



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

LORI GRIFA  
Commissioner

**FINAL DECISION**

**February 24, 2011 Government Records Council Meeting**

Walter T. Wolf (on behalf of Ivette & Gary Moss)  
Complainant

Complaint No. 2010-71

v.

Franklin Township Construction Office  
Custodian of Record

At the February 24, 2011 public meeting, the Government Records Council (“Council”) considered the February 15, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Ms. Freijomil’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Complainant’s request for the Township Construction Official’s entire file fails to specify identifiable government records sought, the Complainant’s request is invalid under OPRA. *See* 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 on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), Dittrich v. Borough of Fort Lee, Construction Office (Bergen), GRC Complaint No. 2009-163 (April 2010).
3. Although Ms. Freijomil violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond to the OPRA request in writing within the statutorily mandated seven (7) business days, the Custodian went beyond their lawful duties by supplying the Complainant with both on-site inspection access and copies of the requested records even though the Complainant’s request is invalid under OPRA because it fails to specify identifiable government records. 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 Ms. Freijomil's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. In the matter before the Council, the Complainant's request is invalid under OPRA because it is overly broad and unclear. Although the Custodian disclosed records subsequent to the filing of the instant Denial of Access Complaint, the Custodian had no lawful duty to produce any records responsive to such a request. Therefore, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved, as the Complainant has filed a broad and unclear request that the Custodian has no lawful duty to fulfill. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, Mason, supra, and Spectraserv v. Middlesex County Utilities Authority, 416 N.J. Super. 565 (App. Div. 2010).

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 24<sup>th</sup> Day of February, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: March 1, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 24, 2011 Council Meeting**

**Walter T. Wolf, Esq. (on behalf of Ivette & Gary Moss)<sup>1</sup> GRC Complaint No. 2010-71  
Complainant**

v.

**Franklin Township, Construction Office (Gloucester)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of the Construction Official's file for the property located at 2501 North Blue Bell Road, Franklinville, NJ 08322, from 1990 to the present; including all documents, permit applications, construction and architectural drawings filed for the permit to construct the home.

**Request Made:** March 12, 2010

**Response Made:** March 24, 2010<sup>3</sup>

**Custodian:** Carolyn Toy

**GRC Complaint Filed:** March 30, 2010<sup>4</sup>

**Background**

**March 12, 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.<sup>5</sup>

**March 12, 2010**

E-mail from Barbara Freijomil, Deputy Township Clerk, to the GRC. Ms. Freijomil makes an inquiry to the GRC concerning whether copyrighted architectural plans are allowed to be copies for another person under OPRA.

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<sup>1</sup> The Complainant is an attorney who originally filed his complaint on behalf of Mr. and Mrs. Moss. He currently no longer represents Mr. and Mrs. Moss and now represents himself in this matter.

<sup>2</sup> Represented by William F. Ziegler, Esq., of Houston, MacDonald, Uzdavinis, Eastlack, Ziegler & Lodge, PA (Woodbury, NJ).

<sup>3</sup> The Custodian's response to the OPRA request was verbal.

<sup>4</sup> The GRC received the Denial of Access Complaint on March 30, 2010.

<sup>5</sup> The evidence of record indicates that the Complainant's clients, Ivette and Gary Moss, filed an OPRA request for the records relevant to this complaint on February 25, 2010. The evidence of record further indicates that following the Custodian's denial of access to such records, the Mosses retained the Complainant's services to obtain the requested records.

**March 15, 2010**

E-mail from the GRC to Ms. Freijomil. The GRC informs Ms. Freijomil that the GRC cannot tell her exactly how to respond to an official OPRA records request because the response is fact specific. The GRC cites to several prior decisions involving copyrighted records to give Ms. Freijomil a point of reference in making her decision. The GRC states that the Council has held that based on the court's holding in Board of Chosen Freeholders of Burlington County v. Robert Bradley Tombs, 215 Fed. Appx. 80 (3d Cir. NJ 2006) and the GRC's decision in Albrecht v. New Jersey Department of Treasury, GRC Complaint No. 2006-191 (July 25, 2007), copyright law does not prohibit access to a government record which is otherwise available under OPRA.

**March 24, 2010**

Ms. Freijomil's response to the OPRA request. Ms. Freijomil responds verbally to the Complainant's OPRA request on the eighth (8<sup>th</sup>) business day following receipt of such request. Ms. Freijomil informs the Complainant that the requested records are ready for on-site inspection.

**March 30, 2010**

Denial of Access Complaint filed with the Government Records Council ("GRC"), attaching the Complainant's OPRA request dated March 12, 2010. The Complainant does not make any arguments in support of his claim.

The Complainant does not agree to mediate this complaint.

**March 31, 2010**

E-mail from Ms. Freijomil to the Complainant. Ms. Freijomil states that she is not sure why the Complainant filed a complaint with the GRC because the request was not denied. Ms. Freijomil states that the township construction department took a blueprint which is part of the requested file to an outside vendor for reproduction and was waiting for an estimate regarding the cost of such reproduction. Ms. Freijomil asserts that the cost of copying the blueprint and file is \$55.34. Ms. Freijomil asserts that the Complainant must pay the copy fees in advance and then the blueprint would be copied. Ms. Freijomil requests that the Complainant send her a letter that informs the GRC that the complaint was made in error.

**May 24, 2010**

Letter from Ms. Freijomil to the Complainant. Ms. Freijomil states that on March 12, 2010, the Complainant's client, Ivette Moss, filed an OPRA request for the Construction Office file regarding her property. Ms. Freijomil asserts that she was told by the Construction Office that Mr. Moss already viewed the file on site on March 24, 2010. Ms. Freijomil states that when her office became aware that the Complainant wanted copies of the blueprints contained in the file, the blueprints were sent to the Township's printer and Ms. Freijomil awaited an estimate as to the cost of copying the blueprints. Ms. Freijomil asserts that Ivette Moss was given the file on April 2, 2010 and that Ms. Freijomil explained to the Complainant and Ivette Moss that the blueprints would be ready in a few days. Ms. Freijomil states that on April 8, 2010, she notified the Complainant that the blueprints were ready to be picked up. Ms. Freijomil states that no one picked them up, but as a courtesy to the Complainant, she made another phone call to the Complainant on April 26, 2010 to

remind him that the blueprints had not been picked up. Ms. Freijomil states that Ivette Moss picked up the records on April 30, 2010.

Ms. Freijomil observes that she previously asked the Complainant to write the GRC a letter rescinding the Denial of Access Complaint but this was never done. Ms. Freijomil asks the Complainant if he intends to go forward with the complaint and, if not, to provide a letter to the Township and the GRC withdrawing the complaint.

**May 21, 2010**

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

**May 27, 2010**

E-mail from the GRC to the Custodian. In response to the Custodian’s request for an extension of the SOI submission deadline, the GRC grants the Custodian a five (5) business day extension.

**June 1, 2010**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated March 12, 2010
- E-mail from the Custodian to the GRC dated March 12, 2010
- E-mail from the GRC to the Complainant dated March 15, 2010
- Copy of the receipt for the records dated April 1, 2010
- E-mail from the Custodian to the Complainant dated May 24, 2010<sup>6</sup>
- Copy of the Clerk’s Office OPRA Log
- Copy of the Township of Franklin Construction Office Sign in and Survey
- Copy of the Township of Franklin Construction Office Prior and Final Approvals
- Copy of the Township of Franklin Construction Office Building Permit Procedures

The Custodian certifies that no records were destroyed in accordance with the records retention schedules promulgated by the New Jersey State Division of Archives and Records Management (“NJDARM”).

The Custodian further certifies that after the OPRA request was received, she received a call from Margaret Hanratty, Construction Clerk, asking whether blueprints were allowed to be given out pursuant to an OPRA request. The Custodian certifies that she e-mailed the GRC and received a reply citing two (2) court cases. The Custodian certifies that there was no resolution of the question because one case said that the records could be disclosed and the other case said there was a question as to security issues. The Custodian certifies that she forwarded the Complainant’s OPRA request to the Construction Office. The Custodian certifies that she contacted Dorothy Fabrizio, Construction Clerk, and further certifies that she understood from Ms. Fabrizio that the homeowners were going to come in and look through the file and see what information they wanted because some of the construction files did not pertain to the structural problem they were having.

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<sup>6</sup> Additional documentation that is not relevant to the adjudication of this matter was also submitted.

The Custodian certifies that on March 26, 2010, the Construction Official, Steve Rickershauser, informed her that Mr. and Mrs. Moss wanted copies of the entire file and that said file and the accompanying blueprints would go to an outside vendor for copying. The Custodian certifies that on March 31, 2010, she received a call from the Construction Office quoting an estimated copying cost of \$25.00 for copies of the file and \$30.34 for copies of the blueprints. The Custodian certifies that she called the Complainant and told him the copying cost and also stated that the Custodian's office had received the instant complaint.

The Custodian certifies that the Complainant stated to her that he knew nothing of the complaint and that he would contact his client, Mr. Moss, to bring over a check and pick up the requested records. The Custodian certifies that she told the Complainant that when she received the check, she would contact the outside vendor and tell them to start copying the file and the blueprints.

The Custodian certifies that Mr. Moss paid for the copies and blueprints on April 1, 2010 and at that time the Custodian handed him all of the requested records except for the blueprints. The Custodian certifies that on April 8, 2010, she received copies of the blueprints from the printer and on that date, she contacted the Complainant to let him know that the requested blueprints were ready for pick up. The Custodian certifies that she contacted the Complainant's Counsel again on April 26, 2010 as a courtesy to let him know that Mr. Moss never picked up his blueprints.

The Custodian certifies that at no time was she ever told that the Construction Office had denied any part of the OPRA request and further certifies that it was her understanding that the homeowner and the Construction Official were working together to pull the information that was needed from the file.

### **June 1, 2010**

The Custodian's supplement to the Statement of Information. The Custodian asserts that there has never been a denial of access to government records in the instant matter. The Custodian states that it is clear from the submissions previously forwarded that all of the requested records were provided. The Custodian maintains that although there was some initial confusion as to which portions of the file the Complainant sought, that confusion was later clarified.

The Custodian states she believes that the Complainant is no longer representing Mr. and Mrs. Moss and asserts that the documents requested were eventually provided. The Custodian states that she does not understand why this case is proceeding.

### **June 3, 2010**

Letter from the Complainant to the GRC. The Complainant responds to the Custodian's Statement of Information. The Complainant states that his firm filed an OPRA request on March 12, 2010 requesting physical copies of the Construction Official's file, including the construction plans for a single family residence located at 2502 N. Blue Bell Road, Franklinville, New Jersey 08332. The Complainant asserts that the request was made because the previous owner of the residence had performed home improvements in the basement without permits. The Complainant states that as part of those renovations, the previous owner removed at least one structural support column, and as a result of removing the beam, the home exhibited signs of collapse. The Complainant maintains that he spoke with an engineer who believed that the home was in danger of collapse. The Complainant states that the engineer needed a copy of the construction plans to perform engineering calculations and evaluate the structural integrity of the home. The Complainant asserts that it would have been impossible for him to perform those calculations and analyze the plans in the Construction Official's office.

The Complainant states that he was informed by the Construction Official's office that the construction plans were prepared by an architectural plans company and copyrighted. The Complainant asserts that as a result, the Construction Office denied the Complainant's request for physical copies of the plans. The Complainant maintains that he was told that if the engineer needed to review the plans he had to do so at the Construction Official's office.

The Complainant states that on March 26, 2010, ten (10) business days after the submission of his OPRA request, the Complainant called the Custodian's office to follow up on the request. The Complainant states that the Custodian's office informed him that the Construction Office's file, including the requested construction plans, would be provided upon payment of the copying fees for the construction plans which could not be copied in-house by the Township. The Complainant asserts that the payment was made the same day.

The Complainant states his client, Gary Moss, visited the Construction Office to obtain a copy of the requested construction file. The Complainant states that the Construction Official refused to provide Mr. Moss with a copy of the requested records. The Complainant asserts that Mr. Moss contacted him to confirm such refusal. The Complainant states that he then called and spoke with the Construction Official; the Complainant states that he was informed that the request was denied because the requested records included confidential information, including the name, address, phone number, and other identifying information of the individuals who previously submitted construction permits and performed construction services on the home. The Complainant states that he asked the Construction Official to redact the confidential information, but the Construction Official refused. The Complainant asserts that the Construction Official stated that any records which contain confidential information could not be provided. The Complainant asserts that the Construction Official eventually agreed to provide redacted records, but only those records the Construction Official believed were needed by the Complainant. The Complainant maintains that the file was not provided in its entirety as requested.

The Complainant states that the Construction Official failed to comply with his request for the *entire* file and indicated that the Construction Official would review the file, determine which records he deemed necessary to investigate the pending collapse, and

provide only those records. The Complainant asserts that when the Construction Official began reviewing the file, the Construction Official cited examples of records that he believed the Complainant did not need based on an arbitrary determination.

The Complainant asserts that after some discussion, the Construction Official agreed to copy the entire file, redact any confidential information contained therein and call the Complainant when it was ready to be picked up. The Complainant maintains that he was not informed of the final copying costs until April 1, 2010. The Complainant states that the copies of the construction plans were not provided to him until April 8, 2010.

The Complainant maintains that the Township denied his OPRA request on March 23, 2010, outside the seven (7) business day time period statutorily mandated by OPRA. The Complainant argues that the law on this issue is clear and cites OPRA as follows in support of his argument:

*“Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived. 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, unless the requester has elected not to provide a name, address, or telephone number, or other means of contacting the requestor. If the requester has elected not to provide a name, address, or telephone number, or other means of contacting the requestor; the custodian shall not be required to respond until the requestor reappears before the custodian seeking a response to the original request. If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requester shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.”* N.J.S.A. 47:1A-5.i. (Emphasis added).

The Complainant states that his OPRA request was made on March 12, 2010. The Complainant asserts that by the Township Clerk's own admission, the Township failed to respond within the seven (7) allotted business days after receiving his request. The Complainant maintains that the Township Clerk did not officially respond to the OPRA request until after a complaint was filed, although the Construction Official had partially denied the request citing copyright issues.

The Complainant argues that the Township has failed to prove that the denial of access was lawful and notes that OPRA places the burden on the public agency to prove that the denial of access is authorized by law. The Complainant maintains that not only has the Township failed to meet the burden of proof, but the Township makes no argument that the denial of access by the failure to provide a timely response was lawful; the Township simply denies that any denial of access occurred. The Custodian states that the Township admits that it took no action until ten (10) business days after the OPRA request was received, only



provided the copying costs for the requested records after a complaint was filed and ignores the language of N.J.S.A. 47:1A-5.i. deeming a delayed response as a denial.

The Complainant argues that the actions by the Township and the Township Construction Official have violated OPRA, and although the requested documents were eventually provided, the Complainant seeks attorney fees pursuant to N.J.S.A. 47:1A-6 which provides in relevant part: “[a] requestor who prevails in any proceeding [to challenge denial of access to records] shall be entitled to a reasonable attorney's fee.” The Complainant argues that the fact that the records were provided subsequent to the filing of a Complaint does not preclude the award of attorney fees.

The Complainant maintains that the Township's assertion that the matter should be dismissed because his firm no longer represents Mr. and Mrs. Moss is without merit. The Complainant points out that he is listed as the requestor in this matter and that attorney's fees related to this issue are paid by his firm and not Mr. and Mrs. Moss. The Complainant states that he intends to move forward with this matter to the extent allowed by law.

#### **November 24, 2010**

Letter from the Custodian to the GRC. The Custodian states that Steven Rickershauser is the Construction Official and the Supervisor of the Construction Department and was responsible for providing the records requested by the Complainant. The Custodian certifies that the March 24, 2010 verbal response to the OPRA request came from Deputy Clerk, Barbara Freijomil. The Custodian certifies that Ms. Freijomil advised the Complainant that the requested records were ready for on-site review. The Custodian states that on March 26, 2010, Gary Moss came to the Construction Office and met with Mr. Rickershauser.

#### **Analysis**

#### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless

otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

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

In the matter before the Council, Ms. Freijomil responded to the OPRA request verbally on March 24, 2010, the eighth (8<sup>th</sup>) business day following receipt of such request, informing the Complainant that the requested records were ready for on-site inspection.

Therefore, Ms. Freijomil’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

However, the Complainant’s request is invalid under OPRA because it is overly broad and fails to specify identifiable government records.

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,

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<sup>7</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA. Walter T. Wolf, Esq. (on behalf of Ivette & Gary Moss) v. Franklin Township, Construction Office (Gloucester), 2010-71 -- Findings and Recommendations of the Executive Director 8

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.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>8</sup> the complainant filed a request for public records with the Stafford Township Custodian of Records. In this request, which consisted of five subparts lettered “a” through “e,” the complainant sought documents comprising the “entire file” of his criminal investigation conducted jointly by the Stafford Township Police Department (STPD), the United States Attorney for New Jersey, and a special agent of the Internal Revenue Service. Additionally, the complainant requested that the custodian provide him with “the factual basis underlying documented action and advice to third parties to act against my interest [having] been credited to SPD under a Federal Grand Jury credit card investigation.” *Id.* at 33-34.

The Appellate Division determined that the GRC properly dismissed the complainant’s request and stated that:

“OPRA [does not] ‘authorize a party to make a blanket request for every document’ a public agency has on file. *See Gannett New Jersey Partners L.P. v. County of Middlesex*, 379 N.J. Super. 205, 219, 877 A.2d 330 (App.Div.2005). Rather, a party requesting access to a public record under OPRA must specifically describe the document sought. *Ibid.*; *see also MAG Entm’t*, 375 N.J. Super. at 546-49, 868 A.2d 1067.” *Bent*, 381 N.J. Super. 30, 37

The Appellate Division notes that in MAG, 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.”<sup>9</sup>

Additionally, 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

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<sup>8</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>9</sup> As stated in Bent, *supra*.

"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.

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..."

This is further exemplified in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); where the Council held 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 Kenneth Mayer v. Borough of Roselle, GRC Complaint No. 2009-336 (November 2010), the Council determined that the Complainant's request for "any and all documents and records concerning 116-122 Chestnut Street, including but not limited to: complete construction permit files, fire prevention records, health department records and housing inspections records", as well as "any and all documents and records concerning the fire at the above location on or about November 18, 2008, including but not limited to police and fire department reports" did not specifically identify any government records except for the police and fire department reports regarding the fire at 116-122 Chestnut Street on or about November 18, 2008, and that therefore this portion of the Complainant's request was not a valid OPRA request.

In the matter before the Council the Complainant's request for the entire file fails to identify specific government records sought and constitutes a broad and unclear request. Therefore, because the Complainant's request for the Township Construction Official's entire file fails to specify identifiable government records sought, the Complainant's request is invalid under OPRA. See 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 on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

**Whether Ms. Freijomil’s deemed denial of access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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

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-7e.

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

Although Ms. Freijomil violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond to the OPRA request in writing within the statutorily mandated seven (7) business days, the Custodian did eventually supply the Complainant with both on-site inspection access and copies of the requested records even though the Complainant’s request is invalid under OPRA because it fails to specify identifiable government records. 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 Ms. Freijomil’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. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

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

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

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

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

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

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

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty

Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.<sup>10</sup> Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief 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)."

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<sup>10</sup> The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.



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

However, in Spectraserv v. Middlesex County Utilities Authority, 416 N.J. Super. 565 (App. Div. 2010), the Appellate Division determined that prevailing party attorney fees are not appropriate where a request is invalid under OPRA because it is overly broad and fails to identify specific government records sought, even if the Custodian released records after the filing of the Denial of Access Complaint. Id. at 578-79.

In the matter before the Council, the Complainant's request is invalid under OPRA because it is overly broad and unclear. Although the Custodian disclosed records subsequent to the filing of the instant Denial of Access Complaint, the Custodian had no lawful duty to produce any records responsive to such a request.

Therefore, pursuant to Teeters, *supra*, the Complainant has not achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Id. at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved, as the Complainant has filed a broad and unclear request that the Custodian has no lawful duty to fulfill. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, Mason, *supra*, and Spectraserv, *supra*.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Ms. Freijomil's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Complainant's request for the Township Construction Official's entire file fails to specify identifiable government records sought, the Complainant's request is invalid under OPRA. See 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 on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC

Complaint No. 2007-151 (February 2009), Dittrich v. Borough of Fort Lee, Construction Office (Bergen), GRC Complaint No. 2009-163 (April 2010).

3. Although Ms. Freijomil violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond to the OPRA request in writing within the statutorily mandated seven (7) business days, the Custodian went beyond their lawful duties by supplying the Complainant with both on-site inspection access and copies of the requested records even though the Complainant's request is invalid under OPRA because it fails to specify identifiable government records. 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 Ms. Freijomil's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
  
4. In the matter before the Council, the Complainant's request is invalid under OPRA because it is overly broad and unclear. Although the Custodian disclosed records subsequent to the filing of the instant Denial of Access Complaint, the Custodian had no lawful duty to produce any records responsive to such a request. Therefore, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved, as the Complainant has filed a broad and unclear request that the Custodian has no lawful duty to fulfill. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, Mason, supra, and Spectraserv v. Middlesex County Utilities Authority, 416 N.J. Super. 565 (App. Div. 2010).

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