



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

**FINAL DECISION**

**June 26, 2012 Government Records Council Meeting**

John Paff  
Complainant  
v.

Complaint No. 2011-174

Neptune Township Housing Authority (Monmouth)  
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council (“Council”) considered the June 19, 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. Although the Custodian provided a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to provide an anticipated date upon which the records responsive to the Complainant’s request for when the executive session minutes would be provided to the Complainant. Accordingly, the Custodian is in violation of OPRA pursuant to N.J.S.A. 47:1A-5.i. and Russomano v. Twp of Edison, GRC Complaint No. 2002-86 (July 2003).
2. Because the Custodian’s response to the Complainant’s OPRA request failed to provide a lawful basis for a denial, the Custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
3. Because the Custodian certified to the GRC on June 4, 2012 that the requested executive session minutes were not approved by the Township at the time of the Complainant’s OPRA request, such executive session minutes are draft documents that constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to the requested executive session minutes pursuant to N.J.S.A. 47:1A-6.
4. Although the Custodian failed to provide a written response to the Complainant’s OPRA request that provided a date certain upon which the Complainant could expect access to be granted or denied, and failed to provide in said response a



lawful basis for the denial of access, the Custodian certified to the GRC that the requested minutes were not approved by the governing body at the time of the Complainant's OPRA request and were therefore exempt from disclosure under OPRA as ACD material; thus, the Custodian did not unlawfully deny the Complainant access to the requested records because the Custodian met his burden of proving that the Complainant was not entitled access to the requested minutes. Accordingly, 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. Specifically, the Complainant failed to demonstrate the Custodian unlawfully denied him access to the requested November 16, 2010 executive session minutes of the Neptune Township Housing Authority. 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 26<sup>th</sup> Day of June, 2012

Steven F. Ritardi, Esq., Acting 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: June 28, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 26, 2012 Council Meeting**

**John Paff<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2011-174**

v.

**Neptune Township Housing Authority (Monmouth)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of:  
Executive session minutes of the November 16, 2010 Neptune Township Housing Authority meeting.<sup>3</sup>

**Request Made:** December 9, 2010  
**Response Made:** December 15, 2010  
**Custodian:** Paul Caverly  
**GRC Complaint Filed:** May 16, 2011<sup>4</sup>

**Background**

**December 9, 2010**

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

**December 15, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing via facsimile to the Complainant's OPRA request on the fourth (4<sup>th</sup>) business day following receipt of such request. The Custodian states the minutes of the special meeting and closed session of November 16, 2010 have been sealed by the Township Attorney. The Custodian informs that the Complainant that he may contact the Township Attorney and inquire when they may become disclosable.

**May 16, 2011**

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

- Complainant's OPRA request dated December 9, 2010

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

<sup>2</sup> Represented by Bart Cook, Esq., of Bart Cook Law (Asbury Park, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

- Letter from the Custodian to the Complainant dated December 15, 2010<sup>5</sup>

The Complainant's Counsel maintains the Custodian failed to disclose the November 16, 2010 executive minutes of the Neptune Township Housing Authority ("Authority"). Counsel argues that the Custodian is withholding the minutes in their entirety without identifying the reason why the entire document may be privileged. Counsel contends that merely stating that the minutes are "sealed" is not a recognized exception to disclosure under OPRA.

Counsel requests that the GRC order the Custodian to provide the Complainant with a copy of the Authority's November 16, 2010 executive session minutes with redactions where appropriate. In addition, Counsel requests that the GRC find the Complainant a prevailing party pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and award a reasonable attorney's fee.

The Complainant does not agree to mediate this complaint.

#### **May 25, 2011**

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

#### **June 1, 2011**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated December 9, 2010
- Letter from the Custodian to the Complainant dated December 15, 2010<sup>6</sup>

The Custodian certifies that a search yielded the requested records. The Custodian further certifies that all of the records requested by the Complainant have a permanent retention schedule and that none of the records were destroyed. The Custodian certifies that he informed the Complainant that the minutes of the special meeting and closed session of November 16, 2010 were unavailable because they were sealed by the Township Attorney. The Custodian maintains that the minutes remained sealed until May 31, 2011. The Custodian certifies that the Township Attorney authorized the unsealing of the minutes on said date. The Custodian certifies that he called the Complainant and informed him that he could speak to the Township Attorney about obtaining the November 16, 2010 minutes since the date of their unsealing.

The Custodian argues that the Township's defense relies on the holding of Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-225 (April 2007) for the proposition that access to the November 16, 2010 minutes was lawfully denied because the minutes were not yet approved and accordingly, not a government record that is subject to disclosure under OPRA. The Custodian requests that the GRC find in favor of the Township and deny the Complainant any attorney's fees.

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<sup>5</sup> The Complainant attached additional documentation that is not relevant to the adjudication of this instant complaint.

<sup>6</sup> The Custodian attached additional documentation that is not relevant to the adjudication of this instant complaint.

### **June 1, 2012**

Letter from the GRC to the Custodian. The GRC requests additional information from the Custodian in order to adjudicate this complaint. Accordingly, the GRC calls upon the Custodian to answer the following:

1. Were the November 16, 2010 minutes approved?
2. If so, when were the minutes approved?

### **June 4, 2012**

Letter from the Custodian to the GRC. The Custodian responds to the GRC's June 1, 2012 request for additional information. The Custodian certifies that the November 16, 2010 minutes were approved at the December 21, 2010 regular meeting.

### **Analysis**

### **Whether the Custodian sufficiently responded to the Complainant's OPRA requests?**

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>7</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an

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<sup>7</sup> It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

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 Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003), while responding to the complainant’s OPRA request, the custodian provided an initial response by telephone and letter indicating that the Township Administrator would be responding to the request at a later (unspecified) date. It was not until well after the filing of a Denial of Access Complaint that the requestor received a written response from the custodian advising that the Township would not be responding because the “request” sought information and not government records. The GRC held that the custodian was obligated to respond to the complainant’s request in seven (7) business days, either rejecting the request as defective under OPRA or advising the requestor of the specific date by which a response would be provided. Having chosen to defer a response to the request to the Township Administrator with an open-ended response timeframe, the Council found that the custodian erred by failing to advise the requestor of the date by which the Administrator would respond, effectively violating N.J.S.A. 47:1A-5.i.

Moreover, OPRA provides that if a “...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” (Emphasis added.) N.J.S.A. 47:1A-5.g. In DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), the complainant argued in the Denial of Access Complaint that although the custodian responded in writing in a timely manner, the custodian failed to provide some of the records responsive and further failed to provide a specific lawful basis for denying access to the missing records.

The Council held that:

“... the Council’s decisions have repeatedly supported this statutory mandate by holding that custodians must provide a legally valid reason for any denial of access to records. *See* Seabrook v. Cherry Hill Police Department, GRC Complaint No. 2004-40 (April 2004), Rosenblum v. Borough of Closter, GRC Complaint No. 2005-16 (October 2005) and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (October 2005). The Council also held that for a denial of access to be in compliance with OPRA, it must be specific and must be sufficient to prove that a custodian’s denial is authorized by OPRA. *See* Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008). Here, while the Custodian’s response to the Complainant’s request was within the time allowed by N.J.S.A. 47:1A-5.i., his response was not in compliance with OPRA because it failed to provide a specific basis for denying the Complainant access to certain records pursuant to N.J.S.A. 47:1A-5.g. and the Council’s decisions in Seabrook, *supra*, Rosenblum, *supra*, Paff, *supra* and Morris, *supra*.” Id. at pg. 7.

Here, the Custodian responded to the Complainant's OPRA requests in writing on the fourth (4<sup>th</sup>) business day following the receipt of the respective requests. Although the Custodian responded to said request timely and in writing, the Custodian merely informed the Complainant that the requested minutes were sealed and failed to provide the Complainant a date on which to expect disclosure of the records. Instead, the Custodian referred the Complainant to the Township's attorney and failed to provide a lawful basis for the denial of access. Such a response is in violation of N.J.S.A. 47:1A-5.g., as the Custodian failed to specifically grant access, deny access, seek clarification, or request an extension of time to produce the requested records in said response as mandated by N.J.S.A. 47:1A-5.g. Accordingly, the Custodian's response is insufficient and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Therefore, although the Custodian provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to provide an anticipated date upon which the records responsive to the Complainant's request for when the executive session minutes would be provided to the Complainant. Accordingly, the Custodian is in violation of OPRA pursuant to N.J.S.A. 47:1A-5.i. and Russomano.

Furthermore, because the Custodian's response to the Complainant's OPRA request failed to provide a lawful basis for a denial, the Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. DeAppolonio.

### **Whether the Custodian unlawfully denied access to the requested executive session minutes?**

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.

In the instant matter, the Complainant requested access to the executive session minutes of the November 16, 2010 Neptune Township Housing Authority meeting. The Complainant alleges that the Custodian failed to disclose the executive session minutes. The Custodian subsequently certified in his letter to the GRC dated June 4, 2012 that the December 21, 2010 executive session minutes had not yet been approved at the time of the Complainant’s December 9, 2010 request.

As a general matter, draft documents are advisory, consultative and deliberative (“ACD”) communications. Although OPRA broadly defines a “government record” as records either “made, maintained or kept on file in the course of [an agency’s] official business,” or “received” by an agency in the course of its official business, N.J.S.A. 47:1A-1.1, the statute also excludes from this definition a variety of documents and information. *Ibid.* See Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that “inter-agency or intra-agency advisory, consultative, or deliberative material” is not included within the definition of a government record. N.J.S.A. 47: 1A-1 .1.

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7<sup>th</sup> Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass’n, v. Dinkins, 807 F. Supp., 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn. App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); *pet. for cert. den.* 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it “reflect[s] that aspect of the agency’s function that precedes formal and informed decision making.” *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004), the Court reviewed an OPRA request to the Department of Corrections for draft regulations and draft statutory revisions. The Court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” *Id.* at 18. It further held:

“[t]he trial judge ruled that while appellant had not overcome the presumption of non-disclosure as to the entire draft, it was nevertheless entitled to those portions which were eventually adopted. Appellant appeals from the portions withheld and DOC appeals from the portions required to be disclosed. We think it plain that all these drafts, in their entirety, are reflective of the deliberative process. On the other hand,



appellant certainly has full access to all regulations and statutory revisions ultimately adopted. We see, therefore, no basis justifying a conclusion that the presumption of nondisclosure has been overcome. *Ibid.* (Emphasis added.)”

Additionally, the GRC has previously ruled on the issue of whether draft meeting minutes are exempt from disclosure pursuant to OPRA. In Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council held that “... the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.” *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-106 (February 2009) and Wolosky v. Stillwater Township (Sussex), GRC Complaint No. 2009-30 (January 2010).

Thus, in accordance with the foregoing case law and the prior GRC decision in Parave-Fogg, *supra*, all draft minutes of a meeting held by a public body are entitled to the protection of the deliberative process privilege. Draft minutes are pre-decisional. In addition, they reflect the deliberative process in that they are prepared as part of the public body’s decision making concerning the specific language and information that should be contained in the minutes to be adopted by that public body, pursuant to its obligation under the Open Public Meetings Act to “keep reasonably comprehensible minutes.” N.J.S.A. 10:4-14.

In the instant matter, the evidence of record indicates that the Complainant submitted the instant OPRA request on December 9, 2010; the Custodian certified to the GRC on June 4, 2012 that the November 16, 2010 minutes were approved at the December 21, 2010 regular meeting. Accordingly, at the time of the Complainant’s request, the November 16, 2010 minutes had not yet been approved and therefore qualified as draft minutes. As previously stated, draft minutes are pre-decisional material that benefits from the deliberative process privilege outlined in Parave-Fogg.

Therefore, because the Custodian certified to the GRC on June 4, 2012 that the requested executive session minutes were not approved by the Township at the time of the Complainant’s OPRA request, such executive session minutes are draft documents that constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg. Accordingly, the Custodian has borne her burden of proving a lawful denial of access to the requested executive session minutes pursuant to N.J.S.A. 47:1A-6.

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

OPRA states that:

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

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

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

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

Although the Custodian failed to provide a written response to the Complainant’s OPRA request that provided a date certain upon which the Complainant could expect access to be granted or denied, and failed to provide in said response a lawful basis for the denial of access, the Custodian certified to the GRC that the requested minutes were not approved by the governing body at the time of the Complainant’s OPRA request and were therefore exempt from disclosure under OPRA as ACD material; thus, the Custodian did not unlawfully deny the Complainant access to the requested records because the Custodian met his burden of proving that the Complainant was not entitled access to the requested minutes. Accordingly, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. 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 John Paff v. Neptune Township Housing Authority (Monmouth), 2011-174 – Findings and Recommendations of the Executive Director

Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that “[a] plaintiff is considered a prevailing party ‘when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.’” *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); see also Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart “generously” defines “a prevailing party [a]s one who succeeds ‘on any

significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005) (NJDP), 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 matter, the Custodian has borne his burden of proof by demonstrating that he lawfully denied the Complainant access to the requested November 16, 2010 executive session minutes. As a result, the Complainant's litigation was unsuccessful and did not result in the obtaining of the sought relief.

Accordingly, pursuant to Teeters, 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, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Complainant failed to demonstrate the Custodian unlawfully denied him access to the requested November 16, 2010 executive session minutes of the Neptune Township Housing Authority. 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 provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to provide an anticipated date upon which the records responsive to the Complainant's request for when the executive session minutes would be provided to the Complainant. Accordingly, the Custodian is in violation of OPRA pursuant to N.J.S.A. 47:1A-5.i. and Russomano v. Twp of Edison, GRC Complaint No. 2002-86 (July 2003).
2. Because the Custodian's response to the Complainant's OPRA request failed to provide a lawful basis for a denial, the Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).

3. Because the Custodian certified to the GRC on June 4, 2012 that the requested executive session minutes were not approved by the Township at the time of the Complainant's OPRA request, such executive session minutes are draft documents that constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to the requested executive session minutes pursuant to N.J.S.A. 47:1A-6.
4. Although the Custodian failed to provide a written response to the Complainant's OPRA request that provided a date certain upon which the Complainant could expect access to be granted or denied, and failed to provide in said response a lawful basis for the denial of access, the Custodian certified to the GRC that the requested minutes were not approved by the governing body at the time of the Complainant's OPRA request and were therefore exempt from disclosure under OPRA as ACD material; thus, the Custodian did not unlawfully deny the Complainant access to the requested records because the Custodian met his burden of proving that the Complainant was not entitled access to the requested minutes. Accordingly, 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. Specifically, the Complainant failed to demonstrate the Custodian unlawfully denied him access to the requested November 16, 2010 executive session minutes of the Neptune Township Housing Authority. 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

June 19, 2012