



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

LORI GRIFA
Commissioner

FINAL DECISION

March 29, 2011 Government Records Council Meeting

Kreszentia Teena Morris
Complainant

Complaint No. 2008-137

v.

Borough of Victory Gardens (Morris)
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 2011 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 this complaint should be dismissed because the Complainant withdrew her complaint in a letter to the GRC dated March 7, 2011 (via her legal counsel) since the parties have reached a settlement in this matter. Therefore, no further adjudication is required.

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 29th Day of March, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: March 30, 2011



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 29, 2011 Council Meeting**

**Kreszentia Teena Morris¹
Complainant**

GRC Complaint No. 2008-137

v.

**Borough of Victory Gardens (Morris)²
Custodian of Records**

Records Relevant to Complaint:

June 17, 2008 OPRA requests:

1. Copies of all contractor's contracts, professional service contracts, and attorney professional contracts.
2. Copy of a list of all individuals in the Public Employee Retirement System ("PERS").³

June 18, 2008 OPRA requests:

1. All invoices from Spectrum Communications from 1999 to present.
2. All drivers' abstracts of all Borough employees from January 2005 to present.
3. All 1099 forms from 2006 and 2007.
4. All documentation of Philip Feintuch, Esq., to the Borough regarding professional services rendered to the Borough, including a current resume.⁴

June 20, 2008 OPRA request:

Titles to all Borough-owned vehicles, copies of all salvage receipts for vehicles owned by the Borough and copies of auction receipts for all vehicles sold.

Requests Made: June 17, 2008, June 18, 2008 and June 20, 2008

Responses Made: Various dates

Custodian: Deborah Evans

GRC Complaint Filed: July 1, 2008⁵

Background

June 29, 2010

Government Records Council's ("Council") Interim Order. At its June 29, 2010 public meeting, the Council considered the June 22, 2010 Findings and

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

² Represented by Philip Feintuch, Esq. (Newark, NJ).

³ The Complainant requests that the list be a printout from the PERS system and not a handwritten list.

⁴ The Complainant requested additional records that are not at issue in this complaint.

⁵ The GRC received the Denial of Access Complaint on said date.

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:

Because the Custodian's Counsel has failed to establish in his motion for reconsideration of the Council's April 28, 2010 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees pursuant to the Council's April 28, 2010 Interim Order.

July 12, 2010

Council's Interim Order distributed to the parties.

September 21, 2010

Complaint transmitted to the Office of Administrative Law ("OAL").

March 7, 2011

Letter from the Complainant's Counsel to the Honorable Edward Delanoy. Counsel states the parties have reached a settlement in the instant complaint; thus, Counsel is withdrawing this complaint pursuant to said settlement.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant withdrew her complaint in a letter to the GRC dated March 7, 2011 (via her legal counsel) since the parties have reached a settlement in this matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 22, 2011



State of New Jersey
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
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INTERIM ORDER

June 29, 2010 Government Records Council Meeting

Kreszentia Teena Morris
Complainant

Complaint No. 2008-137

v.

Borough of Victory Gardens (Morris)
Custodian of Record

At the June 29, 2010 public meeting, the Government Records Council (“Council”) considered the June 22, 2010 *Reconsideration* 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 because the Custodian’s Counsel has failed to establish in his motion for reconsideration of the Council’s April 28, 2010 Interim Order that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees pursuant to the Council’s April 28, 2010 Interim Order.

Interim Order Rendered by the
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On The 29th Day of June, 2010

Robin Berg Tabakin, Chair
Government Records Council



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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: July 12, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

**Supplemental Findings and Recommendations of the Executive Director
June 29, 2010 Council Meeting**

**Kreszentia Teena Morris¹
Complainant**

GRC Complaint No. 2008-137

v.

**Borough of Victory Gardens (Morris)²
Custodian of Records**

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Responses Made: Various dates

Custodian: Deborah Evans

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Background

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³ The Complainant requests that the list be a printout from the PERS system and not a handwritten list.

⁴ The Complainant requested additional records that are not at issue in this complaint.

⁵ The GRC received the Denial of Access Complaint on said date.

April 28, 2010

Government Records Council's ("Council") Interim Order. At its April 28, 2010 public meeting, the Council considered the April 21, 2010 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. Although the Custodian provided access to the invoices responsive to Item No. 1 of the Complainant's June 18, 2008 OPRA request, because the Custodian failed to simultaneously provide certified confirmation of her compliance to the GRC until March 9, 2010 and failed to legally certify to the search undertaken until March 12, 2010, the Custodian failed to fully comply with the Council's February 23, 2010 Interim Order pursuant to Jung & O'Halloran v. Borough of Roselle (Union), GRC Complaint Nos. 2007-299; 2007-307 (April 2009).
2. Because Item No. 1 and No. 2 of the June 17, 2008 request, Item No. 4 of the June 18, 2008 request (except the request for the resume) and the Complainant's June 20, 2008 request are not valid 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, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), and because the Custodian did not unlawfully deny access to the resume responsive to request Item No. 4 of the Complainant's June 18, 2008 request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's February 23, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian disclosed all invoices responsive to Item No. 1 of the Complainant's OPRA request pursuant to the Council's February 23, 2010 Interim Order. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

April 29, 2010

Council's Interim Order distributed to the parties.

May 6, 2010

Custodian Counsel's Motion for Reconsideration. Counsel requests that the GRC reconsider its April 28, 2010 Interim Order pursuant to *N.J.A.C. 5:105.2.10* based on extraordinary circumstances.

Counsel states that the Custodian is the only clerk in a small municipality. Counsel avers that the Custodian has a number of jobs to perform: in addition to the Borough Clerk, she also acts as the Town Administrator, Borough Registrar and secretary for the Building Department. Further, Counsel avers that the Custodian is also tasked with the responsibility of handling banking for the Borough, keeping minutes at council meetings and responding to OPRA requests.

Counsel argues that the Complainant, a former councilmember who was not re-elected, and two (2) other residents have filed at least 70 OPRA requests in the past year. Counsel contends that it is impossible for the Custodian to conduct her daily business and still respond to these numerous OPRA requests in a satisfactory fashion. Counsel argues that, in essence, the Custodian has been overwhelmed by the amount of OPRA requests received.⁶

May 21, 2010

Complainant Counsel's objection to the request for reconsideration. Counsel contends that the Borough's request for reconsideration fails to meet the required standard for reconsideration. Counsel argues that the Custodian's Counsel presents uncertified statements regarding the Custodian's duties as they relate to her employment with the Borough and fails to provide an evidentiary documentation.

Moreover, Counsel asserts that even if the GRC accepts the Borough's uncertified statements, the results of this complaint would remain unchanged. Counsel notes that the uncertified statement that the Custodian is overwhelmed is contradicted by the GRC's April 28, 2010 Supplemental Findings and Recommendations, which states that "the Custodian went above and beyond her responsibilities under OPRA." (See the February 23, 2010 background entry.) Counsel further asserts that being overwhelmed is not a lawful exemption to disclosure of government records under OPRA. Counsel asserts that 70 OPRA requests over the course of one (1) year is a modest number of requests to handle.

Counsel states that the standard for a request for reconsideration found at *N.J.A.C. 5:105-2.10* is stringent. Counsel states that although the actual regulation does not set forth the standard for such requests, applicable case law has set forth the following standard:

⁶ Counsel notes that the Borough may have to consider hiring an additional person solely to handle OPRA requests.
Kreszentia Teena Morris v. Borough of Victory Gardens (Morris), 2008-137 – Supplemental Findings and Recommendations of the Executive Director 3

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).” White v. William Patterson University, GRC Complaint No. 2008-216 (August 2009).

Counsel argues that none of the reasons provided by Counsel meet these criteria. Counsel requests that based on the foregoing, the GRC must deny the Borough’s request for reconsideration.⁷

Whether the Complainant has met the required standard for reconsideration of the Council’s April 28, 2010 Interim Order?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, the Custodian’s Counsel filed the request for reconsideration of the Council’s Order dated April 28, 2010 on May 6, 2010, five (5) business days from the issuance of the Council’s Order.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval

⁷ Counsel also notes that if the Borough needs additional help, it should hire that help instead of excusing its obligations under OPRA.

To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his motion for reconsideration, Counsel stated that the Custodian is the only clerk in a small municipality and has a number of other jobs to perform including Town Administrator, Borough Registrar and secretary for the Building Department. Further, Counsel averred that the Custodian is also tasked with the responsibility of handling banking for the Borough, keeping minutes at council meetings and responding to OPRA requests.

Counsel asserted that the Complainant, a former councilmember who was not re-elected, and two (2) other residents have filed at least 70 OPRA requests in the past year. Counsel contends that it is impossible for the Custodian to conduct her daily business and still respond to these numerous OPRA requests in a satisfactory fashion. Counsel argued that, in essence, the Custodian has been overwhelmed by the amount of OPRA requests received.

Counsel's request for reconsideration of the GRC's April 28, 2010 Interim Order relies on the size of the Borough as well as on the argument that the Custodian performs many other duties for the Borough in addition to responding to OPRA requests. Counsel's argument that the Custodian has received 70 OPRA requests from three (3) individuals, one of whom is the Complainant, raises the issue of whether the Complainant's requests in this complaint pose a substantial disruption of agency operations.

OPRA provides that:

“[t]he custodian ... shall permit the record to be inspected, examined, and copied by any person during regular business hours; or *in the case of a municipality having a population of 5,000 or fewer* according to the most recent federal decennial census ... *during not less than six regular business hours over not less than three business days per week or the entity's regularly-scheduled business hours, whichever is less...*” (Emphasis added.) N.J.S.A. 47:1A-5.a.

According to the 2009 Municipal Directory, distributed by the New Jersey State League of Municipalities, the population for the Borough of Victory Gardens as recorded by the 2000 federal decennial census is 1,546 people. Therefore, the Borough is eligible to maintain limited OPRA hours as defined in N.J.S.A. 47:1A-5.a.

However, the Custodian and Counsel provided no evidence in the SOI, subsequent correspondence or the request for reconsideration that the Borough had publicly posted limited OPRA hours prior to the filing of the Complainant's OPRA requests. *See Frost v. North Hudson Regional Fire & Rescue (Hudson)*, GRC Complaint No. 2008-198 (December 2009)(That Counsel's argument that the North Hudson Regional Fire & Rescue should be recognized under N.J.S.A. 47:1A-5.a. is without merit because the agency does not fall within the set guidelines and Counsel never asserted that

the agency publicly posted limited OPRA hours prior to submission of the Complainant's OPRA requests.)

Additionally, OPRA provides 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.” N.J.S.A. 47:1A-5.g.

The Custodian and Counsel did not previously argue that the Complainant's seven (7) OPRA requests would substantially disrupt operations. Moreover, in reviewing complaints where the Council has found that a Complainant's requests could substantially disrupt agency operations, the Council finds that the facts of the instant matter are not comparable to those other instances in number of complaints filed. *See Caggiano v. Borough of Stanhope*, GRC Complaint No. 2006-220 (September 2007). Additionally, OPRA requires that a custodian attempt to reach a reasonable accommodation with the requestor that accommodates the interests of both parties; the Custodian herein has failed to establish that she in any way attempted to reach a reasonable accommodation of this request with the Complainant.

As the moving party, the Borough was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. The Borough failed to do so. The Borough has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint. *See D'Atria, supra*. Notably, the Borough failed to provide any evidence that limited OPRA hours were publicly posted prior to the submission of the Complainant's OPRA requests. Further, the Borough failed to provide credible evidence that the OPRA requests that were the subject of this complaint would cause a substantial disruption of the Borough's operations and further failed to provide evidence that the Custodian attempted to reach a reasonable accommodation of the request with the Complainant, as is required by N.J.S.A. 47:1A-5.g.

Therefore, because the Custodian's Counsel has failed to establish in his motion for reconsideration of the Council's April 28, 2010 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, said motion for reconsideration is denied. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, this complaint should be referred to the Office of Administrative Law for the determination of

reasonable prevailing party attorney's fees pursuant to the Council's April 28, 2010 Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian's Counsel has failed to establish in his motion for reconsideration of the Council's April 28, 2010 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees pursuant to the Council's April 28, 2010 Interim Order.

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Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 22, 2010



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At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 21, 2010 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:

1. Although the Custodian provided access to the invoices responsive to Item No. 1 of the Complainant’s June 18, 2008 OPRA request, because the Custodian failed to simultaneously provide certified confirmation of her compliance to the GRC until March 9, 2010 and failed to legally certify to the search undertaken until March 12, 2010, the Custodian failed to fully comply with the Council’s February 23, 2010 Interim Order pursuant to Jung & O’Halloran v. Borough of Roselle (Union), GRC Complaint Nos. 2007-299; 2007-307 (April 2009).
2. Because Item No. 1 and No. 2 of the June 17, 2008 request, Item No. 4 of the June 18, 2008 request (except the request for the resume) and the Complainant’s June 20, 2008 request are not valid 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, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), and because the Custodian did not unlawfully deny access to the resume responsive to request Item No. 4 of the Complainant’s June 18, 2008 request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's February 23, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian disclosed all invoices responsive to Item No. 1 of the Complainant's OPRA request pursuant to the Council's February 23, 2010 Interim Order. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the
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On The 28th Day of April, 2010

Robin Berg Tabakin, Chair
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I attest the foregoing is a true and accurate record of the Government Records Council.

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: April 30, 2010

**STATE OF NEW JERSEY
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³ The Complainant requests that the list be a printout from the PERS system and not a handwritten list.

⁴ The Complainant requested additional records that are not at issue in this complaint.

⁵ The GRC received the Denial of Access Complaint on said date.

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. Because Item No. 1 of the June 17, 2008 request and Item No. 4 of the June 18, 2008 OPRA request (except the request for the resume) fails to specify identifiable government records or dates within which the Custodian could focus her search and would require the Custodian to conduct research to identify and locate government records which may be responsive to the requests, these two (2) requests are overly broad and are therefore invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian has not therefore unlawfully denied access to the requested records. Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because the Custodian has certified that no resume responsive to request Item No. 4 of the Complainant's June 18, 2008 request exists, and because the Complainant has provided no credible evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested records. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Moreover, the Custodian's initial response was insufficient pursuant to N.J.S.A. 47:1A-5.i. because the Custodian failed to state that no resume responsive existed in her initial written response.
3. Because the Custodian was not obligated under OPRA to create records that do not otherwise exist, the Custodian went above and beyond her responsibilities under OPRA to create a handwritten record that was responsive to Item No. 2 of the Complainant's June 17, 2008 OPRA request and obtain additional drivers' abstracts responsive to request Item No. 2 of the Complainant's June 18, 2008 OPRA request, the Custodian has not unlawfully denied access to the requested records under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
4. Because the Complainant's June 20, 2008 OPRA request fails to identify a specific time period within which the Custodian could focus her search and would require the Custodian to conduct research to identify and locate government records which may be responsive to the request, this request is overly broad and is therefore invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler

v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). The Custodian has not therefore unlawfully denied access to the requested records. *See also* Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

5. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when Mr. Wood would respond to Item No. 3 of the Complainant's June 18, 2008 OPRA request, the Custodian's written response is inadequate under OPRA pursuant to Ghana v. New Jersey Department of Correction, GRC Complaint No. 2008-154 (June 2009), and the Complainant's request item is "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Additionally, although Mr. Wood did respond to the Complainant on June 29, 2008, his verbal response was insufficient and therefore in violation to N.J.S.A. 47:1A-5.g., because he failed to respond in writing, as required under OPRA, on behalf of the Custodian.
6. Because Mr. Wood certified that the 1099s responsive to request Item No. 3 of the Complainant's June 18, 2008 OPRA request were missing or not yet completed, Mr. Wood has not unlawfully denied access (except for failing to provide a response to the Complainant in writing pursuant to N.J.S.A. 47:1A-5.i.) to the requested 1099s and is under no obligation to provide the requested records after responding that no records were available at the time of the Complainant's request pursuant to Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 207-303 (June 2008).
7. Because the Custodian failed to immediately respond in writing to Item No. 1 of the Complainant's June 18, 2008 OPRA request granting or denying access to the requested invoices or requesting an extension of time to respond, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007). Moreover, the Custodian unlawfully denied access to the requested records. The Custodian shall disclose the requested invoices and legally certify to the search undertaken.
8. **The Custodian shall comply with Item No. 7 above within five (5) business days from receipt of the Council's Interim Order and provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁶, to the Executive Director.**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

10. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

March 1, 2010

Council's Interim Order distributed to the parties.

March 4, 2010

Custodian's response to the Council's Interim Order. The Custodian states that attached records responsive to Item No. 1 of the Complainant's June 18, 2008 request are being provided to the Complainant via certified mail.

March 9, 2010

Custodian's legal certification. The Custodian certifies that she has complied with the Council's February 23, 2010 Interim Order by providing all "invoices from Spectrum Communications from 1999 to present" to the Complainant.⁷

March 10, 2010

E-mail from the GRC to the Custodian. The GRC states that it is in receipt of the Custodian's letter dated March 4, 2010 and legal certification dated March 9, 2010.

The GRC states the Council's February 23, 2010 Interim Order specifically directed the Custodian to provide the invoices responsive to Item No. 1 of the Complainant's June 18, 2008 OPRA request and legally certify to the search undertaken to locate the records. The GRC states that upon further review of the Custodian's legal certification dated March 9, 2010, the Custodian did not include any statements regarding the search undertaken to locate invoices responsive. The GRC requests that the Custodian amend her legal certification to include the search undertaken, as was explicitly ordered by the Council. The GRC requests that the Custodian provide the amended certification as soon as possible.

March 11, 2010

E-mail from the Custodian to the GRC. The Custodian states that she is in receipt of the GRC's request to amend her March 9, 2010 legal certification. The Custodian states that she prepared a submission that is under review by the Custodian's Counsel. The Custodian states that she will provide this submission to the GRC via facsimile as soon as Counsel gives his approval.

March 11, 2010

Letter from the Custodian to the GRC attaching the Custodian's legal certification dated March 11, 2010. The Custodian states that her search for the invoices responsive to Item No. 1 of the Complainant's June 18, 2008 OPRA request involved giving the request to the Fire Chief in order for him to respond to the Complainant. The Custodian

⁷ The Custodian certifies that these records were previously made available to the Complainant (on June 27, 2008); however, the Complainant refused to pay copying costs. However, the Complainant's Counsel asserted on August 19, 2008 that the Complainant was only provided with a customer transaction account and not actual invoices.

states that she attempted to contact Spectrum Communications for the invoices after the Fire Chief failed to provide a response to the Complainant. The Custodian states that Spectrum Communications declined to provide any invoices to the Custodian because the Fire Department was the official account holder and not the Custodian.

The Custodian states that she renewed her attempts to obtain any records responsive from the Fire Chief following her interaction with Spectrum Communications. The Custodian states that after repeated attempts to obtain records, the Fire Chief finally provided all the information he had on file to the Custodian, which was subsequently made available to the Complainant.⁸

March 12, 2010

Custodian's legal certification. The Custodian legally certifies to the search undertaken, as stated in her letter March 11, 2010.

April 14, 2010

Letter from the Complainant's Counsel to the GRC attaching the Complainant's legal certification dated April 6, 2010.

The Complainant certifies that although the Custodian certifies in paragraphs 3 and 4 of her March 11, 2010 and March 12, 2010 legal certifications that "[a]ll invoices from Spectrum Communications from 1999 to present," were previously provided to the Complainant, the Complainant refused to pay the copy costs associated with disclosure of the records. The Complainant certifies that the Custodian never provided or offered any invoices; rather, the Custodian provided a "customer transaction history," which is not an invoice.

Further, the Complainant certifies that the Custodian failed to certify to the dates on which the Custodian performed her search for the invoices responsive. The Complainant certifies that the Custodian also failed to identify the date on which records were obtained from the Fire Department.

Analysis

Whether the Custodian complied with the Council's February 23, 2010 Interim Order?

The Council's February 23, 2010 Interim Order specifically directed the Custodian to disclose the invoices responsive to Item No. 1 of the Complainant's June 18, 2008 OPRA request and legally certify to the search undertaken. Said Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of said Order.

⁸ The Custodian provides details of the search undertaken in a letter separate from the legal certification dated March 11, 2010. Additionally, the Custodian's legal certification is a reiteration of the Custodian's legal certification dated March 9, 2010.

The Custodian subsequently sent via certified mail the invoices responsive to the Complainant on March 4, 2010, or the third (3rd) business day following receipt of the Council's Interim Order. However, the Custodian failed to provide certified confirmation of her compliance with the Council's Interim Order until March 9, 2010, or six (6) business days following receipt of the Council's Interim Order.

Further, the Custodian initially failed to indicate the search undertaken to locate invoices responsive to the Complainant's request. The GRC contacted the Custodian via e-mail requesting that the Custodian provide an amended legal certification addressing the search undertaken as explicitly ordered by the Council. The Custodian responded on March 11, 2010 describing her search; however, such description was not contained within the attached legal certification. Subsequent to the Custodian's letter dated March 11, 2010, the Custodian submitted another certification on March 12, 2010 containing the search undertaken.

In Jung & O'Halloran v. Borough of Roselle (Union), GRC Complaint Nos. 2007-299; 2007-307 (April 2009), the Council's December 18, 2008 Interim Order ordered the custodian to comply with the Administrative Law Judge's ("ALJ") decision to provide records responsive:

“within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.”

The custodian in that complaint complied with the ALJ's order, but failed to provide certified confirmation to the GRC within five (5) business days. The GRC held that the custodian failed to fully comply with the Council's Interim Order.

Therefore, although the Custodian provided access to the invoices responsive to Item No. 1 of the Complainant's June 18, 2008 OPRA request, because the Custodian failed to simultaneously provide certified confirmation of her compliance to the GRC until March 9, 2010 and failed to legally certify to the search undertaken until March 12, 2010, the Custodian failed to fully comply with the Council's February 23, 2010 Interim Order pursuant to Jung & O'Halloran, supra.

The GRC notes that the Complainant submitted a legal certification dated April 6, 2010 to the GRC on April 14, 2010; however, the assertions made therein do not constitute sufficient evidence to overcome the Custodian's certifications dated March 11, 2010 and March 12, 2010.

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).

In the instant complaint, the Custodian’s failure to immediately respond in writing to Item No. 1 of the Complainant’s June 18, 2008 OPRA request granting or denying access to the requested invoices or requesting an extension of time to respond resulted in a violation of N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007). Additionally, the Custodian’s failure to notify the Complainant in writing within the statutorily mandated seven (7) business days of when Mr. Wood would respond to Item No. 3 of the Complainant’s June 18, 2008 OPRA request resulted in a “deemed denial” under OPRA pursuant to Ghana v. New Jersey Department of Correction, GRC Complaint No. 2008-154 (June 2009), and the Custodian unlawfully denied access to the requested records. Moreover, the Custodian failed to fully comply to the Council’s February 23, 2010 Interim Order by failing to simultaneously provide certified confirmation of her compliance to the GRC until March 9, 2010 and failed to legally certify to the search undertaken until March 12, 2010,.

However, because Item No. 1 and No. 2 of the June 17, 2008 request, Item No. 4 of the June 18, 2008 request (except the request for the resume) and the Complainant’s June 20, 2008 request are not valid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151

(February 2009), and because the Custodian did not unlawfully deny access to the resume responsive to request Item No. 4 of the Complainant's June 18, 2008 request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

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

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, 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.⁹ Those changes expand counsel fee awards under OPRA." 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 Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight business days later, or one day beyond the statutory limit. *Id.* at 79. As a result, the Court shifted the burden to Hoboken to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind the City's voluntary disclosure. *Id.* Because Hoboken's February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

In the Complainant Counsel's notice of appearance dated August 19, 2008, Counsel requested that the Custodian search for and produce all of the records requested by the Complainant and asked the GRC to find that the Complainant is a prevailing party entitled to reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6. In the Council's February 23, 2010 Interim Order, the GRC determined that the Custodian had unlawfully denied access to the invoices responsive to Item No. 1 of the Complainant's June 18, 2008 OPRA request and ordered disclosure of the invoices. Subsequent to this order, the Custodian provided on March 4, 2010 via certified mail all invoices responsive to the Complainant's request. Therefore, the action sought by the Complainant came about due to the filing of this Denial of Access Complaint.

Pursuant to Teeters, *supra*, and the Council's February 23, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a

⁹ The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian disclosed all invoices responsive to Item No. 1 of the Complainant's OPRA request pursuant to the Council's February 23, 2010 Interim Order. Additionally, pursuant to Mason, supra, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian provided access to the invoices responsive to Item No. 1 of the Complainant's June 18, 2008 OPRA request, because the Custodian failed to simultaneously provide certified confirmation of her compliance to the GRC until March 9, 2010 and failed to legally certify to the search undertaken until March 12, 2010, the Custodian failed to fully comply with the Council's February 23, 2010 Interim Order pursuant to Jung & O'Halloran v. Borough of Roselle (Union), GRC Complaint Nos. 2007-299; 2007-307 (April 2009).
2. Because Item No. 1 and No. 2 of the June 17, 2008 request, Item No. 4 of the June 18, 2008 request (except the request for the resume) and the Complainant's June 20, 2008 request are not valid 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, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), and because the Custodian did not unlawfully deny access to the resume responsive to request Item No. 4 of the Complainant's June 18, 2008 request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's February 23, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian disclosed all invoices responsive to Item No. 1 of the Complainant's OPRA request pursuant to the Council's February 23, 2010 Interim Order. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable

attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 21, 2010



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

LORI GRIFA
Acting Commissioner

INTERIM ORDER

February 23, 2010 Government Records Council Meeting

Kreszentia Teena Morris
Complainant

Complaint No. 2008-137

v.

Borough of Victory Gardens (Morris)
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 2010 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. Because Item No. 1 of the June 17, 2008 request and Item No. 4 of the June 18, 2008 OPRA request (except the request for the resume) fails to specify identifiable government records or dates within which the Custodian could focus her search and would require the Custodian to conduct research to identify and locate government records which may be responsive to the requests, these two (2) requests are overly broad and are therefore invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian has not therefore unlawfully denied access to the requested records. Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because the Custodian has certified that no resume responsive to request Item No. 4 of the Complainant’s June 18, 2008 request exists, and because the Complainant has provided no credible evidence to refute the Custodian’s certification in this regard, the Custodian has not unlawfully denied access to the requested records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Moreover, the Custodian’s initial response was insufficient pursuant to N.J.S.A. 47:1A-5.i. because the Custodian failed to state that no resume responsive existed in her initial written response.



3. Because the Custodian was not obligated under OPRA to create records that do not otherwise exist, the Custodian went above and beyond her responsibilities under OPRA to create a handwritten record that was responsive to Item No. 2 of the Complainant's June 17, 2008 OPRA request and obtain additional drivers' abstracts responsive to request Item No. 2 of the Complainant's June 18, 2008 OPRA request, the Custodian has not unlawfully denied access to the requested records under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
4. Because the Complainant's June 20, 2008 OPRA request fails to identify a specific time period within which the Custodian could focus her search and would require the Custodian to conduct research to identify and locate government records which may be responsive to the request, this request is overly broad and is therefore invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). The Custodian has not therefore unlawfully denied access to the requested records. *See also* Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
5. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when Mr. Wood would respond to Item No. 3 of the Complainant's June 18, 2008 OPRA request, the Custodian's written response is inadequate under OPRA pursuant to Ghana v. New Jersey Department of Correction, GRC Complaint No. 2008-154 (June 2009), and the Complainant's request item is "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Additionally, although Mr. Wood did respond to the Complainant on June 29, 2008, his verbal response was insufficient and therefore in violation to N.J.S.A. 47:1A-5.g., because he failed to respond in writing, as required under OPRA, on behalf of the Custodian.
6. Because Mr. Wood certified that the 1099s responsive to request Item No. 3 of the Complainant's June 18, 2008 OPRA request were missing or not yet completed, Mr. Wood has not unlawfully denied access (except for failing to provide a response to the Complainant in writing pursuant to N.J.S.A. 47:1A-5.i.) to the requested 1099s and is under no obligation to provide the requested records after responding that no records were available at the time of the Complainant's request pursuant to Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 207-303 (June 2008).

7. Because the Custodian failed to immediately respond in writing to Item No. 1 of the Complainant's June 18, 2008 OPRA request granting or denying access to the requested invoices or requesting an extension of time to respond, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007). Moreover, the Custodian unlawfully denied access to the requested records. The Custodian shall disclose the requested invoices and legally certify to the search undertaken.
8. **The Custodian shall comply with Item No. 7 above within five (5) business days from receipt of the Council's Interim Order and provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
10. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 23rd Day of February, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: March 1, 2010

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2010 Council Meeting**

**Kreszentia Teena Morris¹
Complainant**

GRC Complaint No. 2008-137

v.

**Borough of Victory Gardens (Morris)²
Custodian of Records**

Records Relevant to Complaint:

June 17, 2008 OPRA requests:

1. Copies of all contractor's contracts, professional service contracts, and attorney professional contracts.
2. Copy of a list of all individuals in the Public Employee Retirement System ("PERS").³

June 18, 2008 OPRA requests:

1. All invoices from Spectrum Communications from 1999 to present.
2. All drivers' abstracts of all Borough employees from January 2005 to present.
3. All 1099 forms from 2006 and 2007.
4. All documentation of Philip Feintuch, Esq., to the Borough regarding professional services rendered to the Borough, including a current resume.⁴

June 20, 2008 OPRA request:

Titles to all Borough-owned vehicles, copies of all salvage receipts for vehicles owned by the Borough and copies of auction receipts for all vehicles sold.

Requests Made: June 17, 2008, June 18, 2008 and June 20, 2008

Responses Made: Various dates

Custodian: Deborah Evans

GRC Complaint Filed: July 1, 2008⁵

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

² Represented by Philip Feintuch, Esq. (Newark, NJ).

³ The Complainant requests that the list be a printout from the PERS system and not a handwritten list.

⁴ The Complainant requested additional records that are not at issue in this complaint.

⁵ The GRC received the Denial of Access Complaint on said date.

Background

June 17, 2008

Complainant's two (2) Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on two (2) official OPRA request forms.

June 18, 2008

Complainant's four (4) Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on four (4) official OPRA request forms.

June 20, 2008

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

June 20, 2008

Custodian's response to the Complainant's June 17, 2008 OPRA request Item No. 1. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian indicates that twenty-seven (27) pages of records responsive are available for disclosure upon payment of copying costs from the Complainant.⁶

June 24, 2008

Custodian's response to the following request items:⁷

June 17, 2008 OPRA request Item No. 2:

The Custodian responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian provides a handwritten list of all employees enrolled in PERS.

June 18, 2008 OPRA request Item No. 2:

The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian provides all drivers' abstracts of all Borough employees responsive in her possession with redactions of names, street addresses and drivers' license numbers.

⁶ The Custodian did not provide the estimated copying cost for the twenty-seven (27) pages of records provided; however, the Custodian did note on the OPRA request form that a fee of \$3.00 was being charged though it is unclear how many pages were encompassed in the charge.

⁷ All responses to the Complainant's requests were noted on the OPRA request form.

June 18, 2008 OPRA request Item No. 3:

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 this request item (all 1099 forms from 2006 and 2007) was forwarded to the Finance Officer Charlie Wood ("Mr. Wood") and that the Complainant should contact Mr. Wood if she is inquiring about a specific employee.

June 18, 2008 OPRA request Item No. 4:

The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian indicates that the requested records are available for disclosure pending payment of copying costs from the Complainant. The Custodian further states that these records were also made available in response to the Complainant's June 17, 2008 OPRA request Item No. 1, but that the Complainant has not paid the copying costs to date.

June 27, 2008

Custodian's response to the following request items:⁸

June 18, 2008 OPRA request Item No. 2:

The Custodian provides additional drivers' abstracts responsive to the Complainant's OPRA request with redactions of names, street addresses and drivers' licenses numbers.⁹

June 20, 2008 OPRA request:

The Custodian responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian provides access to ten (10) pages of records, and indicates that no salvage receipts or auction receipts of vehicles exist.

July 1, 2008

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

- Complainant's two (2) OPRA requests dated June 17, 2008.
- Complainant's four (4) OPRA requests dated June 18, 2008.
- Complainant's OPRA request dated June 20, 2008.
- Handwritten list of employees enrolled in PERS dated June 24, 2008.
- Receipt of \$5.00 for copies of vehicle titles dated June 27, 2008.

⁸ All responses to the Complainant's requests were noted on the OPRA request form.

⁹ The Complainant's OPRA request form contains a note that twenty (20) pages were provided with no names or addresses. It is unclear as to whether the notation was made by the Complainant or Custodian. *Kreszentia Teena Morris v. Borough of Victory Gardens (Morris)*, 2008-137 – Findings and Recommendations of the Executive Director

The Complainant states that she made multiple OPRA requests for public records on June 17, 2008, June 18, 2008 and June 20, 2008.

The Complainant contends that the Custodian provided the following responses:

June 17, 2008 OPRA request Item No. 1:

The Complainant asserts she received four (4) records responsive to her June 17, 2008 OPRA request Item No. 1 but was not given all records responsive.

June 17, 2008 OPRA request Item No. 2:

The Complainant avers that she received a handwritten list of employees on PERS system on June 24, 2008. The Complainant asserts that she called Mr. Wood and requested a printout of the employees enrolled in PERS from the State. The Complainant contends that Mr. Wood advised that he could obtain a copy of the quarterly printout.

June 18, 2008 OPRA request Item No. 1:

The Complainant asserts she received no records responsive to this request (all invoices from Spectrum Communications from 1999 to present).

June 18, 2008 OPRA request Item No. 2:

The Complainant further contends that she received twenty (20) pages of drivers' abstracts responsive to this request item with names, addresses and drivers' license numbers redacted by the Custodian at the direction of the Custodian's Counsel.

June 18, 2008 OPRA request Item No. 3:

The Complainant asserts that the Custodian advised in writing on June 24, 2008 that Mr. Wood would provide the 1099 forms responsive to this request. The Complainant asserts that she telephoned Mr. Wood on June 29, 2008 and was advised that the book containing 1099 forms for the year 2006 was missing and the 1099 forms for the year 2007 were not yet completed.

June 18, 2008 OPRA request Item No. 4:

The Complainant states that the Custodian provided one (1) letter to the Complainant in response to this request item.

June 20, 2008 OPRA request:

The Complainant states that she received nine (9) unsigned titles and one (1) signed title responsive to her June 20, 2008 OPRA request at a copying cost of \$5.00. The Complainant states that the Custodian informed her that no salvage receipts or auction receipts existed.

The Complainant contends that the Custodian's recordkeeping ability is subpar. The Complainant asserts that records are often scattered in different places and lost or missing. The Complainant asserts that she has informed the Custodian that she is not in compliance with OPRA in regards to the way OPRA records requests and Denial of Access Complaints are being handled.

Additionally, the Complainant asserts that she was never notified that records were available for disclosure. The Complainant asserts that when she went to the Borough Hall on June 27, 2008 to inquire about her OPRA requests, the Custodian had left a stack of records responsive to the Complainant's requests at a total copying cost of over \$40.00. The Complainant contends that after looking at some of the records, she only paid for titles responsive to her June 20, 2008 OPRA request. The Complainant asserts that she later contacted the Custodian to advise her that OPRA had been violated, to which the Custodian replied she did not make the rules on how to deal with OPRA requests. The Complainant also argues that the Custodian has intentionally impeded or delayed access in order to consult with the Custodian's Counsel.

The Complainant does not agree to mediate this complaint.

July 3, 2008

Letter from the Custodian to Mayor and Borough Council.¹⁰ The Custodian states that the Complainant came in to inquire about drivers' abstracts for the Fire Department and was able to review six (6) abstracts plus two (2) more for the Department of Public Works. The Custodian states that four (4) of the Complainant's OPRA requests are under review by the Custodian's Counsel.

The Custodian also states that the Complainant is still waiting for Mr. Wood to provide access to the Complainant's June 18, 2008 request Item No. 3 for 1099 forms from 2006 and 2007. Additionally, the Custodian states that she has contacted the Fire Chief and asked him to provide the remaining drivers' license information not previously provided but have failed to obtain such information to date. The Custodian states that she has requested help from another Councilwoman to obtain the drivers' license information from the Fire Chief, but the Councilwoman has also been unsuccessful.

July 10, 2008

Letter from the Complainant to Mayor and Borough Council. The Complainant contends that she has met heavy resistance from the Custodian in response to the OPRA requests she has submitted.

July 14, 2008

Letter from the Complainant to Mayor and Borough Council. The Complainant states that the Custodian redacted names and addresses in the drivers' abstracts provided to the Complainant on June 24, 2008 in response to the June 18, 2008 request Item No. 2. The Complainant asserts that the Custodian advised that the records were redacted upon

¹⁰ The Complainant e-mailed this correspondence to the GRC on July 7, 2008, stating that she obtained the attached letter and is forwarding it to the GRC because it pertains to the instant complaint. The letter was also provided to the GRC in the Custodian's Statement of Information.
Kreszentia Teena Morris v. Borough of Victory Gardens (Morris), 2008-137 – Findings and Recommendations of the Executive Director

the advice of Custodian's Counsel. The Complainant asserts that the Custodian provided the drivers' abstracts a second time, but again redacted the addresses, which the Complainant believes is in violation of OPRA.

Additionally, the Complainant contends that not all requested drivers' abstracts were provided. The Complainant asserts that the Custodian advised that the Fire Chief did not provide all drivers' abstracts to the Custodian. The Complainant asserts that the Assistant Fire Chief has not provided his driver's license information so that an abstract may be created.

The Complainant asserts that OPRA was enacted to give better transparency to government. The Complainant contends that she has met resistance from the Custodian and all members of the Borough government since filing these seven (7) OPRA requests.

July 18, 2008

Letter from the Custodian to Mayor and Borough Council. The Custodian states that this letter serves as a response to the Complainant's July 10, 2008 letter to the Mayor and Borough Council.

The Custodian asserts that the Complainant has been notified that some records are ready for pickup, but the Complainant has not obtained the records because she wants more information than is required to be disclosed under OPRA. The Custodian contends that the Complainant did not agree with the Custodian's appropriate responses and has filed a complaint with the GRC.

July 18, 2008

Letter from the Custodian to Mayor and Borough Council. The Custodian states that this letter serves as a further response to the Complainant's July 10, 2008 letter to the Mayor and Borough Council.

The Custodian contends that she did not redact entire home addresses in the drivers' abstracts responsive to Item No. 2 of the Complainant's June 18, 2008 OPRA request. The Custodian asserts that there is no reason to provide the complete address, so the responsive records she provided included only the employee names and the towns where the employees resided. The Custodian asserts that the Mayor spoke with the Fire Chief on July 15, 2008 and again requested the missing drivers' license numbers and consent forms so that the Custodian could provide the remaining drivers' abstracts.

Moreover, the Custodian contends that she is not resisting the Complainant in satisfying the seven (7) OPRA requests relevant to this Complainant. The Custodian asserts that the Complainant has made responding to the seven (7) requests extremely difficult.

July 21, 2008

Request for the Statement of Information sent to the Custodian.

July 24, 2008

Custodian's Statement of Information ("SOF") with the following attachments:

- Complainant's two (2) OPRA requests dated June 17, 2008 with the Custodian's notes thereon and records provided attached.
- Complainant's four (4) OPRA requests dated June 18, 2008 with the Custodian's notes thereon and records provided attached.
- Complainant's OPRA request dated June 20, 2008 with the Custodian's notes thereon and records provided attached.
- Handwritten list of employees enrolled in PERS dated June 24, 2008.
- Receipt of payment for copies of vehicle titles dated June 27, 2008.
- Letter from the Custodian to the Borough Mayor and Council dated July 3, 2008.
- Letter from the Custodian to the Borough Mayor and Council dated July 18, 2008.
- Letter from the Custodian to the Borough Mayor and Council dated July 18, 2008.

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

The Custodian states that each request was handled in the following manner:

June 17, 2008 OPRA request Item No. 1:

The Custodian certifies that she responded to the Complainant on June 20, 2008, stating that the records responsive were available for disclosure pending payment of copying costs. The Custodian states that the Complainant refused to pay the copying costs and informed the Custodian that she would decide if she wanted the records at a later date.

June 17, 2008 OPRA request Item No. 2:

The Custodian certifies that she provided a handwritten list of employees enrolled in the PERS system to the Complainant on June 24, 2008.¹¹ The Custodian contends that the Complainant requested a printout from PERS, which Mr. Wood advised does not exist; therefore, the Custodian had to create a record to provide to the Complainant. The Custodian contends that the Complainant refused to take a copy of the handwritten list.

June 18, 2008 OPRA request Item No. 1:

The Custodian certifies that her search for the requested records involved contacting the Fire Department in order to obtain the records responsive.

The Custodian certifies that she responded to the Complainant on June 27, 2008, stating that the requested records were available for disclosure pending payment of copying costs. The Custodian states that the Complainant refused to pay copying costs.

¹¹ The Custodian notes on the Complainant's records request form that a response is due by June 23, 2008; however, the handwritten list provided to the Complainant is dated June 24, 2008 which is within the statutorily mandated time frame to respond.

Kreszentia Teena Morris v. Borough of Victory Gardens (Morris), 2008-137 – Findings and Recommendations of the Executive Director 7

June 18, 2008 OPRA request Item No. 2:

The Custodian certifies that her search for the requested records involved searching her own records and contacting the Department of Public Works (“DPW”) and the Fire Department for the requested records.

The Custodian certifies that she responded to the Complainant on June 24, 2008, providing access to copies of all drivers’ abstracts in the Custodian’s possession with drivers’ license numbers and street addresses redacted. The Custodian further certifies that she also provided access to drivers’ abstracts from the DPW and the Fire Department that were provided to the Custodian by those two departments. The Custodian certifies that the Complainant inspected the records but again refused to pay copying costs for the requested drivers’ abstracts.

The Custodian asserts that the Fire Department has failed to provide all drivers’ license information responsive in a timely manner even after the Custodian has requested them several times. The Custodian asserts that she has contacted Counsel for help in obtaining the remainder of the requested records.

June 18, 2008 OPRA request Item No. 3:

The Custodian certifies that this request was forwarded to Mr. Wood for his response.

June 18, 2008 OPRA request Item No. 4:

The Custodian contends that this request is for the same information previously made available to the Complainant’s June 17, 2008 OPRA request Item No. 1. The Custodian certifies that she informed the Complainant on June 20, 2008 that the records would be provided upon payment of copying costs. The Custodian states that the Complainant again refused to pay the required copying fees.

June 20, 2008 OPRA request:

The Custodian certifies that she provided access to the Complainant on June 27, 2008 to nine (9) vehicle titles at a copying cost of \$5.00 to the Complainant. The Custodian certifies that no salvage receipts or auction receipts exist and all vehicle titles responsive to the Complainant’s OPRA request were provided. The Custodian also attaches seven (7) insurance cards.¹²

August 19, 2008

The Complainant Counsel’s response to the Custodian’s SOI attaching a legal certification from the Complainant.¹³

¹² Five (5) of the insurance cards match the vehicle identification numbers in titles provided to the Complainant. No titles correspond with the other two (2) insurance cards.

¹³ Counsel states that this letter serves as notice of representation for the Complainant.

Counsel contends that the Custodian's SOI is unclear and misleading. Counsel argues that the Custodian violated OPRA based on the following:

June 17, 2008 OPRA request Item No. 1:

Counsel asserts that although the Complainant was provided with two (2) contracts and two (2) letter agreements in response to this request item, the Complainant does not believe that all records responsive were provided. Counsel avers that the Complainant certifies that Herbert Evans has been a contractor for the Borough but no record was provided reflecting his services. Counsel asserts that, to the extent that other contracts exist but have not been provided to the Complainant, the Custodian has violated OPRA and denied access to the requested records.

June 17, 2008 OPRA request Item No. 2:

Counsel states that the Complainant requested a copy of all individuals enrolled in PERS in list form. Counsel argues that the Custodian provided a handwritten list of ten (10) employees' last names instead of providing public records showing employees of the Borough enrolled in the pension system. Counsel asserts that the Custodian has violated OPRA by creating a record in response to the Complainant's request instead of providing the records responsive. Counsel requests that the GRC order disclosure of the requested pension records immediately.

June 18, 2008 OPRA request Item No. 1:

Counsel states that the Complainant requested invoices from Spectrum Communications from 1999 to the present, but the Custodian offered the Complainant what appeared to be a customer transaction history. Counsel asserts that the Custodian has failed to provide actual invoices or certify to her search for the requested invoices, which are supposedly retained by the Borough for six (6) years in accordance with their DARM schedule. Counsel requests that the GRC order disclosure of all invoices.

June 18, 2008 OPRA request Item No. 2:

Counsel avers that the Complainant certifies that the Borough's policy is to run on an annual basis driver abstracts on Borough employees responsible for driving vehicles. Counsel contends that the Custodian provided few abstracts in regards to the Complainant's request for all abstracts since 2005 with the names, street addresses and drivers' license numbers redacted; however, different copies with only the street addresses and drivers' license numbers redacted were attached to the SOI.¹⁴ Counsel contends that the Custodian has violated OPRA by unlawfully redacting names and street addresses.

¹⁴ Counsel does not take issue with the Custodian's redaction of drivers' licenses numbers on the driver abstracts.
Kreszentia Teena Morris v. Borough of Victory Gardens (Morris), 2008-137 – Findings and Recommendations of the Executive Director

June 18, 2008 OPRA request Item No. 3:

Counsel contends that the Custodian has denied access to all 1099 forms for 2006 and 2007 because no records have been provided to date. Counsel asserts the Custodian claims she forwarded this request to Mr. Wood, who also failed to provide any 1099 forms. Counsel argues that the Custodian cannot delegate her responsibility as custodian of record for the Borough to another public official. Counsel requests that the GRC order disclosure of all 1099 forms responsive to the Complainant's OPRA request.

June 18, 2008 OPRA request Item No. 4:

Counsel states that the Complainant requested, among other records, a current resume for the Custodian's Counsel. Counsel asserts that this record was never provided; therefore, the Custodian has denied access to such.

June 20, 2008 OPRA request:

Counsel contends that even though the Custodian provided ten (10) vehicle titles to the Complainant on June 27, 2008, the Custodian only attached nine (9) vehicle titles to the SOI. Counsel asserts that although the Complainant did not request insurance identification cards, the Custodian included such with the SOI. Counsel contends that the Complainant was not provided with two (2) vehicle titles referenced in the insurance cards provided to the GRC with the SOI.

Additionally, Counsel states that the Borough owns several fire trucks, one (1) rescue squad vehicle and a Fire Chief's truck. Counsel avers that the Custodian has failed to provide access to the titles for those vehicles.

Further, Counsel asserts that several Borough vehicles have been disposed of in recent years. Counsel points to the Complainant's legal certification in which the Complainant certifies that a rescue squad vehicle was disposed of at the Roxbury Auto Salvage in 2007 and a front-end back hoe vehicle and a Fire Chief's truck were disposed of in 2006, which were probably disposed of through salvage or auction. Counsel contends that, based on the evidence provided in the Complainant's certification, the GRC should order the Custodian to search through all files and certify that she has provided all records responsive to the Complainant.

Finally, Counsel requests that:

1. The GRC order the Custodian to search for and produce all of the requested records.
2. The GRC find that the Complainant is a prevailing party entitled to reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.
3. The GRC investigate whether the Custodian has knowingly and willfully violated OPRA.

March 10, 2009

E-mail from the GRC to the Custodian. The GRC states that the Custodian attached to the SOI two (2) letters dated July 18, 2008 that correspond with two (2) letters that have not been provided to the GRC for review. The GRC requests that the Custodian provide the Complainant's two (2) letters to the Mayor and Council by close of business on March 13, 2009.

March 12, 2009

Facsimile from the Custodian to the GRC. The Custodian provides two (2) letters from the Complainant to the Mayor and Council dated July 10, 2008 and July 14, 2008 per the GRC's request.

September 3, 2009

E-mail from the GRC to the Custodian. The GRC advises that after reviewing the evidence of record, additional information from the Borough is needed. Specifically, the GRC requests that Mr. Wood certify to the following:

1. Whether the 1099 book for 2006 was missing at the time of the Complainant's request?
2. Whether the 1099 forms for 2007 were not yet completed at the time of the Complainant's June 28, 2008 OPRA request?

The GRC requests that the Custodian provide Mr. Wood's legal certification by close of business on September 9, 2009.

September 8, 2009

Letter from Mr. Wood to the GRC. Mr. Wood asserts that the 1099's for 2006 have been located and copies have been made but not distributed to the requestor as of this date. Additionally, Mr. Wood asserts that copies of the 1099's for 2007 have been provided to the Complainant.

September 23, 2009

E-mail from the GRC to the Custodian. The GRC states that it is in receipt of Mr. Wood's letter. The GRC advises that this letter does not meet the requirements of being a valid legal certification. The GRC requests that Mr. Wood provide his responses to the following questions in the form of a legal certification:

1. Whether the 1099 book for 2006 was missing at the time of the Complainant's request?
2. Whether the 1099 forms for 2007 were not yet completed at the time of the Complainant's June 28, 2008 OPRA request?

Additionally, the GRC requests that the Custodian legally certify to the following:

1. Whether you were in possession of or were able to obtain individual "Reports of Contribution" or an electronic list of all employees currently enrolled in the Public Employee Retirement System ("PERs")?

2. Whether you maintained on file at time of the request the drivers' abstracts of all Borough employees? If so, for how many Borough employees and who?
3. Whether you maintained on file at the time of the request a copy of the resume of Philip Feintuch, Esq.?
4. How many vehicles were owned by the Borough at the time of the request?

The GRC requests that the Custodian provide both certifications by close of business on September 25, 2009.

September 24, 2009

E-mail from the Custodian to the GRC. The Custodian asserts that she has forwarded the GRC's e-mail dated September 23, 2009 to Mr. Wood.

The Custodian asserts that, in response to question No. 1 of the GRC's September 23, 2009 e-mail, the Custodian was not in possession of nor was she able to obtain individual reports of contribution or a list of all employees enrolled in PERS.

The Custodian asserts that, in response to question No. 2, the Custodian did not have all driving abstracts on file. The Custodian asserts that she only maintained abstracts for two (2) employees from the Department of Public Works ("DPW"). The Custodian asserts that she later received eight (8) drivers' licenses information from the Fire and Rescue Department with which the Custodian obtained the corresponding drivers' abstracts from the court.¹⁵ The Custodian asserts that no other abstracts exist. The Custodian asserts that the Fire Department has refused to turn over additional drivers' licenses information and all other Borough employees drive their own personal vehicles.

The Custodian asserts that, in response to question No. 3, the Borough did not maintain at the time of the request and still does not maintain a resume for the Custodian's Counsel. Additionally, the Custodian asserts that no invoices from the Custodian's Counsel exist. The Custodian asserts that Counsel simply provides a letter to the Borough indicating the charge for his services and what types of services are covered.

Finally, the Custodian asserts that, in response to question No. 4, the Borough owned eight (8) vehicles at the time of the Complainant's OPRA request.

September 24, 2009

E-mail from the GRC to the Custodian. The GRC states that it is in receipt of the Complainant's e-mail dated September 24, 2009. The GRC advises that this letter does not meet the requirements of being a valid legal certification. The GRC states that, in order for a legal certification to be valid, it must contain the following language:

"I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment." N.J. Court Rules, 1969 R. 1:4-4 (2005).

¹⁵ The Custodian lists the names of the eight (8) persons for whom she obtained abstracts. *Kreszentia Teena Morris v. Borough of Victory Gardens (Morris)*, 2008-137 – Findings and Recommendations of the Executive Director 12

The GRC requests that the Custodian also include with the legal certification a response to the following question:

1. Whether you were easily able to receive a copy of the printable list of all individuals in the Public Employee Retirement System (“PERS”) from Mr. Wood?

The GRC requests that the Custodian and Mr. Wood resubmit their responses in the form of a valid legal certification as soon as possible.

September 28, 2009

Legal certifications of Mr. Wood and the Custodian.

Mr. Wood certifies that the 1099s for 2006 could not be located at the time of the Complainant’s request. Mr. Wood certifies that the 1099s have since been located and copies have been made but not distributed to the Complainant.

Mr. Wood certifies that the 1099s for 2007 were not completed at the time of the Complainant’s request, but have since been provided to the Complainant.

The Custodian certifies that, in response to question No. 1 of the GRC’s September 23, 2009 e-mail, the Custodian was not in possession or able to obtain individual reports of contribution¹⁶ or a list of all employees enrolled in PERS.

The Custodian certifies that, in response to question No. 2, the Custodian did not have all driving abstracts on file. The Custodian certifies that she only maintained abstracts for two (2) employees from the Department of Public Works (“DPW”). The Custodian certifies that she later received eight (8) drivers’ license information from the Fire and Rescue Department with which the Custodian obtained the corresponding drivers’ abstracts from the court.¹⁷ The Custodian certifies that no other abstracts exist because the Fire Department has refused to turn over additional drivers’ licenses information and all other Borough employees drive their own personal vehicles.

The Custodian certifies that, in response to question No. 3, the Borough did not maintain at the time of the request and still does not maintain a resume for the Custodian’s Counsel. Additionally, the Custodian certifies that no invoices from the Custodian’s Counsel exist. The Custodian certifies that Counsel simply provides a letter to the Borough indicating the charge for his services and what types of services are covered.

The Custodian certifies that, in response to question No. 4, the Borough owned eight (8) vehicles at the time of the Complainant’s OPRA request.

¹⁶ The internet based report of contribution is used to compile a list of employees on the PERS system. A sample of this report, as well as additional information regarding the report of contribution can be viewed at <http://www.nj.gov/treasury/pensions/epbam/finance/roc.htm#sample>.

¹⁷ The Custodian lists the names of the eight (8) persons for whom she obtained abstracts.

Further, the Custodian certifies that, in response to question No. 1 of the GRC's e-mail dated September 24, 2009, she was not in possession of a list for reports of contributions. The Custodian certifies that she only had the handwritten list of who was enrolled in PERS, which the Complainant received. The Custodian certifies that no other records existed at that time.

January 7, 2010

E-mail from the GRC to the Custodian. The GRC states that upon further review of the SOI, Complainant Counsel's submission dated August 19, 2008 and the Custodian subsequent legal certification dated September 28, 2009, there is conflicting evidence regarding how many records responsive to the Complainant's June 20, 2008 OPRA request exist.

The GRC states that the number of titles provided to the Complainant on June 27, 2008 [ten (10)] differ from those attached to the SOI [nine (9)]. The GRC states that the Custodian also attached seven (7) insurance cards to the SOI, two (2) of which do not correspond with any of the titles attached to the SOI. Further, the GRC states that the Custodian certifies on September 28, 2009 that the Borough possessed eight (8) vehicles at the time of the Complainant's request; however, the Custodian provided ten (10) titles to the Complainant on June 27, 2008. Moreover, the GRC states that the Complainant provided an opposing legal certification certifying that the Borough disposed of three (3) vehicles between 2006 and the present.

The GRC requests that the Custodian provide a detailed document index of all titles, salvage receipts and auction receipts responsive that existed at the time of the Complainant's June 20, 2008 OPRA request. The GRC requests that the document index include the type of documents, identification numbers and date such records were provided. Additionally, the GRC requests that the Custodian legally certify to the accuracy of the requested document index.

The GRC requests that the Custodian submit the requested document index and legal certification by no later than January 13, 2010.

January 8, 2010

E-mail from the Custodian to the GRC. The Custodian states that she is in receipt of the GRC's request for a document index and legal certification. The Custodian admits that inconsistent evidence regarding the Complainant's June 20, 2008 OPRA request exists, but asserts that she was not the only person handling the request. The Custodian states that she will provide the requested document index and certification upon getting information from the Borough's insurance carrier.

January 12, 2010

Custodian's legal certification attaching eight (8) titles and one (1) salvage receipt.

The Custodian certifies that eight (8) titles were originally provided to the Complainant and that three (3) additional titles provided were for old vehicles that the

Borough no longer owned. Further, the Custodian certifies that one (1) salvage receipt was recently located.¹⁸

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 further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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.

¹⁸ On January 25, 2010, the GRC requested a second (2nd) copy of the salvage receipt because the attached receipt was difficult to read. The Custodian provided such on January 26, 2010. Additionally, the Custodian provided meeting minutes dated July 27, 2004 and February 14, 2006, in which the Council voted to dispose of four (4) vehicles at no cost to the Borough or recipient and send two (2) vehicles to a junkyard.

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.

The evidence of record indicates the following:

June 17, 2008 OPRA request Item No. 1:

The Custodian certified that she responded to the Complainant on June 20, 2008, the third (3rd) business day after receipt thereof stating that the records responsive were available for disclosure pending payment of copying costs. The Custodian stated that the Complainant refused to pay the copying costs and informed the Custodian that she would decide if she wanted the records at a later date.

Conversely, the Complainant asserts that she was provided with four (4) records responsive, but was not provided with all records responsive.

June 17, 2008 OPRA request Item No. 2:

The Custodian certified that she provided a handwritten list of employees enrolled in the PERS system to the Complainant on June 24, 2008. The Custodian contended that the Complainant requested a printout from PERS, which does not exist; therefore, the Custodian had to create a record to provide to the Complainant. The Custodian contended that the Complainant refused to take a copy of the handwritten list.

The Custodian subsequently certified that she was not in possession of an electronic list or report of contribution at the time of the Complainant's request. Additionally, the Custodian certified that the handwritten list created by the Custodian and provided to the Complainant was the only record responsive.

Conversely, the Complainant asserts that the Custodian provided her with a handwritten list of individuals enrolled in PERS. The Complainant asserts that she contacted Mr. Wood about providing a printable list and was advised by Mr. Wood that he could get a copy.

June 18, 2008 OPRA request Item No. 1:

The Custodian certified that she responded to the Complainant on June 27, 2008, the seventh (7th) business day after receipt thereof stating that the requested records were available for disclosure pending payment of copying costs. The Custodian stated that the Complainant refused to pay copying costs.

Conversely, the Complainant asserts that the Custodian failed to provide her with any invoices responsive to the request.

June 18, 2008 OPRA request Item No. 2:

The Custodian certified that she responded to the Complainant on June 24, 2008, providing access to copies of all abstracts in the Custodian's possession and redacting

drivers' license numbers and street addresses. The Custodian further certified that she provided access to abstracts from the DPW and the Fire Department. The Custodian certified that the Complainant inspected the records but again refused to pay copying costs for the requested abstracts.

The Custodian subsequently certified that she was in possession of the abstracts of two (2) employees from DPW at the time of the Complainant's request. The Custodian certified that she also undertook the task of obtaining drivers' license information in order to have the court run abstracts to satisfy the Complainant's request. The Custodian certified that she met resistance from the Fire Department in obtaining the remaining drivers' license information and that the Borough's remaining employees drive their own vehicles.

Conversely, the Complainant asserts that she received twenty (20) pages of records with redactions of names and street addresses. The Complainant asserts that the Custodian advised that the redactions were made at the direction of the Custodian's Counsel. Further, the Complainant's Counsel argued on August 19, 2008 that redactions made to the abstracts were unlawful under OPRA.

June 18, 2008 OPRA request Item No. 3:

The Custodian certified that this request was forwarded to Mr. Wood for his response. Mr. Wood subsequently certified that the 1099s for 2006 could not be located at the time of the Complainant's request, but have since been located and copies have been made. Mr. Wood further certifies that the 1099s for 2007 were not completed at the time of the Complainant's request, but were provided to the Complainant upon their completion.

The Complainant asserts that she was informed by Mr. Wood that the 2006 1099s were missing and that the 1099s for 2007 were not completed at the time of the Complainant's request.

June 18, 2008 OPRA request Item No. 4:

The Custodian contended that this request is for the same information previously made available for the Complainant's June 17, 2008 OPRA request Item No. 1. The Custodian certified that she informed the Complainant on June 20, 2008 that the records would be provided upon payment of copying costs. The Custodian stated that the Complainant again refused to pay the required copying fees.

The Custodian subsequently certified that Counsel never provided the Borough with a resume; therefore, no record responsive existed at the time of the Complainant's request. The Custodian certified that Counsel is only required to provide a letter to the Borough containing fees for the year and what services are covered.

Conversely, the Complainant asserts that she received one (1) letter and no other records.

June 20, 2008 OPRA request:

The Custodian certified that she provided access to the Complainant on June 27, 2008 to nine (9) vehicle titles at a copying cost of \$5.00. The Custodian certified that no salvage receipts or auction receipts exist and all vehicle titles responsive to the Complainant's OPRA request were provided.

However, the Custodian later certified that eight (8) titles were originally provided to the Complainant and that three (3) additional titles provided were for old vehicles that the Borough no longer owned. Further, the Custodian certifies that one (1) salvage receipt was recently located.¹⁹

Conversely, the Complainant asserts she received nine (9) unsigned titles and one (1) signed titles. Additionally, the Complainant's Counsel argued that although the Complainant was provided with ten (10) total titles, the Custodian only enclosed nine (9) titles to the GRC with the SOI. Counsel further notes that although the Complainant did not request insurance cards, the Custodian included several insurance cards with the SOI, two (2) of which did not correspond to the titles provided. Counsel asserts that the Borough owns several fire trucks, one (1) rescue squad vehicle and a Fire Chief's truck. Counsel asserts that although the Custodian stated that no salvage or auction receipts exist, the Complainant certifies that several vehicles including a front-end back hoe vehicle and a rescue squad vehicle were disposed of in 2006 and 2007 respectively.

The GRC first addresses whether certain of the Complainant's requests are valid under OPRA.

Item No. 1 of the June 17, 2008 OPRA request and Item No. 4 of the June 18, 2008 OPRA request (except request for the resume):

Item No. 1 of the Complainant's June 17, 2008 OPRA request sought "[c]opies of all contractor's contracts, professional service contracts, and attorney professional contracts[.]" Item No. 4 of the Complainant's June 18, 2008 OPRA request sought "[a]ll documentation of Philip Feintuch, Esq., to the Borough regarding professional services rendered to the Borough, including a current resume."

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). The Court further held that "[u]nder OPRA, agencies are required to disclose only

¹⁹ On January 25, 2010, the GRC requested a second (2nd) copy of the salvage receipt because the attached receipt was difficult to read. The Custodian provided such on January 26, 2010. Additionally, the Custodian provided meeting minutes dated July 27, 2004 and February 14, 2006, in which the Council voted to dispose of four (4) vehicles at no cost to the Borough or recipient and send two (2) vehicles to a junkyard.

'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),²⁰ 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."²¹

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) 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)."

In the instant case, the Complainant failed to provide any dates of or parties to the contracts requested in Item No. 1 of the Complainant's June 17, 2008 OPRA request which could guide the Custodian in her search for records responsive. Item No. 1 of the Complainant's June 17, 2008 OPRA request is therefore overly broad and is invalid under OPRA pursuant to MAG, *supra*, Bent, *supra*, and NJ Builders, *supra*.

Additionally, Item No. 4 of the Complainant's June 18, 2008 OPRA request for "[a]ll documentation of Philip Feintuch, Esq., to the Borough regarding professional services rendered to the Borough..." fails to identify a specific government record over a specific time frame in which the Custodian could focus her search and is also invalid under OPRA pursuant to MAG, *supra*, Bent, *supra*, and NJ Builders, *supra*.

Therefore, because Item No. 1 of the June 17, 2008 request and Item No. 4 of the June 18, 2008 OPRA request (except the request for the resume) fails to specify

²⁰ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

²¹ As stated in Bent, *supra*.

identifiable government records or dates within which the Custodian could focus her search and would require the Custodian to conduct research to identify and locate government records which may be responsive to the requests, these two (2) requests are overly broad and are therefore invalid under OPRA. MAG, supra, Bent, supra, and NJ Builders, supra. The Custodian has not therefore unlawfully denied access to the requested records. Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Additionally, although the Complainant's request Item No. 4 of the June 18, 2008 OPRA is invalid under OPRA, the portion of the request for a current resume for the Custodian's Counsel identifies a specific record. The evidence of record shows that the Custodian provided a copy of a letter on June 24, 2008 submitted to the Borough by Counsel in response to this request item. The Custodian subsequently certified on September 24, 2009 that no resume responsive exists because the Borough did not require the Custodian's Counsel to provide such; however, the Custodian failed to initially state to the Complainant that no resume responsive that portion of the Complainant's request existed.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Further, in Bernstein v. Township of Knowlton (Warren), GRC Complaint No. 2007-278 (June 2008), the Custodian initially responded to the Complainant's request for executive session meeting minutes stating that such would be provided once released by the Custodian's Counsel. The Custodian subsequently certified on May 8, 2008 that executive session meeting minutes responsive were not approved at the time of the Complainant's request. The GRC held that "[t]he Custodian's response to Item No. 2 of the Complainant's September 21, 2007 OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.i. and Paff v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006) because she failed to specifically state that the minutes were not yet approved and were thus exempt from disclosure as ACD material."

Therefore, because the Custodian has certified that no resume responsive to request Item No. 4 of the Complainant's June 18, 2008 request exists, and because the Complainant has provided no credible evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested records. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Moreover, the Custodian's initial response was insufficient pursuant to N.J.S.A. 47:1A-5.i. because the Custodian failed to state that no resume responsive existed in her initial written response.

The GRC next addresses whether the Custodian unlawfully denied access to records requested.

Item No. 2 of June 17, 2008 OPRA request and Item No. 2 of June 18, 2008 OPRA request:

Item No. 2 of the Complainant's June 17, 2008 OPRA request sought a "[c]opy of a list of all individuals in the Public Employee Retirement System ("PERS")," with the Complainant's preference against a handwritten list. The evidence of record indicates that the Custodian provided a handwritten list in response to this request item. The Complainant asserts that she called Mr. Wood and requested a printout of the employees enrolled in PERS from the State. The Complainant contends that Mr. Wood advised that he could obtain a copy of the quarterly printout. Complainant's Counsel argues that the Custodian provided a handwritten list of ten (10) employees' last names instead of providing a computerized list. Complainant's Counsel asserts that the Custodian has violated OPRA by creating a record in response to the Complainant's request instead of providing the computerized record responsive and requests that the GRC order disclosure of the requested pension records immediately.

The Custodian subsequently certified that she was not in possession of a quarterly computerized printout from the PERS system at the time of the request; therefore, the Custodian had to create a record to provide to the Complainant. The Custodian contends that the Complainant refused to take a copy of the handwritten list.

Additionally, Item No. 2 of the Complainant's June 18, 2008 request sought "all drivers' abstracts of all Borough employees from January 2005 to date." The Custodian certified in the SOI that she provided access to all drivers' abstracts in her possession on June 24, 2008 with redactions of drivers' license numbers and home addresses (street and house number only). The Custodian certified that she also contacted the DPW and Fire Departments to obtain additional drivers' license information. The Custodian certified that the Complainant inspected the records, but again refused to pay copying costs.

The Custodian subsequently certified that she only possessed two (2) drivers' abstracts at the time of the Complainant's request and undertook the task of obtaining additional drivers' licenses information from the Fire Department in order to have the court run additional drivers' abstracts.

OPRA does not compel government agencies to analyze, collate or compile data. MAG, *supra*, at 549-50; N.J. Builders, *supra*, at 177. Custodians are therefore not required to create responsive records which do not otherwise exist. Because the Custodian was not obligated under OPRA to create records that do not otherwise exist, the Custodian went above and beyond her responsibilities under OPRA to create a handwritten record that was responsive to Item No. 2 of the Complainant's June 17, 2008 OPRA request and obtain additional drivers' abstracts responsive to request Item No. 2 of the Complainant's June 18, 2008 OPRA request, the Custodian has not unlawfully denied access to the requested records under OPRA. MAG, *supra*, and N.J. Builders, *supra*.

June 20, 2008 OPRA request:

The Complainant’s June 20, 2008 OPRA request sought “[t]itles to all Borough-owned vehicles, copies of all salvage receipts for vehicles owned by the Borough and copies of auction receipts for all vehicles sold.” In reviewing the evidence of record regarding the Custodian’s response, SOI and subsequent certifications, the GRC has found several inconsistencies in regards to how many records responsive to the instant request actually exist and were provided to the Complainant on June 27, 2008. Specifically, the inconsistencies regarding the records responsive to the Complainant’s June 20, 2008 OPRA request are as follows:

Date and Submission	Number of Records	Explanation
June 27, 2008 – Custodian’s Response to the Complainant’s Request.	Ten (10) pages of records.	The Custodian charged \$5.00 for the records and stated that no salvage, auction or sales receipts exist. ²²
July 24, 2008 – Custodian’s SOI.	Nine (9) titles and seven (7) insurance cards.	The Custodian certified that she provided nine (9) records to the Complainant on June 27, 2008. The Custodian also attached copies of seven (7) insurance cards, of which two (2) did not correspond to any titles.
August 19, 2008 – Complainant Counsel’s letter to the GRC.	Ten (10) titles.	Counsel contends that the Complainant was provided with ten (10) titles on June 27, 2008; however, the Custodian certified that she provided nine (9) titles to the Complainant and included several insurance cards with the SOI, of which two (2) did not correspond to any titles. [The Complainant certifies that three (3) vehicles were disposed of between 2006 and the present.]
September 28, 2009 – Custodian’s Legal Certification.	Eight (8) titles.	The Custodian certified that the Borough owned eight (8) vehicles at the time of the Complainant’s request.
January 12, 2010 – Custodian’s Second (2 nd) Legal Certification.	Eight (8) titles and one (1) salvage receipt.	The Custodian certified that the Borough owned eight (8) vehicles at the time of the Complainant’s request, but that she provided the Complainant with three (3) additional titles for vehicles no longer owned by the

²² The Complainant stated in the Denial of Access Complaint that the Custodian provided her with ten (10) titles on June 27, 2008.

		Borough. Additionally, the Custodian certified that she located one (1) salvage receipt.
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The evidence of record in the instant complaint reflects several inconsistencies possibly based on disorganization of records within the Borough. Nonetheless, the Custodian did provide titles in a timely manner and later certified that the Borough owned only eight (8) vehicles at the time of the Complainant’s request. The Custodian subsequently located one (1) salvage receipt responsive to the Complainant’s request and included such as part of her legal certification dated January 12, 2010.

In Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), a custodian is obligated to search his or her files to find identifiable government records listed in a requestor’s OPRA request. The Complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The Custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

“[p]ursuant to [MAG], the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant’s OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as ‘to go or look through carefully in order to find something missing or lost.’²³ The word *research*, on the other hand, means ‘a close and careful study to find new facts or information.’²⁴”

In the matter currently before the Council, the Complainant’s June 20, 2008 OPRA request sought “[t]itles to all Borough-owned vehicles, copies of all salvage receipts for vehicles owned by the Borough and copies of auction receipts for all vehicles sold,” over an open-ended period of time. The Complainant’s request in the instant complaint identifies certain types of records but fails to identify a specific time frame and would require the Custodian to research her records to locate any and all titles, salvage receipts, and auction receipts for every vehicle the Borough has ever owned: the Complainant’s June 20, 2008 OPRA request is overbroad. MAG, *supra*, Bent, *supra*, and NJ Builders, *supra*, and Schuler, *supra*. The failure of the Complainant to include a specific time period factored into the confusion over how many records responsive exist.

Therefore, because the Complainant’s June 20, 2008 OPRA request fails to identify a specific time period within which the Custodian could focus her search and would require the Custodian to conduct research to identify and locate government records which may be responsive to the request, this request is overly broad and is

²³ “Search.” Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006.

²⁴ “Research.” Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd. Kreszentia Teena Morris v. Borough of Victory Gardens (Morris), 2008-137 – Findings and Recommendations of the Executive Director 23

therefore invalid under OPRA. MAG, *supra*, Bent, *supra*, and NJ Builders, *supra*, and Schuler, *supra*. The Custodian has not therefore unlawfully denied access to the requested records. *See also Donato*, *supra*.

Item No. 3 of the June 18, 2008 OPRA request:

Item No. 3 of the Complainant's June 18, 2008 OPRA request sought "[a]ll 1099 forms from 2006 and 2007." The Custodian stated that this request was forwarded to the Finance Officer Charlie Wood ("Mr. Wood") and that the Complainant should contact Mr. Wood if she is inquiring about a specific employee. The Complainant asserts that the Custodian advised in writing on June 24, 2008 that Mr. Wood would provide the 1099 forms responsive to this request. The Complainant asserts that she telephoned Mr. Wood on June 29, 2008 and was advised that the book containing 1099 forms for the year 2006 was missing and the 1099 forms for the year 2007 were not yet completed. The Custodian certifies that this request was forwarded to Mr. Wood for his response.

Mr. Wood subsequently certified to such facts, but also certified that the 2006 1099 forms had since been located and copies have been made but not provided to the Complainant and that the Complainant was provided with copies of the 1099 forms for 2007 upon their completion.

At the point that the Custodian referred the instant request item to Mr. Wood for a response, Mr. Wood henceforth retained the duty of responding in writing granting access, denying access, requesting an extension to respond or seeking clarification on behalf of the Custodian. Mr. Wood did provide a response to the Complainant, but failed to do so in writing, as prescribed pursuant to N.J.S.A. 47:1A-5.i.

In Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009), the Custodian responded on the sixth (6th) day after receipt of the Complainant's request stating that the New Jersey State Prison ("NJSP") OPRA liaison would notify the Complainant if any records responsive to the request exist. The GRC held that this response was in violation of OPRA:

"because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the NJSP OPRA liaison would respond to the Complainant's February 25, 2008, OPRA request, the Custodian's written response to the Complainant's request is inadequate under OPRA pursuant to Hardwick, *supra*, and the Complainant's February 25, 2008 OPRA request is "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, *supra*."

The Custodian's response to this request item is similar to the Custodian's in Ghana. Specifically, the Custodian responded on the fourth (4th) day following receipt of the Complainant's request for 1099s stating that the Complainant's request was forwarded to Mr. Wood for a response; however, the Complainant failed to provide a date certain upon which Mr. Wood would response.

Therefore, because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when Mr. Wood would respond to Item No. 3 of the Complainant's June 18, 2008 OPRA request, the Custodian's written response is inadequate under OPRA pursuant to Ghana, *supra*, and the Complainant's request item is "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, *supra*. Additionally, although Mr. Wood did respond to the Complainant on June 29, 2008, his verbal response was insufficient and therefore in violation to N.J.S.A. 47:1A-5.g., because he failed to respond in writing, as required under OPRA, on behalf of the Custodian.

Further, in Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008), the Complainant requested a proposal for a local athletic field. The Custodian responded on the same day as receipt of the request stating that no record responsive exists. The Custodian subsequently certified in the SOI that, although no record responsive existed at the time of the Complainant's OPRA request, the Custodian provided a copy of the proposal after it was obtained by the Board of Education. The Council held that:

"... because the Custodian in this complaint responded in writing on the same day of receipt of the Complainant's November 30, 2007 OPRA request stating that no records responsive exist, the Custodian has borne his burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, *supra*. Further, the Custodian was under no obligation to provide the requested record to the Complainant following the Custodian's response that no record existed pursuant to Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (February 2007)."

In the instant complaint, the Custodian advised the Complainant in writing that the request was forwarded to Mr. Wood for a response. Moreover, the Complainant asserted that Mr. Wood advised in a telephone conversation that the 2006 1099s were missing and the 2007 1099s were not completed. Mr. Wood later certified to such, adding that the 2006 1099s had been copied for the Complainant but not yet provided and that the 2007 1099s were provided to the Complainant upon completion.

Therefore, because Mr. Wood certified that the 1099s responsive to request Item No. 3 of the Complainant's June 18, 2008 OPRA request were missing or not yet completed, Mr. Wood has not unlawfully denied access (except for failing to provide a response to the Complainant in writing pursuant to N.J.S.A. 47:1A-5.i.) to the requested 1099s and is under no continuing obligation to provide the requested records after responding that no records were available at the time of the Complainant's request pursuant to Driscoll, *supra*.²⁵

²⁵ The instant complaint is distinguishable from Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008) because in that complaint, the Custodian initially responded that no records responsive exist based on an inadequate search but later located the records responsive after performing a more adequate search.

The GRC next addresses whether the Custodian was obligated to release requested records prior to the payment of copying costs.

Item No. 1 of June 18, 2008 OPRA request:

Item No. 1 of the Complainant's June 18, 2008 OPRA request sought "[a]ll invoices from Spectrum Communications from 1999 to present." The Complainant asserts she received no records responsive to this request. The evidence of record, specifically the Custodian's notation appended to the OPRA request form dated June 18, 2008, states that the requested records will be provided on June 27, 2008. The Custodian certified in the SOI that she responded to the Complainant stating that the requested records were ready for pickup, but that the Complainant refused to pay copying costs.²⁶

The Complainant's Counsel asserted that the Custodian did not provide the requested invoices, but rather attempted to provide what appeared to be a customer transaction history.

The invoices requested are specifically classified as "immediate access" records pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007), the GRC held that "immediate access language of OPRA (N.J.S.A. 47:1A-5.e) suggests that the Custodian was still obligated to immediately notify the Complainant..." Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian should respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

In the instant complaint, although the Custodian informed the Complainant in writing on June 27, 2008 that she would provide the records responsive to Item No. 1 of the Complainant's June 18, 2008 OPRA request upon payment of the copy fee, the Custodian identified in the document index that she was providing only invoice numbers, dates and invoice amounts, thus supporting the Complainant's assertion that no invoices responsive were provided. Further, the Custodian failed to provide a reason for not providing the actual invoices requested.

Therefore, because the Custodian failed to immediately respond in writing to Item No. 1 of the Complainant's June 18, 2008 OPRA request granting or denying access to the requested invoices or requesting an extension of time to respond, the Custodian has violated N.J.S.A. 47:1A-5.e pursuant to Herron, *supra*. Moreover, the Custodian unlawfully denied access to the requested records. The Custodian shall disclose the requested invoices and legally certify to the search undertaken.

²⁶ The Custodian's document index indicates that she was providing the Complainant with only invoice numbers, dates and invoice amounts.
Kreszentia Teena Morris v. Borough of Victory Gardens (Morris), 2008-137 – Findings and Recommendations of the Executive Director 26

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?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because Item No. 1 of the June 17, 2008 request and Item No. 4 of the June 18, 2008 OPRA request (except the request for the resume) fails to specify identifiable government records or dates within which the Custodian could focus her search and would require the Custodian to conduct research to identify and locate government records which may be responsive to the requests, these two (2) requests are overly broad and are therefore invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian has not therefore unlawfully denied access to the requested records. Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because the Custodian has certified that no resume responsive to request Item No. 4 of the Complainant’s June 18, 2008 request exists, and because the Complainant has provided no credible evidence to refute the Custodian’s certification in this regard, the Custodian has not unlawfully denied access to the requested records. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Moreover, the Custodian’s initial response was insufficient pursuant to N.J.S.A. 47:1A-5.i. because the Custodian failed to state that no resume responsive existed in her initial written response.
3. Because the Custodian was not obligated under OPRA to create records that do not otherwise exist, the Custodian went above and beyond her responsibilities under OPRA to create a handwritten record that was responsive to Item No. 2 of the Complainant’s June 17, 2008 OPRA request and obtain additional drivers’ abstracts responsive to request Item No. 2 of the Complainant’s June 18, 2008 OPRA request, the Custodian has not unlawfully denied access to the requested records under OPRA. MAG Entertainment,

LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

4. Because the Complainant's June 20, 2008 OPRA request fails to identify a specific time period within which the Custodian could focus her search and would require the Custodian to conduct research to identify and locate government records which may be responsive to the request, this request is overly broad and is therefore invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). The Custodian has not therefore unlawfully denied access to the requested records. *See also* Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
5. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when Mr. Wood would respond to Item No. 3 of the Complainant's June 18, 2008 OPRA request, the Custodian's written response is inadequate under OPRA pursuant to Ghana v. New Jersey Department of Correction, GRC Complaint No. 2008-154 (June 2009), and the Complainant's request item is "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Additionally, although Mr. Wood did respond to the Complainant on June 29, 2008, his verbal response was insufficient and therefore in violation to N.J.S.A. 47:1A-5.g., because he failed to respond in writing, as required under OPRA, on behalf of the Custodian.
6. Because Mr. Wood certified that the 1099s responsive to request Item No. 3 of the Complainant's June 18, 2008 OPRA request were missing or not yet completed, Mr. Wood has not unlawfully denied access (except for failing to provide a response to the Complainant in writing pursuant to N.J.S.A. 47:1A-5.i.) to the requested 1099s and is under no obligation to provide the requested records after responding that no records were available at the time of the Complainant's request pursuant to Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 207-303 (June 2008).
7. Because the Custodian failed to immediately respond in writing to Item No. 1 of the Complainant's June 18, 2008 OPRA request granting or denying access to the requested invoices or requesting an extension of time to respond, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007). Moreover, the Custodian unlawfully denied access to the requested records. The Custodian shall disclose the requested invoices and legally certify to the search undertaken.

8. **The Custodian shall comply with Item No. 7 above within five (5) business days from receipt of the Council's Interim Order and provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4²⁷, to the Executive Director.**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
10. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010

²⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
Kreszentia Teena Morris v. Borough of Victory Gardens (Morris), 2008-137 – Findings and Recommendations of the Executive Director 29