State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

July 26, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant
v.
Sparta Board of Education (Sussex)
Custodian of Record

Complaint No. 2010-189

At the July 26, 2011 public meeting, the Government Records Council ("Council") considered the July 19, 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 evidence of record indicates that the Custodian did not provide all of the requested records by the extended date to do so, the Custodian's failure to grant access, deny access, or seek an additional extension of time within the extension of time to do so 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).

2. While the Custodian failed to provide all of the requested records by the extended response date, such a technical violation of OPRA lacks a positive element of conscious wrongdoing that would be indicative of an intentional and deliberate action by the Custodian. Accordingly, it is concluded that the Custodians' actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

3. 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. Here, the Custodian has borne their burden of proof by presenting substantial evidence that the Sparta Board of Education's response and eventual granting of access to the requested records in their entirety was lawful. As a result, no factual casual nexus exists between the filing of the Complainant's Denial of Access Complaint and the Custodian's technical violation as required by Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008). Accordingly, 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, 73-76 (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 26th Day of July, 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: July 27, 2011

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
July 26, 2011 Council Meeting

Jesse Wolosky[1] **GRC Complaint No. 2010-189**
Complainant

v.

Sparta Board of Education (Sussex)[2]
Custodian of Records

Records Relevant to Complaint:
E-mailed copies of the 2009-2010 invoices for Individuals with Disabilities Education Act ("IDEA") and American Recovery and Reinvestment Act ("ARRA"), support services out of district and other Local Education Agency ("LEA") tuitions.

Request Made: July 7, 2010
Response Made: July 16, 2010
Custodian: Warren Ceurvels
GRC Complaint Filed: August 2, 2010[3]

Background

July 7, 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.

July 16, 2010
Custodian's response to the OPRA request. The Custodian responds via e-mail on the seventh (7th) business day following receipt of such request attaching:

- A PDF file containing a list of personnel charged against ARRA funding.
- Two (2) PDF files containing 2009-2010 IDEA and AARA invoices

The Custodian states that only district personnel were charged to ARRA funding and paid through the regular payroll and as a result invoices are not used in this process. The Custodian asserts that a list of personnel charged against ARRA funding is contained in scan file 1445, attached hereto. The Custodian maintains that the response to the Complainant's request for the 2009-2010 IDEA and AARA invoices will take additional time as the Board of Education has extracted over 500 invoices from their files. The Custodian asserts that each invoice needs to be

[1] Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Oxford, NJ).
[2] Represented by Rodney T. Hara, Esq., of Fogarty and Hara (Fair Lawn, NJ).
[3] The GRC received the Denial of Access Complaint on August 2, 2010.

scrutinized to determine if any information contained in the IDEA and ARRA invoices must be redacted. The Custodian states that the requested invoices will be available on July 23, 2010.

July 19, 2010

E-mail from the Complainant to the Custodian. The Complainant grants the Custodian an extension to complete his request for 2009-10 invoices for IDEA and ARRA. The Complainant acknowledges receipt of the Custodian's PDF files that were e-mailed to him on July 16, 2010.

July 23, 2010

E-mail from the Custodian to the Complainant with attached invoices. The Custodian states that attached to this e-mail are the invoices responsive to the Complainant's request for "2009-10 invoices for IDEA and ARRA, support services…" The Custodian also states that there exists an additional 478 invoices for professional services that were provided to special needs students. The Custodian asserts that these invoices had one or more personal identifying articles of information that had to be redacted and that in order to redact the information each invoice had to be copied. The Custodian states that this was required in order to retain the information on the original invoice which is necessary for auditing by the state or federal government. The Custodian states that the cost for a copy of these records at a rate of five (5) cents per page is $23.90. The Custodian asserts that if the Complainant does not wish to pay the $23.90 charge, the Custodian will e-mail the invoices to the Complainant at no charge.

July 26, 2010

E-mail from the Complainant to the Custodian. The Complainant states that he granted the Custodian an extension of time until July 23, 2010, and as of the date of this correspondence only a portion of his request has been fulfilled. The Complainant states that he will pay the fee associated with the reproduction of the requested records.

August 2, 2010

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

- Complainant's OPRA request dated July 7, 2010
- E-mail from the Custodian to the Complainant dated July 16, 2010
- E-mail from the Complainant to the Custodian dated July 19, 2010
- E-mail from the Custodian to the Complainant dated July 23, 2010
- E-mail from the Complainant to the Custodian dated July 26, 2010

Complainant's Counsel states that the Complainant agreed to the $23.90 charge for the requested invoices. Counsel states that the 478 invoices mentioned in the Custodian's June 23, 2010 e-mail have not yet been received. Counsel states that this constitutes a deemed denial pursuant to OPRA. Finally, in addition to the allegations addressed above, the Complainant argues that the GRC should find that he is the prevailing party under N.J.S.A. 47:1A-6 and award him a reasonable attorney's fee.

The Complainant does not agree to mediate this complaint.

August 16, 2010

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

February 7, 2011[4]

Custodian's SOI.[5] The Custodian certifies that no documents responsive to the Complainant's request were destroyed. The Custodian certifies that the extension to fulfill the Complainant's request was needed due to the voluminous nature of the records request and the need to examine the records for potential redactions and to perform any such redactions. The Custodian certifies that the Complainant had given him until July 28, 2010 to supply the 478 responsive invoices but nevertheless filed a Denial of Access Complaint on July 26, 2010. The Custodian certifies that the remaining invoices were provided to the Complainant on August 4, 2010.

The Custodian argues that the GRC's "Handbook for Records Custodians" ("Handbook") allows for the redaction of sensitive information from records and that the custodian must also identify the legal basis for each redaction. The Custodian states that the Handbook also states that OPRA allows Custodians to seek extensions beyond the seven (7) business days initially prescribed in OPRA to fulfill a complainant's request.

The Custodian argues that the Handbook does not address the extent to which any fees may be charged for the cost of copies produced during the redaction process, particularly with respect to whether such fees are permissible when the requestor's requested medium for response is electronic. The Custodian certifies that he contacted the GRC by telephone via the toll-free helpline staffed by GRC employees, as set forth in N.J.S.A. 47:1A-7.b., asking whether he was permitted to charge $0.05 per page for copies in order to complete the redaction of personally identifiable information from the requested records. The Custodian argues that while custodians are encouraged to seek legal advice when responding to OPRA requests, the GRC has previously determined that awaiting legal advice is not a valid reason sufficient to overcome an otherwise unlawful delay in providing access to public records. Cottrell v. Borough of Glassboro, GRC Complaint No. 2005-247 (April 2006). The Custodian states that in Cottrell, the Council determined that the custodian's actions violated N.J.S.A. 47:1A-5.i. because she did not notify the complainant in writing that she was in the process of seeking advice from the borough's attorney or make any effort to obtain a written agreement from the complainant to extend the time period for responding to the OPRA request.

The Custodian argues that unlike the custodian at issue in Cottrell, the Custodian herein timely requested an extension of time by submitting the request to the Complainant in writing and provided the Complainant with the specific basis for delaying the response to the OPRA records request. The Custodian certifies that he advised the Complainant that additional time would be required in order to respond to the records request due to the process of redacting personally identifiable information from the documents and because he was awaiting guidance from the GRC regarding whether the Board would be permitted to charge a fee for the cost of performing these redactions or collect a special service charge for the cost of redaction pursuant to N.J.S.A. 47:1A-5.c.. The Custodian certifies that although the Complainant offered to pay a

[4] The delay in the receipt of the SOI was due to a misspelling in the Custodian's e-mail address.
[5] The Custodian did not include any attachments with the SOI.

copying fee for the 478 pages of records at the rate of $0.05 per page as set forth in N.J.S.A. 47:1A-5.b. for a total of $23.90, he advised the Complainant that the Board would not accept funds from the Complainant prior to ascertaining whether such a redaction fee was legally authorized. The Custodian certifies that he did not ignore or disregard the OPRA request but merely required additional time to complete the redaction process of the 478 pages of government records and determine whether any fees could lawfully be charged to the Complainant.

The Custodian certifies that on August 4, 2010,[6] he provided the remaining documents responsive to the Complainant's OPRA request without the imposition of a copying fee and that based upon these circumstances, he did not fail to grant or deny access, seek clarification or request an extension of time in writing within the requisite seven (7) business days of the Board's receipt of the records request. The Custodian certifies that the Complainant was subsequently provided with most of the requested records and informed of the reason why the remaining records could not be immediately provided and that therefore the Custodian's actions do not constitute a 'deemed" denial of access under the relevant case law interpreting OPRA.

The Custodian argues that in order to merit an award of attorney's fees, the complaint must bring about a change, voluntary or otherwise, in the custodian's conduct. Teeters v. N.J. Div. of Youth & Family Servs., 387 N.J. Super. 423 (App. Div. 2006). The Custodian asserts that the burden of proof lies with the complainant to demonstrate "a factual causal nexus" between the complaint and the relief ultimately achieved, and that such relief "had a basis in law." Mason v. City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008) (plaintiff's lawsuit was not the catalyst for release of records because custodian's response on the eighth business day following the request included a memo, dated the seventh business day, advising when each record would be available). The Custodian argues that the Court in Mason also held that the burden may shift to a public entity under some limited circumstances; specifically where a public agency "has failed to respond at all" to a request within seven (7) business days "but voluntarily discloses records after a requestor files suit, the agency should be required to prove that the lawsuit was not the catalyst for the agency's belated disclosure." *Id.* at 77.

The Custodian certifies that in this case, the Complainant is not a prevailing party as defined in N.J.S.A. 47:1 A-6 and therefore is not entitled to an award of a reasonable attorney's fee because the complaint has not brought about any change, voluntary or otherwise, in the Custodian's conduct. The Custodian certifies that he intended to provide, and did subsequently provide, copies of all of the requested government records to the Complainant after receiving a response from the GRC as to whether a copying fee could be charged for the cost of photocopying and redacting the documents.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

[6] The Custodian provides no documentation supporting the existence of this correspondence between the parties.

"…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.

In addition, OPRA prescribes 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 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.

Furthermore, 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. A custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.[7] 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 time 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).

[7] 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.

In the instant matter, the Complainant's OPRA request sought "e-mailed copies of the 2009-2010 invoices for Individuals with Disabilities Education Act ("IDEA") and ARRA, support services out of district and other LEA tuitions." In his response to the OPRA request, the Custodian informed the Complainant that due to the voluminous nature of the request and need to scrutinize approximately 500 invoices for possible redactions, he would not be able to provide the records in their entirety until July 23, 2010, but stated that he was able to provide a portion of the invoices responsive to the Complainant's request by July 23, 2010. The evidence of record indicates that on July 23, 2010, the Custodian provided the Complainant with additional responsive invoices free of charge via e-mail, but also informed the Complainant that there existed an additional 478 invoices that were being redacted and that there would be a charge of $23.90[8] (at a rate of $0.05 per page) for paper copies of the invoices. The Custodian also offered to e-mail the invoices to the Complainant free of charge. The Custodian certifies in his SOI that the 478 invoices were provided to the Complainant in their entirety at no cost on August 4, 2010.

The records sought by the Complainant, invoices, are records to which access must ordinarily be granted immediately pursuant to N.J.S.A. 47:1A-5.e., In matters in which additional time is needed for a custodian to produce requested immediate access records, the GRC has found no violation of N.J.S.A. 47:1A-5.e. In Renna v. County of Union, GRC Complaint No. 2008-110 (March 2009), the custodian received the complainant's request for immediate access records within an hour of the close of business. The custodian certified that additional time was needed to perform the necessary conversions to fulfill the complainant's OPRA request. Accordingly, the GRC found that a delay of two (2) business days following receipt of the request for what would ordinarily constitute immediate access records was not a violation of N.J.S.A. 47:1A-5.e.

In the matter before the Council, the evidence of record is clear that the number of invoices responsive to the Complainant's OPRA request was voluminous, and the Custodian has certified that a review and redaction of said invoices was necessary to protect non-disclosable material. Thus, pursuant to Renna, *supra*, the extension of time to July 23, 2010 requested by the Custodian to provide copies of the requested invoices does not violate N.J.S.A. 47:1A-5.e.

However, the evidence of record indicates that the Custodian did not provide all of the requested invoices by the extended date for response of July 23, 2010; instead, the Custodian provided the remaining outstanding invoices to the Complainant on August 4, 2010.

Therefore, because the evidence of record indicates that the Custodian did not provide all of the requested records by the extended date to do so, the Custodian's failure to grant access, deny access, or seek an additional extension of time within the extension of time to do so 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).

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?

[8] The validity of such a charge is not contested nor has the Custodian imposed this fee upon the Complainant.

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).

In the matter before the council, while the Custodian did disclose the requested records, the Custodian failed to provide all of the requested records within the prescribed extension of time. While a technical violation of OPRA, this violation and circumstances of the instant case do not rise to such a level that they are to be considered of the intentional and deliberate variety required for a finding of a "knowing and willful" violation of OPRA; as evidenced by the Custodian's efforts to furnish all of the requested records.

Therefore, while the Custodian failed to provide all of the requested records by the extended response date, such a technical violation of OPRA lacks a positive element of conscious wrongdoing that would be indicative of an intentional and deliberate action by the Custodian. Accordingly, it is concluded that the Custodians' actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

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

1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

> "New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," Id. at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," Id. at 495. See also North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).
>
> Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" Id. at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); see also Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, supra, 328 N.J. Super. at 421. A settlement that

confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. Id. at 422.

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

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed $ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the $ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.[9] Those changes expand counsel fee awards under OPRA."

[9] 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

Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

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

In the instant matter, as in Mason, the Complainant's Denial of Access Complaint was not the catalyst for the release of the requested records. While the Custodian failed to supply all of the requested records by the extended response date in which to do so, the Custodian has still borne her burden of proof that she lawfully responded to the Complainant's voluminous request for immediate access records by providing substantial evidence that the Sparta Board of Education acted within the procedures prescribed in OPRA and prior GRC decisions regarding the release of immediate access records pursuant to N.J.S.A. 47:1A-5.e. Furthermore, evidence in the record details the continued release of the requested invoices as they became available before and after the filing of the Complainant's Denial of Access Complaint.

Therefore, pursuant to Teeters, 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. Here, the Custodian has borne their burden of proof by presenting substantial evidence that the Sparta Board of Education's response and eventual granting of access to the requested records in their entirety was lawful. As a result, no factual casual nexus exists between the filing of the Complainant's Denial of Access Complaint and the Custodian's technical violation as required by Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008). Accordingly, 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, 73-76 (2008).

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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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the evidence of record indicates that the Custodian did not provide all of the requested records by the extended date to do so, the Custodian's failure to grant access, deny access, or seek an additional extension of time within the extension of time to do so 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).

2. While the Custodian failed to provide all of the requested records by the extended response date, such a technical violation of OPRA lacks a positive element of conscious wrongdoing that would be indicative of an intentional and deliberate action by the Custodian. Accordingly, it is concluded that the Custodians' actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

3. 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. Here, the Custodian has borne their burden of proof by presenting substantial evidence that the Sparta Board of Education's response and eventual granting of access to the requested records in their entirety was lawful. As a result, no factual casual nexus exists between the filing of the Complainant's Denial of Access Complaint and the Custodian's technical violation as required by Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008). Accordingly, 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, 73-76 (2008).

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July 19, 2011