



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

Robert A. Verry
Complainant

Complaint Nos. 2011-159 & 2011-195

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

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, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian timely responded to the Complainant’s first (1st) OPRA request in writing requesting an extension of time until May 6, 2011 to respond to said request, the Custodian’s failure to timely respond in writing within the extended deadline results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009). The Custodian’s second (2nd) request for an extension of time is also invalid pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because the Custodian failed to request same in writing within the extended time frame. *See also* Kohn v. Township of Livingston (Essex), GRC Complaint No. 2010-303 (Final Decision dated March 27, 2012)(holding that the custodian’s failure to request an extension of time within the statutorily mandated time frame resulted in an invalid extension request).
2. The Custodian did not timely respond to the Complainant’s second (2nd) OPRA request. As such, the Custodian’s failure to respond in writing to said 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).
3. Because the Complainant’s two (2) requests fail to identify with reasonable clarity the specific government records sought, these request items are invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381



N.J. Super. 30, 37 (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). *See Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2011-119 (July 2012). Thus, the Custodian has not unlawfully denied access to any records. N.J.S.A. 47:1A-6.

4. Although the Custodian's failure to respond in writing to the Complainant's first (1st) OPRA request within the extended time frame results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. and the Custodian's failure to respond to the Complainant's second (2nd) OPRA request results in a "deemed" denial 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), the Complainant's requests are invalid and the Custodian did not unlawfully deny the Complainant access to any records. Additionally, the evidence of record does not indicate that the Custodian's violations 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 these Denial of Access Complaints and the relief ultimately achieved. Specifically, the Complainant's two (2) requests are invalid and the Custodian did not unlawfully deny access to any records. 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: September 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2011-159 & 2011-195

v.

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

Records Relevant to Complaint: Copies of the following record as referenced in the attached invoice dated March 3, 2011 from Cooper & Cooper:

1. February 4, 2011 entry – “... decisions from [New Jersey Department of Community Affairs (“DCA”)] regarding anonymous complaints for various officials ...”
2. February 28, 2011 entry – “... preliminary investigation reports from DCA ...”
3. February 28, 2011 entry – “... materials from Randy Bahr and [the Custodian].”
4. March 1, 2011 entry – “... draft response ... to DCA...”

Request Made: April 19, 2011 and May 7, 2011

Response Made: April 28, 2011 and none.

Custodian: Donald E. Kazar

GRC Complaint Filed: May 9, 2011 and May 31, 2011³

Background

April 19, 2011

Complainant’s first (1st) 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 either e-mail or facsimile.

April 28, 2011

Custodian’s response to the first (1st) OPRA request. The Custodian responds in writing via letter to the Complainant’s OPRA request on the fifth (5th) business day following receipt of such request.⁴ The Custodian requests an extension of time until May 6, 2011 to respond because the responsive records may be maintained by Cooper & Cooper.

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

² Represented by Francesco Taddeo, Esq. (Somerville, NJ).

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

⁴ The Custodian certifies in the Statement of Information that he received the Complainant’s OPRA request on April 21, 2011.

April 28, 2011

E-mail from the Complainant to the Custodian. The Complainant states that he will grant the Custodian an extension of time until May 6, 2011 for the sole purpose of disclosing the responsive record.

May 7, 2011

Letter from the Custodian to the Complainant. The Custodian states that he does not have the records responsive to the Complainant's first (1st) OPRA request in his possession. The Custodian further states that he was unable to obtain the records from Cooper & Cooper because the firm recently resigned as counsel for the Borough. The Custodian that he will contact Cooper & Cooper the following week to attempt to obtain the records. The Custodian thus requests an extension of time until May 12, 2011.

May 9, 2011

Denial of Access Complaint for GRC Complaint No. 2011-159 filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated April 19, 2011.
- Letter from the Custodian to the Complainant dated April 28, 2011.
- E-mail from the Complainant to the Custodian dated April 28, 2011.

The Complainant states that he submitted an OPRA request to the Borough of South Bound Brook ("Borough") on April 19, 2011. The Complainant states that the Custodian responded in writing on April 28, 2011 requesting an extension of time until May 6, 2011 to respond to the Complainant's OPRA request. The Complainant states that he granted the Custodian an extension of time on April 28, 2011.

The Complainant asserts that the Custodian knowingly and willfully failed to disclose the responsive records. The Complainant asserts that until the GRC holds the Custodian accountable for his continuous disregard for OPRA, the Custodian will not change his practices to comply with the law. The Complainant thus requests the following:

1. A determination ordering the Custodian to disclose the responsive records.
2. A determination that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees. N.J.S.A. 47:1A-6.
3. A determination that the Custodian knowingly and willfully violated OPRA and is subject to a civil penalty. N.J.S.A. 47:1A-11.

The Complainant does not agree to mediate this complaint.

May 7, 2011

Complainant's second (2nd) 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 either e-mail or facsimile.

May 13, 2011

E-mail from the Custodian to the Complainant. The Custodian states that the investigation being conducted by DCA is not yet completed. The Custodian states that access to the records responsive to the Complainant's first (1st) OPRA request is not available at this time.

May 13, 2011

E-mail from the Complainant to the Custodian. The Complainant states that his OPRA request does not seek any investigations, thus, the denial of access is unlawful. The Complainant states that he believes the responsive records are already in the Borough's possession. The Complainant requests that the Custodian review the first (1st) OPRA request again.

The Complainant states that if the Custodian is denying access to the responsive records, he will be forced to file a complaint with the GRC and once again resubmit a new OPRA request for the same records.

May 13, 2011

E-mail from the Custodian to the Complainant. The Custodian states that the Complainant's first (1st) OPRA request Item No. 2 sought "preliminary investigation reports" for an investigation that DCA is still conducting. The Custodian states that the Complainant may want to submit an OPRA request to DCA for those records. The Custodian states that he believes the responsive report will be available once the investigation has concluded.

May 13, 2011

E-mail from the Complainant to the Custodian. The Complainant states that according to the Custodian's own statement in his April 28, 2011 letter to the Complainant, the responsive records are in the Borough's possession (via Cooper & Cooper). The Complainant notes that he granted the Custodian request for an extension of time to respond "for the sole purpose of releasing the records requested ..." The Complainant states that if the Custodian is denying access to the responsive records, he may provide his denial in writing.

May 13, 2011

E-mail from the Custodian to the Complainant. The Custodian states that he never said the Borough was in possession of the responsive records; rather, he stated that the records are not at his office. The Custodian further states that he never promised that the extension of time sought for the first (1st) OPRA request was "for the sole purpose ..." of disclosing records. The Custodian states that he simply attempted to fulfill the Complainant's OPRA request and did so with his response.

May 13, 2011

E-mail from the Complainant to the Custodian. The Complainant states that the Custodian requested an extension of time and the Complainant set terms to his agreement with the extension. The Complainant states that the Custodian is ignoring the fact that granting of an extension of time to respond is at the Complainant's discretion. The

Complainant states that the Custodian accepted the terms of the extension by exceeding the statutorily mandated time frame to respond.

May 13, 2011

E-mail from the Custodian to the Complainant. The Custodian states that the GRC's Handbook for Records Custodians (Fifth Edition – January 2011) does not address terms to extensions. The Custodian states that the Complainant granted the request for an extension of time to respond to the Complainant's first (1st) OPRA request and that the Complainant's terms have no bearing on the extension.

May 16, 2011

E-mail from the Complainant to the Custodian. The Complainant restates that he granted the extension of time to respond to the first (1st) OPRA request under certain terms and the Custodian agreed to abide by those terms when exceeding the statutorily mandated time frame to respond. The Complainant states that if the Custodian did not agree to the Complainant's terms, he should not have requested the extension.

The Complainant finally states that because the Borough's records are in possession of Cooper & Cooper, previous counsel to the Borough, those records are in possession of the Borough and should be provided accordingly.

May 31, 2011

Denial of Access Complaint for GRC Complaint No. 2011-195 filed with the GRC with the following attachments:

- Complainant's OPRA request dated May 7, 2011.
- Letter from the Custodian to the Complainant dated May 13, 2011.
- E-mail from the Complainant to the Custodian dated May 13, 2011.
- E-mail from the Custodian to the Complainant dated May 13, 2011.
- E-mail from the Complainant to the Custodian dated May 13, 2011.
- E-mail from the Custodian to the Complainant dated May 13, 2011.
- E-mail from the Complainant to the Custodian dated May 13, 2011.
- E-mail from the Custodian to the Complainant dated May 13, 2011.
- E-mail from the Complainant to the Custodian dated May 16, 2011.

The Complainant states that he submitted an OPRA request to the Borough on May 7, 2011. The Complainant states after an extensive conversation between himself and the Custodian indicates that the Custodian only addressed records relevant to the Complainant's OPRA request Item No. 2.⁵

The Complainant states that his OPRA request sought four (4) records. The Complainant asserts that these records were clearly in possession of Cooper & Cooper; thus, the Custodian's response that the records are not available or are not in the

⁵ The GRC notes that request Item No. 2 of both requests were for the same records. Based on the extensive e-mail exchanges between the Custodian and Complainant regarding the Custodian's April 28, 2011 extension, the GRC has determined that the May 13, 2011 e-mail chain actually refers to the Complainant's first (1st) OPRA request.

Borough's possession is false. The Complainant contends that the location of a record is not a lawful basis to deny access to same. The Complainant asserts that if it were, a custodian would be able to deny access to records on the grounds that they are in storage.

The Complainant asserts that although his OPRA request comprised of four (4) items, the Custodian's response only addresses Item No. 2. The Complainant asserts that the Custodian further failed to provide any responsive records.

The Complainant asserts that the Custodian knowingly and willfully failed to disclose the responsive record. The Complainant asserts that until the GRC holds the Custodian accountable for his continuous disregard for OPRA, the Custodian will not change his practices to comply with the law. The Complainant thus requests the following:

1. A determination ordering the Custodian to disclose the responsive record.
2. A determination that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees. N.J.S.A. 47:1A-6.
3. A determination that the Custodian knowingly and willfully violated OPRA and is subject to a civil penalty. N.J.S.A. 47:1A-11.

The Complainant does not agree to mediate this complaint.

June 29, 2011

Requests for the Statement of Information ("SOI") for GRC Complaint No. 2011-159 sent to the Custodian.

June 29, 2011

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until July 15, 2011 to submit the SOI for GRC Complaint No. 2011-159. The Custodian states that this extension is necessary because of the upcoming holiday and the Custodian will be out of the office for part of the following week.

June 29, 2011

E-mail from the GRC to the Custodian. The GRC states that it will routinely grant one (1) extension of five (5) business days to submit an SOI; however, based on the circumstances, the GRC grants the Custodian an extension of time until July 15, 2011 to submit the SOI.

July 11, 2011

Request for the SOI for GRC Complaint No. 2011-195 sent to the Custodian.

July 14, 2011⁶

Custodian's SOI for GRC Complaint No. 2011-159 with the following attachments:

- Letter from the Custodian to the Complainant dated May 7, 2011.
- E-mail from the Custodian to the Complainant dated May 13, 2011.
- Letter from the GRC to the Custodian dated June 29, 2011.

The Custodian certifies that he received the Complainant's OPRA request on April 21, 2011. The Custodian certifies that he responded in writing on April 28, 2011 requesting an extension of time until May 6, 2011 to respond to the Complainant's OPRA request. The Custodian certifies that on May 7, 2011, he responded via letter to the Complainant advising that the Borough did not possess any of the records sought. The Custodian certifies that he further advised that he would have to contact Cooper & Cooper, who recently resigned as counsel for the Borough, to see if he could obtain the responsive records. The Custodian certifies that he asked for second (2nd) extension until May 12, 2011. The Custodian certifies that he responded on May 13, 2011 via e-mail stating that the DCA was still conducting an investigation; thus, the records could not be disclosed to the Complainant.

The Custodian's Counsel submits a letter brief in support of the Borough's position in the instant complaint. Counsel contends that this matter should be dismissed as a frivolous and harassing action against the Custodian. Counsel contends that this complaint, taken in tandem with multiple other complaints simultaneously filed before the GRC clearly indicate that the intent of the Complainant is not to promote transparency, but to harass and overburden the Custodian with meaningless complaints. Counsel disputes the Complainant's comments regarding the Custodian as an attempt to taint the GRC process. Counsel contends that in toto, these factors evidence the Complainant's clear, malicious intent in filing this complaint.

July 15, 2011

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until July 25, 2011 to submit the SOI for GRC Complaint No. 2011-195.

July 18, 2011

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until July 25, 2011 to submit the SOI.

July 19, 2011

E-mail from the Custodian to the GRC. The Custodian requests an additional two (2) day extension of time to submit the SOI for GRC Complaint No. 2011-195.

⁶ 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).
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2011-159 & 2011-195 – Findings and Recommendations of the Executive Director

July 20, 2011

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until July 27, 2011 to submit the SOI and advises that no further extensions will be granted.

July 27, 2011⁷

Custodian's SOI for GRC Complaint No. 2011-195 with no attachments:

The Custodian contends this complaint is the same as GRC Complaint No. 2011-159 and should be dismissed. The Custodian refers the GRC to review the SOI for GRC Complaint No. 2011-159, in which he certified that no responsive records were provided because Cooper & Cooper was in possession of the records and resigned as counsel during the pendency of this OPRA request.

The Custodian further certifies that the records at issue were part of a pending investigation conducted by DCA; thus, the responsive records were not provided.

Analysis

Whether the Custodian timely responded to the Complainant's first (1st) 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.

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* ... 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 requestor *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.*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

In Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request, seeking an extension of time until April 20, 2007 to fulfill the complainant's OPRA request. However, the custodian responded on April 20, 2007, stating that the requested records would be provided later in the week, and the evidence of record showed that no records were not provided until May 31, 2007. The Council held that:

“[t]he Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. ... however ... [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial of access to the records.” *Id.*

In GRC Complaint No. 2011-159, which is similar to Kohn, *supra*, the Custodian responded to the Complainant in writing on the fifth (5th) business day after receipt of the Complainant's first (1st) OPRA request requesting an extension of time until May 6, 2011 to respond to same. However, the Custodian failed to respond in writing granting access, denying access, requesting clarification or seeking a second (2nd) extension of time within that extended deadline.

Moreover, the Custodian responded in writing on May 7, 2011, one (1) day after the extension of time, seeking another extension until May 12, 2011 to contact Cooper & Cooper regarding the responsive records. However, because the Custodian failed to timely respond, his second (2nd) request for an extension of time is invalid. *See* Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).

Therefore, although the Custodian timely responded to the Complainant's first (1st) OPRA request in writing requesting an extension of time until May 6, 2011 to respond to said request, the Custodian's failure to timely respond in writing within the extended deadline results in a “deemed” denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and GRC Complaint No. 2007-124. *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009). The Custodian's second (2nd) request for an extension of time is also invalid pursuant to Hardwick because the Custodian failed to request same in writing within the extended time frame. *See also* Kohn v. Township of Livingston (Essex), GRC Complaint No. 2010-303 (Final Decision dated March 27, 2012)(holding that the custodian's failure to request an extension of time within the statutorily mandated time frame resulted in an invalid extension request).

Further, the GRC notes that the Custodian and Complainant disputed whether a requestor may place conditions on a request for an extension of time. In Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council determined in pertinent part that “because the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the

Complainant's OPRA request and providing a date certain, on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian's request for an extension of time [to a specific date] to respond to the Complainant's OPRA request was made in writing within the statutorily mandated seven (7) business day response time" the Custodian did not unlawfully deny access to the requested records. *See also Starkey v. NJ Department of Transportation*, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009)(holding that the only requirements for a proper extension of time are that said request is in writing and provides an anticipated deadline date upon which a custodian would respond). Thus, as long as the Custodian responded in writing seeking an extension of time and providing a deadline date, said request is valid and no conditions apply.

Whether the Custodian timely responded to the Complainant's second (2nd) OPRA request?

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).

The Complainant filed GRC Complaint No. 2011-195 arguing that the Custodian responded in writing to the second (2nd) OPRA request on May 13, 2011. However, the e-mail exchange between the Custodian and Complainant on May 13, 2011 appears to have been in relation to the Complainant's first (1st) OPRA request. Specifically, the Custodian and Complainant argue about the basis for requesting an extension, which is only relevant to the request at issue in GRC Complaint No. 2011-159. Additionally, none of the May 13, 2011 e-mails contain any indication that the Custodian was responding to the second (2nd) OPRA request, even if said request was for the same records. Thus, it appears as though the Custodian specifically failed to respond to the second (2nd) OPRA request, thus resulting in a "deemed" denial of said OPRA request.

Therefore, the Custodian did not timely respond to the Complainant's second (2nd) OPRA request. As such, the Custodian's failure to respond in writing to said 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

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.

“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*.

The GRC notes that in Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006), the Council held that “OPRA does not limit the number of times a requestor may ask for the same record even when the record was previously provided.” Notwithstanding the Council’s long standing position on the issue, the facts of these complaints depart from this position. Specifically, the Complainant submitted his second (2nd) OPRA request and filed GRC Complaint No. 2011-159 for the same records on the same day: May 7, 2011.⁹ Thus, the Complainant’s actions give the appearance that he attempted to use the GRC’s complaint process as leverage on the Custodian to produce a different result in response to the Complainant’s second (2nd) OPRA request for the same records. Moreover, the Complainant gives credence to this view by threatening the Custodian with more complaints and requests for the same records in the instance of a denial of access. Additionally, notwithstanding the Custodian’s “deemed” denial of both OPRA requests, it is clear that the Complainant’s continuous filing of requests for the same records in a short time frame and subsequent complaints essentially caused the Custodian’s violations of OPRA.

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 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

⁹ The GRC did not receive the Complainant’s Denial of Access Complaint for GRC Complaint No. 2011-159 until May 9, 2011.

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 complaints, the Complainant sought “decisions,” “materials,” “preliminary investigation reports” and “responses” as noted on a Cooper & Cooper invoice dated March 3, 2011. The GRC previously decided on an identical set of request items in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (July 2012). In that complaint, the custodian’s counsel denied access to the complainant’s OPRA request, to include the request items for the records also at issue herein, advising that same was invalid. The Council determined that because the complainant’s OPRA request items “fail[ed] to identify with reasonable clarity the specific government records sought, these request items are invalid under OPRA.” *Id.* at pg. 8. The Council further determined that:

“The GRC further notes that request items [seeking “preliminary investigation reports”] and [a “draft response”], by their very nature, appear to be inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material. In fact, the Council has consistently determined that draft documents are exempt from disclosure under OPRA as [ACD] material. *See Ciesla (on behalf of The Valley Hospital) v. New Jersey Department of Health & Senior Services, Division of Health Care Quality and Oversight*, GRC Complaint No. 2010-38 (Final Decision dated May 24, 2011).” *Id.*

Therefore, pursuant to *N.J.A.C.* 1:1-15.2(a) and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant’s record of convictions, because judicial notice could have been taken of the records of any court in New Jersey, and appellant’s record of convictions were exclusively in New Jersey. *See Sanders v. Division of Motor Vehicles*, 131 N.J. Super. 95 (App. Div. 1974).

The GRC thus takes judicial notice of GRC Complaint No. 2011-119. Although the Custodian here attempted to locate and obtain nondescript records from Cooper & Cooper, there are no facts present in these complaints that would ultimately change the Council’s first (1st) decision regarding these complaints. Specifically, the Complainant’s OPRA request sought generic records devoid of necessary identifiers that would easily enable the Custodian to provide access to same and further sought records that, by their nature, appear to be ACD material otherwise exempt under OPRA. Thus, the GRC adopts its determination in GRC Complaint No. 2011-119.

Therefore, because the Complainant’s two (2) requests fail to identify with reasonable clarity the specific government records sought, these request items are invalid under OPRA pursuant to MAG; Bent; NJ Builders; Schuler. *See* GRC Complaint No. 2011-119. Thus, the Custodian has not unlawfully denied access to any records. N.J.S.A. 47:1A-6.

Finally, the GRC notes that the Complainant's actions in these two (2) complaints put the GRC in a position to adjudicate essentially the same complaint not once, but three (3) times when taking into account the Council's decision in GRC Complaint No. 2011-119. In fact, the Complainant has created a pattern of continuously filing identical OPRA requests and subsequent complaints in a short amount of time. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2011-128 et seq. (July 2012); 2011-161 et seq. (Interim Order dated August 28, 2012); 2011-194 (Interim Order dated August 28, 2012); 2011-119 (Interim Order dated August 28, 2012); 2011-158 & 2011-193; 2011-160 & 2011-196. In all instances, the Complainant submitted OPRA requests for the same records, complaints based on those requests and subsequently filed more requests and complaints over again even though complaints concerning those records were pending before the Council. The duplicative complaints filed by the Complainant have essentially required the Council to adjudicate the same issue numerous times, which has resulted in the unnecessary expenditure of scarce administrative resources.

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

OPRA states that:

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

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

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

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

Although the Custodian's failure to respond in writing to the Complainant's first (1st) OPRA request within the extended time frame results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. and the Custodian's failure to respond to the Complainant's second (2nd) OPRA request results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra, the Complainant's requests are invalid and the Custodian did not unlawfully deny the Complainant access to any records. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

"[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

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

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

an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

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

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

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

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

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

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

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

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than

federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon ... " *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

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

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

In these complaints, the Complainant requested that the Council order disclosure of the responsive records and find that the Custodian knowingly and willfully violated OPRA. However, the Council has determined that the Complainant's requests are invalid and that the Custodian did not unlawfully deny access to any records. Therefore, the Complainant is not a prevailing party entitled to an award of reasonable attorney's fees.

Therefore, pursuant to Teeters, *supra*, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason, *supra*, no factual causal nexus exists between the Complainant's filing of these Denial of Access Complaints and the relief ultimately achieved. Specifically, the Complainant's two (2) requests are invalid and the Custodian did not unlawfully deny access to any records. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian timely responded to the Complainant's first (1st) OPRA request in writing requesting an extension of time until May 6, 2011 to respond to said request, the Custodian's failure to timely respond in writing

within the extended deadline results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009). The Custodian’s second (2nd) request for an extension of time is also invalid pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because the Custodian failed to request same in writing within the extended time frame. *See also* Kohn v. Township of Livingston (Essex), GRC Complaint No. 2010-303 (Final Decision dated March 27, 2012)(holding that the custodian’s failure to request an extension of time within the statutorily mandated time frame resulted in an invalid extension request).

2. The Custodian did not timely respond to the Complainant’s second (2nd) OPRA request. As such, the Custodian’s failure to respond in writing to said 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).
3. Because the Complainant’s two (2) requests fail to identify with reasonable clarity the specific government records sought, these request items are invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (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). *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (July 2012). Thus, the Custodian has not unlawfully denied access to any records. N.J.S.A. 47:1A-6.
4. Although the Custodian’s failure to respond in writing to the Complainant’s first (1st) OPRA request within the extended time frame results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.i. and the Custodian’s failure to respond to the Complainant’s second (2nd) OPRA request results in a “deemed” denial 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), the Complainant’s requests are invalid and the Custodian did not unlawfully deny the Complainant access to any records. Additionally, the evidence of record does not indicate that the Custodian’s violations 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 these Denial of Access Complaints and the relief ultimately achieved. Specifically, the Complainant's two (2) requests are invalid and the Custodian did not unlawfully deny access to any records. 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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September 18, 2012