



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

March 25, 2014 Government Records Council Meeting

Brian J. Levine, Esq.
Complainant

Complaint No. 2010-339

v.

New Jersey Department of Community Affairs,
Division of Fire Safety
Custodian of Record

At the March 25, 2014 public meeting, the Government Records Council ("Council") considered the March 18, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed because DAG Susan C. Sharpe sent a letter dated November 1, 2014 to the Honorable John F. Russo, Administrative Law Judge, with a copy to Brian J. Levine, Esq., Counsel to the Complainant, advising that the matter had been amicably resolved and could be closed out by OAL. Therefore, no further adjudication is required.

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 25th Day of March, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: March 27, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 25, 2014 Council Meeting**

Brian J. Levine, Esq.
(on behalf of Natalie Stephens)¹
Complainant

GRC Complaint No. 2010-339

v.

**New Jersey Department of Community Affairs,
Division of Fire Safety²**
Custodial Agency

Records Relevant to Complaint: Copies of any and all statements under oath, deposition transcripts and other documentation reviewed, relied upon or considered in the preparation of the Final Report issued on October 1, 2010 by the New Jersey Division of Fire Safety (“Division”), with regard to the January 2, 2009 line-of-duty death of City of Elizabeth firefighter, Mr. Gary V. Stephens (“Mr. Stephens”).

Custodian of Records: Marylain Kemp
Request Received by Custodian: November 4, 2010
Response Made by Custodian: November 12, 2010
GRC Complaint Received: December 24, 2010

Background³

September 25, 2012 Council Meeting

At its September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian failed to provide the GRC with a simultaneous certified order of compliance in accordance with N.J. Court Rule 1:4-4, within five (5)

¹ The Complainant is an attorney representing Ms. Natalie Stephens.

² Represented by DAG Susan C. Sharpe on behalf of the Attorney General. At the time of filing of the Complaint the Custodian was represented by DAG Andrew Walko.

³The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

business days from receipt of the Interim Order, the Custodian has failed to comply with the terms of the Council's July 31, 2012 Interim Order.

2. The Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide the correct statute as the lawful basis for the denial of access in response to the Complainant's OPRA request. The Custodian also violated N.J.S.A. 47:1A-6 by unlawfully denying the Complainant access to the transcripts responsive to the OPRA request. The Custodian further violated the Council's Interim Order dated July 31, 2012 by failing to provide a certified confirmation of compliance within five (5) business days of receipt of said order. However, the Custodian the Custodian provided a certified confirmation of compliance on August 24, 2012. The Custodian also sent a letter to the Complainant within five (5) business days of receipt of the Interim Order indicating that the transcripts will be provided after the Complainant's payment of a special service charge. The Custodian further provided to the Complainant the transcripts responsive to the request as required by the Council's Interim Order on August 23, 2012. 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Thus, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the responsive transcripts to the Complainant on August 23, 2012. Further, the relief achieved ultimately had a basis in law. Therefore, the Complainant is a prevailing party and is entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Procedural History:

On September 27, 2012, the Council distributed its Interim Order to all parties. On April 30, 2013, the complaint was transmitted to the Office of Administrative Law (“OAL”).

On November 7, 2014, Susan C. Sharpe, Counsel for the Custodian, sent a letter to the Honorable John F. Russo, Administrative Law Judge, stating that the matter had been amicably resolved and could be closed out by OAL.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because DAG Susan C. Sharpe sent a letter dated November 1, 2014 to the Honorable John F. Russo, Administrative Law Judge, with a copy to Brain J. Levine, Esq., Counsel to the Complainant, advising that the matter had been amicably resolved and could be closed out by OAL. Therefore, no further adjudication is required.

Prepared and

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

March 18, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

September 25, 2012 Government Records Council Meeting

Brian J. Levine, Esq.
(on behalf of Natalie Stephens)
Complainant

Complaint No. 2010-339

v.

New Jersey Department of Community Affairs,
Division of Fire Safety
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to provide the GRC with a simultaneous certified order of compliance in accordance with N.J. Court Rule 1:4-4, within five (5) business days from receipt of the Interim Order, the Custodian has failed to comply with the terms of the Council’s July 31, 2012 Interim Order.
2. The Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide the correct statute as the lawful basis for the denial of access in response to the Complainant’s OPRA request. The Custodian also violated N.J.S.A. 47:1A-6 by unlawfully denying the Complainant access to the transcripts responsive to the OPRA request. The Custodian further violated the Council’s Interim Order dated July 31, 2012 by failing to provide a certified confirmation of compliance within five (5) business days of receipt of said order. However, the Custodian provided a certified confirmation of compliance on August 24, 2012. The Custodian also sent a letter to the Complainant within five (5) business days of receipt of the Interim Order indicating that the transcripts will be provided after the Complainant’s payment of a special service charge. The Custodian further provided to the Complainant the transcripts responsive to the request as required by the Council’s Interim Order on August 23, 2012. 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Thus, pursuant to Mason v. City of

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Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the responsive transcripts to the Complainant on August 23, 2012. Further, the relief achieved ultimately had a basis in law. Therefore, the Complainant is a prevailing party and is entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 25th Day of September, 2012

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: September 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 25, 2012 Council Meeting**

Brian J. Levine, Esq.
(on behalf of Natalie Stephens)¹
Complainant

GRC Complaint No. 2010-339

v.

**New Jersey Department of Community Affairs,
Division of Fire Safety²**
Custodian of Records

Records Relevant to Complaint: Copies of any and all statements under oath, deposition transcripts and other documentation reviewed, relied upon or considered in the preparation of the Final Report issued on October 1, 2010 by the New Jersey Division of Fire Safety (“Division”), with regard to the January 2, 2009 line-of-duty death of City of Elizabeth firefighter, Mr. Gary V. Stephens (“Mr. Stephens”).

Request Made: November 4, 2010

Response Made: November 12, 2010

Custodian: Marylain Kemp

GRC Complaint Filed: December 24, 2010³

Background

July 31, 2012

Government Records Council’s (“Council”) Interim Order. At its July 31, 2012 public meeting, the Council considered the July 24, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian responded in writing to the Complainant’s 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 she failed to provide the correct statute as the specific lawful basis for said denial of access. Therefore, the Custodian has violated OPRA 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).

¹ The Complainant is an attorney representing Ms. Natalie Stephens.

² Represented by DAG Andrew Walko on behalf of the NJ Attorney General.

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

2. Because the Custodian certified in the Statement of Information that no deposition transcripts responsive to the Complainant's OPRA request 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 the deposition transcripts pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. The Custodian's denial of access to the six (6) transcribed statements and the nine (9) transcribed interviews was unlawful pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-6; the Custodian must provide such records to the Complainant. However, to protect the privacy interests of those who provided such statements, names and ranks of interviewees and any other personal identifying information shall be redacted pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
5. Because the Complainant's request for "other documentation reviewed, relied upon or considered in the preparation of the Final Report issued on October 1, 2010" fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is overly broad and is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

August 3, 2012

Council's Interim Order distributed to the parties.⁶

August 9, 2012

E-mail from the Custodian to the Complainant. The Custodian states that in accordance with the Council's Order dated August 3, 2012, the Division of Fire Safety ("Division") has 226 records of voluntary and subpoenaed transcripts responsive to the Complainant's request. The Custodian also states that the redacting and copying the transcripts required an extraordinary expenditure of time and effort from the Division and thus a special service charge is warranted pursuant to N.J.S.A. 47:1A-5.c. The Custodian further states that the final cost for these transcripts responsive will be \$240.49.⁷ The Custodian additionally states that personal identifying information must be redacted pursuant to the Council's Order. The Custodian requests the Complainant to contact her if he wishes to purchase these transcripts. The Custodian states that upon receipt of payment of the special service charge, the Division will begin redacting the transcripts responsive to the request.

August 15, 2012

Letter from the Complainant to the Custodian. The Complainant states that he is providing a check in the amount of \$240.49 for the transcripts responsive to his OPRA request.

August 23, 2012

Letter from the Custodian to the Complainant. The Custodian states that the Division is in receipt of the Complainant's check in the amount of \$240.49 for the special service charge payment for the transcripts responsive to the request. The Custodian provides the Complainant with copies of the transcripts responsive to the request as required by the Council's Interim Order.

August 24, 2012

Custodian's response to the Council's Interim Order.⁸ The Custodian certifies that she sent an e-mail to the Complainant on August 9, 2012 indicating that the transcripts responsive to the Complainant's request were available and the Division incurred a special service charge of \$240.49. The Custodian also certifies that the Complainant provided the Custodian with a payment of \$240.49 as payment for the special service charge on August 20, 2012. The Custodian further certifies that on August 23, 2012 she provided the Complainant with copies of 226 pages of transcripts responsive along with a redaction log. The Custodian certifies that transcripts were redacted for any personal identifying information pursuant to the Council's Interim Order and to protect the privacy interests of those who provided such statements. The Custodian additionally certifies that she contacted the GRC on August 23, 2012 and the GRC informed the Custodian that she was already in violation of the Interim Order

⁶ The Custodian received the Council's Interim Order on August 3, 2012.

⁷ The Custodian provided the Complainant with a breakdown of the special service charge indicating that a Fire Investigator expended five (5) hours to review the records and make redactions and a clerk expended one (1) hour to remove staples and copy records.

⁸ The Custodian responds to the Council's Interim Order on the fifteenth (15th) business day following receipt of said order.

because the certification of compliance in accordance with N.J. Court Rule 1:4-4 was due within five (5) business days of receipt of the Interim Order.

The Custodian argues that she interpreted paragraph four (4) of the Council's Interim Order to mean that she had to respond to the Complainant within five (5) business days that the records were available. The Custodian asserts that since special service charges of \$240.49 were incurred, she waited for the Complainant to respond to her special service charge request dated August 9, 2012.

Analysis

Whether the Custodian complied with the Council's July 31, 2012 Interim Order?

The Council's July 31, 2012 Interim Order required the Custodian to provide the Complainant with access to the transcripts responsive to the Complainant's request with redacting the names, ranks and any other personal identifying information to protect the privacy interests of those who provided such statements. The Council's Interim Order also required the Custodian to provide certification of compliance to the Executive Director within five (5) business days from receipt of said Interim Order.

The evidence of record indicates that the Custodian received the Council's Interim Order on August 3, 2012. The Custodian certifies that she sent an e-mail to the Complainant on August 9, 2012, indicating that the transcripts responsive to the OPRA request are available but requested the Complainant to provide payment of \$240.49 for a special service charge. Although the Custodian sent a letter to the Complainant five (5) business days after receipt of the Interim Order, the Custodian failed to provide a simultaneous certification of compliance to the GRC certifying that she complied with the Council's Interim Order. However, the Custodian provided the certified statement of compliance in accordance with N.J. Court Rule 1:4-4 to the GRC on the fifteenth (15th) business day following receipt of the Interim Order.

The Custodian argues that she interpreted paragraph four (4) of the Council's Interim Order to mean that she only had to respond to the Complainant within five (5) business days stating that the records were available. However, the Council's Interim Order clearly states to "comply...within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction *and* [to] simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director." (emphasis added).

Therefore, because the Custodian failed to provide the GRC with a certified order of compliance in accordance with N.J. Court Rule 1:4-4 within five (5) business days from receipt of the Interim Order, the Custodian has failed to comply with the terms of the Council's July 31, 2012 Interim Order.

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.g. by failing to provide the correct statute as the lawful basis for the denial of access in response to the Complainant’s OPRA request. The Custodian also violated N.J.S.A. 47:1A-6 by unlawfully denying the Complainant access to the transcripts responsive to the OPRA request. The Custodian further violated the Council’s Interim Order dated July 31, 2012 by failing to provide a certified confirmation of compliance within five (5) business days of receipt of said order. However, the Custodian provided a certified confirmation of compliance on August 24, 2012. The Custodian also sent a letter to the Complainant within five (5) business days of receipt of the Interim Order indicating that the transcripts would be provided after the Complainant’s payment of a special service charge. The Custodian further provided to the Complainant the transcripts responsive to the request as required by the Council’s Interim Order on August 23, 2012. 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 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. *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)). The court in

Buckhannon 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 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).”

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).”

After the filing of this Denial of Access Complaint and the issuance of the Council’s July 31, 2012 Interim Order, the Council ordered the Custodian to provide to the Complainant the transcripts responsive to the request within five (5) business days from receipt of the Interim Order. In response to the Council’s Interim Order, the Custodian provided certified confirmation of compliance to the Executive Director that that she provided the responsive transcripts to the Complainant on August 23, 2012.

Pursuant to Teeters, *supra*, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Thus, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the responsive transcripts to the Complainant on August 23, 2012. Further, the relief achieved ultimately had a basis in law. Therefore, the Complainant is a prevailing party and is entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees. Based on the New Jersey Supreme Court’s decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council’s decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of “unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]” this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to provide the GRC with a simultaneous certified order of compliance in accordance with N.J. Court Rule 1:4-4, within five (5) business days from receipt of the Interim Order, the Custodian has failed to comply with the terms of the Council’s July 31, 2012 Interim Order.
2. The Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide the correct statute as the lawful basis for the denial of access in response to the

Complainant's OPRA request. The Custodian also violated N.J.S.A. 47:1A-6 by unlawfully denying the Complainant access to the transcripts responsive to the OPRA request. The Custodian further violated the Council's Interim Order dated July 31, 2012 by failing to provide a certified confirmation of compliance within five (5) business days of receipt of said order. However, the Custodian the Custodian provided a certified confirmation of compliance on August 24, 2012. The Custodian also sent a letter to the Complainant within five (5) business days of receipt of the Interim Order indicating that the transcripts will be provided after the Complainant's payment of a special service charge. The Custodian further provided to the Complainant the transcripts responsive to the request as required by the Council's Interim Order on August 23, 2012. 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.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Thus, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the responsive transcripts to the Complainant on August 23, 2012. Further, the relief achieved ultimately had a basis in law. Therefore, the Complainant is a prevailing party and is entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

September 18, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

July 31, 2012 Government Records Council Meeting

Brian J. Levine, Esq.
(on behalf of Natalie Stephens)
Complainant

Complaint No. 2010-339

v.
New Jersey Department of Community Affairs,
Division of Fire Safety
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council ("Council") considered the July 24, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian responded in writing to the Complainant's 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 she failed to provide the correct statute as the specific lawful basis for said denial of access. Therefore, the Custodian has violated OPRA 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).
2. Because the Custodian certified in the Statement of Information that no deposition transcripts responsive to the Complainant's OPRA request 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 the deposition transcripts pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. The Custodian's denial of access to the six (6) transcribed statements and the nine (9) transcribed interviews was unlawful pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-6; the Custodian must provide such records to the Complainant. However, to protect the privacy interests of those who provided such statements, names and ranks of interviewees and any other personal identifying information shall be redacted pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**



redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²

5. Because the Complainant's request for "other documentation reviewed, relied upon or considered in the preparation of the Final Report issued on October 1, 2010" fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is overly broad and is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 31st Day of July, 2012

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: August 3, 2012

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

Brian J. Levine, Esq.
(on behalf of Natalie Stephens)¹
Complainant

GRC Complaint No. 2010-339

v.

**New Jersey Department of Community Affairs,
Division of Fire Safety²**
Custodian of Records

Records Relevant to Complaint: Copies of any and all statements under oath, deposition transcripts and other documentation reviewed, relied upon or considered in the preparation of the Final Report issued on October 1, 2010 by the New Jersey Division of Fire Safety (“Division”), with regard to the January 2, 2009 line-of-duty death of City of Elizabeth firefighter, Mr. Gary V. Stephens (“Mr. Stephens”).

Request Made: November 4, 2010

Response Made: November 12, 2010

Custodian: Marylain Kemp

GRC Complaint Filed: December 24, 2010³

Background

November 4, 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.

November 12, 2010

Custodian’s response to the OPRA request. The Custodian responds in writing via letter to the Complainant’s OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that the Division has consulted with the Office of the Attorney General regarding the Complainant’s OPRA request. The Custodian also states that the “statements under oath” in the Division’s possession are privileged or otherwise confidential pursuant to N.J.S.A. 2A:28A-27 and judicial case law and are therefore exempt from disclosure pursuant to N.J.S.A. 47:1A-9.b.⁴ The Custodian further states that the Division does not possess any “deposition transcripts” or

¹ The Complainant is an attorney representing Ms. Natalie Stephens.

² No legal representation listed on record.

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

⁴ N.J.S.A. 2A:28A-27 does not exist within New Jersey’s Annotated Statutes. It appears that the Custodian denied access to the statements under oath pursuant to N.J.S.A. 2A:84A-27 and N.J.S.A. 47:1A-9.a.

any transcribed statements given under oath. Lastly, the Custodian states that the Complainant's request for "other documentation reviewed, relied upon or considered" does not describe a specific record sought and is therefore exempt pursuant to Bent v. Township of Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and MAG Entertainment, LLC v. Division of Alcohol Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).

December 24, 2010

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

- Complainant's OPRA request dated November 4, 2010
- Letter from the Custodian to the Complainant dated November 12, 2010.

The Complainant states that on January 2, 2009, Mr. Stephens was killed in the line of duty when a co-employee backed up a fire truck, knocking Mr. Stephens to the ground and ultimately causing his death. The Complainant also states Mr. Stephens' widow, Ms. Natalie Stephens ("Ms. Stephens"), became aware that the Division was investigating her husband's death. The Complainant further states that he wrote to the Division to inquire about the status of the Division's report. The Complainant states that the report was issued on October 1, 2010 and sent to Ms. Stephens. The Complainant states that he ultimately received and reviewed the report. The Complainant also states that he requested certain items relating to that report which included all statements under oath, deposition transcripts and other documentation reviewed, relied upon or considered in preparation of the report. The Complainant also states that Ms. Stephens informed the Complainant that certain Elizabeth Fire Department employees testified under oath before the Division in regard to Mr. Stephens' death. The Complainant further states that access to this information is important for emotional reasons as well as potential litigation against the City of Elizabeth Fire Department.

The Complainant states that the Custodian denied the Complainant's OPRA request on November 12, 2010, stating that the statements under oath are privileged pursuant to N.J.S.A. 2A:28A-27. The Complainant also states that after subsequent telephone calls and e-mails, the Custodian corrected her previous citation to N.J.S.A. 2A:28A-27 and stated that the statements under oath are not disclosable pursuant to N.J.S.A. 2A:84A-27.⁵ The Complainant further states that N.J.S.A. 2A:84A-27 is entitled "Official Information" and provides that "no person shall disclose official information of this State (a) if disclosure is forbidden by or pursuant to an Act of Congress or of this State or (b) if the judge finds that disclosure of the information in the action would be harmful to the interests of the public." The Complainant argues that this statute is inapplicable. The Complainant states that there has been no court determination that disclosure of the information requested would be harmful to the public interests. The Complainant also states that the Division has not cited any statutory authority which forbids the disclosure of the requested information. The Complainant requests that the GRC compel the Division to produce the requested records.

⁵ The Complainant does not submit any evidence regarding these telephone calls or e-mails.
Brian J. Levine, Esq. (on behalf of Natalie Stephens) v. New Jersey Department of Community Affairs, Division of Fire Safety, 2010-339 – Findings and Recommendations of the Executive Director

The Complainant agrees to mediate this complaint.

January 6, 2011

Offer of Mediation sent to the Custodian.

January 7, 2011

The Custodian agrees to mediate this complaint.

January 7, 2011

Complaint is referred to mediation.

October 17, 2011

Complaint is referred back to the GRC for adjudication.

October 17, 2011

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

October 17, 2011

Telephone call from Custodian’s Counsel to the GRC. Counsel requests a five (5) business day extension to complete the SOI.

October 17, 2011

E-mail from the GRC to Custodian’s Counsel. The GRC grants Counsel’s request for a five (5) business day extension to complete the SOI. The GRC states that the Custodian must complete the SOI by October 31, 2011.

October 27, 2011

E-mail from Custodian’s Counsel to the GRC. Counsel requests an additional extension of time to complete the SOI.

October 27, 2011

E-mail from the GRC to Custodian’s Counsel. The GRC grants a second (2nd) extension to complete the SOI. The GRC states that the Custodian must submit the SOI by November 4, 2011.

November 4, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated November 4, 2010
- Letter from the Custodian to the Complainant dated November 10, 2010.

The Custodian certifies that her search for the requested records included reviewing the investigation file regarding the in-the-line duty death of Mr. Stephens. The Custodian also certifies that Fire Investigator Jason Spiecker searched his computer files. The Custodian further certifies that the Division’s arson unit does not presently have a Records Retention and Disposition Schedule. However, the Custodian certifies that the Division maintains firefighter serious injury or death investigation records permanently.

The Custodian certifies that the following records are responsive to the Complainant's request for statements under oath: 1) three (3) transcribed voluntary statements given to the Elizabeth Police Department; 2) six (6) transcribed voluntary statements of Elizabeth Fire Department Personnel; and 3) nine (9) transcribed interviews of subpoenaed Elizabeth Fire Department Personnel.

The Custodian certifies that access to the three (3) transcribed voluntary statements given to the Elizabeth Police Department responsive to the Complainant's OPRA request was denied because such statements are privileged or confidential pursuant to N.J.S.A. 2A:84A-27, N.J.R.E. 515 and N.J.S.A. 47:1A-9.a.

The Custodian also certifies that the six (6) transcribed voluntary statements of Elizabeth Fire Department Personnel are arguably responsive to the Complainant's OPRA request. The Custodian further certifies that the request for deposition transcripts was denied because the Division does not possess deposition transcripts, only transcribed statements and interviews which were not specifically prepared for court or discovery purposes.

The Custodian certifies that the nine (9) transcribed interviews of subpoenaed Elizabeth Fire Department Personnel are also arguably responsive to the request. The Custodian also certifies that she denied access to the six (6) transcribed voluntary statements and nine (9) transcribed interviews because such statements were not given under oath or a legal equivalent. The Custodian argues that access to these statements was denied because such statements are privileged or confidential pursuant to N.J.S.A. 2A:84A-27, N.J.R.E. 515 and N.J.S.A. 47:1A-9.a. The Custodian argues that the Complainant's request for "other documentation reviewed, relied upon or considered in the preparation of the Final Report" is denied because the request does not describe the specific record sought. *See Spectraserv, Inc. v. Middlesex County Utility Authority*, 416 N.J. Super. 565 (App. Div. 2010).

The Custodian argues that regarding the qualified official information/governmental executive privilege, to the extent that it encompasses investigatory material, is "premised upon the government's need to conduct [investigations] with skill, sensitivity to the privacy interests involved and in an atmosphere of confidentiality that encourages the utmost candor." Loigman v. Kimmelman, 102 N.J. 98, 107 (1986). The Custodian also argues that the government's interest in confidentiality must be weighed against the degree to which disclosure would "further the core purposes of OPRA: to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Burnett v. County of Bergen, 198 N.J. 408, 435 (2009).

The Custodian argues that in considering the government's interest in confidentiality, the focus must be on "the character of the materials sought to be disclosed." Loigman, supra, 102 N.J. at 112. The Custodian certifies that the six (6) transcribed voluntary statements of Elizabeth Fire Department Personnel and the nine (9) transcribed interviews of subpoenaed Elizabeth Fire Department Personnel at issue are transcribed voluntary witness statements. The Custodian certifies that the Union County Prosecutor's Office ("UCPO") voluntarily provided the six (6) transcribed statements of

Elizabeth Fire Department Personnel and the nine (9) transcribed interviews of subpoenaed Elizabeth Fire Department Personnel to the Division. The Custodian argues that whether out of fear of confrontation or reprisal by those involved or affected by the accident or out of a desire to avoid being compelled to be a witness in a subsequent judicial proceeding, disclosure of the voluntary statements may discourage witnesses from giving such statements to the police and thereby impede accident investigations. The Custodian also certifies that the Division depends upon the cooperation of other public agencies in conducting its firefighter serious injury and death investigations. The Custodian further certifies that it has been the Division's experience that some government agencies' willingness to provide materials to the Division is contingent upon an understanding between those government agencies and the Division that the Division will not further disseminate what it receives unless compelled to do so.

The Custodian certifies that although the Division has the power to subpoena the production of relevant evidence, the Division fears that some public agencies, when faced with a subpoena, may attempt to avoid disclosing sensitive records. The Custodian certifies that because the Division is not necessarily aware of what relevant records other public agencies may possess, the Division may remain ignorant of relevant records that the other agencies do not disclose. The Custodian argues that for these reasons, disclosure of the six (6) transcribed statements of Elizabeth Fire Department Personnel and the nine (9) transcribed interviews of subpoenaed Elizabeth Fire Department Personnel may impede future investigations.

The Custodian argues that the Complainant's interest in these statements does not further the purpose of OPRA. The Custodian also argues that the Complainant's interest in the records is personal and private because Ms. Stephens seeks records in order to learn more about the circumstances of her husband's death and possibly to pursue a wrongful death action. The Custodian further argues that unlike a common law right of access request where a citizen may assert a "legitimate private interest" to gain standing to obtain records, a mere private interest in records, is insufficient under OPRA. The Custodian also argues that as with the three (3) statements given to the Elizabeth Police Department are exempt from disclosure as qualified official information/governmental/executive privilege. Thus, the Custodian argues that that the GRC should uphold the Custodian's denial of the three (3) transcribed voluntary statements given to the Elizabeth Police Department.

The Custodian certifies that the six (6) transcribed statements of Elizabeth Fire Department Personnel and the nine (9) transcribed interviews of subpoenaed Elizabeth Fire Department Personnel are technically not responsive to the request because they were not made "under oath" or a legal equivalent. The Custodian certifies that the members of the Elizabeth Fire Department who provided these recorded and transcribed statements signed a form affirming that their statements are true and correct to the best of their knowledge, but the affirmation does not conform to the legal certification pursuant to R. 1:4-4(b). The Custodian also certifies that these statements are not deposition transcripts. The Custodian argues that to the extent that the transcribed voluntary statements and subpoenaed interviews are privileged and confidential pursuant to judicial case law, N.J.S.A. 2A:84A-27 and N.J.S.A. 47:1A-9.b. apply.

The Custodian argues that the Division has a strong interest in maintaining the confidentiality of the voluntary statements and subpoenaed interviews because disclosure may “undermine the efficacy” of future investigations. The Custodian certifies that witness statements are the Division’s primary source in conducting its investigation and carrying out its statutory mandate to “identify those measures which may be required to prevent the future occurrence of deaths and serious injuries under similar circumstances.” N.J.S.A. 52:27D-25d(f). The Custodian also certifies that it is of the utmost importance that the Division obtains candid and comprehensive responses from these firefighter witnesses. The Custodian further certifies that a firefighter may be unwilling to disclose information that is critical of the actions or inactions of another firefighter if that firefighter knows that his statements will be made public under OPRA.

The Custodian argues that, as the United States District Court for the District of Columbia held in Am. Fed’n of Government Employees v. Department of the Army 441 F.Supp. 1308 (D.D.C. 1977), it is doubtful that providing notice that a witness’s statement may be publically disclosed in unusual circumstances, such as when necessary to “satisfy legal or public interest requirements, acts as a major barrier to candid and full testimony of witnesses.” *Id.* at 1314.⁶ The Custodian further argues that the court pointed out that “common sense dictates that a warning to witnesses that their testimony will be generally disclosable under the FOIA would discourage candor and would severely limit the effectiveness of the Inspector General investigations.” The Custodian argues that this same analysis should apply to the expected candor of firefighters giving a voluntary statement or subpoenaed interview in a firefighter investigation.

The Custodian argues that the Complainant’s request for “other documentation reviewed relied upon or considered in preparation of the Final Report” is not a valid OPRA request because it does not specifically identify a government record. The Custodian also argues that this request is nothing more than a request for whatever else that was in the Division’s investigation file. The Custodian further argues that the Custodian’s denial of this portion of the request should be upheld by the GRC.

November 17, 2011

The Complainant’s response to the Custodian’s SOI.⁷ The Complainant asserts that the production of the voluntary statements and subpoenaed interviews are subject to the qualified privilege under Loigman v. Kimmelman, 102 N.J. 98, 107 (1986). The Complainant states that he is asserting a common-law right of access to these records.⁸ The Complainant states that pursuant to Keddie v. Rutgers, the State University, 148 N.J. 36, 50, “the complainant’s right to these public records depend upon three (3) requirements: 1) the records must be common-law documents; 2) the person seeking access must establish an interest in the subject matter of the materials; and 3) the citizen’s right to access must be balanced in the State’s interest in preventing disclosure.” The

⁶ This case involves a Freedom of Information Act (“FOIA”) request for witness statement transcripts from an investigation of the Army Inspector General.

⁷ The Complainant includes correspondence which occurred during the mediation process. Pursuant to the GRC regulations (N.J.A.C. 5:105-2.5(j)) and the Uniform Mediation Act (N.J.S.A. 2A:23C-1 et seq.), the GRC cannot consider any submissions of records or arguments made by either party during mediation.

⁸ The Council has no authority over common law right of access pursuant to N.J.S.A. 47:1A-7.b.

Custodian states that these records are common-law public documents and Ms. Stephens has an interest in the subject matter of the material.

The Complainant states that the GRC must look at the following factors from Loigman v. Kimmelman, 102 N.J. 98, 106 (1986):

“(1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct may have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual’s asserted need for the materials.”

The Complainant states that in analyzing each of the above factors, the production of the three (3) voluntary statements given to the Elizabeth Police Department, the six (6) transcribed voluntary statements and the nine (9) transcribed interviews of subpoenaed Elizabeth Fire Department personnel would not discourage these firefighters from providing information regarding an investigation of a death or serious injury of a fellow firefighter. The Complainant also states that it would seem apparent that these firefighters would expect this information to be publicly available so that such deaths and personal injuries in the future could be avoided. The Complainant further states that despite the Division’s argument that Ms. Stephens may use the statements and interviews to pursue a wrongful death claim, is incorrect. The Complainant states that Ms. Stephens is not seeking a wrongful death claim, because such claim must have been filed within two (2) years from the date of Mr. Stephens’ death. The Complainant states that Ms. Stephens is interested in determining how her husband died and may be able to use this information to prevent other firefighters from suffering a similar fate. The Complainant also states that Ms. Stephens is unaware of any remedial measures that have been instituted to prevent such similar instances in the future. Lastly, the Complainant states that the Division should provide the six (6) transcribed voluntary statements and the nine (9) transcribed interviews of subpoenaed Elizabeth Fire Department personnel.

December 15, 2011

E-mail from the Complainant to Custodian’s Counsel. The Complainant states that Ms. Stephens wants only the three (3) statements provided to the Elizabeth Police Department.

December 22, 2011

Letter from the Custodian to the Complainant. The Custodian states that the Division is in receipt of the Complainant’s e-mail dated December 15, 2011 to Custodian’s Counsel, indicating that Ms. Stephens wishes to purchase the three (3)

voluntary statements provided to the Elizabeth Police Department. The Custodian states that the special service charge for these records is \$76.90.

December 23, 2011

Letter from the Complainant to the Custodian. The Complainant states as per Custodian's letter dated December 22, 2011, the Complainant encloses a check for \$76.90 for the Custodian's special service charge relevant to production of the Elizabeth Police Department's Accident Investigation and the three (3) statements provided to the Elizabeth Police Department.

January 5, 2012

Letter from the Custodian to the Complainant. The Custodian states that she is in receipt of the Complainant's check for \$76.90. The Custodian encloses a copy of the three (3) voluntary statements. The Custodian states that the personal information has been redacted pursuant to OPRA.⁹

April 9, 2012

Letter from the Complainant to the GRC. The Complainant states that he is in receipt of the three (3) statements provided to the Elizabeth Police Department. The Complainant also states that he still wants any other statements that exist as well as the nine (9) subpoenaed interviews that are in the Division's possession.

June 8, 2012

Letter from the GRC to the Complainant. The GRC requests that the Complainant respond to the following questions so that the GRC may employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995):

1. Why do you need the requested records or information?
2. How important are the requested records or information to you?
3. Do you plan to redistribute the requested records or information?
4. Will you use the requested records or information for unsolicited contact of the individuals named in the government record?

June 8, 2012

Letter from the GRC to the Custodian. The GRC requests that the Custodian respond to the following questions so that the GRC may employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995):

1. The type of record(s) requested.

⁹ Upon the GRC's review of these voluntary statements, the Custodian redacted the home addresses, date of births and social security numbers of these witness statements. The Complainant does not dispute the redaction of the three (3) voluntary statements provided to the Elizabeth Police Department. Brian J. Levine, Esq. (on behalf of Natalie Stephens) v. New Jersey Department of Community Affairs, Division of Fire Safety, 8 2010-339 – Findings and Recommendations of the Executive Director

2. The information the requested record(s) do or might contain.
3. The potential harm in any subsequent non-consensual disclosure of the requested records.
4. The injury from disclosure to the relationship in which the requested record(s) was generated.
5. The adequacy of safeguards to prevent unauthorized disclosure.
6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.

June 13, 2012

E-mail from the Custodian to the GRC. The Custodian forwards the following responses to the GRC's balancing test questionnaire:

1. The type of records requested.

The type of records requested by the Complainant are written transcripts of oral statements provided by firefighters associated with the response to a fire that occurred on January 2, 2009, which resulted in the death of Mr. Stephens of the Elizabeth, New Jersey Fire Department ("incident"). The written transcripts were derived from interviews conducted by investigators with the Division's Arson/K-9 Unit ("Unit"), with some firefighter witnesses who provided voluntary statements/interviews concerning the incident and with other firefighter witnesses who provided statements/interviews concerning the incident after being served subpoenas.

2. The information the requested records do or might contain.

The requested records contain statements of firefighter witnesses pertaining to the death of Mr. Stephens. These records identify the name, rank and function of each firefighter witness and directly associate such personal identifying information with the respective oral statement and subsequent written transcription of same for each firefighter witness who as interviewed by Unit investigators as concerns the incident.

The information contained in the requested documents was used by Unit investigators to assist in formulating the Division's formal findings into the causation of the incident, which findings and conclusions were published in the final investigative report of the incident ("report"). The report, issued on October 1, 2010 is clearly a public document and is posted on the publications page of the Division's website. Moreover, Complainant was provided a copy of the report after publication by the Division.¹⁰

Although the report relies in part upon information gleaned from the requested records, in furtherance of firefighter witnesses' privacy interests and expectation of

¹⁰ The Custodian includes a copy of this report.

confidentiality, no attribution of a particular statement was made to the identity of a specific firefighter. Moreover, the information contained in said requested records is merely one component of many utilized by the Unit investigators in conducting their overall investigation and reaching their final conclusions published in the report.

In this regard the report was based upon a review of many documents, reports and independent investigation, as well as the requested records, which led to the ultimate findings and conclusions reached by the Division. Accordingly, the requested records, standing alone, would be taken out of context and could be misunderstood or otherwise misconstrued; the inherent value of the requested records is apparent only when taken in the overall context of their use as one of many components in conducting a thorough and complete investigation in the instant matter, which resulted in the report's published findings and conclusions.

3. The potential harm in any subsequent non-consensual disclosure of the requested records.

During investigation of firefighter fatalities and/or serious injuries, Unit investigators frequently conduct interviews with firefighter witnesses. It has generally been the experience of Unit investigators that in the course of their interviews, firefighter witnesses have been somewhat resistant to provide candid information unless they have a level of assurance and trust that their interviews will be considered confidential.

To be sure, sometimes the information relayed by firefighter witnesses is critical of their employer (*i.e.*, the fire department for whom they are employed), their bosses (*i.e.*, their superiors and/or other officers in the departmental hierarchy) and/or other colleagues and members of the firefighting service. In an effort to encourage the utmost candor and thoroughly receive all information relevant to their investigations Unit investigators conduct their interviews with firefighter witnesses within an atmosphere of privacy and confidentiality. The failure to keep the specific statements of firefighter witnesses and/or their personal identifying information (*i.e.*, name, rank, function, etc.) completely confidential could have a chilling effect on the ability of Unit investigators to adequately and sufficiently conduct their investigations and/or satisfactorily complete their investigations and reach appropriate findings and conclusions. In short, once the expectation of privacy and cloak of confidentiality is pierced, firefighter witnesses in future investigations may be less than cooperative and candid with Unit investigators.

Conversely, interviews by Unit investigators with civilian witnesses may be viewed differently since civilian witnesses do not typically have a vested interest in the firefighter service (*e.g.*, an employment relationship, a reporting relationship to superiors and officers in the departmental hierarchy and a daily work camaraderie built on trust and reliance with fellow members of the firefighting service) and any ensuing investigations. Accordingly, these witnesses would likely not require the heightened sense of confidentiality and privacy expected by firefighter witnesses.

4. The injury from disclosure to the relationship in which the requested record was generated.

The Division principally conducts investigations into incidents which resulted in firefighter fatalities and/or serious injuries for the following reasons: 1) to identify and report on the specific factors, conditions and causes that may have led to the firefighter fatalities and/or serious injuries and 2) to identify those measure which may be required to prevent firefighter fatalities and/or serious injuries from occurring under similar circumstances in the future. Likewise, in some cases the Division makes recommendations for change, especially as new information is developed or old lessons reinforced, in an effort toward preventing similar events in the future.

As interviews with firefighter witnesses following incidents resulting in firefighter fatalities and/or serious injuries are one key component in the overall investigation by the Unit, any breach in the expectation of privacy and cloak of confidentiality as related to investigation interviews of such witnesses would likely result in future investigations being jeopardized. In this regard, firefighter witnesses, especially given the nature of their competing vested interests in the firefighting service, would likely be less candid and more apt to provide “sanitized” statements.

In the instant matter some firefighter witnesses provided voluntary statements while other firefighter witnesses provided statements after being served subpoenas. If the paradigm shifts and both the expectation of privacy and cloak of confidentiality are pierced, voluntary statements by firefighter witnesses would likely diminish and the Division would need to rely more upon the issuance of subpoenas, thereby creating more of an adversarial and hostile relationship between the Division and the firefighting service. As the subpoena process becomes the norm, information would likely com in less timely, less detailed and less accurate. In sum, the two (2) primary purposes of the Division investigating instances of firefighter fatalities and/or serious injuries would be hampered or otherwise thwarted, leading to more incomplete investigations and inconclusive findings. As a result, the welfare, safety, and very lives of both members of the firefighting service and the public as a whole would suffer irreparable harm.

Further, disclosure of statements by firefighter witnesses may subject them to confrontation or reprisal by those involved or affected by a particular incident when another firefighter suffered a fatality and/or was seriously injured. It must also be remembered that the firefighting service, being “para-military” in its very nature is different from most other types of employment, in that members of the firefighting service have a bond of confidence and level of trust with one another that allows them to entrust their welfare, safety and lives to one another. Serious discord may result from the disclosure of the requested records, in that the transcribed statements of firefighter witnesses, once released to the public, would be readily obtainable under OPRA by their employers, their superiors and officers in the departmental hierarchy and their fellow firefighters. This could ultimately erode the requisite cohesive nature of the firefighting service and lead to future injuries and/or the loss of life.

5. The adequacy of safeguards to prevent unauthorized disclosure.

The Division maintains locked file cabinets within its offices at the Department of Community Affairs building. More specifically, within the Division’s office space, the Unit keeps the original tape recordings of investigation interviews and witness

statements, as well as transcripts of such interviews and statements, in its own set of locked file cabinets.

6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.

The Division is not aware of any express statutory mandate, articulated public policy or other recognized public interest militating toward access of the requested records. The Division maintains its position that the requested records are privileged and confidential pursuant to N.J.S.A. 47:1A-9.b.. In addition, for the sake of brevity, the Division incorporates by reference herein the policy arguments set forth in its Response to No. 2 through No. 4, in support of its position that the requested records be protected by the privacy and confidentiality expectations of firefighter witnesses and respectfully urges the GRC to rule in favor of the Division.

June 13, 2012

E-mail from the Complainant to the GRC. The Complainant states although his law office filed the initial OPRA request, the OPRA request was made on behalf of Ms. Stephens. The Complainant also states that the responses to the following questions were drafted from Ms. Stephens's perspective.

1. Why do you need the requested records or information?

Ms. Stephens was the wife and partner of Mr. Stephens for 24 ½ years. Ms. Stephens wants to know exactly how her husband died and all the information relating to the same. Ms. Stephens has been unable to put closure on Mr. Stephens's death and move forward with her life with a number of unanswered questions regarding his death. The information provided so far from the Division has been limited and has not fully explained circumstances regarding Mr. Stephens's death.

2. How important are the records or information to you?

It is extremely important to Ms. Stephens emotionally and from a psychiatric perspective. As Ms. Stephens explained to the Complainant, "it is of the utmost importance that [she] receive this information.

3. Do you plan to redistribute the requested records or information?

No. This information is for Ms. Stephens' personal use only. The time within which any lawsuit could be filed has well passed. Ms. Stephens has even suggested that the GRC or the Division black out the names of the individuals who have the depositions and any specific individuals identified therein.

4. Will you use the requested records or information for the unsolicited contact of the individuals named in the government record?

No. As indicated above, Ms. Stephens has suggested that all names be redacted. She is also suggesting that the individuals who gave the depositions be contacted to see if they will voluntarily disclose their deposition transcripts to Ms. Stephens.

Furthermore, Ms. Stephens has spoken with various members of the Elizabeth Fire Department regarding the incident and her husband's death. Those individuals were willing to speak with Ms. Stephens, but told by Division or the Elizabeth Fire Department not to share information with Ms. Stephens.

In closing, Ms. Stephens is simply seeking to determine the circumstances or facts surrounding Mr. Stephens's line of duty death. Ms. Stephens is not looking to create trouble for the individuals who gave depositions, the Division or the Elizabeth Fire Department. It is of the utmost importance to Ms. Stephens for her to find out as much information regarding the circumstances of her husband's death, so that she can move forward. It has been almost forty-two (42) months since Mr. Stephens was killed and it is time that this information be provided to Ms. Stephens.

Analysis

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

OPRA 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.

Further, OPRA provides that:

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

In the instant complaint, the Custodian responded to the Complainant in writing on the sixth (6th) day after receipt of the instant OPRA request denying the Complainant access to the “statements under oath” because such statements are privileged or otherwise confidential pursuant to N.J.S.A. 2A:28A-27 and therefore are not disclosable pursuant to N.J.S.A. 47:1A-9.b. The Complainant stated in his Denial of Access Complaint that after multiple conversations with the Custodian, the Custodian corrected her denial and claimed that the “statements under oath” are not disclosable pursuant to N.J.S.A. 2A:84A-27. Thus, the Custodian failed to identify the applicable State statute as the

specific lawful basis for denying access.¹¹ The Custodian also did not quote the statute in her response so that the Complainant could identify the correct applicable statute.

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.

Therefore, although the Custodian responded in writing to the Complainant’s 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 she failed to provide the correct statute as the specific lawful basis for said denial of access. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, *supra*.

The Council notes that the Custodian’s response would have been sufficient if the Custodian quoted the applicable State statute or cited to the correct statute number. The Council also notes that it is not the Complainant’s responsibility to contact the Custodian in order to identify the Custodian’s basis for the denial of access to records.

Whether there are any records responsive to request for deposition transcripts exist?

The Complainant’s OPRA request sought copies of “deposition transcripts...with regard to the January 2, 2009 line-of-duty death of...Mr. Stephens.” The Custodian responded to the Complainant’s request in writing stating that the Division does not

¹¹ Upon GRC’s research in LexisNexis, N.J.S.A. 2A:28A-27 does not exist.
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possess any deposition transcripts. The Custodian certified in the SOI that the Division does not possess deposition transcripts responsive to the Complainant's OPRA request.

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 Statement of Information that no deposition transcripts responsive to the Complainant's OPRA request 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 the deposition transcripts pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

Whether the Custodian unlawfully denied access to the six (6) transcribed statements and the nine (9) transcribed interviews of subpoenaed Elizabeth Fire Department personnel?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*... a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would *violate the citizen's reasonable expectation of privacy*." (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 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 also provides:

“The provisions of this act...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...any other statute...” N.J.S.A. 47:1A-9.a.

N.J.S.A. 2A:84A-27 states in pertinent part that:

“No person shall disclose official information of this State or of the United States (a) if disclosure is forbidden by or pursuant to any Act of Congress or of this State, or (b) if the judge finds that disclosure of the information in the action will be harmful to the interests of the public.” N.J.S.A. 2A:84A-27.

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.

In the instant complaint, the Complainant requested “copies of any and all statements under oath...reviewed, relied upon or considered in the preparation of the Final Report issued on October 1, 2010 by the Division, with regard to the January 2, 2009 line of duty death of City of Elizabeth firefighter, Mr. Stephens.” The Custodian timely responded stating that the statements under oath are privileged or otherwise confidential pursuant to N.J.S.A. 2A:28A-27. The Custodian identified six (6) transcribed voluntary statements and nine (9) transcribed interviews of subpoenaed Elizabeth Fire Department responsive to the Complainant’s request in the SOI which, although not made under oath are directly related to the death of Mr. Stephens.

The Complainant argued in his Denial of Access Complaint that N.J.S.A. 2A:84A-27 is inapplicable because the court has not determined that disclosure of these voluntary statements would be harmful to the public’s interest. Conversely, the Custodian certified in the SOI that UCPO voluntarily provided these statements to the Division. The Custodian also certified that the Division relies upon the cooperation of other government agencies to conduct firefighter serious injury and death investigations. The Custodian argued that disclosure of these voluntary statements might impede future investigations because some public agencies’ willingness to provide information to the Division is contingent upon an understanding that the Division will not further disseminate what it receives unless compelled to do so. The Custodian also argued that the Division has a strong interest in maintaining the confidentiality of these voluntary statements because disclosure may undermine the efficacy of future investigations. The Custodian further argued that future witnesses may be unwilling to disclose information that is critical to an investigation if that witness knows that his statements will be made public under OPRA. The Custodian also argued that the Complainant’s interest in the voluntary statements do not further the purpose of OPRA because a mere private interest to gain standing to obtain records is insufficient under OPRA.

N.J.S.A. 47:1A-1 states in pertinent part that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. Moreover, N.J.S.A. 47:1A-9.b. states that OPRA shall not "abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by ... judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record."

The New Jersey Supreme Court remanded the case back to the trial court in Southern New Jersey Newspapers, Inc. v. Township of Mount Laurel, 141 N.J. 56 (1995) to conduct a balancing test. The plaintiffs in this case requested access to firearm permits and the applications for those permits pursuant to the common law and the old Right to Know Law. The New Jersey Supreme Court held that because the Attorney General readopted the regulation exempting these records from disclosure, the plaintiff's claim of access under the Right to Know Law is moot. The Court also held that the plaintiffs have a sufficient interest to request access to public records and since the records requested were considered public records, the Court remanded the matter to the trial court to conduct a new balancing test under the common-law.

In the matter before the Council, the records requested by Complainant are six (6) transcribed statements and nine (9) transcribed interviews of subpoenaed Elizabeth Fire Department personnel. These records contain the name, rank and function of each firefighter witness. In the response to the GRC's request for the common law balancing test, the Custodian stated that during the investigation of firefighter fatalities and/or serious injuries, Unit investigators conduct interviews with firefighter witnesses. The Custodian also stated that firefighter witnesses have been somewhat resistant to provide candid responses unless they have a level of assurance and trust that their interviews will remain confidential. The Custodian further stated that if these records are released, then firefighter witnesses in future investigations may be less than cooperative and candid with Unit investigators and thus future investigations could be jeopardized. The Custodian additionally states that if future investigations are jeopardized, then instances of firefighter fatalities and/or serious injuries would be hampered or otherwise thwarted leading to more incomplete investigations and inconclusive findings. The Custodian stated that as a result, the welfare, safety and the lives of both members of the firefighting service and the public as a whole would suffer irreparable harm.

Conversely, the Complainant also responded to the GRC's request for the common law balancing test. The Complainant stated that Ms. Stephens is the wife and partner of Mr. Stephens for 24 ½ years and wants to know the circumstances surrounding Mr. Stephens's death. The Complainant also stated that Ms. Stephens only wants this information for personal use only; the time within which any lawsuit could be filed has passed. The Complainant further stated that Ms. Stephens has suggested that the names and any identifying information be redacted to protect the privacy of those individuals.

In balancing the Complainant's need for the records requested against the Custodian's need for non-disclosure, the Council finds that the Complainant's need for

copies of the requested records outweighs the Custodian's need to withhold said records from disclosure. The Complainant has repeatedly asserted that Ms. Stephens wants to review these records for her own personal use. The Complainant has also asserted that Ms. Stephens will not be filing a civil lawsuit nor was there any indication that she would distribute these transcripts.

Although the Custodian asserts that release of these records could impede future death/serious injury firefighter investigations because interviewees have a certain expectation of privacy, the Complainant asserted that Ms. Stephens only wants to know the information from the circumstances surrounding her husband's death. The Complainant has suggested that the Custodian redact the names and any personal identifying information from the transcripts. The Council notes that on January 5, 2012, the Custodian provided to the Complainant copies of the three (3) voluntary statements at issue in this matter with redactions to protect personal information. Moreover, the Custodian has failed to establish why the remaining requested records cannot be provided to the Complainant with similar redactions.

Therefore, because the Complainant's interest in obtaining the remaining requested records (*i.e.*, six (6) transcribed statements and the nine (9) transcribed interviews) outweighs the Custodian's interest in non-disclosure of such records, and because the Custodian has failed to establish why the requested records cannot be provided to the Complainant with redactions to protect the personal information of the interviewees, the Council finds that disclosure of the requested records with redactions will not be harmful to the interests of the public; N.J.S.A. 2A:84A-27 therefore does not apply to the instant matter.

Thus, the Custodian's denial of access to the six (6) transcribed statements and the nine (9) transcribed interviews was unlawful pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-6; the Custodian must provide such records to the Complainant. However, to protect the privacy interests of those who provided such statements, names and ranks of interviewees and any other personal identifying information shall be redacted pursuant to N.J.S.A. 47:1A-1.1.

Whether the Complainant's request for "other documentation reviewed, relied upon or considered" is valid under OPRA?

In the instant complaint, part of the Complainant's OPRA request sought "other documentation reviewed, relied upon or considered in the preparation of the Final Report issued on October 1, 2010." This portion of the Complainant's request is overly broad because it fails to identify specific government records sought and is therefore invalid under OPRA.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v.

Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). As the court noted in invalidating MAG's request under OPRA:

"Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.* at 549.

The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.*

In addition, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹² the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."¹³

Moreover, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court enumerated the responsibilities of a custodian and a requestor as follows:

"OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). *Research is not among the custodian's responsibilities.*" (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

¹² Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹³ As stated in Bent, *supra*.

Moreover, the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” The court also quoted N.J.S.A. 47:1A-5.g in that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...” Accordingly, the test under MAG then, is whether a requested record is a *specifically identifiable* government record.

Under such rationale, the GRC has repeatedly found that blanket requests are not valid OPRA requests. In the matter of Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the relevant part of the Complainant’s request sought:

- Item No. 2: “From the Borough Engineer’s files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 3: From the Borough Engineer’s files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
- Item No. 4: From the Borough Attorney’s files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 5: From the Borough Attorney’s files: all documents related to the development or modification to North Street, to the south and east of Wilson St.”

In reviewing the complainant’s request, the Council found that “[b]ecause the Complainant’s OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).”

In the instant complaint, the Complainant requested “other documentation reviewed, relied upon or considered in the preparation of the Final Report issued on October 1, 2010.” The Complainant does not identify the type of government record he is seeking; rather, the Complainant filed a blanket request for all documents relating to the Final Report issued on October 1, 2010. Furthermore, the Complainant’s request would require the Custodian to research her files to determine which records are responsive to said request.

Therefore, because the Complainant’s request for “other documentation reviewed, relied upon or considered in the preparation of the Final Report issued on October 1,

2010” fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant’s request is overly broad and is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing to the Complainant’s 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 she failed to provide the correct statute as the specific lawful basis for said denial of access. Therefore, the Custodian has violated OPRA 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).
2. Because the Custodian certified in the Statement of Information that no deposition transcripts responsive to the Complainant’s OPRA request 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 the deposition transcripts pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. The Custodian’s denial of access to the six (6) transcribed statements and the nine (9) transcribed interviews was unlawful pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-6; the Custodian must provide such records to the Complainant. However, to protect the privacy interests of those who provided such statements, names and ranks of interviewees and any other personal identifying information shall be redacted pursuant to N.J.S.A. 47:1A-1.1.

4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁴ to the Executive Director.¹⁵**
5. Because the Complainant's request for "other documentation reviewed, relied upon or considered in the preparation of the Final Report issued on October 1, 2010" fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is overly broad and is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012

¹⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.