



**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**

**June 29, 2010 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2009-149

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the June 29, 2010 public meeting, the Government Records Council (“Council”) considered the June 22, 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. The Custodian’s response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009) because he failed to specifically state that no records responsive to the request for the period of February 25, 2008 to July 6, 2008 existed at the time of his response.
2. Because the Custodian certified in the Statement of Information that no records responsive to the request exist for this time period, and because the Complainant has not provided any evidence to refute the Custodian’s certification in this regard, the Custodian has not unlawfully denied access to the Custodian’s hours worked for February 25, 2008 to July 6, 2008 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian’s response to the Complainant’s OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009) and he failed to advise the Complainant that no records responsive to the request for the period of February 25, 2008 to July 6, 2008 existed, because the Custodian did not unlawfully deny access to such 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.



4. Pursuant to 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), the Complainant is not a “prevailing party” entitled to an award of reasonable attorney’s fees. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian’s conduct because there are no records to disclose.

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 29<sup>th</sup> 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 13, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-149**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** On-site inspection of the Custodian's hours worked each workday and total hours worked each workweek for each position held within the Borough during the year 2008.

**Request Made:** February 28, 2009

**Response Made:** March 11, 2009

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** May 4, 2009<sup>3</sup>

**Background**

**February 28, 2009**

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.

**March 11, 2009**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request.<sup>4</sup> The Custodian states that the requested records are available for inspection in the Borough's office.<sup>5</sup>

**April 2, 2009**

E-mail from the Complainant to the Custodian attaching the Custodian's response to the OPRA request dated March 11, 2009. The Complainant requests that the Custodian clarify the header of the letter.

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

<sup>2</sup> Represented by William T. Cooper III, Esq. (Somerville, NJ).

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

<sup>4</sup> The Complainant submitted his OPRA request on February 28, 2009, a Saturday. The Custodian received said request on Monday, March 2, 2009.

<sup>5</sup> The heading in the response letter is as follows: "Re: OPRA request – Donald E. Kazar Hours 2007, 2008. Correction Letter: Should be 2009."

## **April 2, 2009**

E-mail from the Custodian to the Complainant. The Custodian states that the heading of the letter should have read 2008 and 2009, not 2007 and 2009. Additionally, the Custodian requests that the Complainant advise when he will inspect the records responsive to the OPRA request. The Custodian further asks whether the Complainant wants copies of the records or still wishes only to inspect same.

## **May 4, 2009**

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

- Complainant’s OPRA request dated February 28, 2009.
- Letter from the Custodian to the Complainant dated March 11, 2009.
- E-mail from the Complainant to the Custodian attaching the Custodian’s response to the OPRA request dated April 2, 2009.
- E-mail from the Custodian to the Complainant dated April 2, 2009.

On behalf of the Complainant, the Complainant’s Counsel states that the Complainant submitted an OPRA request to the Custodian on February 28, 2009. Counsel states that the Custodian responded in writing on March 11, 2009 granting access to the requested records and inviting the Complainant to make an appointment for on site inspection. Counsel states that subsequent to the Custodian’s response, both parties exchanged e-mails confirming that the records being provided were responsive to the Complainant’s request. Counsel states that the Complainant inspected the records on April 23, 2009; however, the records did not include entries for the time period dated February 25, 2008 to July 6, 2008. Counsel contends that the Custodian’s failure to provide a portion of the records requested for inspection results in a “deemed denial” of the Complainant’s request.

Counsel states that the purpose of OPRA is “to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.” Times of Trenton Pub. Corp v. Lafayette Yard Community Development Corp., 183 N.J. 519, 535 (N.J. 2005)(quoting Asbury Park Press v. ocean County Prosecutor’s Office, 374 N.J. Super. 312, 329 (2004)). Counsel further states that OPRA mandates that government records shall be readily accessible and that any limitations on the right of access shall be construed in favor of the public’s right of access and cites to Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006)(citing N.J.S.A. 47:1A-1.1). Moreover, Counsel states that the public agency bears the burden of proving a lawful denial of access and cites to North Jersey Media Group, Inc. v. State, 389 N.J. Super. 527, 533 (2006) and N.J.S.A. 47:1A-6.

Counsel contends that in the instant complaint the Complainant requested the Custodian’s work calendar for all of 2008; however, the Custodian failed to provide a portion of the requested records. Counsel avers that the Custodian has a duty to grant access to all records responsive within the statutorily mandated seven (7) business days, deny access and provide a lawful reason for the denial or request an extension of time to respond to the Complainant’s request. Counsel contends that because the Custodian did

not provide the requested calendar for the time period dated February 25, 2008 to July 6, 2008 and failed to provide a lawful reason for the denial, the Custodian's actions constitute a "deemed denial" pursuant to N.J.S.A. 47:1A-5.i. Counsel requests the following:

1. A determination that the Custodian violated OPRA and denied access to records because he failed to provide them to the Complainant within seven (7) business days.
2. A determination ordering the Custodian to provide access to the calendar entries for the time period dated February 25, 2008 to July 6, 2008.
3. A determination as to whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, thereby warranting a civil penalty pursuant to N.J.S.A. 47:1A-11.a.
4. A determination that the Complainant is a prevailing party entitled to prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

#### **May 11, 2009**

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

#### **May 19, 2009**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 28, 2009.
- Letter from the Custodian to the Complainant dated March 11, 2009.

The Custodian certifies that no records responsive to the request 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").<sup>6</sup>

The Custodian certifies that he received the Complainant's OPRA request on March 5, 2009. The Custodian also certifies that he responded in writing on March 11, 2009 informing the Complainant that the requested records were available for inspection. The Custodian further certifies that at the time of his written response to the Complainant, the Custodian was aware that the date book provided encompassed all the dates within the time period requested by the Complainant that existed and that the Custodian did not believe it was necessary to specifically state that no records exist for the time period dated February 25, 2008 to July 6, 2008.

The Custodian certifies that upon revisiting his March 11, 2009 response stating that the requested records are available for on-site inspection, the Custodian realized that he should have advised the Complainant that no records responsive for the time period dated February 25, 2008 through July 6, 2008 existed. The Custodian also certifies that all records responsive that existed were provided to the Complainant for on site inspection.

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<sup>6</sup> The Custodian does not certify as to the search undertaken to satisfy the Complainant's request.  
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The Custodian argues that because all existing records responsive were provided and no records reflecting hours worked between February 25, 2008 and July 6, 2008 exist, there was no “deemed denial” of those records.

### Analysis

#### **Whether the Custodian unlawfully denied access to the requested records for the time period of February 25, 2008 to July 6, 2008?**

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.

Moreover, OPRA provides that:

“[i]f the *custodian is unable to comply with a request for access*, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy therefore.” (Emphasis added.) N.J.S.A. 47:1A- 5.g.

OPRA provides that:

“...the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record ... *except that ... an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received ... shall be a government record[.]*” (Emphasis added.) N.J.S.A. 47:1A-10.

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

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

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

In the matter before the Council, the Complainant requested “[o]n site inspection of the Custodian’s hours worked each workday and total hours worked each workweek for each position held within the Borough during the year 2008.” The Custodian timely responded in writing on March 11, 2009, providing access to records requested, which comprise of hours recorded on a Microsoft Outlook® calendar. The Complainant has asserted that the records provided to him for inspection did not include records for the time period dated February 25, 2008 to July 6, 2008. The Custodian certified in the SOI that no records responsive for this period of time exist; the Custodian further certified that he did not advise the Complainant of the non-existence of such records in the Custodian’s response to the Complainant on March 11, 2009.

OPRA provides that if a custodian cannot comply with a request for records, he “shall indicate the specific basis therefore...” N.J.S.A. 47:1A-5.g.

In Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009), the Custodian’s Counsel responded to the Complainant’s OPRA request within the statutorily mandated seven (7) business days denying access to the requested record pursuant to N.J.S.A. 47:1A-9, the Open Public Meetings Act and attorney-client privilege exemption. However, the Counsel later certified in the SOI that the Borough did not receive the requested record until October 16, 2007, after receipt of the Complainant’s OPRA request and subsequent Denial of Access complaint. The Council undertook the task of deciding whether Counsel’s initial response was appropriate under OPRA:

“[i]n O’Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), the GRC determined that N.J.S.A. 47:1A-5.g. states that if a Custodian is “unable to comply with a request for access, then the Custodian shall indicate the specific basis” for the inability to comply. In that complaint, the Council applied N.J.S.A. 47:1A-5.g. to the Custodian’s failure to address the Complainant’s choice of mode of delivery and held that “the Custodian’s response is insufficient because she failed to specifically address the Complainant’s preference for receipt of records.”

The GRC also applied N.J.S.A. 47:1A-5.g. to a Custodian’s failure to provide an adequate response when denying access to a request for government records or failure to respond to each request individually. *See* Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008)(holding that the Custodian’s response was insufficient because she failed to specifically state that the requested executive session minutes were not yet approved by the governing body at

the time of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g.) and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008)(holding that the Custodian's response was legally insufficient because he failed to respond to each request item individually)." *Id.* on page 6.

The Council held that based on the foregoing, "Counsel's response was insufficient because he failed to specifically state that the requested record did not exist at the time of the Complainant's September 11, 2007 OPRA request pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008)."

In the instant complaint, the Custodian provided access to printouts of calendar entries from Microsoft Outlook®. However, the Custodian failed to advise the Complainant at the time of the Complainant's inspection that no records responsive to the request for the period of February 25, 2008 to July 6, 2008 existed. Although the facts of this complaint differ slightly from those in Shanker, (specifically, Counsel in that complaint denied access to a record that did not exist while the Custodian in the instant complaint simply failed to state that no records responsive existed) the response is comparative in that neither clearly articulated that records responsive to the request did not exist at the time of the written response.

Therefore, the Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Shanker, *supra*, because he failed to specifically state that no records responsive to the request for the period of February 25, 2008 to July 6, 2008 existed at the time of his response.

OPRA provides that payroll records are government records subject to disclosure. N.J.S.A. 47:1A-10. In Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004), the Council undertook to define the term "payroll record" as follows:

"Neither OPRA nor Executive Order #11<sup>2</sup> defines the term 'payroll record.' Thus, we look to the ordinary meaning of that term, and are informed by other regulatory provisions defining that phrase. 'Payroll' is defined as a list of employees to be paid and the amount due to each of them. Black's Law Dictionary (7th Ed., 1999). It is also clear that documents included within the payroll record exception are, in part, records required by law to be maintained or reported in connection with payment of salary to employees and is adjunct to salary information required to be disclosed. In this regard, N.J.A.C. 12: 16-2.1, a Department of Labor regulation entitled 'Payroll records,' requires the following:

Every employing unit having workers in employment, regardless of whether such unit is or is not an "employer" as defined in the Unemployment Compensation Law, shall keep payroll records that shall show, for each pay period:

1. The beginning and ending dates;



2. The full name of each employee and the day or days in each calendar week on which services for remuneration are performed;
3. The total amount of remuneration paid to each employee showing separately cash, including commissions and bonuses; the cash value of all compensation in any medium other than cash; gratuities received regularly in the course of employment if reported by the employee, or if not so reported, the minimum wage rate prescribed under applicable laws of this State or of the United States or the amount of remuneration actually received by the employee from his employing unit, whichever is the higher; and service charges collected by the employer and distributed to workers in lieu of gratuities and tips;
4. The total amount of all remuneration paid to all employees;
5. The number of weeks worked.

The State of New Jersey, as well as its constituent agencies, is an employing unit. (See N.J.S.A. 43:21-19, a statute entitled ‘Definitions’ in Article 1 of the Unemployment Compensation Law, which defines ‘employing unit’ to mean the State or any of its instrumentalities or any political subdivisions.) Therefore, the State is required to keep payroll records in accordance with N.J.A.C. 12:16-2. By the same token, Kean University, as an instrumentality of the State, is an employing unit. See N.J.S.A. 18A:62-1 and 18A:64-21-1 (Governor continues as public employer for purposes of negotiation by state colleges.)

Additionally, because certain types of sick leave payments are treated as wages within the meaning of the Unemployment Compensation and Temporary Disability Benefits laws for both tax and benefit entitlement purposes, the payroll record should include the type of leave so that it may be treated appropriately for tax and benefit purposes. See N.J.A.C. 12:16-4.2.

Based upon the above, an employee's payroll records should include information that will allow a person to determine whether an employee took a leave of absence, the dates of the leave, whether it was paid, and if so, the amount of salary received for the paid leave of absence. For example, if a payroll record is for a two week period, and the employee is paid \$52,000.00 a year<sup>3</sup>, and has taken a paid leave of absence of one week for that pay period, the payroll record should show that the employee actually worked one week, took one week of leave and received \$2,000.00. The fact that the employee received her full salary during the pay period, even though she took a week of leave, shows that it was a paid leave of absence. Therefore, the relevant law supports a conclusion that the requested information should be disclosed.<sup>4</sup>

Thus, the Complainant’s request for “the Custodian’s hours worked each workday and total hours worked each workweek for each position held within the Borough during the year 2008” is a request for payroll records subject to disclosure under N.J.S.A. 47:1A-10. Although the Complainant contends that the Custodian failed to provide records

responsive to the request for the period of February 25, 2008 to July 6, 2008, the Custodian certified in the SOI that no records responsive to the request exist for this time period. The Complainant has not provided any evidence to refute the Custodian's certification in this regard. The Custodian has not, therefore, unlawfully denied access to the Custodian's hours worked for February 25, 2008 to July 6, 2008.

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.

Therefore, because the Custodian certified in the SOI that no records responsive to the request exist for this time period, and because the Complainant has not provided any evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the Custodian's hours worked for February 25, 2008 to July 6, 2008 pursuant to Pusterhofer, supra.

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

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414

(1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996)).

Although the Custodian's response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Shanker, *supra*, and he failed to advise the Complainant that no records responsive to the request for the period of February 25, 2008 to July 6, 2008 existed, because the Custodian did not unlawfully deny access to such pursuant to Pusterhofer, *supra*, 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 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); see also Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

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

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

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel

noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon . . . ." *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.<sup>7</sup> 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 instant complaint, the Custodian responded to the Complainant's February 28, 2009 request granting access to inspect records responsive to the request. The Complainant filed a Denial of Access Complaint on May 4, 2009. In the Denial of Access Complaint, the Complainant's Counsel asserted that although the Custodian provided access to records responsive to the Complainant's request, the Custodian failed to provide access to calendar entries for the time period dated February 25, 2008 to July

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<sup>7</sup> 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.

6, 2008. Counsel requested that the GRC order the Custodian to provide access to those calendar entries.

However, the Custodian did not unlawfully deny access to the requested records for February 25, 2008 to July 6, 2008 because such records did not exist. Although the Custodian's response to the Complainant's OPRA request was insufficient because it failed to affirmatively state that records for such time period do not exist, the filing of the instant Denial of Access Complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct because there are no records to disclose.

Therefore, pursuant to Teeters, supra and Mason, supra, the Complainant is not a "prevailing party" entitled to an award of reasonable attorney's fees. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct because there are no records to disclose.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009) because he failed to specifically state that no records responsive to the request for the period of February 25, 2008 to July 6, 2008 existed at the time of his response.
2. Because the Custodian certified in the Statement of Information that no records responsive to the request exist for this time period, and because the Complainant has not provided any evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the Custodian's hours worked for February 25, 2008 to July 6, 2008 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian's response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009) and he failed to advise the Complainant that no records responsive to the request for the period of February 25, 2008 to July 6, 2008 existed, because the Custodian did not unlawfully deny access to such 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.
4. Pursuant to 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), the Complainant is not a "prevailing party" entitled to an award of reasonable attorney's fees. The filing of this complaint did not bring about a

change (voluntary or otherwise) in the Custodian's conduct because there are no records to disclose.

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Executive Director

June 22, 2010