



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

December 18, 2012 Government Records Council Meeting

Mark A. Tabakin, Esq.
Complainant

Complaint No. 2011-144

v.

Shalom Academy Charter School (Bergen)
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 23, 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. Because the Complainant’s request fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant’s request is overly broad and is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). Because the Complainant’s request is invalid under OPRA, the GRC declines to address whether Shalom Academy is a public agency under OPRA.
2. 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. Specifically, the Complainant’s request fails to identify a specific government record sought. 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 18th Day of December, 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: December 20, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

Mark A. Tabakin, Esq. **GRC Complaint No. 2011-144**
(on behalf of City of Englewood Board of Education)¹
Complainant

v.

Shalom Academy Charter School (Bergen)²
Custodian of Records

Records Relevant to Complaint: Copies of any and all documents³ regarding the approval and development of the Shalom Academy Charter School (“Shalom Academy”) including but not limited to:

1. Lease agreement entered into or being negotiated by Shalom Academy for the lease of real property located at 241 William Street Englewood, New Jersey.
2. Any and all records, correspondence and documents regarding the selection and criteria and/or process for student admission to the Shalom Academy.
3. Any and all records, correspondence and documents regarding the development and implementation of the “lottery” for student acceptance to Shalom Academy.
4. Any and all records or documents regarding advising the public and/or parents of the date on which the “lottery” was or is to be conducted and the selection of the person chosen to conduct the lottery.
5. Any and all records, notices or correspondence sent to students and/or parents regarding the lottery.
6. A copy of the application for participation in the lottery and/or application for admittance into Shalom Academy.
7. A copy of the employment/consultant agreement entered into or being negotiated between the Shalom Academy and Elizabeth Willaum.
8. Any and all records containing the names, race, sex, and city of residence of all students admitted/accepted for admittance into the Shalom Academy 2011-2012 school year.
9. Any and all records received from the Commissioner of Education and/or New Jersey Department of Education (“DOE”) requesting clarification or additional information regarding Shalom Academy’s request for charter approval in 2010.

¹ “The Complainant is an attorney with the Law Firm of Weiner Lesniak, LLC (Parsippany, NJ) representing the City of Englewood Board of Education.

² No legal representation listed on record.

³ “Any and all documents” shall include but not limited to, e-mails, facsimiles, spreadsheets, correspondences, notes, memos, reports, letters and any other relevant information memorialized in any form as defined by OPRA.

10. Any and all correspondence received by Shalom Academy from the Commissioner of Education and/or New Jersey DOE regarding approval of its charter.
11. Any and all correspondence or records regarding the racial composition of all students who participated in the lottery and the racial composition of students admitted/accepted for admittance into the Shalom Academy for the 2011-2012 school year.
12. Any and all records or correspondence received to Raphael Bachrach, the Board of Trustees of the Shalom Academy and/or the Shalom Academy by either Ms. Willaum or Dr. Richard Segal in connection with Shalom Academy's applications for charter approval for the period of June 30, 2008 through December 31, 2010.
13. Any and all records and correspondence regarding Zoning or Planning Board applications submitted by Raphael Bachrach, the Board of Trustees of Shalom Academy and/or Shalom Academy to the City of Englewood for the proposed charter school location at 241 William Street Englewood, New Jersey.
14. Any and all records, documents, applications or correspondence regarding the Shalom Academy's attempt to obtain grant funding and/or donations including grant applications.
15. Any and all records evidencing the application and/or acceptance of the children to the following individuals: Raphael Bachrach, Tami Beth Horowitz, Sari Klahr, Emma Bass, Amy Citron, Cindy Balsam-Martz and Allan Cutter.

Request Made: February 18, 2011

Response Made: March 2, 2011

Custodian: Raphael Bachrach

GRC Complaint Filed: May 2, 2011⁴

Background

February 18, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA.

March 2, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request.⁵ The Custodian requests and additional fourteen (14) business days to appropriately examine the Complainant's request for a voluminous amount of separate and distinct records and to determine which of the requested records are subject to disclosure under OPRA.

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

⁵ The Custodian certifies in the SOI that he received the Complainant's OPRA request on February 23, 2011.

March 8, 2011

E-mail from Ms. Sarah A. Makuch (“Ms. Makuch”) to the Custodian.⁶ Ms. Makuch states that the City of Englewood Board of Education (“Board”) has granted the Custodian’s request for a fourteen (14) day extension. Ms. Makuch also states that the Board anticipates receipt of all requested records no later than March 16, 2011.

March 16, 2011

Letter from the Custodian to the Complainant. The Custodian denies access to the Complainant’s OPRA request because prior to the final granting of the charter by DOE a charter school is not a public agency and is not subject to OPRA.

March 30, 2011

Letter from the Complainant to the Custodian. The Complainant states that Shalom Academy’s charter was approved by New Jersey DOE on or about January 18, 2011. The Complainant also states that as such, Shalom Academy is a public entity subject to OPRA. The Complainant further states that the Board respectfully demands that the Shalom Academy immediately comply with the requirements of OPRA and to provide the records previously requested.

May 2, 2011

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

- Complainant’s OPRA request dated February 18, 2011
- E-mail from the Custodian to the Complainant dated March 2, 2011
- E-mail from Ms. Makuch to the Custodian dated March 8, 2011
- Letter from the Custodian to the Complainant dated March 16, 2011
- Letter from the Complainant to the Custodian dated March 30, 2011.

The Complainant states that the Custodian received the Complainant’s OPRA request on February 23, 2011 for copies of any and all records relating to Shalom Academy’s charter application and approval. The Complainant also states that he received an e-mail from the Custodian on March 2, 2011 requesting an extension of time in which to respond to the OPRA request. The Complainant further states that the Board granted the Custodian’s request for an extension on March 8, 2011 via e-mail. The Complainant additionally states that he received a letter from the Custodian on March 16, 2011 which the Custodian asserts that Shalom Academy is not considered a public agency and thus, is not required to comply with OPRA.

The Complainant asserts that N.J.S.A. 47:1A-1.1 defines “public agency” “any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority,

⁶ Ms. Makuch is an attorney with the Weiner Lesniak, LLC Law Firm who represents the Englewood City Board of Education.

commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.” The Complainant asserts that Shalom Academy is an instrumentality created by DOE and thus Shalom Academy falls within the definition of a public agency as set forth by OPRA.

The Complainant states that on January 18, 2011 DOE advised Shalom Academy that its application for issuance of a charter had been approved. The Complainant also states that the charter was granted in accordance with *N.J.A.C. 6A:11-2.1.*, “The Commissioner with the authority of *N.J.S.A. 18A:36-1* may approve or deny an application for a charter after review of the application submitted by an eligible applicant and the recommendation(s) from the district board(s) of education or State district superintendent(s) of the district of residence of the proposed charter school.” The Complainant asserts that provision clearly indicates that Shalom Academy exists only with the approval of and compliance with DOE. The Complainant additionally asserts that Shalom Academy is subject to OPRA.

The Complainant states that as a result of New Jersey DOE’s approval of Shalom Academy’s charter, the Custodian was required to submit a Statement of Assurance, wherein he acknowledges that, as a creation of DOE, Shalom Academy would be required to comply with all applicable state statutes and regulations which govern the rights and obligations of all organizations and agencies created by DOE. The Complainant asserts that Shalom Academy has further held itself out as a public agency by initiating the enrollment process among public school students and establishing a Board of Trustees and corresponding bylaws as well as seeking funding through the local Board of Education of Teaneck and Englewood as provided by statute. The Complainant also asserts that Shalom Academy cannot be permitted to claim the status of a public agency while simultaneously disavowing such status so that it may avoid its obligations.

The Complainant does not agree to mediate this complaint.

May 4, 2011

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

May 10, 2011

Telephone call from the Custodian to the GRC. The Custodian requests an extension to complete the SOI.

May 10, 2011

E-mail from the GRC to the Custodian. The GRC grants a five (5) business day extension to complete the SOI. The GRC requests the Custodian to complete the SOI no later than May 18, 2011.

May 18, 2011⁷

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 18, 2011
- Letter from the Custodian to the Complainant dated March 2, 2011
- Letter from the Custodian to the Complainant dated March 16, 2011.

The Custodian certifies that he received the Complainant's OPRA request on February 23, 2011. The Custodian also certifies that he responded to the Complainant's OPRA request on March 2, 2011 via e-mail requesting an additional fourteen (14) business days to respond to said request. The Custodian further certifies that he responded to the Complainant's OPRA request on March 16, 2011 via letter stating that Shalom Academy is not a public agency and not subject to OPRA because New Jersey DOE has not granted Shalom Academy its final charter.

The Custodian argues that prior to the final granting of the charter by DOE, a charter school is not subject to OPRA. The Custodian certifies that according to DOE, "approved applicants will be required for submitted all required documentation no later than June 30th of the year in which the school is scheduled to open. Additionally applicants must provide evidence of readiness for opening through a preparedness visit conducted by [DOE] staff as per *N.J.A.C. 6A:11-2.1*. Applicants who satisfy all requirements by June 30th will be granted a final charter on or before July 15th."

The Custodian asserts that pursuant to *N.J.A.C.6A:11-2.1*: "the approved applicants must submit, by June 30, the documentation not available at the time of the application submission including, but not limited to, copies of: 1) a list of names of the current members of the board of trustees; 2) the bylaws of the board of trustees; 3) the Certificate of Incorporation; 4) The Federal Employer Identification Number; 5) the Credit Authorization Agreement for Automatic Deposits; 6) the lease mortgage or title to its facility; 7) the certificate of occupancy for "E" (education) use issued by the local municipal enforcing official; 8) the sanitary inspections report (if applicable) with "satisfactory" rating 9) the fire inspection certificate with "Ae" (education) code life hazard use; 10) a list of the lead person, teachers, and professional support staff with a copy of certificate(s) for each person; 11) the authorization for emergent hiring pending completion of criminal history check form or criminal history approval letter for each employee of the charter school; 12) evidence of a uniform system of double-entry bookkeeping in conformance with Generally Accepted Accounting Principles; 13) the resolution of the board of trustees naming the Affirmative Action Officer, the Section 504 Coordinator and the Title IX Coordinator; 14) evidence of enrollment of at least 90% of approved maximum enrollment, as verified by student registrations by parents/guardians; and 15) documentation that ensures compliance with all federal and state regulations and statutes.

⁷ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to *Paff v. NJ Department of Labor*, 392 N.J. Super. 334 (App. Div. 2007).)

The Custodian certifies that the DOE's Office of Charter Schools and the Office of Education Funding will conduct a preparedness visit before Shalom Academy may be granted its final charter. The Custodian also certifies that the Commissioner of DOE will grant a final charter on or before July 15, 2011 if all required documentation is submitted and approved by DOE by June 30, 2011.

The Custodian requests that the GRC declare that Shalom Academy is not a public agency until the DOE grants a final charter and that the Board cease and desist harassment of the founders of Shalom Academy in their good faith efforts to open.

Analysis

Whether the Complainant's request is valid under OPRA?

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 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.

In the instant complaint, the Complainant requested any and all documents regarding the approval and development of Shalom Academy. Although the Complainant stated that in the request that "any and all documents" includes, but is not limited to e-mails, facsimiles, spreadsheets, correspondences, notes, memoranda, reports, letters and any other relevant information memorialized in any form as defined by OPRA, this information fails to limit the request but instead broadens it. Here, the Complainant's

request is invalid under OPRA because he has failed to name a specific identifiable record sought, is overly broad, and will require the Custodian to conduct research.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). As the court noted in invalidating MAG's request under OPRA:

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

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

In addition, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁸ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁹

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

"OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of

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

⁹ As stated in Bent, *supra*.

production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). *Research is not among the custodian's responsibilities.*" (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

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

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

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

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

The Complainant's request fails to specifically identify a government record. The Complainant's request seeks all records, correspondence and documents pertaining to the approval and development of Shalom Academy. The Complainant's request does not identify who authored the record, provide for a date range, or even specify what type of record he is seeking. Although the Complainant's request stated that "any and all documents" includes e-mails, facsimiles, spreadsheets, correspondences, notes, memoranda, reports and letters, including other relevant information in any form as defined by OPRA, this information fails to limit the request in any way but instead broadens it. The Complainant's request would require the Custodian not only to search, but research, every document regarding the approval and development of Shalom Academy to determine if such is responsive to the Complainant's request. Thus, the Complainant's request is invalid under OPRA.

Therefore, because the Complainant's request fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is overly broad and is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). Because the Complainant's request is invalid under OPRA, the GRC declines to address whether Shalom Academy is a public agency under OPRA.

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.*

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

However, the Court noted in Mason, *supra*, that 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 accepted the application of the catalyst theory within the context of OPRA, stating that:

“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 at 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 the

Complainant's request is overly broad and failed to identify specific government records sought.

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. Specifically, the Complainant's request fails to identify a specific government record sought. 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. Because the Complainant's request fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is overly broad and is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). Because the Complainant's request is invalid under OPRA, the GRC declines to address whether Shalom Academy is a public agency under OPRA.
2. 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. Specifically, the Complainant's request fails to identify a specific government record sought. 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*.

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

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 23, 2012¹⁰

¹⁰ This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.