



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

December 20, 2011 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2010-248

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the December 20, 2011 public meeting, the Government Records Council (“Council”) considered the December 13, 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. Although the Custodian responded to the Complainant’s OPRA request within the statutorily mandated time frame providing records responsive to the Complainant’s OPRA request that are not at issue in this complaint pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response is insufficient because he failed to provide a specific lawful basis for denying access to the requested April 2010 executive session minutes pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009). Moreover, the Custodian’s response was insufficient because he failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA 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).
2. The unapproved, draft executive session minutes of the Borough’s April 2010 Council meeting constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has lawfully denied access to the draft minutes pursuant to N.J.S.A. 47:1A-6 because he certified in the Statement of Information that same had not been transcribed or approved by the Council at the time of the Complainant’s request.
3. Although the Custodian violated OPRA by providing an insufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g., DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Custodian lawfully denied access to the Complainant’s OPRA request for the Borough’s April 2010 executive session minutes pursuant to Parave-



Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006)(holding that unapproved, draft meeting minutes are exempt from disclosure as advisory, consultative or deliberative material). 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.

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 did not bring about a change (voluntary or otherwise) in the custodian's conduct. 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 Custodian lawfully denied access to the Complainant's OPRA request for the Borough's April 2010 executive session minutes because same had not been transcribed and thus not reviewed or approved by the Borough's Council at the time of the Complainant's OPRA request. 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 20th Day of December, 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: December 22, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 20, 2011 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2010-248

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copy of minutes for the Borough of South Bound Brook's ("Borough") April 2010 executive session.³

Request Made: May 17, 2010

Response Made: May 25, 2010

Custodian: Donald E. Kazar

GRC Complaint Filed: September 20, 2010⁴

Background

May 17, 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 indicates that the preferred method of delivery is via facsimile.

May 25, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via facsimile to the Complainant's OPRA request on the same business day following receipt of such request.⁵ The Custodian provides records not at issue in the instant complaint to the Complainant.⁶

September 20, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated May 17, 2010.

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

² Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previously represented by William T. Cooper, III, Esq., of Cooper & Cooper (Somerville, NJ).

³ The Complainant requested additional records that are not at issue in this complaint.

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

⁵ The Custodian certifies in the SOI that he received the Complainant's OPRA request on May 25, 2010.

⁶ Although the Custodian responded to the Complainant's OPRA request on May 25, 2010, there is no evidence in the record to indicate that the Custodian addressed the Complainant's request item seeking the Borough's April 2010 executive session minutes.

The Complainant states that he submitted an OPRA request to the Borough on May 17, 2010. The Complainant states that on May 25, 2010, the Custodian faxed the Complainant records not at issue in this complaint but failed to provide the requested April 2010 executive session minutes. The Complainant argues that to date the Custodian has either refused or failed to provide the April 2010 executive session minutes at issue herein.

Complainant's Counsel submits a letter brief in support of the Complainant's position. Counsel states that OPRA mandates that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] ... shall be construed in favor of the public's right of access." Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006)(citing N.J.S.A. 47:1A-1). Further, Counsel states that "[t]he purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004). Counsel states that in any action under OPRA, the burden of proof rests with the public agency. N.J.S.A. 47:1A-6.

Counsel states that the custodian of record must bear the burden of proof in any proceeding under OPRA. N.J.S.A. 47:1A-6 and Paff v. Township of Lawnside (Camden), GRC Complaint No. 2009-155 (October 2010). Counsel contends that there is no doubt that the records requested by the Complainant are government records as defined under OPRA. N.J.S.A. 47:1A-1.1.

Counsel argues that here, the Complainant sought copies of executive session minutes. Counsel asserts that although the Complainant may not be entitled to unredacted copies of the minutes, he is certainly entitled to a version of the minutes that is appropriately redacted. Wolosky v. Vernon Township Board of Education (Essex), GRC Complaint No. 2009-57 (December 2009) and Taylor v. Township of Downe (Cumberland), GRC Complaint No. 2009-174 (July 2010). Counsel argues that the Complainant's OPRA request for April 2010 executive session minutes is therefore, deemed denied pursuant to N.J.S.A. 47:1A-5.i.

Counsel thus requests a determination ordering the Custodian to disclose a copy of the Borough's April 2010 executive session minutes; and a determination that the Complainant is a prevailing party entitled to reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

September 24, 2010

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

September 28, 2010

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until October 8, 2010 to submit the requested SOI.

September 29, 2010

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until October 8, 2010 to submit the requested SOI.

October 5, 2010⁷

Custodian's SOI attaching Complainant's OPRA request dated May 17, 2010.

The Custodian certifies that he received the Complainant's OPRA request on May 25, 2010. The Custodian certifies that the minutes at issue herein had not been transcribed at the time of the Complainant's OPRA request and therefore were not reviewed and approved by the Borough Council.

Analysis

Whether the Custodian's response to the Complainant's OPRA request was sufficient?

OPRA also provides that:

“[a] custodian *shall promptly comply* with a request to inspect, examine, copy, or provide a copy of a government record. If 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 ...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

The Complainant filed this complaint arguing that the Custodian failed to provide the requested April 2010 executive session minutes. The Complainant stated that although the Custodian faxed records that were part of the request (but not at issue in this complaint), the Custodian either refused to or failed to provide access to the Borough's April 2010 executive session minutes. Further, the Custodian did not provide as part of the SOI a written response detailing how the Custodian responded to the request item at issue. However, the Custodian did certify in the SOI that the April 2010 executive session minutes were not transcribed at the time of the Complainant's OPRA request and therefore had not been reviewed and approved by Borough Council. Thus, the evidence of record indicates that the Custodian failed to respond in writing noting the reason for his denying access to the Complainant's request. Further, the evidence indicates that the Custodian also failed to address each request item individually.

⁷ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA 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 as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

OPRA provides that if a "...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" (Emphasis added.) N.J.S.A. 47:1A-5.g. In DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), the complainant argued in the Denial of Access Complaint that although the custodian responded in writing in a timely manner, the custodian failed to provide some of the records responsive and further failed to provide a specific lawful basis for denying access to the missing records. The GRC held that:

"... the Council's decisions have repeatedly supported this statutory mandate by holding that custodians must provide a legally valid reason for any denial of access to records. *See Seabrook v. Cherry Hill Police Department*, GRC Complaint No. 2004-40 (April 2004), Rosenblum v. Borough of Closter, GRC Complaint No. 2005-16 (October 2005) and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (October 2005). The Council also held that for a denial of access to be in compliance with OPRA, it must be specific and must be sufficient to prove that a custodian's denial is authorized by OPRA. *See Morris v. Trenton Police Department*, GRC Complaint No. 2007-160 (May 2008).

Here, while the Custodian's response to the Complainant's request was within the time allowed by N.J.S.A. 47:1A-5.i., his response was not in compliance with OPRA because it failed to provide a specific basis for denying the Complainant access to certain records pursuant to N.J.S.A. 47:1A-5.g. and the Council's decisions in Seabrook, *supra*, Rosenblum, *supra*, Paff, *supra* and Morris, *supra*." *Id.* at pg. 7.

Moreover, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the complainant's counsel asserted that the custodian violated OPRA by failing to respond to each of the complainant's request items individually within seven (7) business days. The GRC contemplated how the facts in Paff applied to its prior holding in O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005)(that the custodian's initial response that the complainant's request was a duplicate of a previous request was legally insufficient because the custodian has a duty to answer each request individually). The Council reasoned that, "[b]ased on OPRA and the GRC's holding in O'Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request." The GRC ultimately held that:

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

Based on OPRA and the GRC's holding in Paff, *supra*, a custodian is vested with the responsibility to respond to each individual request item contained in an OPRA request within the statutorily mandated time frame.

Here, although the Custodian provided access to records not at issue in this complaint via facsimile in a timely manner, the evidence of record indicates that the Custodian provided no written response to the Complainant regarding the April 2010 executive session minutes at issue here. Moreover, the evidence indicates that the Custodian failed to provide the Complainant with a specific lawful basis for his denial of access to the responsive minutes. OPRA provides that a custodian shall comply with a request for records or indicate the specific basis thereof in the event that a record cannot be disclosed. N.J.S.A. 47:1A-5.g.

Therefore, although the Custodian responded to the Complainant's OPRA request within the statutorily mandated time frame providing records responsive to the Complainant's OPRA request that are not at issue in this complaint pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because he failed to provide a specific lawful basis for denying access to the requested April 2010 executive session minutes pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, *supra*. Moreover, the Custodian's response was insufficient because he failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff, *supra*.

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 ... The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material" (Emphasis added.) N.J.S.A. 47:1A-1.1.

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.

As a general matter, draft documents are advisory, consultative and deliberative (“ACD”) communications. Although OPRA broadly defines a “government record” as records either “made, maintained or kept on file in the course of [an agency’s] official business,” or “received” by an agency in the course of its official business, N.J.S.A. 47:1A-1.1., the statute also excludes from this definition a variety of documents and information. Ibid. See Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that “inter-agency or intra-agency advisory, consultative, or deliberative material” is not included within the definition of a government record. N.J.S.A. 47: 1A-1 .1.

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass’n, v. Dinkins, 807 F. Supp., 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn. App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it “reflect[s] that aspect of the agency’s function that precedes formal and informed decision making.” *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004), the Court reviewed an OPRA request to the Department of Corrections for draft regulations and draft statutory revisions. The Court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” *Id.* at 18. It further held:

“[t]he trial judge ruled that while appellant had not overcome the presumption of non-disclosure as to the entire draft, it was nevertheless entitled to those portions which were eventually adopted. Appellant appeals from the portions withheld and DOC appeals from the portions required to be disclosed. We think it plain that all these drafts, in their entirety, are reflective of the deliberative process. On the other hand, appellant certainly has full access to all regulations and statutory revisions ultimately adopted. We see, therefore, no basis justifying a conclusion that the presumption of nondisclosure has been overcome. *Ibid.* (Emphasis added.)”

Additionally, the GRC has previously ruled on the issue of whether draft meeting minutes are exempt from disclosure pursuant to OPRA. In Parave-Fogg v. Lower

Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council held that "...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1." See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-106 (February 2009) and Wolosky v. Stillwater Township (Sussex), GRC Complaint No. 2009-30 (January 2010).

Thus, in accordance with the foregoing case law and the prior GRC decision in Parave-Fogg, *supra*, all draft minutes of a meeting held by a public body are entitled to the protection of the deliberative process privilege. Draft minutes are pre-decisional. In addition, they reflect the deliberative process in that they are prepared as part of the public body's decision making concerning the specific language and information that should be contained in the minutes to be adopted by that public body, pursuant to its obligation under the Open Public Meetings Act to "keep reasonably comprehensible minutes." N.J.S.A. 10:4-14.

Here, the Custodian certified in the SOI that the April 2010 executive session minutes had not been transcribed and thus had not been reviewed or approved by the Borough Council. Moreover, the Complainant did not dispute the Custodian's certification. Thus, the Custodian lawfully denied access to the responsive minutes which are considered ACD material because same were not approved by the Borough Council.

Therefore, the unapproved, draft executive session minutes of the Borough's April 2010 Council meeting constitute ACD material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, *supra*. Accordingly, the Custodian has lawfully denied access to the draft minutes pursuant to N.J.S.A. 47:1A-6 because he certified in the SOI that same had not been transcribed or approved by the Council at the time of the Complainant's request.

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

OPRA states that:

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

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

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

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

Although the Custodian violated OPRA by providing an insufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g., DeAppolonio, *supra*, and Paff, *supra*, the Custodian lawfully denied access to the Complainant’s OPRA request for the Borough’s April 2010 executive session minutes pursuant to Parave-Fogg (holding that unapproved, draft meeting minutes are exempt from disclosure as ACD material). 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 (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. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) 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.

The Complainant filed the instant complaint seeking the following relief:

1. A determination ordering the Custodian to disclose a copy of the responsive April 2010 executive session minutes; and
2. A determination that the Complainant is a prevailing party entitled to reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

In determining whether the Complainant is a prevailing party, the GRC acknowledges that the Custodian responded insufficiently to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., DeAppolonio, supra, and Paff, supra. However, the Custodian lawfully denied access to the Complainant's May 17, 2010 OPRA request for the Borough's April 2010 executive session minutes. Specifically, the Custodian certified in the SOI that the minutes at issue had not been transcribed and thus not reviewed or approved by the Borough's Council at the time of the Complainant's OPRA request. *See Parave-Fogg*. Thus, the GRC has determined that the Custodian lawfully denied access to the requested executive session minutes. Based on the foregoing, this complaint did not bring about any change in the Custodian's conduct. 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. 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 Custodian lawfully denied access to the Complainant's OPRA request for the Borough's April 2010 executive session minutes because same had not been transcribed and thus not reviewed or approved by the Borough's Council at the time of the Complainant's OPRA request. 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. Although the Custodian responded to the Complainant's OPRA request within the statutorily mandated time frame providing records responsive to the Complainant's OPRA request that are not at issue in this complaint pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because he failed to provide a specific lawful basis for denying access to the requested April 2010 executive session minutes pursuant to N.J.S.A. 47:1A-5.g. and

DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009). Moreover, the Custodian's response was insufficient because he failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA 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).

2. The unapproved, draft executive session minutes of the Borough's April 2010 Council meeting constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has lawfully denied access to the draft minutes pursuant to N.J.S.A. 47:1A-6 because he certified in the Statement of Information that same had not been transcribed or approved by the Council at the time of the Complainant's request.
3. Although the Custodian violated OPRA by providing an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Custodian lawfully denied access to the Complainant's OPRA request for the Borough's April 2010 executive session minutes pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006)(holding that unapproved, draft meeting minutes are exempt from disclosure as advisory, consultative or deliberative material). 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.
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 did not bring about a change (voluntary or otherwise) in the custodian's conduct. 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 Custodian lawfully denied access to the Complainant's OPRA request for the Borough's April 2010 executive session minutes because same had not been transcribed and thus not reviewed or approved by the Borough's Council at the time of the Complainant's OPRA request. 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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December 13, 2011