



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

December 21, 2010 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2009-223

v.

Borough of Hopatcong (Sussex)
Custodian of Record

At the December 21, 2010 public meeting, the Government Records Council ("Council") considered the December 14, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian certified that there are no records responsive to the Complainant's request for the 2007 financial disclosure form, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the statutorily mandated seven (7) business days pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to properly request an extension of time in order to continue searching for the misplaced 2007 financial disclosure form of Hopatcong Borough Council member Richard Bruce, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



4. 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. The Custodian is still unable to locate the requested 2007 financial disclosure form and thus no change in her behavior has occurred. 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 relief ultimately achieved. Although the Complainant did receive his requested relief in that the Council determined the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian is still unable to locate the requested record and thus is unable to provide access to said record. 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 21st Day of December, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

James W. Requa, Secretary
Government Records Council

Decision Distribution Date: January 4, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 21, 2010 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2009-223

v.

**Borough of Hopatcong (Sussex)²
Custodian of Records**

Records Relevant to Complaint: Copies of the financial disclosure statements for the years 2007, 2008 and 2009 submitted by Hopatcong Borough Council member Richard Bruce.³

Request Made: June 8, 2009

Response Made: June 12, 2009

Custodian: Lorraine Stark

GRC Complaint Filed: July 24, 2009⁴

Background

June 8, 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.

June 12, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that she has the 2008 and 2009 financial disclosure statements, but she has been unable to locate the 2007 ethics file. The Custodian states that she can provide access to the 2006 statement, if desired, and that she will continue to search for the 2007 statement.

July 24, 2009

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

¹ Represented by Eric Taylor, Esq., of Taylor & Mitchell, LLC (Audubon, NJ).

² Represented by Robin J. Willner, Esq., of Courter, Kobert & Cohen, P.C. (Hackettstown, NJ).

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

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

- Complainant's OPRA request dated June 8, 2009
- Custodian's response to the OPRA request dated June 12, 2009

The Complainant states that he faxed his OPRA request to the Custodian on June 8, 2009. The Complainant states that he received the Custodian's e-mailed response on June 12, 2009 wherein the Custodian stated that she has the 2008 and 2009 financial disclosure statements but that she was still looking for the misplaced 2007 file. The Custodian stated that she could provide the 2006 statement, if desired, and that all records can be faxed for \$0.30. The Complainant states that following the Custodian's e-mail, the Custodian faxed him the 2006, 2008 and 2009 financial disclosure statements.

The Complainant states that N.J.S.A. 47:1A-5.i. provides that:

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

The Complainant states that Custodian indicated in her June 12, 2009 response to the Complainant that she was unable to locate the 2007 ethics file and that she would continue to look for said file. However, the Complainant states that the Custodian failed to specify a length of time she was requesting to search for the misplaced file. The Complainant states that as of the date of this complaint he has not received any further response from the Custodian regarding her search for the 2007 file. As such, the Complainant seeks a declaration from the Council that his request for the 2007 file has been “deemed” denied pursuant to N.J.S.A. 47:1A-5.i. and that the Custodian unlawfully denied access to said request. The Complainant also seeks prevailing party attorney's fees.

The Complainant does not agree to mediate this complaint.

July 30, 2009

Letter of Representation submitted to GRC from Custodian's Counsel.

August 5, 2009

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

August 6, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 8, 2009
- Custodian's response to the Complainant's OPRA request dated June 12, 2009

The Custodian certifies receiving the Complainant's OPRA request on June 8, 2009 and providing a written response on June 12, 2009.

The Custodian also certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management, financial disclosure statements are required to be maintained on file for six (6) years.

The Custodian states that N.J.S.A. 47:1A-5.i. provides that "...a custodian of a government record shall grant access to a government record as soon as possible, but not later than seven (7) business days after receiving the request, provided that the record is **currently available** and not in storage or archived..." (Emphasis added).

The Custodian certifies that she did not grant or deny the Complainant access to the requested 2007 financial disclosure statement because it was not currently available. Instead, the Custodian certifies that she informed the Complainant via e-mail on June 12, 2009, within the statutorily mandated time frame to respond, that she could not locate the requested record because it was misplaced and that she would continue to search for said record.

Additionally, the Custodian claims the Complainant's assertion that the Custodian failed to specify the length of time she sought in order to search for the missing record is of no consequence because the statute only provides that the requestor be advised when the record can be made available in the event that the government record is in storage or archived. The Custodian certifies that she could not advise when the record could be made available because the record could not, and currently cannot be found. As such, the Custodian asserts that the Complainant's requested relief from the Council should be denied.

August 26, 2009

Complainant Counsel's response to the Custodian's SOI. Counsel states that in the Custodian's SOI she contends that N.J.S.A. 47:1A-5.i. does not apply to the Complainant's Denial of Access Complaint because the requested 2007 financial disclosure form is not in storage or archived, but cannot be located and is misplaced. Counsel asserts that the Custodian's interpretation of N.J.S.A. 47:1A-5.i. is erroneous and creates a gaping hole in OPRA through which a custodian could avoid the requirement to respond to a request.

Counsel contends that if the requested 2007 financial disclosure form is neither in storage or archived, the custodian's proper response should have been to deny access to said record pursuant to N.J.S.A. 47:1A-5.i. However, Counsel states that the Custodian informed the Complainant that she could not locate the requested record but that she "will continue to look for the misplaced 2007 file." Counsel asserts that the Custodian's statement raises the possibility that the record might still be located and thus creates a presumption that the record, while misplaced, is actually in storage or archived. As such, Counsel contends that a proper response from the Custodian under N.J.S.A. 47:1A-5.i would have been to contact the Complainant within the seven (7) business days to advise how much time the Custodian required to search for the misplaced record. Counsel asserts that under the Custodian's interpretation of the law she would be able to search for the misplaced record under an infinite timeline, which is contrary to the public policy

in OPRA at N.J.S.A. 47:1A-1 that the statute “shall be construed in favor of the public’s right of access.”

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA states that:

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

OPRA further states that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request...* If the...record is in storage or archived, the requestor shall be so advised...*when record can be made available. If the record is not made available by that time, access shall be deemed denied.*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁵ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this instant complaint, the Complainant stated that he submitted his OPRA request on June 8, 2009. The Custodian certified receiving the Complainant’s OPRA request on June 8, 2009 and providing a written response on June 12, 2009 wherein the Custodian provided access to the requested financial disclosure forms for the years 2006, 2008 and 2009, and stated that she could not locate the 2007 form but would continue to search for said record.

The Complainant contends that the 2007 file has been “deemed” denied pursuant to N.J.S.A. 47:1A-5.i. because the Custodian failed to provide any further response regarding the requested 2007 financial disclosure form. However, the Custodian states N.J.S.A. 47:1A-5.i. provides that “...a custodian of a government record shall grant access to a government record as soon as possible, but not later than seven (7) business days after receiving the request, provided that the record is **currently available** and not in storage or archived...” (Emphasis added).

The Custodian certifies that she did not grant or deny the Complainant access to the requested 2007 financial disclosure statement because it was not currently available. Instead, the Custodian certifies that she informed the Complainant via e-mail on June 12, 2009, within the statutorily mandated time frame to respond, that she could not locate the requested record because it was misplaced and that she would continue to search.

The Custodian’s Counsel asserts that under the Custodian’s interpretation of the law, she would be able to search for the misplaced record under an infinite timeline, which is contrary to the public policy in OPRA at N.J.S.A. 47:1A-1 that the statute “shall be construed in favor of the public’s right of access.”

⁵ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

The Council has routinely held that a custodian must respond in writing to an OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. See Kelley, supra.

The Custodian admits in her SOI that she did not grant or deny the Complainant access to the requested 2007 financial disclosure statement because it was not currently available. The evidence of record indicates that the Custodian was fully aware of the specific record sought – a 2007 financial disclosure form submitted by Hopatcong Borough Council member Richard Bruce – and thus the Custodian did not need any clarification from the Complainant. Accordingly, in line with the GRC’s holding in Kelley, supra, since the Custodian did not grant or deny access and did not need any clarification of the request, the Custodian’s proper response would have been to request an extension of time beyond the seven (7) business days to continue to search for the misplaced record. While the Custodian contends that the seven (7) business day timeline only applies to records that are currently available, the Custodian provides no legal justification for her open ended timeline to search for the missing record.

In fact, the Council has previously ruled on the issue of requesting a proper extension of time in instances when the Custodian was not aware at the time of the request of whether the requested record existed. In Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010), the Custodian requested an extension of time to respond to a request for tenure charges filed against an individual when the Custodian was not currently aware of whether the record existed. The Custodian certified that she would have to search through 27 boxes of records in order to locate the requested record. As such, the Custodian provided the Complainant with a written response to his OPRA requests on the sixth (6th) business day following receipt of said requests in which the Custodian requested an extension of time and provided an anticipated date upon which she would provide a further response. The Council held that “because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. [and] N.J.S.A. 47:1A-5.i.” See also Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).

In this instant complaint, the Custodian did provide the Complainant with a written response to his OPRA request within the statutorily mandated seven (7) business days, but the Custodian gave herself an endless window of time to continue to search for the missing 2007 financial disclosure form. The Custodian indicated that she would continue to search for the missing record, but failed to adequately request an extension of time by providing a date certain when the Complainant could expect disclosure of the requested records or a specific denial of access thereto.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A.

47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

However, the Custodian certified in her SOI that she is still unable to locate the requested 2007 financial disclosure form.

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

However, in this instant complaint, the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days that the requested 2007 financial disclosure form did not exist, or had been misplaced and could not be located.

Therefore, because the Custodian certified that there are no records responsive to the Complainant's request for the 2007 financial disclosure form, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the statutorily mandated seven (7) business days pursuant to Pusterhofer, *supra*.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

The Custodian in this instant complaint provided the Complainant with a written response to his OPRA request on the fourth (4th) business day following receipt of said request wherein she provided the Complainant access to all records requested with the

exception of the 2007 financial disclosure form. The Custodian indicated in her response that she was unable to locate said record but would continue to search. The Custodian failed to provide an anticipated date upon which she would provide the Complainant with a further response to his request. As such, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

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

Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to properly request an extension of time in order to continue searching for the misplaced 2007 financial disclosure form of Hopatcong Borough Council member Richard Bruce, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.*

at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

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

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

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

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

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

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

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

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

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

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

⁶ 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.

plaintiff's lawsuit, filed on March 4, was not the catalyst behind the City's voluntary disclosure. *Id.* Because Hoboken's February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

In this instant complaint, the Complainant sought a declaration from the Council that his request for the 2007 file has been "deemed" denied pursuant to N.J.S.A. 47:1A-5.i. and that the Custodian unlawfully denied access to said request. As previously stated in these findings, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). However, the Custodian asserted in her SOI that she is still unable to locate the requested 2007 financial disclosure form. Thus, no change in the Custodian's behavior has occurred in this instance.

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. The Custodian is still unable to locate the requested 2007 financial disclosure form and thus no change in her behavior has occurred. 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 relief ultimately achieved. Although the Complainant did receive his requested relief in that the Council determined the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian is still unable to locate the requested record and thus is unable to provide access to said record. 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 failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian certified that there are no records responsive to the Complainant's request for the 2007 financial disclosure form, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the statutorily mandated seven (7) business days pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to properly request an extension of time in order to continue searching for the misplaced 2007 financial disclosure form of Hopatcong Borough Council member Richard Bruce, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. 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. The Custodian is still unable to locate the requested 2007 financial disclosure form and thus no change in her behavior has occurred. 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 relief ultimately achieved. Although the Complainant did receive his requested relief in that the Council determined the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian is still unable to locate the requested record and thus is unable to provide access to said record. 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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December 14, 2010