



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

October 26, 2010 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2009-155

v.

Borough of Lawnside (Camden)
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 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 this complaint should be dismissed because the Complainant withdrew his complaint via e-mail to the GRC dated October 6, 2010 (via his 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 26th Day of October, 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: October 28, 2010



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2009-155

v.

**Borough of Lawnside (Camden)²
Custodian of Records**

Records Relevant to Complaint: The Complainant requests the records enumerated below by the following delivery methods in order of preference: e-mail; fax; regular mail.

1. Each Internal Affairs Summary Report Form filed by the Lawnside Police Department for the years 2003 through 2007.
2. The “rules and regulations,” “standard operating procedures” and any “directives or orders” that are presently in force within the Lawnside Police Department, as those terms are defined under the “Policy Management System” heading on page 11-8 of the Attorney General’s Manual.³
3. The “written policy” that “establish[es] an internal affairs unit or function” within the Lawnside Police Department, as stated at the top of page 11-14 of the Attorney General’s Manual.
4. Any and all letters of assignment or other records that assign specific personnel to the “internal affairs unit or function” within the Lawnside Police Department. This request is limited to those records that assigned the personnel who presently serve in that unit or function.
5. Any rule which “requires an officer or employee to notify the agency if he or she has been charged with an offense, received a motor vehicle summons, or have been involved in a domestic violence incident” as recommended at the bottom of page 11-24 of the Attorney General’s Manual.

Request Made: March 2, 2009

Response Made: March 6, 2009 and May 21, 2009

Custodian: Sylvia A. Van Nockay

GRC Complaint Filed: May 8, 2009⁴

¹ Represented by Richard Gutman, Esq. (Montclair, NJ).

² Represented by Morris G. Smith, Esq. (Collingswood, NJ). However, Counsel at the time of the Complainant’s OPRA request and Denial of Access Complaint was Matthew B. Wieliczko, Esq., of Zeller & Wieliczko, LLP (Cherry Hill, NJ).

³ The Complainant included a copy of said manual with his OPRA request.

⁴ The GRC received the Denial of Access Complaint on said date.

Background

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. Because the Custodian's Counsel provided the Complainant with a written response within the statutorily mandated seven (7) business days to seek an extension of time to fulfill said request, and because Counsel provided a date certain on which he would further respond to said request (ten business days beyond the statutory deadline), the Custodian's Counsel properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. The Custodian's failure to grant access, deny access, seek clarification, or request an additional extension of time within the extended deadline date results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
3. Because the Complainant's OPRA request items no. 2-5 are not requests for specific identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, said request items 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), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), Taylor v. Elizabeth Board of Education (Union), GRC Complaint No. 2007-214 (April 2008), and Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009). Nevertheless, the Custodian indicated that no records responsive to said request items exist. Because the Custodian indicated that there are no records responsive to request items no. 2-5, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the extended timeframe, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a subsequent written response within the extended deadline date, there is no evidence in the record that suggests the Custodian's delay in providing access to the requested records

was intentional and deliberate. Additionally, the Custodian's Counsel ultimately provided the Complainant access to all records responsive that exist. Therefore, despite the Custodian's violation of OPRA, 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.

5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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. 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. Specifically, the Custodian and Counsel failed to provide the Complainant with a further response to his OPRA request until after the filing of this complaint, despite the Complainant's repeated attempts to obtain such a response prior to the filing of this complaint. Further, the relief ultimately achieved had a basis in law. The Custodian was obligated to either grant access, deny access, seek clarification, or request an additional extension of time by March 25, 2009, the extended deadline date, pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. 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.

April 30, 2010

Council's Interim Order distributed to the parties.

June 23, 2010

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

July 11, 2010

E-mail from Complainant's Counsel to GRC. Counsel requests that the GRC adjourn this matter for sixty (60) days because the parties are discussing settlement.

July 13, 2010

Letter from GRC to OAL. The GRC requests that OAL remove this complaint from its docket since the parties have requested an adjournment for sixty (60) days on the basis that said parties are discussing settlement.

September 20, 2010

E-mail from GRC to the parties' legal counsel. The GRC states that it requested OAL to adjourn this matter for sixty (60) days because the parties were discussing settlement. The GRC states that said adjournment expired on September 13, 2010. The GRC requests that the parties provide the GRC with the status on any settlement discussions by the close of business on September 27, 2010.

September 28, 2010

Letter from Custodian's Counsel to GRC. Counsel states that the Borough has forwarded a check in the amount of \$9,705.50 to Counsel for the Complainant regarding the settlement in this complaint.

October 6, 2010

E-mail from Complainant's Counsel to GRC. The Complainant's Counsel states that he is in receipt of the Borough's settlement check and as such, the Complainant withdraws this complaint.

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 his complaint via e-mail to the GRC dated October 6, 2010 (via his legal counsel) since the parties have reached a settlement in this matter. Therefore, no further adjudication is required.

Prepared By: Dara Lownie
Communications Manager/Information Specialist

Approved By: Catherine Starghill, Esq.
Executive Director

October 19, 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

April 28, 2010 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2009-155

v.

Borough of Lawnside (Camden)
Custodian of Record

At the April 28, 2010 public meeting, the Government Records Council (“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, finds that:

1. Because the Custodian’s Counsel provided the Complainant with a written response within the statutorily mandated seven (7) business days to seek an extension of time to fulfill said request, and because Counsel provided a date certain on which he would further respond to said request (ten business days beyond the statutory deadline), the Custodian’s Counsel properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. The Custodian’s failure to grant access, deny access, seek clarification, or request an additional extension of time within the extended deadline date results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
3. Because the Complainant’s OPRA request items no. 2-5 are not requests for specific identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, said request items 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), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC



Complaint No. 2007-151 (February 2009), Taylor v. Elizabeth Board of Education (Union), GRC Complaint No. 2007-214 (April 2008), and Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009). Nevertheless, the Custodian indicated that no records responsive to said request items exist. Because the Custodian indicated that there are no records responsive to request items no. 2-5, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the extended timeframe, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

4. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a subsequent written response within the extended deadline date, there is no evidence in the record that suggests the Custodian's delay in providing access to the requested records was intentional and deliberate. Additionally, the Custodian's Counsel ultimately provided the Complainant access to all records responsive that exist. Therefore, despite the Custodian's violation of OPRA, 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.
5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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. 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. Specifically, the Custodian and Counsel failed to provide the Complainant with a further response to his OPRA request until after the filing of this complaint, despite the Complainant's repeated attempts to obtain such a response prior to the filing of this complaint. Further, the relief ultimately achieved had a basis in law. The Custodian was obligated to either grant access, deny access, seek clarification, or request an additional extension of time by March 25, 2009, the extended deadline date, pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. 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.

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

Robin Berg Tabakin, Chair
Government Records Council

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
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 28, 2010 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2009-155

v.

**Borough of Lawnside (Camden)²
Custodian of Records**

Records Relevant to Complaint: The Complainant requests the records enumerated below by the following delivery methods in order of preference: e-mail; fax; regular mail.

1. Each Internal Affairs Summary Report Form filed by the Lawnside Police Department for the years 2003 through 2007.
2. The “rules and regulations,” “standard operating procedures” and any “directives or orders” that are presently in force within the Lawnside Police Department, as those terms are defined under the “Policy Management System” heading on page 11-8 of the Attorney General’s Manual.³
3. The “written policy” that “establish[es] an internal affairs unit or function” within the Lawnside Police Department, as stated at the top of page 11-14 of the Attorney General’s Manual.
4. Any and all letters of assignment or other records that assign specific personnel to the “internal affairs unit or function” within the Lawnside Police Department. This request is limited to those records that assigned the personnel who presently serve in that unit or function.
5. Any rule which “requires an officer or employee to notify the agency if he or she has been charged with an offense, received a motor vehicle summons, or have been involved in a domestic violence incident” as recommended at the bottom of page 11-24 of the Attorney General’s Manual.

Request Made: March 2, 2009

Response Made: March 6, 2009 and May 21, 2009

Custodian: Sylvia A. Van Nockay

GRC Complaint Filed: May 8, 2009⁴

¹ Represented by Richard Gutman, Esq. (Montclair, NJ).

² Represented by Morris G. Smith, Esq. (Collingswood, NJ). However, Counsel at the time of the Complainant’s OPRA request and Denial of Access Complaint was Matthew B. Wieliczko Esq., of Zeller & Wieliczko, LLP (Cherry Hill, NJ).

³ The Complainant included a copy of said manual with his OPRA request.

⁴ The GRC received the Denial of Access Complaint on said date.

Background

March 2, 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 6, 2009

Custodian Counsel's response to the OPRA request. Counsel responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. Counsel requests a ten (10) day extension of time to respond to the Complainant's OPRA request. For each of the five (5) request items, Counsel states that responsive records have not yet been identified. Counsel states that inquiry into the existence of responsive records continues and to the extent that said records are located, it is anticipated that said records will be provided. Counsel states that the Complainant will be advised if it is determined that no records responsive exist.

March 16, 2009

Letter from Complainant to Custodian's Counsel. The Complainant grants Counsel's request for a ten (10) day extension of time to respond to the Complainant's OPRA request. Additionally, the Complainant provides a temporary mailing address and requests that instead of regular mail, any further responses or responsive records be provided via e-mail or fax.

April 9, 2009

Letter from Complainant to Custodian's Counsel. The Complainant states that he has not received a further response from Counsel regarding his OPRA request. The Complainant requests that any further responses or responsive records be provided via e-mail or fax.

April 13, 2009

E-mail from Complainant to Custodian. The Complainant attaches his letter to the Custodian's Counsel dated April 9, 2009 and asks the Custodian to follow up with Counsel or otherwise resolve the Complainant's outstanding OPRA request. The Complainant also asks the Custodian to confirm receipt of this e-mail.

April 16, 2009

Facsimile from Complainant to Custodian. The Complainant states that he e-mailed the Custodian on April 13, 2009 and attached a copy of the Complainant's letter to the Custodian's Counsel dated April 9, 2009. The Complainant states that he did not receive the Custodian's confirmation of receiving said e-mail and thus is faxing this letter with said e-mail attached. The Complainant requests that any further responses or responsive records be provided via e-mail or fax.

May 8, 2009

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

- Complainant's OPRA request dated March 2, 2009
- Custodian Counsel's response to the Complainant's OPRA request dated March 6, 2009
- Letter from Complainant to Custodian's Counsel dated March 16, 2009
- Letter from Complainant to Custodian's Counsel dated April 9, 2009
- E-mail from Complainant to Custodian dated April 13, 2009
- Facsimile from Complainant to Custodian dated April 16, 2009

The Complainant states that he submitted his OPRA request on March 2, 2009. The Complainant states that the Municipal Solicitor responded on March 6, 2009 and sought a ten (10) day extension of time, which the Complainant granted. The Complainant states that he e-mailed the Solicitor on April 9, 2009 indicating that he had not received a further response regarding his OPRA request. The Complainant states that he e-mailed and faxed the Custodian on April 13, 2009 and April 16, 2009 regarding the Solicitor's failure to respond further. The Complainant also states that he spoke to the Custodian regarding the matter on April 13, 2009. The Complainant states that he has not received any further response from the Custodian or the Solicitor.

The Complainant states that N.J.S.A. 47:1A-5.f. provides that a custodian's adopted OPRA request form "shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged." The Complainant states that said provision also mandates that the form shall include "space for the custodian to list reasons if a request is denied in whole or in part." The Complainant also states that N.J.S.A. 47:1A-5.g. provides that "if the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor." The Complainant states that pursuant to N.J.S.A. 47:1A-5.i., a custodian is to respond to an OPRA request "as soon as possible, but not later than seven business days after receiving the request."

The Complainant asserts that the Borough violated OPRA because it failed to state that the requested records were available or state that said records were not available and provide reasons for the unavailability of said records. As such, the Complainant requests that the Council find the Borough in violation of OPRA by not properly responding to the Complainant's OPRA request in a timely manner. The Complainant also requests that the Council order the Borough to indicate by a date certain whether each of the requested records exist, the fees to provide the records that exist, and the reasons for non-disclosure of records, if any. Additionally, the Complainant seeks prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6. Further, the Complainant contends that if the Borough is unable to demonstrate reasonable grounds for its violation of OPRA, the Council should issue a penalty pursuant to N.J.S.A. 47:1A-11.

The Complainant does not agree to mediate this complaint.

May 15, 2009

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

May 21, 2009

Custodian Counsel's subsequent response to the Complainant's OPRA request. Counsel states that he has enclosed copies of the requested Internal Affairs Summary Report Forms for the years 2005-2007. However, Counsel states that the requested forms for the years 2003 and 2004 are not available because the Borough no longer maintains said records.

The Custodian's Counsel states that the Borough has no records responsive to the Complainant's request for "rules and regulations," "standard operating procedures" and any "directives or orders" that are presently in force within the Lawnside Police Department. The Custodian's Counsel also states that the Borough has no records responsive to the Complainant's request for a "written policy" that "establish[es] an internal affairs unit or function" within the Lawnside Police Department. Further, Counsel states that the Borough has no records responsive to the Complainant's request for records which assign specific personnel to Internal Affairs. Additionally, Counsel states that the Borough does not maintain any records responsive to the Complainant's request for any rule which requires an officer or employee to notify the agency if he or she has been charged with an offense, received a motor vehicle summons, or have been involved in a domestic violence incident, because the Borough has not yet adopted such a rule.⁵

May 21, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated March 2, 2009
- Custodian Counsel's response to the Complainant's OPRA request dated March 6, 2009
- Custodian Counsel's subsequent response to the Complainant's OPRA request dated May 21, 2009

The Custodian certifies that she received the Complainant's OPRA request on March 2, 2009. The Custodian certifies that because the Complainant's OPRA request involved police records and were of a legal nature, she forwarded said request to legal counsel. The Custodian states that the Custodian's Counsel provided a written response to the Complainant's OPRA request on March 6, 2009 indicating that the request required further review and sought an extension of time. The Custodian states that Counsel provided the Complainant with a further response to his OPRA request on May 21, 2009.

The Custodian certifies that the investigation into the existence of the requested records was handled primarily by Counsel. The Custodian states that the information Counsel received was from the Lawnside Director of Public Safety, John D. Cunningham. However, the Custodian states that because Mr. Cunningham was not the Director of Public Safety at all times covering the period of the Complainant's OPRA request, he was not specifically aware of when the records from 2003 and 2004 may have been destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records

⁵ Counsel includes additional information which is not relevant to the adjudication of this Denial of Access Complaint.

Management. However, the Custodian certifies that the Borough must maintain records related to Internal Affairs Reports of a non-criminal nature for five (5) years.⁶

July 13, 2009

Letter from Complainant's Counsel to GRC. The Complainant's Counsel states that on May 21, 2009, after the Complainant filed this Denial of Access Complaint, the Custodian's Counsel provided the Complainant with some records responsive to request item no. 1 and stated that the remainder of request item no. 1 and records responsive to request items no. 2-5 do not exist. As such, the Complainant's Counsel states that the Complainant's request for the Council to order the Borough to indicate by a date certain whether each of the requested records exists, the fees to provide the records that exist, and the reasons for non-disclosure of records, if any, is moot.

July 30, 2009

Letter from Custodian's Counsel to GRC. The Custodian's Counsel contends that the Complainant is not entitled to an award of prevailing party attorney's fees. Counsel states that in Mason v. City of Hoboken, 196 N.J. 51, 78 (2008), the court stated that it may consider the *possibility* of awarding attorney's fees *only* when the public entity fails to respond at all within the seven (7) day period *and* requestor can establish a factual causal nexus between the filing of a complaint and the production of the requested records. Ibid at 76 (emphasis added).

Counsel asserts that the filing of this Denial of Access Complaint was not the catalyst for the production of records, but rather due to the complex legal nature of the Complainant's request, additional time was needed to determine if any records responsive existed. Counsel also states that the Borough, a small municipality with only 3,000 residents, operates with limited resources and has only two (2) full-time employees in the Clerk's Office handling OPRA requests. Counsel states that once the records responsive were located and the non-existence of the remaining records was determined, the Custodian provided the Complainant with a subsequent response. Counsel contends that the Borough would have provided a subsequent response to the Complainant regardless of the filing of this Denial of Access Complaint.⁷

August 16, 2009⁸

Letter from Complainant's Counsel to GRC. The Complainant's Counsel states 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.'" Mason v. City of Hoboken, 196 N.J. 51, 76 (2008). Counsel contends that attorney's fees can be awarded even when a custodian provides a response within seven (7) business days, and that said fees are mandatory, not discretionary, when the previously mentioned requirements have been satisfied.

⁶ The Custodian discusses additional OPRA requests which are not the subject of this Denial of Access Complaint.

⁷ Counsel also restates the facts/assertions already presented to the GRC.

⁸ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

Counsel asserts that the Complainant has satisfied his burden of proving that he is a prevailing party. Counsel contends that the Borough failed to properly respond to the Complainant's OPRA request within the statutory seven (7) business days and the ten (10) day extension. Counsel asserts that the requested Internal Affairs Summary Reports are public records because the Attorney General's manual so states. Additionally, Counsel contends that a factual causal nexus exists between the filing of this Denial of Access Complaint and the relief ultimately achieved. Specifically, Counsel states that the Custodian failed to provide the Complainant with certain requested records or a specific response that no records responsive exist until after the filing of said complaint.

Further, Counsel asserts that the Complainant has, or will have, achieved two types of relief because of this complaint. Counsel contends that the Council will presumably declare that the Custodian violated OPRA by failing to either grant or deny access in writing within the seven (7) business days plus the ten (10) day extension. Counsel states that the Appellate Division held that "there is no question that a delay in providing records in response to a proper OPRA request may amount to a denial of access under OPRA and entitle a person denied access to 'prevail' if the agency does not establish that the delay is authorized by law." New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 184 (App. Div. 2007).

Counsel also asserts that this complaint caused the Borough to release the 2005, 2006 and 2007 Internal Affairs Summary Reports. Counsel asserts that the need for this complaint is evidenced by the Borough's conduct following the Complainant's OPRA request. Counsel states that the Complainant agreed to the Custodian's request for an extension of time. Counsel states that after said extension ended, the Complainant waited 19 more days to inquire about his OPRA request. Counsel states that during the following week, the Complainant contacted the Custodian and her Counsel three times and spoke to the Custodian on April 16, 2009. Counsel states that the Complainant waited an additional 21 days to file this complaint. Counsel states that the Custodian failed to inform the Complainant during said timeframe of any action on the Borough's part to fulfill his request.⁹

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

⁹ Counsel also restates the facts/assertions already presented to the GRC.
John Paff v. Borough of Lawnside (Camden), 2009-155 – Findings and Recommendations of the Executive Director

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 states 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 thereof ...” N.J.S.A. 47:1A-5.g.

OPRA also states:

“[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* ... If the government record is in storage or archived, the requestor shall be so *advised within seven business days* after the custodian *receives the request*. The requestor shall be advised by the custodian *when the record can be made available*. If the *record is not made available by that time*, access shall be *deemed denied*.” (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. 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.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁰ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA

¹⁰ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days is required. *John Paff v. Borough of Lawnside (Camden), 2009-155 – Findings and Recommendations of the Executive Director*

request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request 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). Further, if a custodian requires additional time beyond the statutorily mandated seven (7) business days to fulfill a request, the custodian must provide the requestor with a date certain on which the records will be provided. N.J.S.A. 47:1A-5.i.

The Custodian certified that she received the Complainant’s OPRA request on March 2, 2009. The Custodian’s Counsel provided the Complainant with a written response on March 6, 2009, the fourth (4th) business day following the Custodian’s receipt of said request, in which Counsel sought a ten (10) day extension of time to fulfill the request. The Complainant agreed to said extension via letter dated March 16, 2009.

The Council has described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that “because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. [and] N.J.S.A. 47:1A-5.i.”

Similarly, in this instant complaint the Custodian’s Counsel provided the Complainant with a written response on the fourth (4th) business day and sought a ten (10) day extension of time.

Therefore, because the Custodian’s Counsel provided the Complainant with a written response within the statutorily mandated seven (7) business days to seek an extension of time to fulfill said request, and because Counsel provided a date certain on which he would further respond to said request (ten business days beyond the standard deadline), the Custodian’s Counsel properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey, supra.

However, OPRA provides that if a custodian fails to provide a written response within the extended deadline date, the request is deemed denied. N.J.S.A. 47:1A-5.i. Because the Custodian certified that she received the Complainant’s OPRA request on March 2, 2009, the seven (7) business day deadline was March 11, 2009. The Custodian’s Counsel requested a ten (10) day extension from said date which ended on March 25, 2009. Neither the Custodian nor the Custodian’s Counsel provided the Complainant with a subsequent written response to his OPRA request during this extended timeframe. The Custodian’s Counsel asserts that due to the complex legal

days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

nature of the Complainant's request, additional time was needed to determine if any records responsive existed.

The Council has previously held that "[w]hile seeking legal advice on how to appropriately respond to a records request is reasonable, it is not a lawful reason for delaying a response to an OPRA records request." Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006). Thus, if the Custodian required additional time beyond the already extended deadline date, the Custodian should have sought an additional extension.

Therefore, the Custodian's failure to grant access, deny access, seek clarification, or request an additional extension of time within the extended deadline date results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

The Custodian's Counsel ultimately provided the Complainant with a subsequent written response on May 21, 2009. In said response, Counsel provided the Complainant with the requested Internal Affairs Summary Reports for the years 2005-2007 in response to request item no. 1. Counsel denied access to said reports for the years 2003-2004 on the basis that said records no longer exist. Additionally, Counsel denied access to request items no. 2-5 on the basis that no records responsive exist.

However, 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 '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),¹¹ 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."¹²

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..."

¹¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹² As stated in Bent, *supra*.

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 this instant complaint, the Complainant’s request items no. 2-5 require the Custodian to perform some type of research in order to identify any records responsive. Specifically, request items no. 2, 3 and 5 require the Custodian to cross reference a manual from the Attorney General’s Office which describes records that should be created and maintained by police departments. Request item no. 4 requires the Custodian to research the names of the personnel who were assigned to Internal Affairs at the time of the Complainant’s OPRA request. Additionally, while said request item specifically names “letters of assignment,” the Complainant also request “other records that assign specific personnel to the ‘internal affairs unit or function’” without any further clarification regarding said records.

The Council has previously ruled on whether a request for records created pursuant to a particular statute is a valid request under OPRA in Taylor v. Elizabeth Board of Education (Union), GRC Complaint No. 2007-214 (April 2008). In said complaint, the Complainant submitted numerous requests for records which may have been required to be created under federal rules. The Council held that:

“[b]ecause the Complainant’s OPRA requests are not requests for identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant’s 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 (March 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (October 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007)...”

The Council reasoned that:

“[w]hile some of the requests may provide a certain level of specific information as to the record sought (such as identifying a federal regulation under which a record should be created), there is still not enough information for the Custodian to identify with reasonable clarity the records sought. In fact, item # 2 of the Complainant’s requests cites to a definitional regulation rather than a regulation that requires the creation of a record. In actuality, many of the regulations cited by the Complainant do not specifically require that a record be created and thus such records may not even exist. More importantly, *the fact that the Custodian would have to research the federal regulations cited by the Complainant to*

determine whether said regulations require that a record be created places an undue burden on the Custodian.” (Emphasis added).

Similarly, in Bart v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), the Complainant requested the Passaic County Housing Agency signs currently posted in conformance with N.J.S.A. 47:1A-5.j., which is a provision of OPRA. The Council held that:

“[c]ustodians are required to be familiar with all provisions of OPRA as custodians must grant or deny access in accordance with the law... However, the court cases listed above [MAG, supra, Bent, supra, and NJ Builders, supra] specifically state that a custodian is not required to conduct research in response to an OPRA request. The court in Mag, supra, does not qualify the extent of research custodian may or may not do in response to requests. The court simply states that custodians are not required to conduct research and that only identifiable government records shall be accessible. Mag, supra, at 546, 549. The Complainant here fails to explain in his request what N.J.S.A. 47:1A-5.j. provides and thus leaves it to the Custodian to conduct research in order to determine what said provision of OPRA mandates. Thus, the Complainant’s request as currently written does not seek an identifiable government record without requiring the Custodian to research a New Jersey State statute. Although the Public Information Officer ultimately provided the Complainant with the requested records, neither she nor the Custodian were required to conduct research in order to fulfill the Complainant’s requests.”

The Complainant appealed the Council’s decision in Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009). The Appellate Division held that:

“[the Complainant’s] request for documents required the Agency's custodian of records to undertake some legal research and analysis in order to identify the signs to which [the Complainant] was referring in his request. The Act does not, however, require that custodians of government records engage in legal research or consult an attorney in order to identify the records being requested. [The Complainant] was required to identify the records he requested with specificity. In our judgment, the GRC correctly found that he failed to do so.”

While the request items at issue in this instant complaint do not refer to any state statute or federal regulation as in the GRC decisions cited above, said request items do refer to a manual from the Attorney General’s Office. Thus, said request items require the Custodian to conduct research in said manual to determine which records, if any, are required to be created and maintained by the police department. Such research is not required under OPRA.

Therefore, because the Complainant’s OPRA request items no. 2-5 are not requests for specific identifiable government records and because the Custodian is not

required to conduct research in response to an OPRA request, said request items are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, Schuler, supra, Taylor, supra, and Bart, supra.

Nevertheless, the Custodian indicated that no records responsive to said request items exist.

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 Council determined that, because the Custodian certified that no records responsive to the request existed, the Custodian did not unlawfully deny access to the requested records.

However, in this instant complaint, although the Custodian properly requested an extension of time to fulfill the Complainant's OPRA request, neither the Custodian nor the Custodian's Counsel provided the Complainant with a subsequent written response to his OPRA request during this extended timeframe and thus said request is "deemed" denied.

Therefore, because the Custodian indicated that there are no records responsive to request items no. 2-5, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the extended timeframe, pursuant to Pusterhofer, supra.

Whether the Custodian's delay in access to the requested records 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.

The Custodian's Counsel provided the Complainant with a written response to his OPRA request on the fourth (4th) business day following receipt of said request and sought a ten (10) day extension of time to further respond. Because the Custodian's Counsel provided the Complainant with a written response within the statutorily mandated seven (7) business days to seek an extension of time to fulfill said request, and because Counsel provided a date certain on which he would further respond to said request (ten business days beyond the statutory timeframe), the Custodian's Counsel properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey, supra.

However, the Custodian's failure to grant access, deny access, seek clarification, or request an additional extension of time within the extended deadline date resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

The Custodian's Counsel ultimately provided the Complainant with a subsequent written response on May 21, 2009, approximately two (2) months after the extended deadline ended. In said response, Counsel provided the Complainant with the requested Internal Affairs Summary Reports for the years 2005-2007 in response to request item no. 1. Counsel denied access to said reports for the years 2003-2004 on the basis that said records no longer exist. Additionally, Counsel denied access to request items no. 2-5 on the basis that there are no records responsive. The Custodian asserted that the delay in responding to the Complainant's request was due to the complex legal nature of the Complainant's request, and thus additional time was needed to determine if any records responsive existed.

Nevertheless, the Complainant's OPRA request items no. 2-5 are not requests for specific identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, said request items are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, Schuler, supra, Taylor, supra, and Bart, supra.

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 violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a subsequent written response within the extended deadline date, there is no evidence in the record that suggests the Custodian's

delay in providing access to the requested records was intentional and deliberate. Additionally, the Custodian's Counsel ultimately provided the Complainant access to all records responsive that exist. Therefore, despite the Custodian's violation of OPRA, 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 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.¹³ 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 this instant complaint, the Custodian's Counsel provided the Complainant with a written response to his OPRA request on the fourth (4th) business day following receipt of said request in which Counsel sought a ten (10) day extension of time to further respond. Said extension ended on March 25, 2009. Within said extended time frame, neither the Custodian nor the Custodian's Counsel provided the Complainant with a further response regarding his OPRA request. As such, the Complainant sent a letter to the Custodian's Counsel on April 9, 2009 indicating that he had not received a subsequent response to his OPRA request. The Complainant also e-mailed the Custodian on April 13, 2009 and faxed her on April 16, 2009 for the same reason. Again, neither the Custodian nor the Custodian's Counsel provided the Complainant with a further response regarding his OPRA request. Thus, the Complainant filed this Denial of Access Complaint on May 8, 2009.

¹³ 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.

After the filing of this Complaint, on May 21, 2009, the same date the Custodian provided the GRC with her response to this Denial of Access Complaint, the Custodian's Counsel provided the Complainant with the requested Internal Affairs Summary Reports for the years 2005-2007 and stated that all other requested records do not exist. The Custodian's Counsel asserts that the filing of this Denial of Access Complaint was not the catalyst for the production of records, but rather due to the complex legal nature of the Complainant's request, additional time was needed to determine if any records responsive existed. Counsel contends that the Borough would have provided a subsequent response to the Complainant regardless of the filing of this Denial of Access Complaint. However, the Custodian and Counsel had three (3) opportunities to inform the Complainant that a search for the requested records was still ongoing after the Complainant contacted said parties in April 2009, yet they failed to do so.

Similar to the facts in Teeters, *supra*, the Complainant in this instant matter engaged in reasonable efforts to pursue his access rights to the requested records and sought attorney assistance only after his personal efforts were unavailing. With that assistance, the Complainant achieved a favorable result that reflected an alteration of position and behavior on the Borough's part because the Custodian's Counsel provided access to the requested records that exist and denied access to the remaining records that do not exist.

Pursuant to Teeters, *supra*, 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. 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. Specifically, the Custodian and Counsel failed to provide the Complainant with a further response to his OPRA request until after the filing of this complaint, despite the Complainant's repeated attempts to obtain such a response prior to the filing of this complaint. Further, the relief ultimately achieved had a basis in law. The Custodian was obligated to either grant access, deny access, seek clarification, or request an additional extension of time by March 25, 2009, the extended deadline date, pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. 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. Because the Custodian's Counsel provided the Complainant with a written response within the statutorily mandated seven (7) business days to seek an extension of time to fulfill said request, and because Counsel provided a date certain on which he would further respond to said request (ten business days beyond the statutory deadline), the Custodian's Counsel properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and

Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).

2. The Custodian's failure to grant access, deny access, seek clarification, or request an additional extension of time within the extended deadline date results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
3. Because the Complainant's OPRA request items no. 2-5 are not requests for specific identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, said request items 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), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), Taylor v. Elizabeth Board of Education (Union), GRC Complaint No. 2007-214 (April 2008), and Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009). Nevertheless, the Custodian indicated that no records responsive to said request items exist. Because the Custodian indicated that there are no records responsive to request items no. 2-5, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the extended timeframe, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a subsequent written response within the extended deadline date, there is no evidence in the record that suggests the Custodian's delay in providing access to the requested records was intentional and deliberate. Additionally, the Custodian's Counsel ultimately provided the Complainant access to all records responsive that exist. Therefore, despite the Custodian's violation of OPRA, 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.
5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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. 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. Specifically, the Custodian and Counsel failed to provide the Complainant with a further response to his OPRA request until after the filing of this complaint, despite the Complainant's repeated attempts

to obtain such a response prior to the filing of this complaint. Further, the relief ultimately achieved had a basis in law. The Custodian was obligated to either grant access, deny access, seek clarification, or request an additional extension of time by March 25, 2009, the extended deadline date, pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. 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.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 21, 2010