



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 25, 2012 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2011-194

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 Supplemental 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. The Custodian timely complied with the Council’s August 28, 2012 Interim Order by certifying that no responsive records exist for the relevant time frame.
2. Although the GRC determined that the Complainant’s OPRA request was valid under OPRA and thus the Custodian failed to bear his burden of a lawful denial of access to the responsive records pursuant to N.J.S.A. 47:1A-6, the Custodian timely complied with the Council’s August 28, 2012 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. 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, no records responsive to the Complainant’s OPRA request exist. 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**

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

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2011-194

v.

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

Records Relevant to Complaint: Copies of subpoena or subpoenas served on Mr. William T. Cooper, III, Esq. (“Mr. Cooper”), the Custodian, Mr. Terry G. Warrelman (“Mr. Warrelman”), Ms. Jo-Anne B. Schubert (“Ms. Schubert”), and the Borough of South Bound Brook (“Borough”) by the Somerset County Prosecutor’s Office whereby the State of New Jersey is the victim for the time frame of January 1, 2011 to May 12, 2011.

Request Made: May 12, 2011

Response Made: May 13, 2011

Custodian: Donald E. Kazar

GRC Complaint Filed: May 31, 2011³

Background

August 28, 2012

Government Records Council’s (“Council”) Interim Order. At its August 28, 2012 public meeting, the Council considered the August 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted, by a majority vote, to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian unlawfully denied access to the Complainant’s seven (7) OPRA requests because they are valid pursuant to GRC Complaint No. 2011-128 et seq., GRC Complaint No. 2011-167 and Byrnes v. Morris County Prosecutor’s Office, GRC Complaint No. 2009-323 (Interim Order dated December 21, 2010). N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the responsive records because the Custodian already disclosed the records to the Complainant on August 17, 2012 pursuant to the Council’s July 31, 2012 Order. Nevertheless, the Custodian must either provide any

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.

records that fall within the time period of May 1, 2011 and May 12, 2011 or legally certify that no responsive records exist.

2. **The Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if necessary, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

August 29, 2012

Council's Interim Order ("Order") distributed to the parties.

August 29, 2012

E-mail from the Custodian to the GRC. The Custodian states that he does not understand the Council's Order because he already complied with a similar order in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2011-128, 2011-129, 2011-130, 2011-131 & 2011-132 (Interim Order dated July 31, 2012).

August 29, 2011

E-mail from the GRC to the Custodian. The GRC states that the Council's Order requires the Custodian to provide whether any subpoenas came into existence between May 1, 2011 and May 12, 2011 or certify if no records exist. The GRC states that the Custodian must account from the time period between the request in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-167 and the submission of the OPRA request at issue herein.

September 5, 2012

Custodian's response to the Council's Interim Order. The Custodian certifies that the Council's August 28, 2012 Order required him to provide any subpoenas that came into existence between May 1, 2011 and May 12, 2011 or certify that no records responsive exist. The Custodian certifies that no records responsive exist for the time frame indicated in the Council's Order.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Analysis

Whether the Custodian complied with the Council's August 28, 2012 Interim Order?

At its August 28, 2012 meeting, the Council ordered the Custodian to:

“... either provide any records that fall within the time period of May 1, 2011 and May 12, 2011 or legally certify that no responsive records exist. **The Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**” (Footnotes omitted.)

The Council disseminated its Interim Order to the parties on August 29, 2012, 2012. Thus, the Custodian's response was due by close of business on September 6, 2012. On September 5, 2012, the Custodian certified that no records responsive for the time frame May 1, 2011 to May 12, 2011 exist.

Therefore, the Custodian timely complied with the Council's August 28, 2012 Interim Order by certifying that no responsive records existed for the relevant time frame.

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 GRC determined that the Complainant's OPRA request was valid under OPRA and thus the Custodian failed to bear his burden of a lawful denial of access to the responsive records pursuant to N.J.S.A. 47:1A-6, the Custodian timely complied with the Council's August 28, 2012 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

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

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the 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), *cert. 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)."

The Complainant filed the instant complaint requesting that the GRC order the Custodian to disclose responsive records. The GRC determined that it would not order disclosure of records because the Custodian previously responded to similar OPRA requests in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-128, 2011-129, 2011-130, 2011-131 & 2011-132 (Interim Order dated July 31, 2012). However, the Council ordered the Custodian to either provide access to records that came into existence between May 1, 2011 and May 12, 2011 or certify that no records responsive exist. The Custodian complied in a timely manner, certifying that no responsive records for the relevant time frame existed.

In determining whether the Complainant is a prevailing party in the instant complaint, the GRC must look to the Custodian's compliance in Verry, *supra*. Specifically, the Custodian therein disclosed to the Complainant two (2) subpoenas dated September 28, 2005 and September 22, 2009. The Custodian certified that these two (2) subpoenas represented all records responsive that existed to the Complainant's five (5) OPRA requests. Thus, based on the Custodian certified compliance of the Council's July

31, 2012 Interim Order, no records responsive to the Complainant's OPRA request seeking the same records at issue herein existed.

Further, on September 5, 2012, the Custodian submitted certified confirmation of compliance in the instant complaint, certifying that no records for the time frame May 1, 2011 to May 12, 2011 exist. Therefore, it is clear from the evidence of record that no records responsive to the OPRA request at issue herein exist. Because no records were provided to the Complainant (because none exist), the Complainant has not achieved a change in the custodian's conduct and cannot be considered 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, no records responsive to the Complainant's OPRA request exist. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian timely complied with the Council's August 28, 2012 Interim Order by certifying that no responsive records exist for the relevant time frame.
2. Although the GRC determined that the Complainant's OPRA request was valid under OPRA and thus the Custodian failed to bear his burden of a lawful denial of access to the responsive records pursuant to N.J.S.A. 47:1A-6, the Custodian timely complied with the Council's August 28, 2012 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. 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, no records responsive to the Complainant's OPRA request exist. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

September 18, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

August 28, 2012 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2011-194

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council ("Council") considered the August 21, 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. The Custodian unlawfully denied access to the Complainant's seven (7) OPRA requests because they are valid pursuant to GRC Complaint No. 2011-128 et seq., GRC Complaint No. 2011-167 and Byrnes v. Morris County Prosecutor's Office, GRC Complaint No. 2009-323 (Interim Order dated December 21, 2010). N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the responsive records because the Custodian already disclosed the records to the Complainant on August 17, 2012 pursuant to the Council's July 31, 2012 Order. Nevertheless, the Custodian must either provide any records that fall within the time period of May 1, 2011 and May 12, 2011 or legally certify that no responsive records exist.
2. **The Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if necessary, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of August, 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: August 29, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2011-194

v.

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

Records Relevant to Complaint: Copies of subpoena or subpoenas served on Mr. William T. Cooper, III, Esq. (“Mr. Cooper”), the Custodian, Mr. Terry G. Warrelman (“Mr. Warrelman”), Ms. Jo-Anne B. Schubert (“Ms. Schubert”), and the Borough of South Bound Brook (“Borough”) by the Somerset County Prosecutor’s Office whereby the State of New Jersey is the victim for the time frame of January 1, 2011 to May 12, 2011.

Request Made: May 12, 2011

Response Made: May 13, 2011

Custodian: Donald E. Kazar

GRC Complaint Filed: May 31, 2011³

Background

April 29, 2011

E-mail from Mr. Cooper to the Complainant. Mr. Cooper states that he is in receipt of the Complainant’s e-mail seeking assistance on properly identifying government records. Mr. Cooper states that limiting an OPRA request for subpoenas to those issued by the SCPO only partially narrows the request. Mr. Cooper states that seeking these records over a period of six (6) years (2005 through 2011) would require the Custodian to undertake a lengthy research through the Borough’s files.

Mr. Cooper advises that the Complainant should review the Council’s decision in Byrnes v. Morris County Prosecutor’s Office, GRC Complaint No. 2009-323 (Interim Order dated December 21, 2010) for additional suggestions on how to properly compose an OPRA request for subpoenas. Mr. Cooper further advises that if the Complainant is interested in obtaining subpoenas issued by the SCPO, he should consider directing an OPRA request to that agency as the complainant in Byrnes, *supra*, did when seeking subpoenas issued to Rockaway Township by the Morris County Prosecutor’s Office.

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.

May 12, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA. The Complainant indicates that the preferred method of delivery is e-mail or facsimile if the records are not available electronically.

May 13, 2011

Custodian's response to the OPRA request with the following attachments:

- N.J. Court Rules, R. 3:6 et seq. – The Grand Jury.
- N.J. Court Rules, R. 3:13 et seq. – Depositions; Discovery.
- Patterson v. Somerdale Board of Education, GRC Complaint No. 2004-127 (December 2004).
- E-mail chain (undated).

The Custodian responds in writing via e-mail to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that access to the requested record is denied because same are exempt from disclosure pursuant to R. 3:6. The Custodian states that subpoenas are products of grand jury requests and are not subject to access under OPRA as noted in Patterson.⁴

May 13, 2011

E-mail from the Complainant to the Custodian. The Complainant states that the documents attached to his e-mail are silent on the disclosure of subpoenas and are therefore not relevant. The Complainant notes that the GRC has already determined in Byrnes v. Morris County Prosecutor's Office, GRC Complaint No. 2009-323 (Interim Order dated December 21, 2010) that an OPRA request similar to the Complainant's OPRA request was valid.

The Complainant states that on April 29, 2011 he received guidance from Mr. Cooper, previous Counsel for the Borough, directing the Complainant to review the Council's decision in Byrnes on how to properly request subpoenas.⁵

May 13, 2011

E-mail from the Custodian to the Complainant. The Custodian states that he believes that R. 3:6 et seq. is relevant because subpoenas are grand jury records. The Custodian states that the Complainant has already filed many complaints with the GRC regarding these records and that the Borough's position will not change if the Complainant submits additional requests for the same records. The Custodian states that he does not believe he can disclose any subpoenas without a court order.

⁴ The GRC notes that in Patterson, the Council determined that it did not have the authority to compel disclosure of debit card records because the Grand Jury, which is an arm of the Judiciary, had possession of sole copies of said records. The facts of that complaint are inapposite to the facts herein.

⁵ The Complainant notes that he requested the records at issue herein pursuant to OPRA and the common law right of access.

May 31, 2011

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:⁶

- E-mail from Mr. Cooper to the Complainant dated April 29, 2011.
- Complainant’s OPRA request dated May 12, 2011
- E-mail from the Custodian to the Complainant dated May 13, 2011 (with attachments).
- E-mail from the Complainant to the Custodian dated May 13, 2011.
- Letter from the Custodian to the Complainant dated May 13, 2011.

The Complainant states that on May 12, 2011, he submitted an OPRA request to the Custodian. The Complainant states that the Custodian responded on May 13, 2011 denying access to the responsive subpoenas because they may be Grand Jury records and attaching R 3:6, R. 3:13 and the Council’s Patterson decision.

The Complainant states that he e-mailed the Custodian on the same day stating that none of the attached material provides that subpoenas are exempt from disclosure. The Complainant states that his request is similar to the request at issue in Byrnes. The Complainant states that he further advised the Custodian that he fashioned his OPRA request based on guidance received from Mr. Cooper on April 29, 2011. The Complainant states that the Custodian reasserted on May 13, 2011 that the requested records were exempt from disclosure.

The Complainant reiterates that he fashioned the OPRA request at issue herein based on Mr. Cooper’s April 29, 2011 guidance. The Complainant notes that at no time did Mr. Cooper assert that subpoenas were exempt from disclosure. The Complainant contends that even though the Custodian was copied on Mr. Cooper’s April 29, 2011 e-mail, he knowingly and willfully refused to grant access to the responsive records. The Complainant asserts that the Custodian’s response contradicts the Council’s decision in Byrnes and further contradicts Mr. Cooper’s advice.

The Complainant states that the Custodian never disclosed records and has knowingly and willfully failed to comply with OPRA. 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.

⁶ The Complainant attached additional records that are not relevant to the instant complaint.
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2011-194 – Findings and Recommendations of the Executive Director

July 11, 2011

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

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.

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.

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 with no attachments.

The Custodian contends that the Borough’s response to Verry v. Borough of South Bound Brook, GRC Complaint No. 2011-167 applies to the OPRA request at issue herein: same is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian contends that the requests lack specificity and are open-ended demand for records. The Custodian asserts that the courts have consistently upheld such a denial. MAG, supra.

The Custodian finally requests that the GRC review whether the Borough is capable of seeking fees from the Complainant for misleading or omitting information and submitting frivolous complaints.

Analysis

Whether the Custodian unlawfully denied access to the requested subpoenas records?

OPRA provides that:

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

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

Additionally, OPRA defines a government record as:

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

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

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

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

The records at issue herein are subpoenas served on five (5) parties from January 1, 2011 to May 12, 2011. The Complainant filed this complaint seeking a determination that the Custodian disclose the responsive records and a determination that the Custodian knowingly and willfully violated OPRA. After further review, the GRC has determined that the parties and the request at issue herein seeking subpoenas is nearly identical to one of the OPRA requests encompassed in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-128, 2011-129, 2011-130, 2011-131 & 2011-132 (Interim Order dated July 31, 2012). The Complainant’s OPRA request is also nearly identical to the OPRA request at issue in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-167.⁸ In both complaints, the Complainant sought subpoenas to the date of the OPRA request, which preceded the submission of the OPRA request at issue herein.

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

⁸ This complaint was combined with GRC Complaint Nos. 2011-161, 2011-162, 2011-163, 2011-164, 2011-165 and 2011-166 due to commonalty of parties and issues.

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. 2011-128 et seq. and GRC Complaint No. 2011-167. In both complaints, the Complainant submitted Denial of Access Complaints arguing that his OPRA requests were valid pursuant to Byrnes v. Morris County Prosecutor's Office, GRC Complaint No. 2009-323 (Interim Order dated December 21, 2010). In GRC Complaint No. 2011-128 et seq., the Complainant submitted one (1) request for a seven (7) year period served on each of five (5) specific parties. Mr. Cooper responded on behalf of the Custodian denying access to said requests stating that same were overly broad and thus invalid pursuant to MAG, supra, Bent, supra, New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). The Council determined that the Complainant's OPRA requests were valid OPRA requests that:

“... are similar to, if not more specific than, the requests in Byrnes and are valid under OPRA. Specifically, the Complainant included the specific type of record, a time period, (3) key words and five (5) individuals who were named in the subpoenas sought. Thus, said requests contain enough information for the Custodian simply to search his files to find the responsive subpoenas.” *Id.*

The Council thus ordered the Custodian to provide the responsive records to the Complainant and to certify if no records responsive to a particular OPRA request exist. The GRC further takes judicial notice that the Custodian complied with the Council's July 31, 2012 Interim Order (“Order”) on August 17, 2012 by providing the responsive subpoenas to the Complainant and certified confirmation of compliance to the Executive Director within the extended time frame to comply with said Order.

The GRC further takes judicial notice that in GRC Complaint No. 2011-167, it took judicial notice of GRC Complaint No. 2011-128 et seq. and thus determined that the Complainant's OPRA requests were valid. The GRC further determined that because the GRC already ordered the Custodian to provide the responsive records pursuant to the Council's July 31, 2012 Interim Order, ordering the Custodian to again disclose the records would not advance the purpose of OPRA, which is to ensure an informed citizenry. *See Bart v. City of Paterson Housing Authority*, 403 N.J. Super. 609 (App. Div. 2008). However, the GRC did order the Custodian to “either provide any records that fall within [March 20, 2011 and May 1, 2011] or legally certify that no responsive records exist.” *See* GRC Complaint No. 2011-161 et seq. at pg. 12.

Here, the Complainant's OPRA request seeks the same records at issue in GRC Complaint No. 2011-128 et seq., and GRC Complaint No. 2011-167: subpoenas served on five (5) parties from January 1, 2011 to May 12, 2011. Thus, the Council's holding in both complaints applies here. The Complainant's OPRA request contains sufficient information for the Custodian to locate the responsive records and the responsive records were provided in response to the Council's July 31, 2012 Interim Order.

The GRC notes that the Complainant submitted his OPRA request at issue in GRC Complaint No. 2011-167 on May 1, 2011 and submitted the OPRA request at issue herein on May 12, 2011. It is possible that the Borough received subpoenas within that time frame; therefore, the Custodian must certify whether any responsive subpoenas came into existence between May 1, 2011 and May 12, 2011.

Thus, the Custodian unlawfully denied access to the Complainant's seven (7) OPRA requests because they are valid pursuant to GRC Complaint No. 2011-128 et seq., GRC Complaint No. 2011-167 and Byrnes, *supra*. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the responsive records because the Custodian already disclosed the records to the Complainant on August 17, 2012 pursuant to the Council's July 31, 2012 Order. Nevertheless, the Custodian must either provide any records that fall within the time period of May 1, 2011 and May 12, 2011 or legally certify that no responsive records exist.

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?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the Complainant's seven (7) OPRA requests because they are valid pursuant to GRC Complaint No. 2011-128 et seq., GRC Complaint No. 2011-167 and Byrnes v. Morris County Prosecutor's Office, GRC Complaint No. 2009-323 (Interim Order dated December 21, 2010). N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the responsive records because the Custodian already disclosed the records to the Complainant on August 17, 2012 pursuant to the Council's July 31, 2012 Order. Nevertheless, the Custodian must either provide any records that fall within the time period of May 1, 2011 and May 12, 2011 or legally certify that no responsive records exist.
2. **The Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if necessary, and simultaneously**

provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁹ to the Executive Director.¹⁰

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹⁰ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.