



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2009-194

v.

New Jersey Department of Environmental Protection
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 2011 *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:

1. Because the Complainant has failed to establish in his motion for reconsideration of the Council’s August 24, 2010 Final Decision and Order that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in making its determinations in the August 24, 2010 Final Decision and failed to submit any evidence to establish how the New Jersey Department of Environmental Protection referral page was responsive to the Complainant’s OPRA request Item No. 9 and failed to submit any evidence to establish how the applications for Commercial Shooting Preserve Permit No. 272106 and Permit No. 282106 attest that shooting occurs in the interior of the Hudson Farms property and is therefore responsive to the Complainant’s OPRA request Item No. 11, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council’s August 24, 2010 Final Decision and Order remains unchanged.

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 24th Day of May, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 2, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*
Supplemental Findings and Recommendations of the Executive Director
April 27, 2011 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-194

v.

**New Jersey Department of
Environmental Protection²
Custodian of Records**

Records Relevant to Complaint: Electronic copies of the following:

1. New Jersey Department of Environmental Protection (“NJDEP”) policy or procedure for assessing the noise impact of a prospective shooting range.
2. The non-exempt portions of Mr. William Stansley (“Mr. Stansley”), Research Scientist, personnel file.
3. Organizational Chart showing Mr. Stansley’s position in relation to other NJDEP employees.
4. Testing and health assurance process for pheasants raised at Rockport Pheasant Facility.
5. Testing and health assurance processes for Commercial Shooting Preserve (“CSP”) licensed pheasant facilities.
6. Inspection reports for Item No. 5 above, for pheasant raising facilities licensed to Hudson Farm in Andover, New Jersey.
7. Certifications from 1999 to the present that Hudson Guild/Hudson Farm, which are licensed CSP entities, were registered in New Jersey and remained in good standing.
8. Letter to NJDEP Commissioner Lisa Jackson (“Commissioner Jackson”) signed by nine (9) New Jersey residents dated October 17, 2007, letters to Commissioner Jackson and Director David Chanda (“Director Chanda”), Fish & Wildlife, dated November 2, 2007 and a letter to Commissioner Jackson and Director Chanda from Ms. Fred Gillespie (“Mr. Gillespie”) regarding CSP Permit No. 2106 (later found to be No. 272106).
9. All NJDEP personnel written communications, including e-mails concerning the letters identified in Item No. 8 above.
10. All NJDEP personnel written communications, including e-mails and meeting reports, regarding the January 2008 meeting between a Mr. Herrightly, Mr. Roseff, Mr. Gonzalez and Mr. Gillespie.

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

² Represented by DAG Lauren Trasferini, on behalf of the NJ Attorney General.

11. Licensee applications for CSP Permit No. 272106 and Permit No. 282106 attesting that shooting occurs in interior of property per a letter from Director Chanda to one Mr. Roy Fernandez dated January 15, 2009.

Request Made: April 13, 2009

Response Made: April 22, 2009

Custodian: Matthew Coefer

GRC Complaint Filed: June 5, 2009³

Background

August 24, 2010

Government Records Council's ("Council") Final Decision. At its August 24, 2010 public meeting, the Council considered the August 17, 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 response is insufficient pursuant to N.J.S.A. 47:1A-5.g., O'Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008) because he failed to address the Complainant's preferred method of delivery (e-mail). Moreover, the Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008) because he failed to individually address each of the Complainant's eleven (11) request items.
2. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant's request Items No. 1, No. 7, No. 9, No. 10 and No. 11 exist, and because there is no credible evidence to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested records. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Because the Custodian certified in the Statement of Information that he provided all records responsive to the Complainant's OPRA request Items No. 4, No. 5 and No. 6 and there is no credible evidence in the record to refute the Custodian's certification, he did not unlawfully deny access to the records responsive to the Complainant's three (3) OPRA request items pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
4. Although the Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5.g. because he failed to address the Complainant's preferred method of delivery (e-mail) and failed to individually address each of the

³ The GRC received the Denial of Access Complaint on said date.
Jesse Wolosky v. New Jersey Department of Environmental Protection, 2009-194 – Supplemental Findings and Recommendations of the Executive Director

Complainant's eleven (11) request items, because the Custodian certified in the Statement of Information that no records responsive to request Items No. 1, No. 7, No. 9, No. 10 and No. 11 exist and because the Custodian provided the Complainant with all records responsive to request Items No. 4, No. 5 and No. 6, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the Custodian's technical violation of OPRA (failing to address the preferred method of delivery and failing to respond to each request item individually). Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

August 27, 2010

Council's Interim Order distributed to the parties.

September 3, 2010

The Complainant's motion for reconsideration with the following attachments:

- Letter from New Jersey residents to Commissioner Jackson dated October 17, 2007.
- NJDEP Governor/Commissioner referral page dated October 23, 2007.
- Letter from Director Chanda to Mr. Roy Fernandez ("Mr. Fernandez") dated January 15, 2009.
- License for Hudson Farm to operate a commercial shooting preserve dated October 2, 2007.
- Completed "Commercial Preserve Permit Renewal Form" dated April 10, 2007.

The Complainant requests that the GRC reconsider findings regarding items No. 9 and No. 11 of the Complainant's April 13, 2009 OPRA request contained within the GRC's August 24, 2010 Final Decision pursuant to *N.J.A.C. 5:105.2.10* based on a mistake, new evidence and fraud.

The Complainant certifies that Item No. 9 of his request sought, "[a]ll NJDEP personnel written communications, including e-mails concerning the letters identified in Item No. 8 above." The Complainant certifies that those letters referenced were, "... a letter to Commissioner Jackson signed by nine (9) New Jersey residents dated October 17, 2007, letters to Commissioner Jackson and Director Chanda dated November 2, 2007 and a letter to Commissioner Jackson and Director Chanda from Mr. Gillespie regarding

CSP Permit No. 2106 (later found to be No. 272106).” The Complainant certifies that a copy of the October 17, 2007 letter is attached.

The Complainant certifies that following receipt of the GRC’s August 24, 2010 Final Decision, new evidence has come to light confirming that written communications responsive to Item No. 9 existed. Specifically, the Complainant certifies that on October 23, 2007, the NJDEP prepared an “NJDEP Governor/Commissioner” referral form. The Complainant certifies that this referral form was provided to the Complainant by Mr. Harvey Roseff (“Mr. Roseff”), who received the referral form pursuant to an OPRA request he made to the NJDEP.

The Complainant argues that based on this referral form, the GRC should reconsider its finding that the Custodian did not unlawfully deny access to any records responsive to request Item No. 9 because the Custodian certified that no records responsive existed and there is no credible evidence to refute the Custodian’s certification. The Complainant argues that the referral form should have been provided as responsive to Item No. 9, and any letters written as a result of the referral should also have been provided.

The Complainant certifies that Item No. 11 of his request sought, “[l]icensee applications for CSP Permit No. 272106 and Permit No. 282106 attesting that shooting occurs in interior of property per a letter from Director Chanda to one Mr. Roy Fernandez dated January 15, 2009.” The Complainant certifies that a copy of the letter from Director Chanda to Mr. Fernandez is attached.

The Complainant certifies that in the letter, Director Chanda explicitly discusses the Hudson Farm shooting preserve license. The Complainant certifies that Director Chanda states that:

“[i]n 2007, a newly acquired property in Byram and Andover Township was added to the license ... this property was inspected by a conservation officer and found to be appropriate for this activity. The officer determined that the farm added to the preserve was large enough to allow hunting activity associated with a commercial preserve to safely occur on this property ... and the commercial preserve activities take place in the interior portion of this very large land holding ...”

The Complainant certifies that based on the statement above, the Complainant requested copies of the Hudson Farms permit applications regarding the locations of the property that is subject to this action. The Complainant certifies that the NJDEP stated that no records responsive exist.

However, the Complainant certifies that Mr. Roseff provided him with a copy of the Hudson Farms 2007 conservation application, which he also acquired from the NJDEP.⁴ The Complainant certifies that the application contained information regarding the new lots that were being added by Hudson Farms and maps of the conservation area.

⁴ The record is unclear whether Mr. Roseff received these records pursuant to an OPRA request. Jesse Wolosky v. New Jersey Department of Environmental Protection, 2009-194 – Supplemental Findings and Recommendations of the Executive Director

The Complainant certifies that the 2007 application resulted in the issuance of Permit No. 272106.

The Complainant argues that based on the above, the NJDEP's statement that it does not maintain applications that show the locations of property is false: the NJDEP is in possession of a copy of the Hudson Farms application which identified by block and lot number the locations being added to the conservation area and included maps of the area. The Complainant states that all of this information was contained within the applications. The Complainant contends that the applications for CSP Permit No. 272106 and Permit No. 282106 should have been provided by the NJDEP and were not.

December 28, 2010

E-mail from the Complainant's Counsel to the GRC. Counsel states that he submitted a request for reconsideration of the instant complaint to the GRC on September 2, 2010. Counsel states that to date, he has received no objection papers from the Custodian. Counsel requests that if the GRC has received any objections from the Custodian they be forwarded to Counsel.

December 29, 2010

E-mail from the GRC to the Complainant's Counsel. The GRC states that the Custodian did not submit any objection papers.

December 30, 2010

E-mail from the Custodian to the GRC. The Custodian states that he was unaware that the GRC was waiting for objection papers from the NJDEP. The Custodian states that the NJDEP will be responding shortly.

December 30, 2010

E-mail from the GRC to the Custodian. The GRC states that filing an objection to the request for reconsideration is not required. The GRC states that its promulgated regulations allow for parties to file any objections to a request for reconsideration; however, those parties must do so "within ten (10) business days from receipt of the request." *N.J.A.C. 5:105-2.10*.

The GRC states that based on the foregoing, the GRC was not waiting for objection papers from the NJDEP because submission of same is optional.

January 4, 2011

E-mail from the Custodian's Counsel to the GRC.

Counsel states that the Custodian forwarded her an e-mail from the Complainant's Counsel dated December 28, 2010 regarding the status of the Complainant's request for reconsideration dated September 2, 2010. Counsel states that based on an error with her e-mail address, she had no knowledge of the request for reconsideration until receiving the Complainant Counsel's e-mail. Counsel further states that she understands that *N.J.A.C. 5:105-2.10* requires a party to file an objection within ten (10) business days from receipt of the request for reconsideration.

Counsel states that in light of the foregoing, the GRC accept and consider the NJDEP's objections to the request for reconsideration at this time. Counsel states that the NJDEP's objections are as follows.

The Custodian states that the Complainant's request for reconsideration addresses two (2) disputed items requested pursuant to OPRA.

The Custodian states that the Complainant's OPRA request Item No. 9 sought "[a]ll NJDEP personnel written communication, including e-mails concerning the letters identified in Item No. 8 above." The Custodian states that the "[NJDEP] Referral Governor/Commissioner" document the Complainant offers as Exhibit No. 2 is a print-screen from a Referral Database and serves as a tracking receipt regarding the October 17, 2007 letter to Commissioner Jackson. The Custodian asserts that this document is not a communication itself, nor does it indicate that correspondence was issued since the "Date Completed" is blank. The Custodian further states that he has confirmed that the Commissioner's Office did not issue a response to the October 17, 2007 letter.

The Custodian states that the Complainant's OPRA request Item No. 11 sought "Licensee applications for CSP Permit No. 272106 and Permit No. 282106 attesting that shooting occurs in interior of property per a letter from Director Chanda to one Mr. Roy Fernandez dated January 15, 2009." The Custodian states that the NJDEP's response that no records responsive exist was and still is accurate. The Custodian asserts that there are no documents that exist that "attest" that shooting occurs in the interior of the subject property outside of the statements in the NJDEP's letter dated January 15, 2009.

The Custodian further asserts the four (4) maps provided by the Complainant do not establish in any way that shooting is designated for the interior of the property. The Custodian argues that the Complainant's statements suggest that the NJDEP should conduct research and correlate data by reviewing and analyzing all potentially responsive records and correlating data (in this instance block and lot numbers on one record to locations on maps in a file): OPRA does not require a custodian to perform such a task. *See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546 (App. Div. 2005). The Custodian asserts that if the Complainant's OPRA request was for applications associated with CSP Permit No. 272106 and Permit No. 282106, then the NJDEP would have provided the existing records.

The Custodian states that in light of the forgoing, the NJDEP respectfully requests that the Complainant's request for reconsideration be denied.

January 13, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC states that based on the circumstances provided in Counsel's letter to the GRC dated January 4, 2011, the GRC accepts the NJDEP's objections to the Complainant's request for reconsideration.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's August 24, 2010 Final Decision conclusions relating to request items No. 9 and No. 11 of the Complainant's April 13, 2009 OPRA request?

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

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Order dated August 24, 2010 on September 3, 2010, five (5) days from the issuance of the Council's Order.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g., Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria, supra*, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his motion for reconsideration, the Complainant submitted a certification that he had discovered new evidence requiring reconsideration of the Council's Order regarding Item No. 9 of the Complainant's OPRA request, *to wit*, on October 23, 2007, the NJDEP prepared an “NJDEP Governor/Commissioner” referral form. The Complainant certified that this referral form was provided to the Complainant by Mr. Roseff. The Complainant argued that the referral form should have been provided as responsive to request Item No. 9 and any letters written as a result of the referral should also have been provided.

With regard to Item No. 11 of the Complainant's OPRA request, the Complainant certified that Mr. Roseff provided him with a copy of the Hudson Farms 2007 conservation application and further certified that the application contained information regarding the new lots that were being added by Hudson Farms and maps of the conservation area. The Complainant certified that the 2007 application resulted in the issuance of Permit No. 272106. The Complainant argued that based on the above, the NJDEP's statement that it does not maintain applications that show the locations of property is false: the NJDEP is in possession of a copy of the Hudson Farms application which identified by block and lot number the locations being added to the conservation area and included maps of the area. The Complainant argued that all of this information was contained within the applications and that the applications for CSP Permit No. 272106 and Permit No. 282106 should have been provided by the NJDEP.

In opposition to the Complainant's motion for reconsideration, the Custodian stated that the NJDEP "Referral Governor/Commissioner" document submitted by the Complainant is actually a print-screen from a Referral Database and served as a tracking receipt regarding the October 17, 2007 letter to Commissioner Jackson. The Custodian asserted that this document is not a communication itself, nor does it indicate that correspondence was issued since the "Date Completed" is blank. The Custodian further stated that he confirmed that the Commissioner's Office did not issue a response to the October 17, 2007 letter.

Moreover, regarding the Complainant's request Item No. 11, the Custodian stated that the NJDEP's response that no records responsive exist to the Complainant's OPRA request Item No. 11 seeking "[l]icensee applications for CSP Permit No. 272106 and Permit No. 282106 attesting that shooting occurs in interior of property per a letter from Director Chanda to one Mr. Roy Fernandez dated January 15, 2009" was and still is accurate. The Custodian asserted that there are no documents that exist that "attest" that shooting occurs in the interior of the subject property outside of the statements in the NJDEP's letter dated January 15, 2009. The Custodian further asserted that the four (4) maps provided by the Complainant do not establish in any way that shooting is designated for the interior of the property, and argued that the Complainant's statements suggest that the NJDEP should conduct research and correlate data by reviewing and analyzing all potentially responsive records and correlating data (in this instance block and lot numbers on one record to locations on maps in a file): OPRA does not require a custodian to perform such a task. *See* MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Custodian asserted that if the Complainant's OPRA request was for applications associated with CSP Permit No. 272106 and Permit No. 282106, then the NJDEP would have provided the existing records.

Regarding the Complainant's assertion that the "NJDEP Governor/Commissioner" referral form should have been provided to him as it was responsive to his request for "[a]ll NJDEP personnel written communication, including e-mails[,]" the Custodian has asserted that the referral form is actually a print-screen from a Referral Database and served as a tracking receipt regarding the October 17, 2007 letter to Commissioner Jackson. The Custodian also asserted that this document is not a communication itself, nor does it indicate that correspondence was issued since the "Date

Completed” is blank. The Complainant has not disputed the Custodian’s assertions. A review of the referral form submitted by the Complainant in support of his motion for reconsideration discloses that no information is imparted or disseminated on such form; it appears to merely be a cover sheet for the October 17, 2007 letter to Commissioner Jackson.

The evidence of record therefore establishes that the “NJDEP Governor/Commissioner” referral form does not impart or exchange information or news, nor can it reasonably be considered a letter or message containing information or news. Therefore, the Complainant has failed to establish that the “NJDEP Governor/Commissioner” referral form is responsive to the Complainant’s request Item No. 9 for “[a]ll NJDEP personnel written communication, including e-mails[.]”

Regarding the Complainant’s assertion that the applications for CSP Permit No. 272106 and Permit No. 282106 should have been provided by the NJDEP in response to the Complainant’s OPRA request Item No. 11 because the Hudson Farms 2007 conservation application contained information regarding the new lot and block numbers that were being added by Hudson Farms and contain maps of the conservation area and because the 2007 conservation application resulted in the issuance of Permit No. 272106, the GRC notes that the Complainant’s request item sought “[l]icensee applications for CSP Permit No. 272106 and Permit No. 282106 attesting that shooting occurs in interior of property per a letter from Director Chanda to one Mr. Roy Fernandez dated January 15, 2009.” The Complainant’s request Item No. 11 seeks licensee applications that “attest” to certain facts; however, the Complainant has failed to establish how the applications for CSP Permit No. 272106 and Permit No. 282106 attest to such facts. Although the Complainant argues that the conservation applications for these permits showed the locations being added to the conservation area and included maps of the area, he has failed to submit any evidence that the conservation applications contain the factual attestation set forth in the Complainant’s request Item No. 11. A review of the maps attached to the Complainant’s motion for reconsideration discloses no information as to the location of any shooting that may take place on the real property shown thereon.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. The Complainant failed to do so. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing of the complaint. *See D’Atria, supra*. Notably, the Complainant failed to submit any evidence to establish that the “NJDEP Governor/Commissioner” referral form is responsive to the Complainant’s request Item No. 9 and has similarly failed to establish how the applications for CSP Permit No. 272106 and Permit No. 282106 attest that shooting occurs in the interior of the Hudson Farms property and is therefore responsive to the Complainant’s request Item No. 11.

Therefore, because the Complainant has failed to establish in his motion for reconsideration of the Council’s August 24, 2010 Final Decision and Order that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious

that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in making its determinations in the August 24, 2010 Final Decision and failed to submit any evidence to establish how the NJDEP referral page was responsive to the Complainant's OPRA request Item No. 9 and failed to submit any evidence to establish how the applications for CSP Permit No. 272106 and Permit No. 282106 attest that shooting occurs in the interior of the Hudson Farms property and is therefore responsive to the Complainant's OPRA request Item No. 11, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

The Council's August 24, 2010 Final Decision and Order therefore remains unchanged.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant has failed to establish in his motion for reconsideration of the Council's August 24, 2010 Final Decision and Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in making its determinations in the August 24, 2010 Final Decision and failed to submit any evidence to establish how the New Jersey Department of Environmental Protection referral page was responsive to the Complainant's OPRA request Item No. 9 and failed to submit any evidence to establish how the applications for Commercial Shooting Preserve Permit No. 272106 and Permit No. 282106 attest that shooting occurs in the interior of the Hudson Farms property and is therefore responsive to the Complainant's OPRA request Item No. 11, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council's August 24, 2010 Final Decision and Order remains unchanged.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011



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At the August 24, 2010 public meeting, the Government Records Council (“Council”) considered the August 17, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s response is insufficient pursuant to N.J.S.A. 47:1A-5.g., O’Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008) because he failed to address the Complainant’s preferred method of delivery (e-mail). Moreover, the Custodian’s response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008) because he failed to individually address each of the Complainant’s eleven (11) request items.
2. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant’s request Items No. 1, No. 7, No. 9, No. 10 and No. 11 exist, and because there is no credible evidence to refute the Custodian’s certification, the Custodian has not unlawfully denied access to the requested records. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).
3. Because the Custodian certified in the Statement of Information that he provided all records responsive to the Complainant’s OPRA request Items No. 4, No. 5 and No. 6 and there is no credible evidence in the record to refute the Custodian’s certification, he did not unlawfully deny access to the records responsive to the Complainant’s three (3) OPRA request items pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).



4. Although the Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5.g. because he failed to address the Complainant's preferred method of delivery (e-mail) and failed to individually address each of the Complainant's eleven (11) request items, because the Custodian certified in the Statement of Information that no records responsive to request Items No. 1, No. 7, No. 9, No. 10 and No. 11 exist and because the Custodian provided the Complainant with all records responsive to request Items No. 4, No. 5 and No. 6, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the Custodian's technical violation of OPRA (failing to address the preferred method of delivery and failing to respond to each request item individually). Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

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 24th Day of August, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Stacy Spera, Secretary
Government Records Council

Decision Distribution Date: August 27, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 24, 2010 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-194

v.

**New Jersey Department of Environmental Protection²
Custodian of Records**

Records Relevant to Complaint: Electronic copies of the following:

1. New Jersey Department of Environmental Protection (“NJDEP”) policy or procedure for assessing the noise impact of a prospective shooting range.
2. The non-exempt portions of Mr. William Stansley (“Mr. Stansley”), Research Scientist, personnel file.
3. Organizational Chart showing Mr. Stansley’s position in relation to other NJDEP employees.
4. Testing and health assurance process for pheasants raised at Rockport Pheasant Facility.
5. Testing and health assurance processes for Commercial Shooting Preserve (“CSP”) licensed pheasant facilities.
6. Inspection reports for Item No. 5 above, for pheasant raising facilities licensed to Hudson Farm in Andover, New Jersey.
7. Certifications from 1999 to the present that Hudson Guild/Hudson Farm, which are licensed CSP entities, were registered in New Jersey and remained in good standing.
8. Letter to NJDEP Commissioner Lisa Jackson (“Commissioner Jackson”) signed by nine (9) New Jersey residents dated October 17, 2007, letters to Commissioner Jackson and Director David Chanda (“Director Chanda”), Fish & Wildlife, dated November 2, 2007 and a letter to Commissioner Lisa Jackson and Director Chanda from Ms. Fred Gillespie (“Mr. Gillespie”) regarding CSP Permit No. 2106 (later found to be No. 272106).
9. All NJDEP personnel written communications, including e-mails concerning the letters identified in Item No. 8 above.
10. All NJDEP personnel written communications, including e-mails and meeting reports, regarding the January 2008 meeting between a Mr. Herrighty, Mr. Roseff, Mr. Gonzalez and Mr. Gillespie.
11. Licensee applications for CSP Permit No. 272106 and Permit No. 282106 attesting that shooting occurs in interior of property per a letter from Director Chanda to one Mr. Roy Fernandez dated January 15, 2009.

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

² Represented by DAG Lauren Trasferini, on behalf of the NJ Attorney General.

Request Made: April 13, 2009
Response Made: April 22, 2009
Custodian: Matthew Coefer
GRC Complaint Filed: June 5, 2009³

Background

April 13, 2009

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

April 22, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian requests an extension until April 27, 2009 to respond to the Complainant's OPRA request.

April 23, 2009

E-mail from the Complainant to the Custodian. The Complainant consents to the requested extension until April 27, 2009 to respond.

April 23, 2009

E-mail from the Custodian to the Complainant. The Custodian states that records responsive to the Complainant's OPRA request were located. The Custodian requests that the Complainant contact the NJDEP to schedule an inspection, to obtain copies or to receive further information.

June 5, 2009

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

- Complainant's OPRA request dated April 13, 2009.
- E-mail from the Custodian to the Complainant dated April 22, 2009 attaching the Complainant's OPRA request with the Custodian's notes thereon.
- E-mail from the Complainant to the Custodian.
- E-mail from the Custodian to the Complainant dated April 23, 2009 attaching the Complainant's OPRA request with the Custodian's notes thereon.
- Records deemed to be responsive to the Complainant's OPRA request:
 - E-mail from Alena Baldwin Brown to Marybeth Brenner dated January 14, 2008.
 - Letter from twenty-five (25) senders to Commissioner Jackson dated May 7, 2007.
 - Letter from six (6) senders to Commissioner Jackson dated November 26, 2007.

³ The GRC received the Denial of Access Complaint on said date.

- New Jersey Department of Personnel (“DOP”) Employee master Inquiry for Mr. Stansley with redactions.
- Division of Fish and Wildlife organizational chart.
- Division of Fish and Wildlife, Office of Fish and Wildlife Health and Forensics organizational chart.
- E-mail from Deborah Pinto to an unidentifiable party⁴ dated November 1, 2000.
- Performance Evaluation System Report for Mr. Stansley dated October 6, 2008.
- Letter from Nancy E. Halpern, Director of Division of Animal Health, to Mr. Bob Carr, Rockport Pheasant Farm dated August 7, 2007.
- Letter from Nancy E. Halpern, Director of Division of Animal Health, to Mr. Bob Carr, Rockport Pheasant Farm dated August 21, 2007.
- Letter from Nancy E. Halpern, Director of Division of Animal Health, to Mr. Bob Carr, Rockport Pheasant Farm dated August 28, 2007.
- Letter from Nancy E. Halpern, Director of Division of Animal Health, to Mr. Bob Carr, Rockport Pheasant Farm dated September 10, 2007.
- Letter from Nancy E. Halpern, Director of Division of Animal Health, to Mr. Bob Carr, Rockport Pheasant Farm dated September 26, 2007.
- Letter from Nancy E. Halpern, Director of Division of Animal Health, to Mr. Bob Carr, Rockport Pheasant Farm dated October 29, 2007.
- Letter from Nancy E. Halpern, Director of Division of Animal Health, to Mr. Bob Carr, Rockport Pheasant Farm dated November 16, 2007.
- Letter from Nancy E. Halpern, Director of Division of Animal Health, to Mr. Bob Carr, Rockport Pheasant Farm dated January 29, 2008.
- Letter from Nancy E. Halpern, Director of Division of Animal Health, to Mr. Bob Carr, Rockport Pheasant Farm dated May 1, 2008.
- Letter from Nancy E. Halpern, Director of Division of Animal Health, to Mr. Bob Carr, Rockport Pheasant Farm dated July 28, 2008.
- Letter from Nancy E. Halpern, Director of Division of Animal Health, to Mr. Bob Carr, Rockport Pheasant Farm dated December 10, 2008.
- Letter from Nancy E. Halpern, Director of Division of Animal Health, to Mr. Bob Carr, Rockport Pheasant Farm dated January 28, 2009.
- Flock Inspection and Check-Testing report for Rockport Pheasant Farm dated October 18, 2006.
- Flock Inspection and Check-Testing report for Rockport Pheasant Farm dated October 24, 2007.
- Flock Inspection and Check-Testing report for Rockport Pheasant Farm dated October 21, 2008.
- Flock Selecting and Testing report for Rockport Pheasant Farm dated October 18, 2006.
- Flock Selecting and Testing report for Rockport Pheasant Farm dated October 24, 2007.
- Letter from Nancy E. Halpern, Director of Division of Animal Health, to Mr. Steve Polanish, Hudson Farm, dated September 19, 2008.

⁴ The e-mail may have been sent to Martin McHugh, Director of the Division of Fish and Wildlife; however, the e-mail does not provide enough evidence to confirm this.

- Report of Sales of Hatching Eggs, Chicks, and Poults for Hudson Farm dated April 12, 2007.
- Letter from nine (9) senders to Commissioner Jackson dated October 17, 2007.
- Letter from seven (7) senders to Commissioner Jackson and Director Chanda dated November 2, 2007.
- Letter from Mr. Fred Gillespie to Commissioner Jackson dated December 17, 2007.

The Complainant's Counsel states that this action is being brought against the NJDEP for its failure to provide access to many of the records requested by the Complainant. Counsel states that the Custodian submitted an OPRA request to the NJDEP on April 13, 2009. Counsel states that the NJDEP acknowledged receipt of the Complainant's request on April 14, 2009. Counsel states that the NJDEP requested an extension of time to respond on April 22, 2009. Counsel states that the NJDEP sent a response to the Complainant's OPRA request on April 23, 2009 stating that records responsive were prepared and that the Complainant should contact the NJDEP to schedule an inspection or obtain copies. Counsel states that the Complainant received paper copies of the records he requested on April 27, 2009, despite having requested the records to be provided electronically.

Counsel asserts that the NJDEP did not provide all the records requested, nor did the NJDEP distinguish between the records provided, located and withheld and those that did not exist. Counsel asserts that the NJDEP provided no records in response to request Items No. 1, No. 7, No. 10 and No. 11.⁵

Additionally, Counsel states that the Complainant's request Items No. 4 and No. 5 sought the "process" of testing and health assurance program and data for the pheasant facilities identified, which would be the data and testing methods; however, the NJDEP only provided single page letters instead of reports of the results of the tests. Counsel notes that in response to request Item No. 6, the NJDEP provided some charts with handwritten entries thereon. Counsel asserts that the chart data was the type of data sought in request Items No. 4 and No. 5, but was not provided. Counsel asserts that no internal e-mails or documents responsive to request Item No. 9, No. 10 and No. 11 were provided.

Counsel states that the records requested by the Complainant are government records pursuant to OPRA. N.J.S.A. 47:1A-1.1. Counsel asserts that the records requested by the Complainant should have been provided within the statutorily mandated seven (7) business day time frame. N.J.S.A. 47:1A-5.i. Further, Counsel argues that the Custodian failed to specifically address each item individually stating whether records could not be located, did not exist or were being withheld as exempt under OPRA. Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005) and Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (December 2008).

⁵ Counsel notes that the NJDEP provided records responsive to request Items No. 2, No. 3 and No. 8. Jesse Wolosky v. New Jersey Department of Environmental Protection, 2009-194 – Findings and Recommendations of the Executive Director

Further, Counsel argues that the NJDEP also ignored the Complainant's preference for electronic delivery of the requested records and states that the NJDEP sent records to the Complainant via U.S. mail.

Counsel requests the following relief:

1. An order requiring the NJDEP to provide the Complainant with copies of the records responsive which were not previously provided;
2. A determination that the NJDEP violated OPRA by failing to provide all records responsive within the statutorily mandated time frame and failing to provide records by the method of delivery requested.
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.

The Complainant does not agree to mediate this complaint.

June 30, 2009

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

June 30, 2009

E-mail from the Custodian to the GRC. The Custodian questions whether a forty-five (45) day statute of limitations applies to filing a complaint with the GRC. The Custodian states that this Denial of Access Complaint was filed with the GRC sixty-seven (67) days after the NJDEP's response.

July 1, 2009

E-mail from the GRC to the Custodian. The GRC states that OPRA allows for a requestor to file a complaint regarding access to government records with either the Law Division of the Superior Court of New Jersey or the GRC. The GRC states that if a requestor chooses to file a complaint in Superior Court, said requestor must do so within forty-five (45) days of the denial of access. The GRC states that this forty-five (45) day filing period does not apply to complaints filed with the GRC, which has no statute of limitations.

July 14, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 14, 2009.
- E-mail from the Custodian to the Complainant dated April 22, 2009.
- E-mail from the Custodian to the Complainant dated April 23, 2009.

The Custodian certifies that his search for the requested records involved assigning the Complainant's OPRA request to the appropriate NJDEP program areas (Commissioner's Office, Natural and Historic Resources Program and Management & Budget), who in turn reviewed the Complainant's request and disseminated it to the appropriate personnel within each program area. The Custodian certifies that each of the three (3) program areas identified records responsive to the Complainant's OPRA request.

The Custodian also certifies that no 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”).

The Custodian certifies that he received the Complainant’s OPRA request on April 14, 2009. The Custodian certifies that on April 22, 2009 he requested an extension until April 27, 2009 to respond based on the wide range of records identified in the Complainant’s eleven (11) item OPRA request. The Custodian certifies that the Complainant agreed to the extension.

The Custodian certifies that he responded to the Complainant’s OPRA request on April 23, 2009 advising that records responsive to the Complainant’s OPRA request were located. The Custodian certifies that he requested that the Complainant contact the NJDEP to schedule an inspection, to obtain copies or to receive further information. The Custodian certifies that the Complainant contacted the NJDEP on the same day requesting copies of the records responsive and was advised that forty (40) pages of records had been identified. The Custodian certifies that the requested records were sent to the Complainant on April 27, 2009.

The Custodian certifies that the following records were provided to the Complainant:

Records Responsive to the Request	Redactions	Legal Explanation for Redactions
Outdoor Firing Range – Notice of Action e-mail dated November 1, 2000 (1 page)	N/A	
Division of Fish & Wildlife Organization Chart (1 page)	N/A	
Division of Fish and Wildlife, Office of Fish and Wildlife Health and Forensics organizational chart identifying Mr. Stansley (1 page)	N/A	
First three (3) pages of Performance Evaluation System Report for Mr. Stansley (3 pages)	N/A	
New Jersey Department of Agriculture letters to Rockport Pheasant Farm indicating testing results from August 2007 to December 2008. (12 pages)	N/A	
US Department of Agriculture Flock Inspection & Check-	N/A	

Testing Reports (4 pages)		
New Jersey Department of Agriculture letters to Hudson Farm indicating testing result for inspection on September 16, 2008 (1 page)	N/A	
US Department of Agriculture Report of Sales of Hatching Eggs, Chicks and Poults dated April 12, 2007 (1 page)	N/A	
Letter from New Jersey residents to Commissioner Jackson dated October 17, 2007 (3 pages)	N/A	
Letter from New Jersey residents to Commissioner Jackson dated November 2, 2007 (3 pages)	N/A	
Letter from Mr. Gillespie to Commissioner Jackson dated December 17, 2007 (1page)	N/A	
New Jersey Department of Personnel (“DOP”) Employee master Inquiry for Mr. Stansley with redactions	Yes.	Redaction of the following pursuant to <u>N.J.S.A.</u> 47:1A-1 (expectation of privacy), <u>N.J.S.A.</u> 47:1A-1.1. (personal identifying information), and <u>N.J.S.A.</u> 47:1A-10 (personnel and pension records): <ul style="list-style-type: none"> • Social Security Number • Birth date • Ethnic code • Gender and Age • Residence code • PARS rating • Employee ID Number • Anniversary date • Veteran status • Education • Out-of-Step

The Custodian states that the Complainant alleged in the Denial of Access Complaint that the NJDEP did not respond to his OPRA request Item No. 1 for the NJDEP’s “policy or procedure for assessing the noise impact of a prospective shooting range.” The Custodian certifies that the NJDEP is not required to assess the noise impact of a shooting range and therefore has no policy or procedure responsive to the Complainant’s OPRA request.

The Custodian states that the Complainant alleges in his Denial of Access Complaint that the NJDEP did not provide all records responsive to request Items No. 4, No. 5 and No. 6 of the OPRA request. The Custodian states that OPRA provides that:

“... 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.

The Custodian certifies that, as indicated on the records provided to the Complainant and as verified in the document index, the records responsive to request Items No. 4, No. 5 and No. 6 of the Complainant’s OPRA request are records of other agencies (i.e. the New Jersey Department of Agriculture and U.S. Department of Agriculture). The Custodian argues that OPRA does not require a government agency to contact another government agency to acquire records responsive to a request. The Custodian argues that the NJDEP provided access to the records it “*maintained*” and “*received*” from other agencies. The Custodian advises that for complete sets of records responsive to request Items No. 4, No. 5 and No. 6, the Complainant should contact the appropriate state or federal agencies.

The Custodian certifies that the NJDEP does not maintain any records responsive to request Items No. 7, No. 9, No. 10 and No. 11. The Custodian certifies that, more specifically, the NJDEP does not certify if a business entity is registered and in good standing with the State; therefore, no records responsive to request Item No. 7 exist. Furthermore, the Custodian certifies that the NJDEP did not locate any communication records requested in Item No. 9 and No. 10. Finally, the Custodian certifies that no records responsive to request Item No. 11 exist because the NJDEP does not maintain commercial shooting preserve license applications or any documents associated therewith.

The Custodian states that the Complainant also challenges in the Denial of Access Complaint that the NJDEP failed to provide the responsive records in the preferred method of delivery: in electronic format. The Custodian states that OPRA provides that:

“[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.” N.J.S.A. 47:1A-5.d.

The Custodian states that the foregoing also appears in the NJDEP’s Proposed OPRA rules:

“[u]nless otherwise specifically requested, copies of records shall be provided in printed form on ordinary business size paper. The requestor may request that the agency provide a copy of a record in the specific

medium. If the agency maintains the government record in the medium requested, the custodian shall provide the record in the medium sought. If the agency does not maintain the government record in the medium requested, the custodian shall convert the record to the medium requested if reasonable or provide a copy in some other meaningful medium.”
N.J.A.C. 7:1C-3.10

The Custodian notes that the NJDEP’s proposed rules are effective as being published pursuant to Executive Order No. 9 (Governor Hughes, 1963), N.J.S.A. 47:1A-9.a. and Executive Order No. 26 (McGreevey, 2002)(which modified Executive Order No. 21 (McGreevey, 2002)).⁶

The Custodian states that he acknowledges that the Complainant requested receipt of records electronically; however, the NJDEP does not maintain the records responsive electronically. The Custodian contends that the NJDEP is not required to convert records into the format requested if the records can be provided in another meaningful medium pursuant to N.J.S.A. 47:1A-5.d. The Custodian argues that, based on the foregoing, the NJDEP did not violate OPRA by providing the records responsive in paper form.

The Custodian certifies that all records responsive to the Complainant’s OPRA request were located and provided to the Complainant and no other records exist. The Custodian further states that the NJDEP responded within seven (7) business days appropriately requesting an extension of time and responded within said extension.

Finally, the Custodian argues that the NJDEP’s response to the Complainant was complete and accurate. The Custodian further argues that OPRA does not require an agency to individually respond to each request item. The Custodian requests that, based on the foregoing, the GRC determine that the NJDEP’s actions were sufficient under OPRA, that no knowing and willful violation occurred and that this complaint should be dismissed.

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:

⁶ The Appellate Division recently invalidated State agencies’ proposed regulations pursuant to Executive Order No. 26 (McGreevey, 2002) in Slaughter v. Government Records Council, ___ N.J. Super. ___, Docket No. A-0163-08T1 (App. Div. 2010).

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

OPRA further provides that:

“[a] custodian *shall permit access* to a government record and provide a copy thereof *in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian *shall either convert the record to the medium requested* or provide a copy in some other meaningful medium. If a request is for a record...require[s] a substantial amount of manipulation ... the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency...” (Emphasis added). N.J.S.A. 47:1A-5.d.

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.

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.

First, the GRC will address whether the Custodian’s response to the Complainant’s OPRA request was sufficient pursuant to OPRA and precedential case law.⁷

⁷ Because the Custodian responded within seven (7) business days requesting an extension until April 27, 2009 to respond to the Complainant’s OPRA request, there is no need to address whether the Custodian’s Jesse Wolosky v. New Jersey Department of Environmental Protection, 2009-194 – Findings and Recommendations of the Executive Director

In the instant complaint, the Custodian responded to the Complainant on April 22, 2009 requesting an extension of time to respond to the Complainant's OPRA request. The Custodian subsequently responded on April 23, 2009 providing access to some records. The Complainant's Counsel argued in the Denial of Access Complaint that the Custodian violated OPRA by failing to (1) address the Complainant's preferred method of delivery, and (2) provide a specific response to each of the Complainant's eleven (11) request items.

The Custodian acknowledged in the SOI that the Complainant requested to receive records in electronic format; however, the NJDEP does not maintain the records responsive in such medium. The Custodian contended that the NJDEP is not required to convert records into the format requested if the records can be provided in another meaningful medium pursuant to N.J.S.A. 47:1A-5.d. and the DEP's proposed regulations at N.J.A.C. 7:1C-3.10. The Custodian argued that, based on the foregoing, the NJDEP did not violate OPRA by providing the records responsive in paper form. Moreover, the Custodian argues that OPRA does not require an agency to individually respond to each request item.

Contrary to the Custodian's assertions whether a custodian is required to address the preferred method of delivery and address each OPRA request item individually, the GRC has previously decided on both issues multiple times.

In O'Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), the complainant contended that the custodian's response to his OPRA request was insufficient because it did not address his preference for e-mailed records over paper copies via regular mail. The Council held that "[a]ccording to [the] language of N.J.S.A. 47:1A-5.g., the Custodian was given two ways to comply and should have, therefore, responded acknowledging the Complainant's preferences with a sufficient response for each."⁸ The Council further held that "the Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records." In Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008), the complainant requested that the records be provided by e-mail or facsimile, and the custodian failed to address the method of delivery. In Paff, despite the fact the custodian responded in writing granting access to the requested record in a timely manner, the Council determined that the "Custodian's response [was] insufficient because she failed to specifically address the Complainant's preference for receipt of the records...[t]herefore, the Custodian...violated OPRA...".

Moreover, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Complainant's Counsel asserted that the Custodian violated OPRA by failing to respond to each of the Complainant's request

request for an extension was lawful. See Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (April, 2010).

⁸ The Council noted that N.J.S.A. 47:1A-5.g. states that if a Custodian is "unable to comply with a request for access, then the Custodian shall indicate the specific basis" for noncompliance. In O'Shea, *supra*, the Complainant stated in his request that receipt of the requested records by e-mail was preferred over having to pay copying costs.

items individually within seven (7) business days. The GRC examined how the facts in Paff applied to its prior holding in O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005) (finding that the Custodian’s initial response stating that the Complainant’s request was a duplicate of a previous request to the Complainant’s June 22, 2007 request was legally insufficient because the Custodian has a duty to answer each request individually). The Council reasoned that, “[b]ased on OPRA and the GRC’s holding in O’Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request.” The GRC ultimately held that:

“[a]lthough the Custodian responded in writing to the Complainant’s August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.” *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009) and Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).

The commonality between the complaints above and the instant complaint is clear. Although the Custodian herein argued that OPRA does not require a custodian to address either preferred method of delivery or each request item individually, the GRC has held that N.J.S.A. 47:1A-5.g. requires that a custodian address both issues when responding to an OPRA request.

Therefore, the Custodian’s response is insufficient pursuant to N.J.S.A. 47:1A-5.g., O’Shea, *supra*, and Paff, *supra*, because he failed to address the Complainant’s preferred method of delivery (e-mail). Moreover, the Custodian’s response is insufficient pursuant N.J.S.A. 47:1A-5.g. and Paff, *supra* because he failed to individually address each of the Complainant’s eleven (11) request items.

The GRC will now address whether the Custodian unlawfully denied access to the records sought in the Complainant’s OPRA request.

In the Denial of Access Complaint, the Complainant’s Counsel asserts that the Custodian failed to provide a number of the records requested. Counsel alleges that the NJDEP provided no records in response to request Items No. 1, No. 7, No. 10 and No. 11. Further, Counsel states that the Complainant’s request Items No. 4 and No. 5 sought the “process” of testing and health assurance program and data for the pheasant facilities identified (*i.e.*, data and testing methods); however, the NJDEP only provided one-page letters instead of reports of the results of the tests. Counsel notes that, the NJDEP provided some charts with handwritten entries thereon in response to request Item No. 6. Counsel asserts that the chart data was the type of data sought in request Items No. 4 and No. 5, but that such data was not provided. Counsel asserts that no internal e-mails or documents responsive to request Item No. 9, No. 10 and No. 11 were provided. Counsel does not dispute that the Custodian provided access to records responsive to request Item No. 2, No. 3 and No. 8.

In the SOI, the Custodian certified that no records responsive to request Item No. 1 exist because NJDEP is not required to assess the noise impact of a shooting range. The Custodian also certified that no records responsive to request Item No. 7 exist because NJDEP does not certify if a business entity is registered and in good standing with the State. The Custodian certified that he was unable to locate any communications responsive to request Items No. 9 and No. 10. Finally, the Custodian certified that no records responsive to request Item No. 11 exist because the NJDEP does not maintain commercial shooting preserve license applications or any documents associated therewith. The Complainant has not provided any evidence to refute the Custodian's certification in this regard.

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 Complainant provided no evidence to refute this certification. The GRC determined the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified in the SOI that no records responsive to the Complainant's request Items No. 1, No. 7, No. 9, No. 10 and No. 11 exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested records. *See Pusterhofer, supra.*

Additionally, the Custodian certifies in the SOI that all records responsive to request Items No. 4, No. 5 and No. 6 that were maintained by the NJDEP were provided to the Complainant. The Custodian certified that most of the records requested are records of other agencies, as evidenced by the titles on the actual records. The Custodian also advises that for complete sets of records responsive to request Items No. 4, No. 5 and No. 6, the Complainant should contact the appropriate state or federal agencies.

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.”

The Custodian in this complaint certified in the SOI that all records responsive to request Items No. 4, No. 5 and No. 6 maintained by the NJDEP were provided to the Complainant. The Custodian further certified that the records provided were obtained from other state and federal agencies, as is indicated by the titles of the records provided. The Custodian advised that the Complainant should contact the appropriate state and federal agencies for complete sets of the records requested to these three (3) request items. The Custodian here acted similarly to the Custodian in Burns, in that both provided access to record(s) and subsequently certified that the record(s) provided represented all records responsive.

Therefore, because the Custodian certified in the SOI that he provided all records responsive to the Complainant's OPRA request Items No. 4, No. 5 and No. 6 and there is no credible evidence in the record to refute the Custodians' certification, he did not unlawfully deny access to the records responsive to the Complainant's three (3) OPRA request items pursuant to Burns, supra.

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

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

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

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

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

Although the Custodian's April 22, 2009 response to the OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. because he failed to address the Complainant's preferred method of delivery (e-mail) and failed to individually address each of the Complainant's eleven (11) request items, because the Custodian certified in the SOI that no records responsive to request Items No. 1, No. 7, No. 9, No. 10 and No. 11 exist and because the Custodian provided the Complainant with all records responsive to request Items No. 4, No. 5 and No. 6⁹, 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

⁹ The Complainant did not take issue with request Items No. 2, No. 3 and No. 8; noting the Denial of Access Complaint that the NJDEP provided records responsive each request.
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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 the matter currently before the Council, the Complainant filed the instant Denial of Access complaint seeking the following relief:

- An order requiring the NJDEP to provide the Complainant with copies of the records responsive which were not previously provided;
- A determination that the NJDEP violated OPRA by failing to provide all records responsive within the statutorily mandated time frame and failing to provide records in the method of delivery requested.

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.

- 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.

After this complaint was filed, the Custodian certified that no records responsive to the Complainant's request Items No. 1, No. 7, No. 9, No. 10 and No. 11 exist and that he provided access to all records responsive to the Complainant's OPRA request Items No. 4, No. 5 and No. 6.¹¹ The Custodian argued that OPRA did not require a custodian to address preferred method of delivery or respond to each request item individually. Although the GRC has found that the Custodian did not deny access to the requested records, the GRC did find that the Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., O'Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008) and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008). However, this technical violation of OPRA does not amount to a change in the Custodian's behavior thus triggering an award of attorney's fees. See Taylor v. Cherry Hill Board of Education, GRC Complaint No. 2008-258 (August 2009) and Petrycki v. Township of Hammonton (Atlantic), GRC Complaint No. 2009-159 (May 2010).

Therefore, pursuant to Teeters, supra, the Complainant has not achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, supra, a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the Custodian's technical violation of OPRA (failing to address the preferred method of delivery and failing to respond to each request item individually). Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g., O'Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008) because he failed to address the Complainant's preferred method of delivery (e-mail). Moreover, the Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008) because he failed to individually address each of the Complainant's eleven (11) request items.
2. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant's request Items No. 1, No. 7, No. 9, No. 10 and No. 11 exist, and because there is no credible evidence to refute the Custodian's certification, the Custodian has not unlawfully denied access

¹¹ The GRC reiterates that the Complainant did not take issue with request Items No. 2, No. 3 and No. 8.
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to the requested records. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).

3. Because the Custodian certified in the Statement of Information that he provided all records responsive to the Complainant's OPRA request Items No. 4, No. 5 and No. 6 and there is no credible evidence in the record to refute the Custodian's certification, he did not unlawfully deny access to the records responsive to the Complainant's three (3) OPRA request items pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
4. Although the Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5.g. because he failed to address the Complainant's preferred method of delivery (e-mail) and failed to individually address each of the Complainant's eleven (11) request items, because the Custodian certified in the Statement of Information that no records responsive to request Items No. 1, No. 7, No. 9, No. 10 and No. 11 exist and because the Custodian provided the Complainant with all records responsive to request Items No. 4, No. 5 and No. 6, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the Custodian's technical violation of OPRA (failing to address the preferred method of delivery and failing to respond to each request item individually). Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

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