See also Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).

**Whether the Custodian lawfully required that the Complainant use an official OPRA request form to make his request?**

OPRA provides that:

“[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:



- (1) specific directions and procedures for requesting a record;
- (2) a statement as to whether prepayment of fees or a deposit is required;
- (3) the time period within which the public agency is required by [OPRA], to make the record available;
- (4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (5) space for the custodian to list reasons if a request is denied in whole or in part;
- (6) space for the requestor to sign and date the form;
- (7) space for the custodian to sign and date the form if the request is fulfilled or denied.” N.J.S.A. 47:1A-5.f.

Furthermore, OPRA states that “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.” N.J.S.A. 47:1A-5.g.

In the instant matter, the Custodian responded to the Complainant’s e-mailed request by requiring the Complainant to complete an official Township OPRA request form. The Custodian cited Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009) and N.J.S.A. 47:1A-5.f. in support of the argument that the Township’s official OPRA request form is required because the Complainant’s e-mailed OPRA request lacked the elements set forth in N.J.S.A. 47:1A-5.f. The Council has previously determined that the Superior Court of New Jersey, Appellate Division, has held that a denial of access based solely upon a requestor’s failure to utilize an official OPRA request form is unlawful.

In Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), the Appellate Division held that although requestors shall continue to use public agencies’ OPRA request forms when making requests, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in the section of OPRA requiring custodians to adopt a form. *Id.* In effect, this permits requesters to write their own correspondence that requests records from a custodian, as long as the request properly invokes OPRA.

While Renna holds that “[w]here the requestor fails to produce an equivalent writing that raises issues as to the nature or substance of the requested records, the custodian may require that the requestor complete the form generated by the custodian pursuant to N.J.S.A. 47:1A-5.g.,” such was not the case in the instant matter as the Custodian notified the Complainant by letter dated September 10, 2010 that none of the requested records exist within the Township. At a minimum, such letter indicates that the Custodian understood the nature of the request.

In the instant matter, the evidence of record indicates that the Custodian required the Complainant to use the Township’s official OPRA request form because the Complainant’s e-mailed OPRA request allegedly did not contain all of the required elements set forth at N.J.S.A. 47:1A-5.f. However, pursuant to the Appellate Division’s

decision in Renna, supra, a custodian may not refuse a request for records made under OPRA so long as the request is in writing and clearly invokes OPRA. *Id.* at 245. Moreover, the Custodian failed to explain how the request did not comport with N.J.S.A. 47:1A-5.f. nor did she submit any competent evidence to establish this point. The evidence of record indicates that the Complainant's request properly invoked OPRA. While the Council finds that the Complainant's request does not seek specific identifiable government records, the Custodian improperly required the Complainant to complete the Township's official OPRA request form pursuant to Renna, supra.

Accordingly, the Custodian improperly required the Complainant to complete an official Township OPRA request form pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant's e-mailed OPRA request clearly invoked OPRA and made clear the nature of the request.

**Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian improperly required the Complainant to complete an official Township OPRA request form, the Complainant's request is invalid under OPRA because it fails to specifically name identifiable individual senders and recipients and because the request requires research beyond the scope of a custodian's duties. Accordingly, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

**Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees when the Complainant is an attorney?**

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. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

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

the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

The Mason Court then examined the catalyst theory within the context of New Jersey law, stating that:

"New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. See also North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999) (applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App.

Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); see also Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005) (NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in

Buckhannon ... " *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.' Singer v. State, 95 N.J. 487, 495, cert denied (1984)."

In the instant matter, as in Mason, the Complainant's Denial of Access Complaint was not the catalyst for the release of the requested records, because the Complainant's request is invalid under OPRA as it fails to specify identifiable individual senders and recipients and requires the Custodian to perform research beyond the scope of a custodian's duties pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010). Additionally, although the Custodian improperly required the Complainant to complete an official Township OPRA request form pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), the filing of this complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct, nor does a factual causal nexus exist between the Complainant's filing of this Denial of Access Complaint and the relief ultimately achieved, as the Complainant's request is invalid under OPRA.

Thus, pursuant to Teeters, *supra*, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason, *supra*, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant's request is invalid under OPRA because it fails to specifically name identifiable individual senders and recipients and because the request requires research beyond the scope of a custodian's duties pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). See also Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).
2. The Custodian improperly required the Complainant to complete an official Township OPRA request form pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant's e-mailed OPRA request clearly invoked OPRA and made clear the nature of the request.
3. Although the Custodian improperly required the Complainant to complete an official Township OPRA request form, the Complainant's request is invalid under OPRA because it fails to specifically name identifiable individual senders and recipients and because the request requires research beyond the scope of a custodian's duties. Accordingly, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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February 21, 2012