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

September 27, 2011 Government Records Council Meeting

Laura A. Danis
Complainant
v.
Garfield Board of Education (Bergen)
Custodian of Record

Complaint No. 2009-156, 2009-157, 2009-158

At the September 27, 2011 public meeting, the Government Records Council ("Council") considered the September 20, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed because the Complainant withdrew her complaint via e-mail to the GRC dated September 5, 2011 (via legal counsel) because the parties have reached a settlement agreement 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 27th Day of September, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: October 3, 2011

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
September 27, 2011 Council Meeting

Laura A. Danis[1] **GRC Complaint Nos. 2009-156, 2009-157, 2009-158**[2]
Complainant

v.

Garfield Board of Education (Bergen)[3]
Custodian of Records

Records Relevant to Complaint:

March 25, 2009 OPRA request: The name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008 to March 24, 2009.

March 26, 2009 OPRA request No. 1: Executive session minutes for every meeting held by the Garfield Board of Education ("BOE") from January 1, 2009 to March 24, 2009.

March 26, 2009 OPRA request No. 2:
1. Comprehensive annual financial ("CAFR") report ending June 30, 2008
2. Management report
3. Corrective action plan ("CAP")
4. Resolution accepting CAFR

Request Made: March 25, 2009 and March 26, 2009[4]
Response Made: May 18, 2009[5]
Custodian: Dr. Dennis Frohnapfel
GRC Complaint Filed: May 8, 2009[6]

[1] Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).
[2] The GRC has consolidated these matters for adjudication due to the commonality of the parties.
[3] Represented by Curt J. Geisler, Esq. (Garfield, NJ).
[4] The Complainant asserts in the Denial of Access Complaint that all three (3) requests were submitted to the BOE on March 25, 2009; however, the evidence of record shows that two (2) of the requests were dated March 26, 2009.
[5] Although the Custodian certifies in the Statement of Information that he verbally told the Complainant to return in seven (7) days, or on April 3, 2009, the first written response to the Complainant was dated May 18, 2009.
[6] The GRC received the Denial of Access Complaint on said date.

Background

June 29, 2010

Government Records Council's ("Council") Interim Order. At its June 29, 2010 public meeting, the Council considered the June 22, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

> "… because 'name, title, position, salary, payroll record and length of service' is information which is specifically considered to be a government record under N.J.S.A. 47:1A-10, and because 'payroll records' must be disclosed pursuant to Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004), the Complainant's March 25, 2009 request for '[t]he name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008 to March 24, 2009' is a valid request pursuant to OPRA. And as such, the Council's April 28, 2010 Interim Order is amended accordingly. This amendment changes the conclusions and recommendations contained in the Council's April 28, 2010 Interim Order as follows:
>
> 1. Although the Custodian's failure to provide a written response to the Complainant's three (3) records requests within the statutorily mandated seven (7) business days resulted in a 'deemed' denial, because the Custodian bore his burden of proving a lawful denial of access to the minutes responsive to the Complainant's March 26, 2009 OPRA request No. 1, and because the Custodian provided all records responsive to the Complainant's March, 25, 2009 OPRA request and March 26, 2009 OPRA request No. 2 on June 15, 2009, 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.
>
> 2. 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 GRC is unable to determine whether the Complainant is a 'prevailing party' entitled to an award of reasonable attorney's fees. Specifically, the GRC cannot determine whether the filing of this complaint brought about a change (voluntary or otherwise) in the Custodian's conduct because the Custodian responded in writing and provided access to the records responsive to the Complainant's March 25, 2009 OPRA request and March 26, 2009 OPRA request No. 2 following the filing of this complaint. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the filing of the Complainant's Denial of Access Complaint was the catalyst for the Custodian's change in conduct and, if warranted, a determination of the amount of appropriate prevailing party attorney's fees."

July 12, 2010

Council's Interim Order distributed to the parties.

September 21, 2010

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

September 5, 2011

E-mail from the Complainant's Counsel to the GRC attaching a letter from Counsel to the Honorable Sandra A. Robinson, Administrative Law Judge ("ALJ"), dated September 1, 2011. Counsel states that pursuant to the terms of a settlement agreement reached between the parties, the Complainant withdraws this complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew her complaint via e-mail to the GRC dated September 5, 2011 (via legal counsel) because the parties have reached a settlement agreement in this matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 20, 2011

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

INTERIM ORDER

June 29, 2010 Government Records Council Meeting

Laura A. Danis
Complainant
v.
Garfield Board of Education (Bergen)
Custodian of Record

Complaint No. 2009-156, 2009-157 & 2009-158

At the June 29, 2010 public meeting, the Government Records Council ("Council") considered the June 22, 2010 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because "name, title, position, salary, payroll record and length of service" is information which is specifically considered to be a government record under N.J.S.A. 47:1A-10, and because "payroll records" must be disclosed pursuant to Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004), the Complainant's March 25, 2009 request for "[t]he name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008 to March 24, 2009" is a valid request pursuant to OPRA. And as such, the Council's April 28, 2010 Interim Order is amended accordingly. This amendment changes the conclusions and recommendations contained in the Council's April 28, 2010 Interim Order as follows:

1. Although the Custodian's failure to provide a written response to the Complainant's three (3) records requests within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian bore his burden of proving a lawful denial of access to the minutes responsive to the Complainant's March 26, 2009 OPRA request No. 1, and because the Custodian provided all records responsive to the Complainant's March, 25, 2009 OPRA request and March 26, 2009 OPRA request No. 2 on June 15, 2009, 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.

2. 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 GRC is unable to determine whether the Complainant is a "prevailing party" entitled to an award of reasonable attorney's fees. Specifically, the GRC cannot

determine whether the filing of this complaint brought about a change (voluntary or otherwise) in the Custodian's conduct because the Custodian responded in writing and provided access to the records responsive to the Complainant's March 25, 2009 OPRA request and March 26, 2009 OPRA request No. 2 following the filing of this complaint. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the filing of the Complainant's Denial of Access Complaint was the catalyst for the Custodian's change in conduct and, if warranted, a determination of the amount of appropriate prevailing party attorney's fees.

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

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: July 12, 2010

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

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

Laura A. Danis[1] **GRC Complaint No. 2009-156, 2009-157 & 2009-158**[2]
Complainant

v.

Garfield Board of Education (Bergen)[3]
Custodian of Records

Records Relevant to Complaint:

March 25, 2009 OPRA request: The name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008 to March 24, 2009.

March 26, 2009 OPRA request No. 1: Executive session meeting minutes for every meeting held by the Garfield Board of Education ("BOE") from January 1, 2009 to March 24, 2009.

March 26, 2009 OPRA request No. 2:
1. Comprehensive annual financial ("CAFR") report ending June 30, 2008
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Request Made: March 25, 2009, March 26, 2009[4]
Response Made: May 18, 2009[5]
Custodian: Dr. Dennis Frohnapfel
GRC Complaint Filed: May 8, 2009[6]

[1] Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).
[2] The Government Records Council has consolidated these matters for adjudication due to the commonality of the parties.
[3] Represented by Curt J. Geisler, Esq. (Garfield, NJ).
[4] The Complainant asserts in the Denial of Access Complaint that all three (3) requests were submitted to the BOE on March 25, 2009; however, the evidence of record shows that two (2) of the requests were dated March 26, 2009.
[5] Although the Custodian certifies in the Statement of Information that he verbally told the Complainant to return in seven (7) days, or on April 3, 2009, the first written response to the Complainant was dated May 18, 2009.
[6] The GRC received the Denial of Access Complaint on said date.

Background

April 28, 2010

Government Records Council's ("Council") 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. The Custodian's failure to respond in writing to the Complainant's March 25, 2009 request, March 26, 2009 request No. 1 and March 26, 2009 request No. 2 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 three (3) OPRA requests 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).

2. Because the Complainant's March 25, 2009 request seeks information rather than a specifically identifiable government record, the request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

3. The unapproved, draft executive session meeting minutes dated January 27, 2009 and February 24, 2009 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne his burden of proving a lawful denial of access to the January 27, 2009 and February 24, 2009 draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive minutes were not approved by the governing body at the time of the Complainant's March 26, 2009 OPRA request No. 1.

4. The Custodian certified that he provided all records responsive to the Complainant on June 15, 2009 and there is no credible evidence in the record to refute the Custodians' certification. Therefore, 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 a written response to the Complainant within the statutorily mandated time frame, he did not unlawfully deny access to the records responsive to the Complainant's March 26, 2009 request No. 2 pursuant Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

5. Although the Custodian's failure to provide a written response to the Complainant's three (3) records requests within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Complainant's March 25, 2009 request is invalid under OPRA, because the Custodian bore his burden of proving a lawful denial of access to the minutes responsive to the Complainant's March 26, 2009 OPRA request No. 1, and because the Custodian provided all records responsive to the Complainant's March 26, 2009 OPRA request No. 2 on June 15, 2009, 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.

6. 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 GRC is unable to determine whether the Complainant is a "prevailing party" entitled to an award of reasonable attorney's fees. Specifically, the GRC cannot determine whether the filing of this complaint brought about a change (voluntary or otherwise) in the Custodian's conduct based on the lack of documentary evidence. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the filing of the Complainant's Denial of Access Complaint was the catalyst for a change in the Custodian's behavior and, if warranted, a determination of the amount of appropriate prevailing party attorney's fees.

April 30, 2010

Council's Order distributed to the parties.

Analysis

The Council is reconsidering this matter of its own volition to amend its April 28, 2010 Interim Order.

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[.]" N.J.S.A. 47:1A-10.

Pursuant to *N.J.A.C.* 5:105-2.10(a), the Council may, at its own discretion, reconsider any decision it renders.

The Council therefore determines pursuant to the within Supplemental Findings and Recommendations its April 28, 2010 Findings and Recommendations require clarification, and therefore reconsiders said Findings and Recommendations as follows.

In the instant matter, the Complainant requested on March 25, 2009 "the name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008 to March 24, 2009." The Custodian certified in the SOI that the BOE's district payroll report from March 13, 2009 were hand delivered to the Complainant on June 15, 2009. In its April 28, 2010 Findings and Recommendations, the Council determined that the Complainant's March 25, 2009 request was not a valid OPRA request because it was a request for information rather than a request for specific identifiable government records.

However, the Complainant's March 25, 2009 request sought personnel information ("name, title, position, salary, payroll record and length of service"), which information is itself specifically considered to be a government record under N.J.S.A. 47:1A-10.

Moreover, 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[2] 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[3], 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.[4]"

Thus, because "name, title, position, salary, payroll record and length of service" is information which is specifically considered to be a government record under N.J.S.A. 47:1A-10, and because "payroll records" must be disclosed pursuant to Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004), the Complainant's March 25, 2009 request for "[t]he name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008 to March 24, 2009" is a valid request pursuant to OPRA. And as such, the Council's April 28, 2010 Interim Order is amended accordingly.

Whether the Custodian's "deemed" denial of the Complainant's three (3) records requests rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

Based on the foregoing amended conclusion, the GRC must also amend its analysis of whether the Custodian's "deemed" denial rises to a level of a knowing and willful violation under the totality of circumstances as follows:

Although the Custodian's failure to provide a written response to the Complainant's three (3) records requests within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian bore his burden of proving a lawful denial of access to the minutes responsive to the Complainant's March 26, 2009 OPRA request No. 1, and because the Custodian provided all records responsive to the Complainant's March, 25, 2009 OPRA request and March 26, 2009 OPRA request No. 2 on June 15, 2009, 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?

Moreover, the GRC must amend its analysis of whether the Complainant is a prevailing party entitled to reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

In the matter before the Council, the Complainant filed a Denial of Access Complaint with the GRC on May 8, 2009 contending that the Custodian failed to respond to her three (3) OPRA requests. The Complainant's Counsel requested that the GRC order disclosure of all records responsive and determine that the Custodian violated OPRA by not responding to the Complainant's requests.

Following the filing of this complaint with the GRC, the Custodian's Counsel sent a letter to the Complainant's Counsel on May 18, 2009 averring that the records responsive to the Complainant's March 25, 2009 request and March 26, 2009 OPRA request No. 2 had been prepared for pick up on April 3, 2009 and that access to the executive session meeting minutes responsive to the Complainant's March 26, 2009 OPRA request No. 1 was denied. Moreover, in a letter to the Complainant dated June 9, 2009, the Custodian reiterated that the Complainant was verbally advised to return seven (7) days after submitting her three (3) requests in order to retrieve the records. The Custodian also certified to such in the SOI.

Further, the Custodian lawfully denied access to the records responsive to the Complainant's March 26, 2009 request No. 1 and the Custodian provided all records responsive to the Complainant's March 25, 2009 request and March 26, 2009 OPRA request No. 2.

The evidence of record shows that the Custodian signed and dated all three (3) requests April 3, 2009 (prior to the filing of the instant complaint) and provided the records responsive to the Complainant's March 25, 2009 OPRA request and March 26, 2009 OPRA request No. 2 via hand delivery on June 15, 2009 (subsequent to the filing of this complaint).

Pursuant to Mason, *supra*, because the Custodian failed to provide a written response to the Complainant within the statutorily mandated seven (7) business day time frame as provided under OPRA and voluntarily provided records responsive to the Complainant's March 25, 2009 OPRA request and March 26, 2009 OPRA request No. 2, proving that the filing of this Denial of Access Complaint was not a catalyst for the BOE's "belated disclosure" shifts to the BOE. Although the Custodian asserted both in his letter to the Complainant on June 9, 2009 and subsequently certified in the SOI that he verbally advised the Complainant to return to the BOE on April 3, 2009, this verbal response is not corroborated by any competent, credible evidence in the record other than the Custodian's June 9, 2009 letter and subsequent SOI certification.

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 GRC is unable to determine whether the Complainant is a "prevailing party" entitled to an award of reasonable attorney's fees. Specifically, the GRC cannot determine whether the filing of this complaint brought about a change (voluntary or otherwise) in the Custodian's conduct because the Custodian responded in writing and provided access to the records responsive to the Complainant's March 25, 2009 OPRA request and March 26, 2009 OPRA request No. 2 following the filing of this complaint. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the filing of the Complainant's Denial of Access Complaint was the catalyst for the Custodian's change in conduct and, if warranted, a determination of the amount of appropriate prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because "name, title, position, salary, payroll record and length of service" is information which is specifically considered to be a government record under N.J.S.A. 47:1A-10, and because "payroll records" must be disclosed pursuant to Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004), the Complainant's March 25, 2009 request for "[t]he name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008 to March 24, 2009" is a valid request pursuant to OPRA. And as such, the Council's April 28, 2010 Interim Order is amended accordingly. This amendment changes the conclusions and recommendations contained in the Council's April 28, 2010 Interim Order as follows:

1. Although the Custodian's failure to provide a written response to the Complainant's three (3) records requests within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian bore his burden of proving a lawful denial of access to the minutes responsive to the Complainant's March 26, 2009 OPRA request No. 1, and because the Custodian provided all records responsive to the Complainant's March, 25, 2009 OPRA request and March 26, 2009 OPRA request No. 2 on June 15, 2009, 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.

2. 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 GRC is unable to determine whether the Complainant is a "prevailing party" entitled to an award of reasonable attorney's fees. Specifically, the GRC cannot determine whether the filing of this complaint brought about a change (voluntary or otherwise) in the Custodian's conduct because the Custodian responded in writing and provided access to the records responsive to the Complainant's March 25, 2009 OPRA request and March 26, 2009 OPRA request No. 2 following the filing of this complaint. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the filing of the Complainant's Denial of Access Complaint was the catalyst for the Custodian's change in conduct and, if warranted, a determination of the amount of appropriate prevailing party attorney's fees.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 22, 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

Laura A. Danis
Complainant
v.
Garfield Board of Education (Bergen)
Custodian of Record

Complaint No. 2009-156, 2009-157 & 2009-158

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. The Custodian's failure to respond in writing to the Complainant's March 25, 2009 request, March 26, 2009 request No. 1 and March 26, 2009 request No. 2 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 three (3) OPRA requests 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).

2. Because the Complainant's March 25, 2009 request seeks information rather than a specifically identifiable government record, the request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

3. The unapproved, draft executive session meeting minutes dated January 27, 2009 and February 24, 2009 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).

Accordingly, the Custodian has borne his burden of proving a lawful denial of access to the January 27, 2009 and February 24, 2009 draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive minutes were not approved by the governing body at the time of the Complainant's March 26, 2009 OPRA request No. 1.

4. The Custodian certified that he provided all records responsive to the Complainant on June 15, 2009 and there is no credible evidence in the record to refute the Custodians' certification. Therefore, 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 a written response to the Complainant within the statutorily mandated time frame, he did not unlawfully deny access to the records responsive to the Complainant's March 26, 2009 request No. 2 pursuant Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

5. Although the Custodian's failure to provide a written response to the Complainant's three (3) records requests within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Complainant's March 25, 2009 request is invalid under OPRA, because the Custodian bore his burden of proving a lawful denial of access to the minutes responsive to the Complainant's March 26, 2009 OPRA request No. 1, and because the Custodian provided all records responsive to the Complainant's March 26, 2009 OPRA request No. 2 on June 15, 2009, 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.

6. 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 GRC is unable to determine whether the Complainant is a "prevailing party" entitled to an award of reasonable attorney's fees. Specifically, the GRC cannot determine whether the filing of this complaint brought about a change (voluntary or otherwise) in the Custodian's conduct based on the lack of documentary evidence. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the filing of the Complainant's Denial of Access Complaint was the catalyst for a change in the Custodian's behavior and, if warranted, a determination of the amount of appropriate 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

Laura A. Danis[1]
Complainant

GRC Complaint No. 2009-156, 2009-157 & 2009-158[2]

v.

Garfield Board of Education (Bergen)[3]
Custodian of Records

Records Relevant to Complaint:

March 25, 2009 OPRA request: The name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008 to March 24, 2009.

March 26, 2009 OPRA request No. 1: Executive session meeting minutes for every meeting held by the Garfield Board of Education ("BOE") from January 1, 2009 to March 24, 2009.

March 26, 2009 OPRA request No. 2:

1. Comprehensive annual financial ("CAFR") report ending June 30, 2008
2. Management report
3. Corrective action plan ("CAP")
4. Resolution accepting CAFR

Request Made: March 25, 2009, March 26, 2009[4]
Response Made: May 18, 2009[5]
Custodian: Dr. Dennis Frohnapfel
GRC Complaint Filed: May 8, 2009[6]

[1] Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).
[2] The Government Records Council has consolidated these matters for adjudication due to the commonality of the parties.
[3] Represented by Curt J. Geisler, Esq. (Garfield, NJ).
[4] The Complainant asserts in the Denial of Access Complaint that all three (3) requests were submitted to the BOE on March 25, 2009; however, the evidence of record shows that two (2) of the requests were dated March 26, 2009.
[5] Although the Custodian certifies in the Statement of Information that he verbally told the Complainant to return in seven (7) days, or on April 3, 2009, the first written response to the Complainant was dated May 18, 2009.
[6] The GRC received the Denial of Access Complaint on said date.

Background

March 25, 2009

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

March 26, 2009

Complainant's second (2nd) and third (3rd) Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on two (2) official OPRA request forms.

May 8, 2009

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

- Complainant's first (1st) OPRA request dated March 25, 2009
- Complainant's second (2nd) request dated March 26, 2009
- Complainant's third (3rd) request dated March 26, 2009

The Complainant's Counsel states that the instant complaints are being filed with the GRC because the Custodian unlawfully denied access to the Complainant's three (3) OPRA requests.

March 25, 2009 OPRA request:

Counsel states that the Complainant prepared and submitted an OPRA request to the BOE on March 25, 2009 for the name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008 to March 24, 2009. Counsel states that the Custodian failed to respond to the Complainant's request.

Counsel avers that the records requested by the Complainant are government records under OPRA. *See* N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-10. Counsel contends that the requested records should have been provided to the Complainant within seven (7) business days as required under OPRA pursuant to N.J.S.A. 47:1A-5.i. Counsel asserts that if the BOE needed additional time to respond, the BOE should have requested an extension of time as opposed to ignoring the Complainant's request.

March 26, 2009 OPRA request No. 1:[7]

Counsel states that the Complainant prepared and submitted an OPRA request to the BOE on March 26, 2009 for executive session meeting minutes for every meeting held by the BOE from January 1, 2009 to March 24, 2009. Counsel states that the Custodian failed to respond to the Complainant's request.

[7] The evidence of record indicates that this request was submitted to the Custodian on March 26, 2009.

Counsel states that executive session meeting minutes are public records within the meaning of OPRA. N.J.S.A. 47:1A-1.1. Counsel acknowledges that although executive session meeting minutes that have not been approved by a public agency are exempt from disclosure as advisory, consultative or deliberative ("ACD") material pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), those minutes become public record once they are approved. *See* Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (June 2008).

Counsel contends that the requested minutes should have been provided to the Complainant within seven (7) business days as required by N.J.S.A. 47:1A-5.i. Counsel asserts that even though the minutes may contain information not subject to disclosure under OPRA, the Custodian was required to provide the requested minutes with appropriate redactions and a written explanation of the specific lawful basis thereof. *See* Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006) *and* Paff v. Borough of Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008).

March 26, 2009 OPRA request No. 2:[8]

Counsel states that the Complainant prepared and submitted an OPRA request to the BOE on March 26, 2009 for the following:

1. Comprehensive annual financial ("CAFR") report ending June 30, 2008
2. Management report
3. Corrective action plan ("CAP")
4. Resolution accepting audit

Counsel states that the Custodian failed to respond to the Complainant's request.

Counsel avers that the records requested by the Complainant are government records under OPRA. *See* N.J.S.A. 47:1A-1.1. Counsel contends that the requested records should have been provided to the Complainant within seven (7) business days as required by N.J.S.A. 47:1A-5.i. Counsel asserts that even though the records may contain information not subject to disclosure under OPRA, the Custodian was required to provide the requested records with appropriate redactions and a written explanation of the specific lawful basis thereof. *See* Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006) *and* Paff v. Borough of Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008).

Counsel requests the following relief:

1. A determination ordering the BOE to provide all records responsive to the Complainant's three (3) OPRA requests;
2. A determination that the BOE violated OPRA by not providing access to the requested records or requesting additional time to respond;
3. A determination that the Complainant is a prevailing party in this matter and is entitled to prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6.

[8] The evidence of record indicates that this request was submitted to the Custodian on March 26, 2009.

The Complainant does not agree to mediate this complaint.

May 18, 2009

The Custodian Counsel's response to the OPRA request.[9] Counsel states that the Complainant submitted three (3) separate OPRA requests to the Custodian: one (1) on March 25, 2009 and two (2) on March 26, 2009.

March 25, 2009 OPRA request:

Counsel responds in writing to the Complainant's OPRA request on the thirty-fifth (35th) business day following receipt of such request. Counsel states that the requested information regarding employees of the BOE from January 1, 2008 to March 24, 2009 was retrieved and collated for the Complainant. Counsel states that the records responsive were made available for pickup at the BOE Business Office on April 3, 2009, or six (6) days following receipt of the Complainant's OPRA request. Counsel states that the Complainant has failed to retrieve the records.

March 26, 2009 OPRA request No. 1:

Counsel responds in writing to the Complainant's OPRA request on the thirty-fourth (34th) business day following receipt of such request. Counsel states that access to the requested executive session meeting minutes for meetings held between January 1, 2009 and March 24, 2009 is denied. Counsel states that the BOE went into executive session on January 27, 2009 and February 24, 2009 and has not yet approved the minutes for these two (2) meetings. Counsel states that the Custodian noted the reason for denying access to the requested meeting minutes on the Complainant's request form, which was made available to the Complainant for pick up on April 3, 2009.

March 26, 2009 OPRA request No. 2:

Counsel responds in writing to the Complainant's OPRA request on the thirty-fourth (34th) business day following receipt of such request. Counsel states that the CAFR, management report, CAP and resolutions approving the CAFR were gathered and made available to the Complainant for pick up on April 3, 2009, or five (5) business days after receipt of the request. Counsel states that the copying charge for the CAFR is $57.00, which is refundable if the CAFR is returned to the BOE.

Counsel requests that the Complainant's Counsel advise the Complainant that the BOE is in full compliance with OPRA and that the instant complaints should be withdrawn.

June 9, 2009

Letter from the Custodian to the Complainant. The Custodian states that Counsel previously responded in writing to the Complainant's Counsel in a letter dated May 18,

[9] The Custodian's previous Counsel, Ms. Toni Belford Damiano, Esq., responded to the Complainant's OPRA requests on behalf of the Custodian. Ms. Damiano's term of service with the BOE expired on June 30, 2009.

2009. The Custodian states that the letter clearly indicated that the requested information has been available since April 3, 2009. The Custodian states that not only was the Complainant verbally advised to return in seven (7) business days (or on April 3, 2009) to retrieve the requested records at the time she submitted all three (3) requests, but that the Complainant cannot deny that she received a written response dated May 18, 2009 from the Custodian's Counsel. The Custodian advises that this correspondence will be the Complainant's final notice that the records responsive to the Complainant's three (3) OPRA requests have been available since April 3, 2009 and remain available for pick up.

The Custodian reiterates that there is no charge for the records responsive to the Complainant's March 25, 2009 request, which consist of copies of BOE minutes from January, 2008 through February, 2009 and a copy of the BOE's payroll report from the March 13, 2009 payroll. The Custodian also reiterates that the Complainant's March 26, 2009 request No. 1 for executive session meeting minutes requested is denied because the records responsive for meetings held on January 27, 2009 and February 24, 2009 have not been approved by the BOE.

The Custodian further reiterates that the records responsive to the Complainant's March 26, 2009 request No. 2 have been available since April 3, 2009. The Custodian states that the cost for the CAFR is $57.00, which is refundable upon returning the CAFR to the BOE. The Custodian states that there is no charge for the other records responsive.

Finally, the Custodian states that the records subject to disclosure have been ready for pick up since April 3, 2009 and continue to be available for the Complainant.[10]

June 11, 2009

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

June 12, 2009

E-mail from the Complainant to the Custodian. The Complainant requests that all records responsive to the Complainant's three (3) requests be mailed to her with the exception of the CAFR. The Complainant states that she believes that she is required to pay postage for such and is willing to submit payment upon notification of the costs associated with postage.[11]

June 15, 2009

E-mail from the Custodian to the Complainant. The Custodian confirms that pursuant to a telephone conversation with the Complainant, the requested records will be hand delivered. Moreover, the Custodian states that the fee for the CAFR will be waived because the Complainant has agreed to return the CAFR to the BOE by September 7, 2009.

[10] The Custodian provides details about several other OPRA requests that are not at issue in the instant complaint.

[11] The Complainant informs the Custodian that any future correspondence should be forwarded to the Complainant's Counsel.

June 15, 2009

E-mail from the Complainant to the Custodian. The Complainant thanks the Custodian for offering the records via mail and confirms that she has agreed to return the CAFR by September 7, 2009.

June 15, 2009

E-mail from the Custodian to the Complainant. The Custodian confirms that the requested records will be hand delivered on this date. Further, the Custodian advises the Complainant to contact the Custodian if there are any questions regarding the payroll report.

June 23, 2009

Letter from the Custodian's Counsel to the GRC with the following attachments:

- Letter from the Custodian to the Complainant dated June 9, 2009
- E-mail from the Complainant to the Custodian dated June 12, 2009
- E-mail from the Custodian to the Complainant dated June 15, 2009
- E-mail from the Complainant to the Custodian dated June 15, 2009
- E-mail from the Custodian to the Complainant dated June 15, 2009

Counsel states that she is aware that the SOI was due on June 18, 2009; however, Counsel was unable to submit the SOI due to extenuating circumstances. Counsel requests that the GRC provide additional time to submit the requested SOI.

Counsel asserts that the attached e-mails will likely negate the BOE's need to submit an SOI. Counsel states that the Complainant is in possession of the records she requested.[12] Counsel states that based on the attached e-mails, the BOE believes that no outstanding issues with the Complainant remain.

June 23, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC states that it is in receipt of Counsel's letter dated June 23, 2009. The GRC states that, due to the extenuating circumstances regarding the instant complaint, the GRC grants an extension until July 2, 2009 to submit the requested SOI.

July 1, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated March 25, 2009 with the Custodian's signature thereon dated April 3, 2009
- Complainant's second (2^{nd}) request dated March 26, 2009 with the Custodian's signature and reason for denial thereon dated April 3, 2009
- Complainant's third (3^{rd}) request dated March 26, 2009 with the Custodian's signature thereon dated April 3, 2009

[12] Counsel provides an outline of events based on the attached e-mails.

- Letter from the Custodian's Counsel to the Complainant's Counsel dated May 18, 2009
- Letter from the Custodian to the Complainant dated June 9, 2009
- Letter from Counsel to the GRC dated June 23, 2009
- E-mail from the Complainant to the Custodian dated June 12, 2009
- E-mail from the Custodian to the Complainant dated June 15, 2009
- E-mail from the Complainant to the Custodian dated June 15, 2009
- E-mail from the Custodian to the Complainant dated June 15, 2009[13]

The Custodian certifies that he handled each request item as follows:

March 25, 2009 OPRA request:

The Custodian certifies that the Complainant, upon hand-delivering the instant request, was verbally advised by the Custodian to return in seven (7) days to retrieve the requested records. The Custodian certifies that Counsel provided written notification to the Complainant's Counsel on May 18, 2009 that the records responsive to this request have been prepared and ready for retrieval since April 3, 2009.

The Custodian certifies that he notified the Complainant again on June 9, 2009 that the records responsive were available for retrieval. The Custodian certifies that BOE meeting minutes from January 2008 through February 2009 and the BOE's district payroll report from March 13, 2009 were hand delivered to the Complainant on June 15, 2009.

March 26, 2009 OPRA request No. 1:

The Custodian certifies that access to the records responsive to the Complainant's request for executive session meeting minutes was denied because the minutes for executive session meetings held on January 27, 2009 and February 24, 2009 were not yet approved by the BOE at the time of the Complainant's OPRA request. The Custodian certifies that he included his reason for denying access to the Complainant's request directly on the form. Further, the Custodian certifies that Counsel provided a written response to the Complainant's Counsel on May 18, 2009 and the Custodian sent a second letter to the Complainant on June 9, 2009.

March 26, 2009 OPRA request No. 2:

The Custodian certifies that the Complainant, upon hand-delivering the instant request, was verbally advised by the Custodian to return in seven (7) days to retrieve the requested records. The Custodian certifies that Counsel provided written notification to the Complainant's Counsel on May 18, 2009 that the records responsive to this request have been prepared for retrieval since April 3, 2009. The Custodian certifies that on June

[13] The Custodian does not certify to the search undertaken to locate the requested records. Additionally, the Custodian did not certify as to the last date upon which records that may have been 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").

9, 2009 he again notified the Complainant that the records responsive to the request were available for retrieval.

The Custodian certifies that the responsive records consist of the BOE's CAFR, management report, CAP and BOE resolution accepting the CAFR. The Custodian certifies that the only fee charged was $57.00 for the CAFR, which was refundable upon return of the document undamaged to the BOE. The Custodian certifies that the requested records were hand delivered to the Complainant on June 15, 2009 and the $57.00 fee was waived because the Complainant agreed to return the CAFR by September 7, 2009.

The Custodian asserts that there was no unlawful denial of access regarding these three (3) OPRA requests. The Custodian asserts that the instant complaints are frivolous.

Analysis

Whether the Custodian's failure to respond in writing to the Complainant's three (3) OPRA requests results in a "deemed" denial of access under OPRA?

OPRA provides that:

> "…government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*…" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

> "… any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* … or *that has been received* in the course of his or its official business …" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also 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 thereof …" N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

> "[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access … or deny a request for access … as soon as possible, but *not later than seven business days after receiving the request* … In the event a custodian

> fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* …" (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. 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.[14] Thus, a custodian's failure to respond in writing to a complainant's OPRA 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).

Additionally, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-106 (February 2009), the Complainant stated in the Denial of Access Complaint that the Custodian failed to respond to his June 17, 2007 OPRA request. The GRC noted in Verry that the evidence of record showed that the Custodian stated the reason for denial and signed and dated the Complainant's request form; however, the Custodian failed to return the form to the Complainant. The GRC held that "the Custodian's failure to respond in writing to the Complainant's OPRA request … within the statutorily mandated seven (7) business days results in a "deemed" denial … 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)."

In the instant complaint, the Custodian's Counsel initially responded in writing on May 18, 2009, or the thirty-fifth (35th) and (34th) business days after receipt of the Complainant's three (3) OPRA requests respectively, stating that the records responsive

[14] 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, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

to the Complainant's March 25, 2009 request and March 26, 2009 request No. 2 were available. Additionally, Counsel advised the Complainant that the Custodian denied access to the meeting minutes responsive to the Complainant's March 26 request No. 1 because the minutes responsive were not yet approved by the BOE. Counsel advised that the Custodian noted this denial on the Complainant's form, which was available for pick up on April 3, 2009. Further, the Custodian stated in a letter to the Complainant dated June 9, 2009 that at the time the Complainant submitted all three (3) requests, the Custodian verbally advised the Complainant to return in seven (7) days, or on April 3, 2009.

The Custodian subsequently certified in the SOI that he verbally advised the Complainant to return to the BOE on April 3, 2009 to retrieve the requested records; however, the Custodian failed to provide written response granting access to the records responsive to the Complainant's March 25, 2009 request and March 26, 2009 request No. 2 until the thirty-fifth (35^{th}) and (34^{th}) business days after receipt of the requests respectively. Additionally, the Custodian signed and dated the Complainant's three (3) request forms and included the reason for denying access to the executive session meeting minutes responsive to the Complainant's March 26, 2009 request No. 1; however, the Custodian failed to return any of the three (3) request forms to the Complainant.

Therefore, the Custodian's failure to respond in writing to the Complainant's March 25, 2009 request, March 26, 2009 request No. 1 and March 26, 2009 request No. 2 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 three (3) OPRA requests 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).

Whether the Complainant's March 25, 2009 request is invalid under OPRA?

In the matter before the Council, on March 25, 2009 the Complainant requested "[t]he name, position, salary, payroll record and length of service for every Board/ District employee who was employed in whole or part from January 1, 2008 to March 24, 2009." The Custodian certified in the SOI that BOE meeting minutes from January 2008 through February 2009 and the BOE's district payroll report from March 13, 2009 were hand delivered to the Complainant on June 15, 2009. However, the Complainant's March 25, 2009 request is invalid because it is a request for information and not a request for specific identifiable government records.

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

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

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

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),[15] 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."[16]

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

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

Moreover, the court cited MAG by stating that "…when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not

[15] Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).
[16] As stated in Bent, *supra*.

'encompassed' by OPRA…" The court also quoted N.J.S.A. 47:1A-5.g in that "'[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.'" The court further stated that "…the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to…generate new records…"

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

In the instant complaint, the Complainant's request for "name, position, salary…" seeks information and fails to specify identifiable government records. As such, the Complainant's March 25, 2009 request is invalid under OPRA. MAG, *supra*, NJ Builders, *supra*, Bent, *supra* and Schuler, *supra*.

Therefore, because the Complainant's March 25, 2009 request seeks information rather than a specifically identifiable government record, the request is invalid under OPRA pursuant to MAG, *supra*, NJ Builders, *supra*, Bent, *supra* and Schuler, *supra*.

Finally, the GRC notes that although the Complainant's request for information is invalid under OPRA, the Custodian still undertook the task of locating records which may be responsive to the Complainant's request. The GRC notes that 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 and shall not be made available for public access, 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.

Even though N.J.S.A 47:1A-10 allows for certain parts of a personnel record to be public, a requestor is still required to identify a specific government record that may contain this information. Therefore, although the Complainant in the instant complaint identified the parts of a personnel record that are not exempt under OPRA, such is still an invalid request for information because the Complainant failed to identify a specific government record.

Whether the Custodian unlawfully denied access to records responsive to the Complainant's March 26, 2009 OPRA requests No. 1 and request No. 2?

First, the GRC addresses whether the Custodian unlawfully denied access to the executive session meeting minutes responsive to the Complainant's March 26, 2009 request No. 1.

In the instant complaint, the Custodian noted on the Complainant's request form and certified in the SOI that the January 27, 2009 and February 24, 2009 executive session meeting minutes requested by the Complainant were not yet approved by the BOE at the time of the Complainant's OPRA request.

As a general matter, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a "government record" as records either "made, maintained or kept on file in the course of [an agency's] official business," or "received" by an agency in the course of its official business, N.J.S.A. 47:1A-l.l., the statute also excludes from this definition a variety of documents and information. Ibid. *See* Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that "inter-agency or intra-agency advisory, consultative, or deliberative material" is not included within the definition of a government record. N.J.S.A. 47: 1A-1 .1.

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass'n, v. Dinkins, 807 F.Supp., 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn. App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it "'reflect[s] that aspect of the agency's function that precedes formal and informed decision making.'" *Id*. at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004), the court reviewed an OPRA request to the Department of Corrections ("DOC") for draft regulations and draft statutory revisions. The court stated that these drafts were "all clearly pre-decisional and reflective of the deliberative process." *Id.* at 18. It further held:

> "[t]he trial judge ruled that while appellant had not overcome the presumption of non-disclosure as to the entire draft, it was nevertheless entitled to those portions which were eventually adopted. Appellant appeals from the portions withheld and DOC appeals from the portions required to be disclosed. We think it plain that all these drafts, in their entirety, are reflective of the deliberative process. On the other hand, appellant certainly has full access to all regulations and statutory revisions ultimately adopted. We see, therefore, no basis justifying a conclusion that

the presumption of nondisclosure has been overcome. Ibid. (Emphasis added.)"

Additionally, the GRC has previously ruled on the issue of whether draft meeting minutes are exempt from disclosure pursuant to OPRA. In Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council held that "…the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1."

Thus, in accordance with the foregoing case law and the prior GRC decision in Parave-Fogg, *supra*, all draft minutes of a meeting held by a public body are entitled to the protection of the deliberative process privilege. Draft minutes are pre-decisional. In addition, they reflect the deliberative process in that they are prepared as part of the public body's decision making concerning the specific language and information that should be contained in the minutes to be adopted by that public body, pursuant to its obligation under the Open Public Meetings Act to "keep reasonably comprehensible minutes." N.J.S.A. 10:4-14.

Therefore, in the matter before the Council, the unapproved, draft executive session meeting minutes dated January 27, 2009 and February 24, 2009 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, *supra*. Accordingly, the Custodian has borne his burden of proving a lawful denial of access to the January 27, 2009 and February 24, 2009 draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive minutes were not approved by the governing body at the time of the Complainant's March 26, 2009 OPRA request No. 1.

Finally, the GRC addresses whether the Custodian unlawfully denied access to the records responsive to the Complainant's March 26, 2009 OPRA request No. 2.

In response to the Complainant's request for four (4) records, the Custodian's Counsel advised the Complainant's Counsel in a letter dated May 18, 2009 that the requested records were ready for pick up on April 3, 2009 and that the copying charge for the CAFR is $57.00 (which is refundable if the CAFR is returned to the BOE). Further, the Custodian reiterated in a letter to the Complainant dated June 9, 2009 that the records were available for pick up. The Custodian subsequently certified in the SOI that all four (4) records were hand delivered to the Complainant on June 15, 2009.

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Custodian stated in the SOI that one (1) record responsive to the Complainant's March 2, 2005, OPRA request was provided and that no other records responsive existed. The Complainant contended that she believed more records responsive did, in fact, exist. The GRC requested that the Custodian certify as to whether all records responsive had been provided to the Complainant. The Custodian

subsequently certified on August 1, 2005 that the record provided to the Complainant was the only record responsive. The GRC held that:

> "[t]he Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access."

In this complaint, the Custodian certified that he provided all records responsive to the Complainant on June 15, 2009 and there is no credible evidence in the record to refute the Custodians' certification. Therefore, 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 a written response to the Complainant within the statutorily mandated time frame, he did not unlawfully deny access to the records responsive to the Complainant's March 26, 2009 request No. 2 pursuant to Burns, *supra*.

Whether the Custodian's "deemed" denial of the Complainant's three (3) records requests 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 failure to provide a written response to the Complainant's three (3) records requests within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Complainant's March 25, 2009 request is invalid under OPRA, and because the Custodian bore his burden of proving a lawful denial of access to the minutes responsive to the Complainant's March 26, 2009 OPRA request No. 1, and because the Custodian provided all records responsive to the Complainant's March 26, 2009 OPRA request No. 2 on June 15, 2009, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

> "[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:
>
> - institute a proceeding to challenge the custodian's decision by filing an action in Superior Court…; or
> - in lieu of filing an action in Superior Court, file a complaint with the Government Records Council…
>
> A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

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

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

unavailing. *Id*. at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id*. As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

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

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

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

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

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

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

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

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

> federal fee-shifting laws. *Id*. at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon . . . ." *Id*. at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.
>
> OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed $ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the $ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.[17] 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)."

However, in Mason, the New Jersey Supreme Court shifted the traditional burden of proof to the responding agency in one category of cases: when an agency has failed to respond *at all* to a request within seven business days. The Court noted that:

> "OPRA requires that an agency provide access or a denial no later than seven business days after a request. The statute also encourages compromise and efforts to work through certain problematic requests. But under the terms of the statute, the agency must start that process with some form of response within seven business days of a request. *If an agency fails to respond at all within that time frame, but voluntarily discloses records after a requestor files suit, the agency should be required to prove that the lawsuit was not the catalyst for the agency's belated disclosure.* Such an approach is faithful to OPRA's clear command that an agency not sit silently once a request is made." [Emphasis added]. Mason v. City Clerk of the City of Hoboken, 196 N.J. 51, 77 (2008).

[17] 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.

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 matter before the Council, the Complainant filed a Denial of Access Complaint with the GRC on May 8, 2009 contending that the Custodian failed to respond to her three (3) OPRA requests. The Complainant's Counsel requested that the GRC order disclosure of all records responsive and determine that the Custodian violated OPRA by not responding to the Complainant's requests.

Following the filing of this complaint with the GRC, the Custodian's Counsel sent a letter to the Complainant's Counsel on May 18, 2009 averring that the records responsive to the Complainant's March 25, 2009 request and March 26, 2009 OPRA request No. 2 had been prepared for pick up on April 3, 2009 and that access to the executive session meeting minutes responsive to the Complainant's March 26, 2009 OPRA request No. 1 was denied. Moreover, in a letter to the Complainant dated June 9, 2009, the Custodian reiterated that the Complainant was verbally advised to return seven (7) days after submitting her three (3) requests in order to retrieve the records. The Custodian also certified to such in the SOI.

Further, the Complainant's March 25, 2009 request is an invalid request for information, the Custodian lawfully denied access to the records responsive to the Complainant's March 26, 2009 request No. 1 and the Custodian provided all records responsive to the Complainant's March 26, 2009 OPRA request No. 2.

Pursuant to Mason, *supra*, because the Custodian failed to provide a written response to the Complainant within the statutorily mandated seven (7) business day time frame as provided by OPRA and voluntarily provided records responsive to the Complainant's March 26, 2009 OPRA request No. 2, the burden of proving that the filing of this Denial of Access Complaint was not a catalyst for the BOE's "belated disclosure" shifts to the BOE. The evidence of record shows that the Custodian signed and dated all three (3) requests April 3, 2009 and provided the records responsive to the Complainant's March 26, 2009 OPRA request No. 2 via hand delivery on June 15, 2009. Although the Custodian asserted both in his letter to the Complainant on June 9, 2009 and subsequently certified in the SOI that he verbally advised the Complainant to return to the BOE on April 3, 2009, this verbal response is not corroborated by any competent, credible evidence in the record other than the Custodian's June 9, 2009 letter and subsequent SOI certification.

Therefore, pursuant to Teeters, *supra*, and Mason, *supra*, the GRC is unable to determine whether the Complainant is a "prevailing party" entitled to an award of reasonable attorney's fees. Specifically, the GRC cannot determine whether the filing

of this complaint brought about a change (voluntary or otherwise) in the Custodian's conduct based on the lack of documentary evidence. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the filing of the Complainant's Denial of Access Complaint was the catalyst for a change in the Custodian's behavior and, if warranted, a determination of the amount of appropriate prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's March 25, 2009 request, March 26, 2009 request No. 1 and March 26, 2009 request No. 2 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 three (3) OPRA requests 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).

2. Because the Complainant's March 25, 2009 request seeks information rather than a specifically identifiable government record, the request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

3. The unapproved, draft executive session meeting minutes dated January 27, 2009 and February 24, 2009 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne his burden of proving a lawful denial of access to the January 27, 2009 and February 24, 2009 draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive minutes were not approved by the governing body at the time of the Complainant's March 26, 2009 OPRA request No. 1.

4. The Custodian certified that he provided all records responsive to the Complainant on June 15, 2009 and there is no credible evidence in the record to refute the Custodians' certification. Therefore, 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 a written response to the Complainant within the statutorily mandated time frame, he did not unlawfully deny access to the records responsive to the Complainant's March 26, 2009 request No. 2 pursuant Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

5. Although the Custodian's failure to provide a written response to the Complainant's three (3) records requests within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Complainant's March 25, 2009 request is invalid under OPRA, because the Custodian bore his burden of proving a lawful denial of access to the minutes responsive to the Complainant's March 26, 2009 OPRA request No. 1, and because the Custodian provided all records responsive to the Complainant's March 26, 2009 OPRA request No. 2 on June 15, 2009, 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.

6. 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 GRC is unable to determine whether the Complainant is a "prevailing party" entitled to an award of reasonable attorney's fees. Specifically, the GRC cannot determine whether the filing of this complaint brought about a change (voluntary or otherwise) in the Custodian's conduct based on the lack of documentary evidence. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the filing of the Complainant's Denial of Access Complaint was the catalyst for a change in the Custodian's behavior and, if warranted, a determination of the amount of appropriate prevailing party attorney's fees.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 21, 2010