State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 25, 2012 Government Records Council Meeting

Christopher Pipa
Complainant
v.
New Jersey Turnpike Authority
Custodian of Record

Complaint No. 2011-107

At the September 25, 2012 public meeting, the Government Records Council ("Council") considered the September 18, 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, finds that:

1. The Custodian did not timely respond to the Complainant's OPRA request. As such, the Custodian'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 (Interim Order October 31, 2007)..

2. Because the Custodian certified that the records responsive were still pending Board approval and subject to the Governor's ten (10) day veto authority period, at the time of the Complainant's request, the records responsive to the Complainant's OPRA request herein is deliberative in nature and thus exempt from disclosure under OPRA as advisory consultative and deliberative pursuant to N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).

3. The evidence of record indicates that at the time of the Complainant's request, the Board's approval to award the toll attendant services bid and the expiration of the Governor's ten (10) day veto period was still pending. Thus, the Custodian lawfully denied access to the records responsive to the Complainant's OPRA request because providing such records would give an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1. *See* Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (March 2011)(where Council held that the Custodian lawfully denied access to the requested proposals because although the requested bids were presented to the public during public session, were still being used in the process of negotiating a contract for the position of Borough solicitor.) and Renna v. County of Union, GRC Complaint No. 2003-100 (February 2004)(the Custodian lawfully denied access to a

proposal submitted by Xerox to run a print shop because the release of the information would give an unfair advantage to competitors.)

4. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to timely respond to the Complainant's OPRA request. However, the Custodian certified that the records responsive were still pending Board approval and subject to the Governor's ten (10) day veto authority period, at the time of the Complainant's request, and that the records contained material which could be advantageous to competitors or bidders under N.J.S.A. 47:1A-1.1. Thus, access to the records responsive to the Complainant's OPRA request was lawfully denied. 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.

5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 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: October 1, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

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

Christopher Pipa[1] **GRC Complaint No. 2011-107**
Complainant

v.

New Jersey Turnpike Authority[2]
Custodian of Records

Records Relevant to Complaint: A list of vendors bidding on the request for proposals, including bid amounts, for toll attendant services on the New Jersey Turnpike, Garden State Parkway and the Atlantic City Expressway.

Request Made: March 21, 2011
Response Made: April 5, 2011
Custodian: Ramon de la Cruz
GRC Complaint Filed: April 8, 2011[3]

Background

March 21, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that the preferred method of delivery is facsimile or e-mail.

April 6, 2011

Facsimile from the Complainant to the Custodian. The Complainant states that he submitted his OPRA request on March 21, 2011. The Complainant also states that to date he has not received a response to his request.

April 6, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via facsimile and e-mail to the Complainant's OPRA request on the twelfth (12^{th}) business day following receipt of such request. The Custodian states that access to the requested record is denied because records related to a procurement that is currently under review by an evaluation committee, attorneys and the New Jersey Turnpike Authority ("NJTA"). The Custodian also states that confidential deliberation is necessary to guarantee the integrity of the evaluation process. The Custodian further states that the evaluation of proposals involves ongoing negotiation with potential contractors and their

[1] Represented by Katy Dunn, Esq., of the Service Employees International Union (New York, NY).
[2] No legal representation listed on record.
[3] The GRC received the Denial of Access Complaint on said date.

representatives. The Custodian additionally states that the records responsive contain intra-agency deliberative communication regarding review of terms in the proposals; trade secrets and propriety commercial or financial information; records within the attorney-client privilege and information which if disclosed, would give an advantage to competitors or bidders.

The Custodian states that although the NJTA cannot make these records available as of the current date, the Complainant's OPRA request will be kept open and the records responsive to the request will be furnished after the anticipated award at the April 27, 2011 NJTA Board of Commissioner's ("Board") meeting, subject to the Governor's ten (10) day veto authority.

April 8, 2011

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

- Complainant's OPRA request dated March 21, 2011
- Facsimile from the Custodian to the Complainant dated April 6, 2011
- Facsimile from the Complainant to the Custodian dated April 6, 2011.

The Complainant states he submitted an OPRA request on March 14, 2011 to the NJTA.[4] The Complainant also states that he did not receive an acknowledgement of his request. The Complainant further states that he telephoned the NJTA and left messages to check the status of his request, but his telephone calls were not returned. The Complainant additionally states that he sent another facsimile to NJTA copying his original OPRA request on April 5, 2011.

The Complainant states that on April 5, 2011 he received a response from the Custodian via facsimile and e-mail denying his OPRA request. The Complainant also states that the NJTA has refused to produce any records responsive to his request until after April 27, 2011. The Complainant further states that he telephoned the Custodian on April 5, 2011 and clarified his request to only seek the names of the vendors bidding. The Complainant additionally states that the Custodian also denied his clarified request. The Complainant states that releasing the bid amounts prior to their opening may fall within an exception to OPRA, the names of the vendors bidding should not fall within this exception. The Complainant asserts that there is no reason why a simple release of the names of the vendor's bidding would give an advantage to competitors or bidders. The Complainant also asserts that the NJTA should be required to release this information prior to April 27, 2011.

The Complainant does not agree to mediate this complaint.

April 13, 2011

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

[4] The Complainant's OPRA request is dated March 21, 2011, not March 14, 2011.

April 19, 2011[5]

Custodian's SOI attaching an e-mail and facsimile from the Custodian to the Complainant dated April 6, 2011.[6]

The Custodian certifies that he received the Complainant's OPRA request and promptly began research.[7] The Custodian also certifies that no records responsive to the Complainant's request were located after an initial search. The Custodian further certifies that after additional research, the Custodian realized the Complainant sought records that pertain to sealed government records that are currently the subject of an ongoing procurement for toll attendant services. The Custodian certifies that this procurement is confidential in keeping with the NJTA's policy that professional service procurement information and recommendations are confidential until the Board approves and after the expiration of the Governor's ten (10) day veto period.

The Custodian certifies that an independent committee is established to deliberate every proposal and to negotiate the proposal's terms with the bidders. The Custodian also certifies that this committee will present an award recommendation report to the NJTA's Executive Director and upon approval the award recommendation will be submitted to the Board for vote at the April 27, 2011 NJTA's Commission meeting. The Custodian further certifies that records will be provided pending the Board's approval and after the Governor's ten (10) day veto authority period. The Custodian argues that release of these records responsive before Board approval would compromise the independence and confidential deliberation of the evaluation process.

The Custodian certifies that the records responsive to the request contain intra-agency deliberative communication regarding the evaluation of the proposal terms and the award recommendation to the Board pursuant to N.J.S.A. 47:1A-1.1. The Custodian also certifies that the records responsive contain contractor trade secrets and proprietary commercial or financial information which if disclosed would give an advantage to competitors or bidders.

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

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.

[5] The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

[6] The Custodian does not include the Complainant's OPRA request. The Custodian attaches additional correspondence not relevant to the adjudication of this complaint.

[7] The Custodian does not certify when he received the Complainant's OPRA request.

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.

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.[8] 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 (Interim Order October 31, 2007).

In the instant complaint, the Complainant filed his OPRA request on March 21, 2011. The Custodian responded to the Complainant's OPRA request on April 6, 2011, denying the Complainant access to the requested records. Because the Custodian failed to certify in the SOI when he received the Complainant's request, the evidence of record indicates that the Custodian responded to said request in writing on the twelfth (12^{th}) business day following receipt of such request.

Therefore, the Custodian did not timely respond to the Complainant's OPRA request. As such, the Custodian'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, *supra*.

[8] 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.

Whether the records responsive to the Complainant's request are exempt from disclosure as advisory, consultative or deliberative material?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

> "… any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* … or *that has been received* in the course of his or its official business … The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

> "…[t]he public agency shall have the burden of proving that the denial of access is authorized by law…" N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

The Complainant requested a "list of vendors bidding on the request for proposals, including bid amounts, for toll attendant services on the New Jersey Turnpike, Garden State Parkway and the Atlantic City Expressway. The Custodian denied access to the Complainant's request via facsimile stating that the records responsive contain intra-agency deliberative communication regarding review of the terms in the proposals. The Custodian also informed the Complainant that the records responsive to the request will be provided after the anticipated award at the April 27, 2011 Commission meeting, subject to the Governor's ten (10) day veto authority. The Custodian certified in the SOI

that this procurement process is kept confidential until the Board approval and after the expiration of the Governor's ten (10) day veto period.

In O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that "neither the statute nor the courts have defined the terms… 'advisory, consultative, or deliberative' in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA's ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

> "[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. … Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. … Purely factual material that does not reflect deliberative processes is not protected. … Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the

"preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure." (Citations omitted.) *Id*. at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

"[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies." In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, *citing* McClain, *supra*, 99 N.J. at 361-62.

In In Re Liquidation of Integrity, *supra*, 165 N.J. at 84-5, the judiciary set forth the legal standard for applying the deliberative process privilege as follows:

(1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.

a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.

b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.

i. Deliberative materials do not include purely factual materials.

ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.

c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.

d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.

e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the*

document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency.

(2) Please note that if an *in camera* inspection were conducted by the courts, the process would include the following:

Once it has been determined that a record is deliberative, there is a presumption against disclosure and the party seeking the document has the burden of establishing his or her compelling or substantial need for the record.

a. That burden can be met by a showing of:
   i. the importance of the information to the requesting party,
   ii. its availability from other sources **and**
   iii. the effect of disclosure on frank and independent discussion of contemplated government policies.

In the instant complaint, the Complainant filed his OPRA request on March 21, 2011. The Custodian certified in the SOI that that the records responsive contain intra-agency deliberative communications regarding the evaluation of the proposal terms and award recommendation to the Board pursuant to N.J.S.A. 47:1A-1.1. The Custodian also certified that the Commission will approve the award recommendation at the April 27, 2011 meeting. The Custodian also certified that the Commission's approval is subject to the Governor's ten (10) day veto authority period.

Because the Custodian certified that the records responsive were still pending Commission approval and subject to the Governor's ten (10) day veto authority period, at the time of the Complainant's request, the records responsive to the Complainant's OPRA request herein is deliberative in nature and thus exempt from disclosure under OPRA as ACD pursuant to N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).

In addition, the evidence of record indicates that at the time of the Complainant's request, the Board's approval to award the toll attendant services bid and the expiration of the Governor's ten (10) day veto period was still pending. Thus, the Custodian lawfully denied access to the records responsive to the Complainant's OPRA request because providing such records would give an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1. *See* Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (March 2011)(where Council held that the Custodian lawfully denied access to the requested proposals because although the requested bids were presented to the public during public session, were still being used in the process of negotiating a contract for the position of Borough solicitor.) and Renna v. County of Union, GRC Complaint No. 2003-100 (February 2004)(the Custodian lawfully denied access to a proposal submitted by Xerox to run a print shop because the release of the information would give an unfair advantage to competitors.)

Whether the Custodian's failure to timely respond to the Complainant's request rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

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

The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to timely respond to the Complainant's OPRA request. However, the Custodian certified that the records responsive were still pending Board approval and subject to the Governor's ten (10) day veto authority period, at the time of the Complainant's request, and that the records contained material which could be advantageous to competitors or bidders under N.J.S.A. 47:1A-1.1. Thus, access to the records responsive to the Complainant's OPRA request was lawfully denied. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

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

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra,* at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). 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).
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> Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id*. at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); see also Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather,

courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id*. at 422.

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

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

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

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

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

In the instant complaint, as in Mason, the Complainant's Denial of Access Complaint was not the catalyst for the release of the requested records, because at the time of the Complainant's OPRA request, the requested records contained ACD material because said were still pending Board approval and subject to the Governor's ten (10) day veto authority period and thus were not subject to disclosure under OPRA.

Pursuant to Teeters, *supra*, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason, *supra*, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not timely respond to the Complainant's OPRA request. As such, the Custodian'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 (Interim Order October 31, 2007)..

2. Because the Custodian certified that the records responsive were still pending Board approval and subject to the Governor's ten (10) day veto authority period, at the time of the Complainant's request, the records responsive to the Complainant's OPRA request herein is deliberative in nature and thus exempt from disclosure under OPRA as advisory consultative and deliberative pursuant to N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).

3. The evidence of record indicates that at the time of the Complainant's request, the Board's approval to award the toll attendant services bid and the expiration of the Governor's ten (10) day veto period was still pending. Thus, the Custodian lawfully denied access to the records responsive to the Complainant's OPRA request because providing such records would give an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1. *See* Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (March

2011)(where Council held that the Custodian lawfully denied access to the requested proposals because although the requested bids were presented to the public during public session, were still being used in the process of negotiating a contract for the position of Borough solicitor.) and Renna v. County of Union, GRC Complaint No. 2003-100 (February 2004)(the Custodian lawfully denied access to a proposal submitted by Xerox to run a print shop because the release of the information would give an unfair advantage to competitors.)

4. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to timely respond to the Complainant's OPRA request. However, the Custodian certified that the records responsive were still pending Board approval and subject to the Governor's ten (10) day veto authority period, at the time of the Complainant's request, and that the records contained material which could be advantageous to competitors or bidders under N.J.S.A. 47:1A-1.1. Thus, access to the records responsive to the Complainant's OPRA request was lawfully denied. 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.

5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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Acting Executive Director

September 18, 2012