



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

May 27, 2010 Government Records Council Meeting

John V. Petrycki, Jr., Esq.
Complainant

Complaint No. 2009-159

v.

Township of Hammonton (Atlantic)
Custodian of Record

At the May 27, 2010 public meeting, the Government Records Council (“Council”) considered the May 20, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian certified that she did not receive the Complainant’s OPRA requests dated November 25, 2008, and because the Complainant has not provided any evidence to contradict the Custodian’s certification, the Custodian has not unlawfully denied access to said requests. See Avila v. Camden County Prosecutor’s Office, 2007-287 (July 2008).
2. The Custodian’s failure to respond in writing to the Complainant’s re-submitted OPRA requests 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 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).
3. Because the Custodian certified that there are no records responsive to the Complainant’s OPRA requests for video recordings, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the statutorily mandated seven (7) business days, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide a written response to the Complainant’s re-submitted



OPRA requests within the statutorily mandated seven (7) business days, the Custodian certified that no video recordings responsive existed and thus would have carried her burden of proving a lawful denial of access has she responded timely. Additionally, there is no evidence in the record that suggests the Custodian's delay in providing a response to the Complainant's OPRA requests was intentional or deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. Although the Complainant is eligible for the state's fee-shifting provision under OPRA because the evidence of record indicated that he is an attorney representing a client in this matter, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant is not a "prevailing party" entitled to an award of reasonable attorney's fees. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct. The Custodian did not provide any videotapes to the Complainant as a result of this complaint because the Custodian certified that no records responsive exist. Additionally, using the catalyst theory discussed in Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), there is no factual causal nexus between the filing of the Complainant's Denial of Access Complaint and the Custodian's technical violation of OPRA (failing to respond in writing to the 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) and subsequent Statement of Information certification that no records responsive exist.

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 May, 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: June 3, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 27, 2010 Council Meeting**

**John V. Petrycki, Jr., Esq.
(On Behalf of James Donio)¹
Complainant**

GRC Complaint No. 2009-159

v.

**Township of Hammonton (Atlantic)²
Custodian of Records**

Records Relevant to Complaint:

1. Video recording of the October 23, 2006 Town Council meeting.
2. Video recording of the October 2006 Halloween Parade.
3. Video recording of the February 26, 2007 Town Council meeting.³

Request Made: November 25, 2008 and March 3, 2009

Response Made: March 4, 2009

Custodian: Susanne Oddo

GRC Complaint Filed: May 8, 2009⁴

Background

November 25, 2008

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

March 3, 2009

Letter from Jennifer L. Stratis, an associate with the Complainant's law firm, to Pam DiGurolamo of the Township Clerk's Office. Ms. Stratis states that the Complainant submitted multiple OPRA requests on November 25, 2008. Ms. Stratis includes copies of said requests and asks for a response and estimated cost to provide the requested records.

¹ No legal representation listed on record.

² Represented by Brian G. Howell, Esq. (Hammonton, NJ).

³ The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

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

March 4, 2009

Assistant Clerk's response to the OPRA request. The Assistant Clerk responds via telephone to Ms. Stratis on the first (1st) business day following the re-submittal of the Complainant's OPRA request. The Assistant Clerk states that she did not receive the Complainant's original OPRA request. The Assistant Clerk states that the requested records are not housed in her office, but she will forward the Complainant's OPRA request to the departments that maintain said records. However, the Assistant Clerk also states that it has been her experience that tapes are destroyed every 80 days.

March 6, 2009

E-mail from Assistant Clerk to Police Chief and Computer Technician. The Assistant Clerk forwards the Complainant's OPRA request and asks the Police Chief and Computer Technician to respond to Ms. Stratis within a week regarding a cost estimate for this request since it is already overdue.

March 10, 2009

Letter from Danielle Noto of the Hammonton Police Department to Jennifer L. Stratis. Ms. Noto provides the records responsive to the Complainant's requests which are not the subject of this Denial of Access Complaint and states that the Clerk's Office will respond to the remaining request items.

March 30, 2009

E-mail from Custodian to Computer Technician. The Custodian asks the Technician to provide all records responsive to the Complainant's OPRA request by April 2, 2009 or respond that no records responsive exist.

April 2, 2009

E-mail from Custodian to Computer Technician. The Custodian states that all audio/video maintained by the Township must be disclosed. The Custodian requests that if the Technician maintains any records responsive to the Complainant's request, he must provide said videos to the Town Attorney.

April 2, 2009

E-mail from Computer Technician to Custodian. The Technician states that he is not aware of any public records requirement for his area and as such, he has no records responsive.

May 8, 2009

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

- Complainant's OPRA requests dated November 25, 2008⁵
- Letter from Jennifer L. Stratis to Pam DiGurolamo dated March 3, 2009
- Certification of Jennifer L. Stratis dated April 28, 2009
- Complainant's Certification dated April 28, 2009

⁵ The Complainant submitted five (5) OPRA requests on said date; however, only three (3) OPRA requests are the subject of this Denial of Access Complaint.

The Complainant certifies that he submitted his OPRA requests on or about November 25, 2008. Jennifer L. Stratis, an associate with the Complainant's law firm, certifies that when the Complainant had not received a response to his OPRA requests, she spoke to Pam DiGurolamo from the Township's Clerk's Office on February 26, 2009 and requested that the Township provide a response to the Complainant's OPRA request. Ms. Stratis certifies that on or about March 4, 2009⁶, she sent Ms. DiGurolamo a letter requesting a response to the Complainant's OPRA requests. Ms. Stratis certifies that on or about March 6, 2009 she spoke to April Maimone, Assistant Clerk, who advised that the videographer would contact Ms. Stratis regarding the Complainant's OPRA requests within the next week. Ms. Stratis certifies that on April 6, 2009 she spoke to the Custodian's Counsel who advised that it would be difficult for the Custodian to locate the requested videos because said videos were not catalogued in any particular manner. Ms. Stratis certifies that the Custodian's Counsel informed her that a response to the Complainant's OPRA requests would be forthcoming. Ms. Stratis states that she has not received any further response from the Township.

Ms. Stratis contends that the Township has improperly denied access to the Complainant's OPRA requests. Ms. Stratis asserts that the Custodian has also violated N.J.S.A. 47:1A-5.i. by failing to respond to the Complainant's OPRA requests within seven (7) business days. Ms. Stratis also contends that the Township knowingly and willfully violated OPRA and unreasonably denied access to the requested video recordings under the totality of the circumstances and should be subject to a civil penalty pursuant to N.J.S.A. 47:1A-11. Further, Ms. Stratis requests that the Council award prevailing party attorney's fees to the Complainant.⁷

Additionally, the Complainant does not agree to mediate this complaint.

May 15, 2009

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

June 3, 2009

E-mail from Custodian's Counsel to GRC. The Custodian's Counsel states that the Custodian provided Ms. Stratis with the records responsive that exist approximately six (6) weeks ago. Counsel states that the Custodian also conducted a thorough search for the remaining records (primarily videotapes of public meetings and other public events) and the Computer Technician informed the Custodian that he often reused his videotapes as a cost saving effort. Counsel states that he has since advised the Technician that he is obligated to comply with record retention regulations. Counsel states that the requested videos do not exist.

June 4, 2009

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on May 15, 2009 and to date has not received a response. The GRC states

⁶ Letter dated March 3, 2009.

⁷ Ms. Stratis discusses the reasons behind the Complainant's OPRA requests; however, the Complainant's need for said records is not relevant to the adjudication of this Denial of Access Complaint.

that unless the Complainant withdraws his Denial of Access Complaint, the GRC must proceed with its investigation of this matter. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

June 8, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated November 25, 2008
- Letter from Jennifer L. Stratis to Pam DiGurolamo dated March 3, 2009
- E-mail from Assistant Clerk to Police Chief and Computer Technician dated March 6, 2009
- Letter from Danielle Noto of the Hammonton Police Department to Jennifer L. Stratis dated March 10, 2009
- E-mail from Custodian to Computer Technician dated March 30, 2009
- E-mail from Custodian to Computer Technician dated April 2, 2009
- E-mail from Computer Technician to Custodian dated April 2, 2009
- E-mail from Custodian's Counsel to GRC dated June 3, 2009
- Letter from Assistant Clerk to GRC dated June 8, 2009⁸

The Custodian certifies that she did not receive the Complainant's OPRA requests until March 4, 2009. The Custodian states that the Assistant Clerk verbally responded to Jennifer Stratis regarding the Complainant's OPRA requests.

The Custodian certifies that the requested videotapes do not exist because they were destroyed per Chapter 3 of Records Management R. 1996 d.590, record series # 0512-0000 which only requires a retention period of 80 days.

June 8, 2009

Letter from Assistant Clerk to GRC. The Assistant Clerk states that she did not receive the Complainant's original OPRA request, but received said requests when re-sent by Ms. Stratis. The Assistant Clerk states that she verbally informed Ms. Stratis that she did not believe the Township maintained copies of the requested videos since it has been her experience that videos are destroyed every 80 days.

The Assistant Clerk states that the Solicitor contacted the Computer Technician, who handles the videotapes, to determine if said videos exist. The Assistant Clerk states that the Technician responded that recordings are taped over and thus the Assistant Clerk assumes that the requested videos were taped over at the next month's meeting. The Assistant Clerk states that she thought she made it clear to Ms. Stratis that the requested videotapes no longer existed.

⁸ The Custodian also attached records responsive to the Complainant's OPRA requests which are not the subject of this Denial of Access Complaint.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA states that:

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

OPRA also states:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...*” (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.⁹ 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).

In this instant complaint, the Complainant certified that he submitted his OPRA requests on or about November 25, 2008 and did not receive any response from the Custodian. The Custodian certified that she did not receive the Complainant's OPRA requests until an associate with the Complainant's law firm re-submitted said requests on March 4, 2009. The Complainant did not provide any evidence to contradict the Custodian's certification.

In a similar complaint, Avila v. Camden County Prosecutor's Office, 2007-287 (July 2008), the Custodian certified that she did not receive any OPRA requests for request items no. 4 and 5. The Council held that, "the Custodian has not unlawfully denied access to request Items No. 4 and No. 5 because the Custodian certified that no OPRA request was ever received from the Complainant."

Therefore, in this instant complaint, because the Custodian certified that she did not receive the Complainant's OPRA requests dated November 25, 2008, and because the Complainant has not provided any evidence to contradict the Custodian's certification, the Custodian has not unlawfully denied access to said requests. See Avila, *supra*.

However, Jennifer L. Stratis, an associate with the Complainant's law firm, certified that she re-sent the Complainant's OPRA requests under cover letter dated March 3, 2009 to Pam DiGurolamo from the Township's Clerk's Office. The Custodian certified that she received said requests on March 4, 2009. The Custodian stated that the Assistant Clerk verbally responded to Ms. Stratis regarding the Complainant's OPRA requests. Ms. Stratis confirmed that on or about March 6, 2009, the second (2nd) business day following the Custodian's receipt of the Complainant's re-submitted OPRA requests, she spoke to the Assistant Clerk who verbally advised that the videographer would contact Ms. Stratis regarding the Complainant's OPRA requests within the next week. Ms. Stratis certified that on April 6, 2009, approximately one (1) month following the Custodian's receipt of the Complainant's re-submitted OPRA requests, she spoke to the Custodian's Counsel who advised that it would be difficult for the Custodian to locate the requested videos because said videos were not catalogued in any particular manner. Ms.

⁹ 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.

Stratis certified that the Custodian's Counsel informed her that a response to the Complainant's OPRA requests would be forthcoming. Ms. Stratis stated that she has not received any further response from the Township.

Therefore, the Custodian's failure to respond in writing to the Complainant's re-submitted OPRA requests dated March 3, 2009 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 requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

Nevertheless, the Custodian certified that the requested videotapes do not exist because they were destroyed per Chapter 3 of Records Management R. 1996 d.590, record series # 0512-0000 which only requires a retention period of 80 days.

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

However, in this instant complaint, the Custodian failed to provide the Complainant with a written response within the statutorily mandated seven (7) business days indicating that no records responsive existed.

Therefore, because the Custodian certified that there are no records responsive to the Complainant's OPRA requests, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the statutorily mandated seven (7) business days, pursuant to Pusterhofer, supra.

Whether the Custodian's delay in responding to the Complainant's OPRA 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.

The Complainant certified that he submitted his OPRA requests on or about November 25, 2008 and did not receive any response from the Custodian. The Custodian certified that she did not receive the Complainant’s OPRA requests until an Associate with the Complainant’s law firm re-submitted said requests on March 4, 2009. The Complainant did not provide any evidence to contradict the Custodian’s certification.

As previously stated, because the Custodian certified that she did not receive the Complainant’s OPRA requests dated November 25, 2008, and because the Complainant has not provided any evidence to contradict the Custodian’s certification, the Custodian has not unlawfully denied access to said requests.

However, Jennifer L. Stratis, an Associate with the Complainant’s law firm, certified that she re-sent the Complainant’s OPRA requests under cover letter dated March 3, 2009 to Pam DiGurolamo from the Township’s Clerk’s Office. The Custodian certified that she received said requests on March 4, 2009. However, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests 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, supra.

Further, because the Custodian certified that there are no records responsive to the Complainant’s OPRA requests for video recordings, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the extended timeframe, pursuant to Pusterhofer, supra.

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

Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide a written response to the Complainant’s re-submitted OPRA requests

within the statutorily mandated seven (7) business days, the Custodian certified that no video recordings responsive existed and thus would have carried her burden of proving a lawful denial of access has she responded timely. Additionally, there is no evidence in the record that suggests the Custodian's delay in providing a response to the Complainant's OPRA requests was intentional or deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

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

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

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

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

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

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

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that “[a] plaintiff is considered a prevailing party ‘when actual relief on the merits of [the]

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

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

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

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon" *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.¹⁰ Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight business days later, or one day beyond the statutory limit. *Id.* at 79. As a result, the Court shifted the burden to Hoboken to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind the City's voluntary disclosure. *Id.* Because Hoboken's February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

In this instant matter, the Complainant sought access to various videotapes and asserted that the Custodian had not yet provided said tapes. Specifically, the Complainant certified that he submitted his OPRA requests on or about November 25, 2008 and did not receive any response from the Custodian. However, because the Custodian certified that she did not receive the Complainant's OPRA requests dated November 25, 2008, and because the Complainant has not provided any evidence to contradict the Custodian's certification, the Custodian has not unlawfully denied access to said requests.

Yet, Jennifer L. Stratis, an Associate with the Complainant's law firm, certified that she re-sent the Complainant's OPRA requests under cover letter dated March 3, 2009 to Pam DiGurolamo from the Township's Clerk's Office. The Custodian certified that she received said requests on March 4, 2009. However, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying

¹⁰ 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.

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, supra.

Nevertheless, because the Custodian certified that there are no records responsive to the Complainant’s OPRA request for video recordings, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the extended timeframe, pursuant to Pusterhofer, supra.

The more complicated aspect of this issue is whether the Complainant would qualify for reasonable attorney’s fees. According to the Supreme Court of New Jersey, the New Jersey Legislature has promulgated a “substantial number of statutes authorizing an award of a reasonable counsel fee *to the attorney for the prevailing party.*” (Emphasis added.) New Jerseyans For A Death Penalty Moratorium v. New Jersey Department of Corrections and Devon Brown, 182 N.J. 628 (2005) (decision without a published opinion), (quoting Rendine v. Pantzer, 141 N.J. 292 (1995)). Although the underlying purpose of those statutes may vary, they share a common rationale for incorporating a fee-shifting measure: to ensure “that plaintiffs with bona fide claims are able to find lawyers to represent them[,]... to attract competent counsel in cases involving statutory rights, ... and to ensure justice for all citizens.” New Jerseyans For A Death Penalty Moratorium supra, quoting Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989). Thus, the courts of the state have determined that the state’s fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, not an attorney who is the plaintiff representing himself.

In Phillip Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006), the requestor was an attorney requesting records on behalf of his client. The Council held that “[b]ased on the fact that the courts of the state have determined that the state’s fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff *not an attorney who is the plaintiff representing himself*, the Complainant is not entitled to reasonable attorney’s fees pursuant to OPRA.” (Emphasis added). The Council also held the same ruling in Daryle Pitts v. NJ Department of Corrections, GRC Complaint No. 2005-71 (April 2006).

However, in Johnston (on behalf of Hillside Board of Education) v. Township of Hillside, GRC Complaint No. 2006-202 (March 2008), the Complainant (an attorney representing the Hillside Board of Education) submitted an OPRA request under his name but on behalf of his client. Additionally, the Complainant filed a Denial of Access Complaint under his name but on behalf of the Hillside Board of Education. The Council distinguished this complaint from Boggia, supra, and Pitts, supra, in that the Complainant clearly identified at the time of the request and complaint that he was requesting records and filing a complaint on behalf of his client. As such, the Council held that “because the Complainant clearly identified at the time of the request and complaint that the Complainant represented the Hillside Board of Education, the Complainant’s legal representation was established, allowing for the applicability of the state’s fee-shifting provision.”

In this instant complaint, the Complainant did not identify on his OPRA requests dated November 25, 2008 that he submitted said requests on behalf of his client. However, when Ms. Stratis re-submitted the Complainant's OPRA requests under cover letter dated March 3, 2009, she did reference the client's lawsuits, thus indicating that the Complainant, an attorney, represented the client. Therefore, the Complainant is eligible for the state's fee-shifting provision under OPRA, assuming the facts support the conclusion that the Complainant is a "prevailing party."

Although the Complainant is eligible for the state's fee-shifting provision under OPRA because the evidence of record indicate that he is an attorney representing a client in this matter, pursuant to Teeters, supra, the Complainant is not a "prevailing party" entitled to an award of reasonable attorney's fees. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct. The Custodian did not provide any videotapes to the Complainant as a result of this complaint because the Custodian certified that no records responsive exist. Additionally, using the catalyst theory discussed in Mason, supra, there is no factual causal nexus between the filing of the Complainant's Denial of Access Complaint and the Custodian's technical violation of OPRA (failing to respond in writing to the 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) and subsequent SOI certification that no records responsive exist.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified that she did not receive the Complainant's OPRA requests dated November 25, 2008, and because the Complainant has not provided any evidence to contradict the Custodian's certification, the Custodian has not unlawfully denied access to said requests. See Avila v. Camden County Prosecutor's Office, 2007-287 (July 2008).
2. The Custodian's failure to respond in writing to the Complainant's re-submitted OPRA requests 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 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).
3. Because the Custodian certified that there are no records responsive to the Complainant's OPRA requests for video recordings, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the statutorily mandated seven (7) business days, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

4. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide a written response to the Complainant's re-submitted OPRA requests within the statutorily mandated seven (7) business days, the Custodian certified that no video recordings responsive existed and thus would have carried her burden of proving a lawful denial of access has she responded timely. Additionally, there is no evidence in the record that suggests the Custodian's delay in providing a response to the Complainant's OPRA requests was intentional or deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. Although the Complainant is eligible for the state's fee-shifting provision under OPRA because the evidence of record indicated that he is an attorney representing a client in this matter, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant is not a "prevailing party" entitled to an award of reasonable attorney's fees. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct. The Custodian did not provide any videotapes to the Complainant as a result of this complaint because the Custodian certified that no records responsive exist. Additionally, using the catalyst theory discussed in Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), there is no factual causal nexus between the filing of the Complainant's Denial of Access Complaint and the Custodian's technical violation of OPRA (failing to respond in writing to the 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) and subsequent Statement of Information certification that no records responsive exist.

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Executive Director

May 20, 2010