



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**FINAL DECISION**

**September 27, 2011 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2010-175

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the September 27, 2011 public meeting, the Government Records Council (“Council”) considered the August 23, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to immediately grant or deny access to the requested invoices, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).
2. Because the Complainant’s cause of action for his OPRA request Items No. 1, No. 3, No. 4 and No. 5 was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the OPRA request items and the extended time frame for the Custodian to respond had not expired, the instant complaint is materially defective and therefore should be dismissed. *See* Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-226 (April 2009).
3. Based on the application of N.J.S.A. 47:1A-5.g., the Custodian’s response was insufficient because he failed to specifically state that the two (2) invoices responsive to OPRA request Item No. 2 and minutes for the June special and executive sessions responsive to OPRA request Item No. 5 did not exist pursuant to N.J.S.A. 47:1A-5.g. and Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009).
4. Because the Custodian certified in the Statement of Information that two (2) invoices responsive to OPRA request Item No. 2 and minutes for the June special and executive sessions responsive to OPRA request Item No. 5 do not exist, and because there is no evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant access to these records pursuant to



Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

5. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request Item No. 2 for invoices and failed to specifically state that four (4) of the responsive records did not exist, thus resulting in violations of N.J.S.A. 47:1A-5.g. pursuant to Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009). However, the Complainant's cause of action for his OPRA request Items No. 1, No. 3, No. 4 and No. 5 was not ripe at the time of the filing of this Denial of Access Complaint because the Complainant filed the instant complaint prior to being denied access to said records and prior to the expiration of the extended deadline to respond, the Custodian did not unlawfully deny access to two (2) of the invoices responsive to request Item No. 2 and the special and executive session minutes responsive to request Item No. 5 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), and the Custodian provided access to all other records that existed on July 27, 2010, four (4) days before the expiration of the extended deadline to respond. Additionally, 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.
6. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved "the desired result because the complaint [did not bring] 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 relief ultimately achieved. Specifically, the Complainant filed this complaint prior to the expiration of the extended deadline to respond and the Custodian provided access to all responsive records that existed four (4) days prior to the expiration of said deadline. Further, the relief ultimately achieved did not have a basis in law. 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*

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 27<sup>th</sup> Day of September, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: October 3, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-175**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of:

1. Borough of South Bound Brook (“Borough”) detailed check registry for July 2010.
2. June 2010 Invoices for William T. Cooper, Esq., of Cooper & Cooper; Francesco Taddeo, Esq., John A Kelleher, Esq., of Kelleher & Moore; Michael Rogers, Esq., of McDonalds & Rogers; and Francis P. Linnus, Esq.
3. The Custodian’s time sheets for each position held in the Borough between June 12, 2010 and July 9, 2010.
4. Ms. Arleen Lih’s time sheets for each position held in the Borough between June 12, 2010 and July 9, 2010.
5. June’s agendas, as well as regular, special and executive session minutes.

**Request Made:** July 14, 2010

**Response Made:** July 20, 2010

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** July 26, 2010<sup>3</sup>

**Background**

**July 14, 2010**

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. The Complainant states that his preferred method of delivery is via facsimile.

**July 20, 2010**

Custodian’s response to the OPRA request. On behalf of the Custodian, the Custodian’s Counsel responds in writing to the Complainant’s OPRA request on the fourth (4<sup>th</sup>) business day following receipt of such request. The Custodian’s Counsel

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previous counsel was William T. Cooper III, Esq. (Somerville, NJ), who advised the GRC on May 6, 2011 that he no longer represents the Borough.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

states that it is his understanding that the Complainant recently submitted an OPRA request. The Custodian's Counsel states that the Custodian is out of the office due to a medical emergency. The Custodian's Counsel requests an extension of time until August 2, 2010 to respond to the Complainant's OPRA request.

**July 26, 2010**

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated July 14, 2010.

The Complainant states that he submitted an OPRA request to the Custodian on July 14, 2010. The Complainant states that the Custodian failed to provide access to any of the requested records. The Complainant states that the Custodian was required to provide immediate access to the requested invoices.

The Complainant does not agree to mediate this complaint.

**July 27, 2010**

Facsimile from the Custodian to the Complainant. The Custodian provides access to all requested records that existed via the Complainant's preferred method of delivery.<sup>4</sup>

**August 6, 2010**

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

**August 12, 2010**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until August 18, 2010 to submit the requested SOI.

**August 12, 2010**

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until August 18, 2010 to submit the requested SOI.

**August 16, 2010**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 14, 2010.
- Complainant's OPRA request dated July 14, 2010 with the Custodian's notes thereon.<sup>5</sup>
- Facsimile journal dated July 27, 2010 to August 2, 2010.

The Custodian 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").

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<sup>4</sup> The facsimile journal log submitted as part of the Custodian's Statement of Information indicates that the Custodian sent five (5) separate transmissions to the Complainant on July 27, 2010.

<sup>5</sup> The notes contained on the OPRA request indicate that the Custodian had an extension until August 2, 2010 to respond to the Complainant's OPRA request.

The Custodian certifies that the Borough received the Complainant's OPRA request on July 14, 2010. The Custodian certifies that the Borough requested an extension of time to respond to the Complainant's OPRA request on July 20, 2010. The Custodian certifies that he provided access to all requested records that existed via facsimile on July 27, 2010.

The Custodian certifies that access to the invoices of John A. Kelleher, Esq., and Michael Rogers, Esq., responsive to request Item No. 2 was denied because no records responsive exist. The Custodian further certifies that access to the special and executive session minutes responsive to request Item No. 5 was denied because no special and executive sessions were held in June, thus no records responsive exist.<sup>6</sup>

### **August 23, 2010**

Letter from the Complainant's Counsel to the GRC. Counsel states that although it is true that the Custodian provided the Complainant with the requested records, the Custodian did not do so until July 27, 2010. Counsel states that the Complainant submitted his OPRA request to the Custodian on July 14, 2010 and it was received by the Custodian on the same day. Counsel states that based on the foregoing, the Custodian's deadline to respond was July 23, 2010. Counsel states that the GRC has continuously held that records custodians must respond to a request for government records, "not later than seven (7) business days after receiving the request..." N.J.S.A. 47:1A-5.i.; *See Paff v. County of Camden*, GRC Complaint No. 2009-25 (January 2010).

Counsel asserts that the Custodian did not respond to the Complainant's OPRA request on June 23, 2010; therefore, the Complainant filed this complaint on the next business day, or July 24, 2010. Counsel asserts that the Custodian provided access to the requested records only after the Complainant filed a complaint, which was simultaneously copied to the Custodian.

Counsel contends that based on the foregoing, the GRC should hold that the Custodian violated OPRA. Counsel further contends that because the filing of this complaint was the catalyst that caused the Custodian to respond to the Complainant's OPRA request, the GRC should hold that the Complainant is a prevailing party entitled to reasonable attorney's fees pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

### **May 19, 2011**

E-mail from the GRC to the Custodian. The GRC states that it is in need of additional information. The GRC states that in the SOI the Custodian certified that on July 20, 2010, he obtained an extension of time until either July 27, 2010 or August 2, 2010 to respond to the Complainant's OPRA request. *See* Complainant's July 14, 2010 OPRA request form with the Custodian's notes thereon. The GRC states that the Custodian further certified that some of the requested records did not exist.

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<sup>6</sup> The Custodian did not certify to the search undertaken for responsive records.

The GRC states that the Custodian has provided no supporting documentation that indicates that the Custodian obtained an extension of time to respond to the Complainant's OPRA request. Additionally, the GRC states that the evidence of record does not support a conclusion that the Custodian sent a written response to the OPRA request to the Complainant indicating those records being provided and those records that did not exist. The GRC requests that the Custodian legally certify to the following:

1. Whether the Custodian requested an extension of time until July 27, 2010 or August 2, 2010 to respond to the Complainant's OPRA request? Please provide written evidence that an extension was obtained.
2. Whether the Custodian responded in writing to the Complainant's OPRA request identifying those records for which access was provided and those records that did not exist? Please provide the Borough's written response.

The GRC requests that the Custodian provide the requested legal certification and supporting documentation by May 23, 2011.

### **May 23, 2011**

Custodian's legal certification with the following attachments:

- E-mail from previous Custodian's Counsel to the GRC dated July 20, 2010.
- E-mail from previous Custodian's Counsel to the Complainant dated July 20, 2010.

The Custodian certifies that the Complainant submitted an OPRA request to the Borough on July 14, 2010. The Custodian certifies that around that time, he was out of the office due to a medical emergency. The Custodian certifies that at that time, the previous Custodian's Counsel notified both the GRC and the Complainant on July 20, 2010 that the Custodian was out of the office and that the Complainant's OPRA request could not be fulfilled until August 2, 2010.

The Custodian certifies that he returned to the office prior to August 2, 2010 and responded to the Complainant's OPRA request on July 27, 2010. The Custodian certifies that his response was confirmed by the facsimile journals attached to the SOI. The Custodian certifies that the Complainant received the requested records within the extended time frame to respond.

### **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 provides that:

“*Immediate access ordinarily shall be granted* to budgets, *bills*, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA further 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 also provides that:

“a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived....” 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.

The GRC first addresses whether the Custodian timely responded to the Complainant’s OPRA request Item No. 2.



The Complainant's OPRA request Item No. 2 sought "June 2010 Invoices ..." for five (5) attorneys. The evidence of record indicates that the Custodian's Counsel responded in writing on behalf of the Custodian on the fourth (4<sup>th</sup>) business day after receipt of the Complainant's OPRA request requesting an extension of time until August 2, 2010 to respond to same because the Custodian was out of the office due to a medical emergency.

The invoices requested are specifically classified under OPRA as "immediate access" records pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that "immediate access language of OPRA (N.J.S.A. 47:1A-5.e) suggests that the Custodian was still obligated to immediately notify the Complainant..." Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

Based on the foregoing, the Custodian Counsel's response four (4) business days after receipt of the Complainant's OPRA request for attorney invoices is a violation of N.J.S.A. 47:1A-5.e because the Custodian has an obligation to respond to OPRA requests for immediate access records immediately, even if said records are part of a larger request containing a combination of records requiring a response within seven (7) business days and immediate access records requiring an immediate response, as was the case here.

Therefore, because the Custodian failed to immediately grant or deny access to the requested invoices, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e pursuant to Herron, *supra*. See also Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

The GRC next addresses whether the Complainant's Denial of Access Complaint for OPRA request Items No. 1 No. 3, No. 4 and No. 5 are ripe for adjudication.

As one means of challenging denials of access to a government record, OPRA provides for the filing of a complaint with the GRC. N.J.S.A. 47:1A-6. In order for such a complaint to be ripe, a complainant must have been denied access to a government record. In the instant matter, however, the Complainant filed this complaint with the GRC prior to being denied access to any records responsive to his OPRA request Items No. 1, No. 3, No. 4 and No. 5 and prior to the expiration of the Custodian's extended time frame to respond, or August 2, 2010.

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. 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 (January 2010).

In the matter currently before the Council, the Custodian certified in the SOI that on July 20, 2010, the Borough requested an extension of time to respond to the Complainant’s OPRA request. The Custodian provided a certification and a copy of the e-mail from the Custodian’s Counsel to the Complainant dated July 20, 2010 in which Counsel requested an extension of time until August 2, 2010 to respond because the Custodian was out of the office due to a medical emergency. Thus, the Custodian met his requirement of responding in writing to the Complainant’s OPRA request Items No. 1, No. 3, No. 4 and No. 5 within the mandated seven (7) business day time frame requesting an extension of time to respond to said request items. N.J.S.A. 47:1A-5.g. and Kelley, supra.

Although the evidence of record indicates that the Custodian properly requested an extension of time until August 2, 2010 to respond to the Complainant’s OPRA request, the Complainant filed this complaint on July 26, 2010, six (6) business days prior to the expiration of the extended time frame to respond and one (1) day before the Custodian responded to such OPRA request, providing access to the responsive records via facsimile. Subsequent to the filing of the SOI, the Complainant’s Counsel did not address nor refute the Custodian’s certification that the Borough obtained an extension of time until August 2, 2010.

In Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-226 (April 2009), the complainant forwarded a complaint to the GRC asserting that he had not received a response from the custodian and seven (7) business days would have passed by the time the GRC received the Denial of Access Complaint. The custodian argued in the SOI that the complainant filed the complaint prior to the expiration of the statutorily mandated seven (7) business day time frame set forth in N.J.S.A. 47:1A-5.i. The Council held that:

“...because the Complainant’s cause of action was not ripe at the time he verified his Denial of Access Complaint; to wit, the Custodian had not at that time denied the Complainant access to a government record, the complaint is materially defective and therefore should be dismissed.”

The Complainant herein acted in a similar manner as the complainant in Sallie, supra, by filing a Denial of Access Complaint with the GRC prior to any denial of access to request Items No. 1, No. 3, No. 4 and No. 5. However, whereas the complainant in Sallie, supra, filed his complaint with the GRC prior to the expiration of the statutorily mandated seven (7) business day time frame set forth in N.J.S.A. 47:1A-5.i., the Complainant here filed his complaint prior to the expiration of the extended deadline. Although the facts of Sallie, supra, are not exactly on point with this complaint, the outcome is similar: the Complainant filed his complaint prior to the Custodian’s response

and prior to the expiration of the extended time frame; thus, the required denial of access did not exist at the time of the filing of this complaint.

Therefore, because the Complainant's cause of action for his OPRA request Items No. 1, No. 3, No. 4 and No. 5 was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the OPRA request items and the extended time frame for the Custodian to respond had not expired, the instant complaint is materially defective and therefore should be dismissed. *See Sallie, supra.*

Although the Complainant's OPRA request Items No. 1, No. 3, No. 4 and No. 5 are not ripe for adjudication, the GRC must address the Custodian's July 27, 2010 response to the OPRA request.

The evidence of record indicates that the Custodian faxed the requested records to the Complainant on July 27, 2010. However, the Custodian certified in the SOI that two (2) invoices responsive to OPRA request Item No. 2 and minutes for the June special and executive sessions responsive to OPRA request Item No. 5 do not exist. The GRC requested that the Custodian provide evidence that he responded in writing advising the Complainant that these four (4) records did not exist. The Custodian failed to provide any evidence corroborating that he responded in writing advising the Complainant of the nonexistence of the aforementioned records. However, the Complainant has not presented any evidence to refute the Custodian's certification.

In O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), the Council stated that N.J.S.A. 47:1A-5.g. provides that if a Custodian is "unable to comply with a request for access, then the Custodian shall indicate the specific basis" for the inability to comply. To this end, the Council applied N.J.S.A. 47:1A-5.g. to the custodian's failure to address the complainant's choice of mode of delivery and held that "the Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records."

The Council also applied N.J.S.A. 47:1A-5.g. to a custodian's failure to provide an adequate response when denying access to a request for government records or failure to respond to each request individually. *See Paff v. Township of Berkeley Heights (Union)*, GRC Complaint No. 2007-271 (November 2008)(holding that the custodian's response was insufficient because she failed to specifically state that the requested executive session minutes were not yet approved by the governing body at the time of the complainant's request 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)(holding that the custodian's response was legally insufficient because he failed to respond to each request item individually).

In Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009), the custodian initially responded denying access to the report sought by the complainant pursuant to N.J.S.A. 47:1A-9 and N.J.S.A. 10:4-12. In the SOI, the Custodian certified that the report was not provided until after the Complainant's OPRA request, thus no record responsive existed at the time. The Council in turn held that

“...based on the application of N.J.S.A. 47:1A-5.g., Counsel’s response was insufficient because he failed to specifically state that the requested record did not exist at the time of the Complainant’s September 11, 2007 OPRA request pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008).”

Therefore, based on the application of N.J.S.A. 47:1A-5.g., the Custodian’s response to the OPRA request was insufficient because he failed to specifically state that the two (2) invoices responsive to OPRA request Item No. 2 and minutes for the June special and executive sessions responsive to OPRA request Item No. 5 did not exist pursuant to N.J.S.A. 47:1A-5.g. and Shanker, *supra*.

Additionally, 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 failed to submit any evidence to refute the custodian’s certification. The GRC held that 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 two (2) invoices responsive to OPRA request Item No. 2 and minutes for the June special and executive sessions responsive to OPRA request Item No. 5 do not exist, and there is no evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant access to these records pursuant to Pusterhofer, *supra*.

**Whether the Custodian’s actions rise 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)).

The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request Item No. 2 for invoices and failed to specifically state that four (4) of the requested records did not exist, thus resulting in violations of N.J.S.A. 47:1A-5.g. pursuant to Shanker, supra. However, the Complainant's cause of action for his OPRA request Items No. 1, No. 3, No. 4 and No. 5 was not ripe at the time of the filing of this Denial of Access Complaint because the Complainant filed the instant complaint prior to being denied access to said records and prior to the expiration of the extended deadline to respond, the Custodian did not unlawfully deny access to two (2) of the invoices responsive to request Item No. 2 and the special and executive session minutes responsive to request Item No. 5 pursuant to Pusterhofer, supra, and the Custodian provided access to all other records that existed on July 27, 2010, four (4) days before the expiration of the extended deadline to respond. Additionally, 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 the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> 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.<sup>7</sup> 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

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<sup>7</sup> 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.



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 determining whether the Complainant is a prevailing party, the GRC acknowledges that the Custodian did not timely respond to the Complainant's OPRA request for invoices, which are immediate access records. However, on July 20, 2010, the Custodian's Counsel requested an extension of time until August 2, 2010 to respond to the Complainant's OPRA request, or six (6) days prior to the filing of this complaint. Additionally, although the Complainant filed the instant complaint on July 26, 2010 and the Custodian responded on July 27, 2010 providing access to the requested records that existed, the Custodian's response fell within the extended deadline. At the time this complaint was filed, the Custodian was still statutorily obligated to respond to the Complainant's OPRA request, rather than the filing of this complaint being the catalyst for his response. Thus the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee.

Therefore, pursuant to Teeters, *supra*, the Complainant has not achieved “the desired result because the complaint [did not bring] 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 relief ultimately achieved. Specifically, the Complainant filed this complaint prior to the expiration of the extended deadline to respond and the Custodian provided access to all responsive records that existed four (4) days prior to the expiration of said deadline. Further, the relief ultimately achieved did not have a basis in law. 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. Because the Custodian failed to immediately grant or deny access to the requested invoices, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

2. Because the Complainant's cause of action for his OPRA request Items No. 1, No. 3, No. 4 and No. 5 was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the OPRA request items and the extended time frame for the Custodian to respond had not expired, the instant complaint is materially defective and therefore should be dismissed. *See Sallie v. NJ Department of Banking and Insurance*, GRC Complaint No. 2007-226 (April 2009).
3. Based on the application of N.J.S.A. 47:1A-5.g., the Custodian's response was insufficient because he failed to specifically state that the two (2) invoices responsive to OPRA request Item No. 2 and minutes for the June special and executive sessions responsive to OPRA request Item No. 5 did not exist pursuant to N.J.S.A. 47:1A-5.g. and Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009).
4. Because the Custodian certified in the Statement of Information that two (2) invoices responsive to OPRA request Item No. 2 and minutes for the June special and executive sessions responsive to OPRA request Item No. 5 do not exist, and because there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to these records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request Item No. 2 for invoices and failed to specifically state that four (4) of the responsive records did not exist, thus resulting in violations of N.J.S.A. 47:1A-5.g. pursuant to Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009). However, the Complainant's cause of action for his OPRA request Items No. 1, No. 3, No. 4 and No. 5 was not ripe at the time of the filing of this Denial of Access Complaint because the Complainant filed the instant complaint prior to being denied access to said records and prior to the expiration of the extended deadline to respond, the Custodian did not unlawfully deny access to two (2) of the invoices responsive to request Item No. 2 and the special and executive session minutes responsive to request Item No. 5 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), and the Custodian provided access to all other records that existed on July 27, 2010, four (4) days before the expiration of the extended deadline to respond. Additionally, 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.
6. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved "the desired result because the complaint [did

not bring] 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 relief ultimately achieved. Specifically, the Complainant filed this complaint prior to the expiration of the extended deadline to respond and the Custodian provided access to all responsive records that existed four (4) days prior to the expiration of said deadline. Further, the relief ultimately achieved did not have a basis in law. 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

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