State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 25, 2012 Government Records Council Meeting

Robert A. Verry
Complainant
v.
Borough of South Bound Brook (Somerset)
Custodian of Record

Complaint Nos. 2011-160 & 2011-196

At the September 25, 2012 public meeting, the Government Records Council ("Council") considered the September 18, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian timely responded to the Complainant's first (1st) OPRA request in writing requesting an extension of time until May 6, 2011 to respond to said request, the Custodian's failure to timely respond in writing within the extended deadline results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009)

2. Although the Custodian provided a written response to the Complainant's second (2nd) OPRA request within the statutorily mandated seven (7) business days, said response is insufficient pursuant to OPRA because it does not grant access, deny access, seek clarification, or request an extension of time. N.J.S.A. 47:1A-5.g., Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007), *and* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009).

3. Because the Complainant's two (2) requests fail to identify with reasonable clarity the specific government records sought, these request items are invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (July 2012). Thus, the Custodian has not unlawfully denied access to any records. N.J.S.A. 47:1A-6.

4. Although the Custodian's failure to respond in writing to the Complainant's first (1st) OPRA request within the extended time frame results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. and the Custodian's response to the Complainant's second (2nd) OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g., Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007), *and* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009), the Complainant's requests are invalid and the Custodian did not unlawfully deny the Complainant access to any records. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of these Denial of Access Complaints and the relief ultimately achieved. Specifically, the Complainant's two (2) requests are invalid and the Custodian did not unlawfully deny access to any records. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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

Final Decision Rendered by the
Government Records Council
On The 25th Day of September, 2012

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: September 27, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

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

Robert A. Verry[1] **GRC Complaint No. 2011-160 & 2011-196**
Complainant

v.

Borough of South Bound Brook (Somerset)[2]
Custodian of Records

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

1. January 26, 2011 entry – "… e-mail from [the Complainant's Counsel] …"
2. January 28, 2011 entry – "… e-mail from [the Complainant's Counsel] regarding adjournment of Case Management Conf."

Request Made: April 19, 2011 and May 7, 2011
Response Made: April 28, 2011 and May 13, 2011.
Custodian: Donald E. Kazar
GRC Complaint Filed: May 9, 2011 and May 31, 2011[3]

Background

April 19, 2011

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that the preferred method of delivery is either e-mail or facsimile.

April 28, 2011

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

[1] Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).
[2] Represented by Francesco Taddeo, Esq. (Somerville, NJ).
[3] The GRC received the Denial of Access Complaint on said date.
[4] The Custodian certifies in the Statement of Information that he received the Complainant's OPRA request on April 21, 2011.

April 28, 2011

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

May 7, 2011

E-mail from the Custodian to the Complainant. The Custodian states that he faxed the Complainant on May 6, 2011 advising that he was not in possession of the responsive e-mails and was working on obtaining same from Cooper & Cooper if they are not exempt as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1.[5]

May 7, 2011

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that the preferred method of delivery is either e-mail or facsimile.

May 9, 2011

Denial of Access Complaint for GRC Complaint No. 2011-160 filed with the Government Records Council ("GRC") with the following attachments:

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

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

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

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

The Complainant does not agree to mediate this complaint.

[5] The Custodian received a copy of the Denial of Access Complaint via e-mail on May 7, 2011, a Saturday.

May 13, 2011

Custodian's response to the second (2nd) OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request.[6] The Custodian states that he does not possess the responsive e-mails in his office because same were sent to Cooper & Cooper as "attorney-client privilege." The Custodian states that he sent an e-mail to the Complainant's Counsel requesting that Counsel provide same to the Custodian. The Custodian states that Counsel has not responded.

May 13, 2011

E-mail from the Complainant to the Custodian. The Complainant states that the Complainant's Counsel is not the custodian for the Borough; thus, the Custodian's denial of access based on Counsel's failure to respond is unlawful. The Complainant further argues that the Custodian's claim that the records are exempt under the attorney-client privilege is erroneous because the Custodian has already admitted that he has not seen the records. The Complainant questions whether it is the Custodian's position that every single correspondence from an attorney to a Borough attorney is privileged.

The Complainant states that the Custodian is required to retrieve, store, archive and disclose records in response to OPRA requests. The Complainant states that if the Custodian plans on using Cooper & Cooper's resignation as an exemption, the Complainant will be forced to litigate the issue accordingly. The Complainant asserts that the Custodian's refusal to disclose records will be considered a "deemed" denial.

May 13, 2011

E-mail from the Custodian to the Complainant. The Custodian states that he never said the Borough was in possession of the responsive records; rather, he stated that the records are not at his office.

The Custodian further states that he never promised that the extension of time sought for the first (1st) OPRA request was "for the sole purpose …" of disclosing records. The Custodian states that he simply attempted to fulfill the Complainant's OPRA request and did so with his response.

May 31, 2011

Denial of Access Complaint for GRC Complaint No. 2011-196 filed with the GRC with the following attachments:

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

The Complainant states that he submitted an OPRA request to the Borough on May 7, 2011. The Complainant states that he and the Custodian exchanges e-mails on

[6] The Custodian certifies in the Statement of Information that he received the Complainant's OPRA request on April 21, 2011.

May 13, 2011 in which the Custodian asserted that the responsive e-mails were not in the Borough's possession.

The Complainant asserts that the Cooper & Cooper invoice proves that the Borough, through previous counsel, possessed the responsive records. The Complainant thus asserts that the Custodian's response was deceptive in that not having possession of the records "in his office" does not constitute a lawful denial of access. The Complainant contends that if it did, a custodian would be able to lawfully deny access to records in storage. The Complainant further asserts that a custodian would then only have to store records offsite in order to exempt access.

The Complainant states that the Custodian previously noted in response to the second (2nd) OPRA request that the e-mails were sent to Cooper & Cooper as attorney-client privileged material. The Complainant contends that the Custodian however never denied access to the responsive records pursuant to this exemption because he was not in possession of the records.

The Complainant asserts that the Custodian never provided him with the responsive e-mails. The Complainant asserts that the Custodian knowingly and willfully failed to disclose the responsive record. The Complainant asserts that until the GRC holds the Custodian accountable for his continuous disregard for OPRA, the Custodian will not change his practices to comply with the law. The Complainant thus requests the following:

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

June 29, 2011

Request for the Statement of Information ("SOI") for GRC Complaint No. 2011-160 sent to the Custodian.

June 29, 2011

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until July 15, 2011 to submit the SOI for GRC Complaint No. 2011-160. The Custodian states that this extension is necessary because of the upcoming holiday and the Custodian will be out of the office for part of the following week.

June 29, 2011

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

July 11, 2011

Request for the SOI for GRC Complaint No. 2011-196 sent to the Custodian.

July 14, 2011[7]

Custodian's SOI for GRC Complaint No. 2011-160 with the following attachments:

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

The Custodian certifies that he received the Complainant's OPRA request on April 21, 2011. The Custodian certifies that he responded in writing on April 28, 2011 requesting an extension of time until May 6, 2011 to respond to the Complainant's OPRA request. The Custodian certifies that on May 6, 2011, he faxed[8] the Complainant advising that he was not in possession of the responsive e-mails but would attempt to obtain same from Cooper & Cooper.

The Custodian contends that this complaint is a clear example of the harassing and frivolous nature of the Complainant's OPRA request. The Custodian notes that the Complainant sought e-mails that the Complainant's Counsel sent to Cooper & Cooper, previous counsel for the Borough. The Custodian certifies that Cooper & Cooper resigned during the pendency of the subject OPRA request.

The Custodian contends that he believes the records were produced to the Complainant and this complaint should thus be dismissed because the Complainant was being disingenuous with the Council. The Custodian further contends that it appears that the Complainant filed this complaint because the Custodian failed to meet the "terms" of his agreement to extend the Custodian's response time until May 6, 2011. The Custodian disputes the Complainant's attempt to place these terms on the Custodian's request for an extension of time. The Custodian notes the GRC's Handbook for Records Custodians (Fifth Edition – January 2011) specifically states that "[i]t 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." (Emphasis added.) *Id.* at pg. 16.

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

[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).

[8] The Custodian does not include a copy of this facsimile as part of his Denial of Access Complaint.

taint the GRC process. Counsel contends that in toto, these factors evidence the Complainant's clear, malicious intent in filing this complaint.

July 15, 2011

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

July 18, 2011

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

July 18, 2011

Letter from the Complainant to the GRC. The Complainant asserts that his Denial of Access Complaint position for GRC Complaint No. 2011-160 that the Custodian knowingly and willfully failed to disclose the responsive records stands. The Complainant further notes that the GRC is aware that the Custodian was previously fined for a knowing and willful violation. Paff v. Borough of South Bound Brook, GRC Complaint No. 2006-158 (May 2007). The Complainant also notes that the Custodian has consistently ignored OPRA requests. Perilli v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2006-180 (September 2007); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-49 (June 2009); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-233 (January 2012); LaGrua v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-335 (January 2011)(voluntary withdrawal); LaGrua v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-336 (January 2011)(voluntary withdrawal). The Complainant argues that the Custodian's record before the GRC proves that he has a pattern of failing to respond to OPRA requests.

The Complainant states that the Custodian presented an erroneous argument in the SOI for GRC Complaint No. 2011-160. The Complainant specifically notes that in the document index, the Custodian claims to have provided the responsive e-mails to the Complainant. The Complainant asserts that because he is represented by the Complainant's Counsel in select complaints has no bearing on this complaint: the Complainant has not received the responsive records as of this date. The Complainant asserts that the totality of the circumstances prove that the Custodian knowingly and willfully violated OPRA. The Complainant further contends that the Custodian erroneously argued that GRC Complaint No. 2011-160 should be dismissed because the Complainant did not state that the Custodian provided him with the responsive records. The Complainant reiterates that the Custodian never provided him with the responsive e-mails.

The Complainant asserts that both the Custodian and Custodian's Counsel use the attorney-client privilege exemption on a consistent basis. The Complainant argues that the e-mails in question were billed under the caption "Administration" instead of under the caption "OPRA – Verry." The Complainant contends that had if the subject e-mails involved discussion regarding the Complainant, they would have been billed under

"OPRA – Verry" and not "Administration." The Complainant asserts that it thus appears that the e-mails relate to another of the Complainant Counsel's clients.

The Complainant further contends that the Custodian's request from the Complainant's Counsel to obtain the e-mails indicates that the Borough accepts the position that because the Complainant's Counsel previously represented the Complainant, then the Borough should be allowed to access all of Counsel's files. The Complainant asserts that the evidence indicates that the e-mails should have been disclosed because neither the Custodian nor Custodian's Counsel asserted that the records were subject to the attorney-client privilege.

The Complainant asserts that regardless of whether Cooper & Cooper resigned during the pendency of the Complainant's first (1st) OPRA request, the Custodian still has a legal obligation to either grant or deny access to the responsive records. The Complainant further asserts that both the Custodian's Counsel and Cooper & Cooper share an office in Somerville; thus, the Custodian's Counsel could have easily obtained any record possessed by Cooper & Cooper. The Complainant further notes that an e-mail from Cooper & Cooper to the Custodian's Counsel dated July 14, 2011 proves that Counsel could easily obtain records. The Complainant asserts that at the point that the Custodian's Counsel replaced Cooper & Cooper, all relevant documents regarding Borough business should have been released to the Custodian's Counsel.

The Complainant states that the Custodian's Counsel argued in the SOI for GRC Complaint No. 2011-160 that the Complainant's conduct "… is not warranted, nor do I believe should influence the GRC's decisions regarding the Custodian's conduct in dealing with the Complainant's endless amount of mostly frivolous requests." The Complainant contends that this argument is contradictory because the Custodian appears to handle the Complainant's OPRA requests in a negative or defensive posture based on the identity of the requestor. The Complainant asserts that the GRC should not allow the Custodian to respond in this manner. The Complainant further asserts that the Custodian Counsel's characterization of the Complainant's OPRA requests as "mostly frivolous" indicates that even Counsel believes the requests are not frivolous. The Complainant notes that not one of his requests have ever been frivolous.

The Complainant finally contends that the Custodian, Custodian's Counsel and Cooper & Cooper have routinely asserted that the Complainant is harassing the Borough for the sole purpose of intimidating the Complainant. The Complainant asserts this intimidation is an attempt to allow the Borough to deny the public unfettered access to government records. The Complainant asserts that Paff v. South Bound Brook Borough & Donald E. Kazar, Docket No. L-1212-10 provides an adequate example of the Custodian's aggressive attempt to keep the "Mayor's Wife's family" criminal investigation report hidden from the public. The Complainant thus contends that public officials like the Custodian, Custodian's Counsel and Cooper & Cooper should not be allowed to bully the public into not submitting OPRA requests. The Complainant asserts that allowing them to do so would negate the purpose of OPRA and advance government corruption.

July 19, 2011

E-mail from the Custodian to the GRC. The Custodian requests an additional two (2) day extension of time to submit the SOI for GRC Complaint No. 2011-196.

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, 2011[9]

Custodian's SOI for GRC Complaint No. 2011-196 with no attachments:

The Custodian contends this complaint is the same as GRC Complaint No. 2011-160 and should be dismissed. The Custodian refers the GRC to review the SOI for GRC Complaint No. 2011-160.

Analysis

Whether the Custodian timely responded to the Complainant's first (1st) OPRA request?

OPRA provides that:

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

Further, OPRA provides that:

> "[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access … or deny a request for access … as soon as possible, but *not later than seven business days after receiving the request* … In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* … If the government record is in storage or archived, the requestor shall be *so advised within seven business days* after the custodian receives the request. The requestor *shall be advised by the custodian when the record can be made available*. If the record *is not made available by that time, access shall be deemed denied.*" (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

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

In GRC Complaint No. 2011-160, which is similar to Kohn, *supra*, the Custodian responded to the Complainant in writing on the fifth (5th) business day after receipt of the Complainant's first (1st) OPRA request requesting an extension of time until May 6, 2011 to respond to same. The Custodian e-mailed the Complainant on May 7, 2011 stating that he faxed a letter to the Complainant on May 6, 2011 regarding the e-mails at issue herein. However, the Custodian failed to provide the GRC with a copy of this letter.

Whenever a denial of access complaint is filed, a custodian is required to bear his burden of proving a lawful denial of access to any records. N.J.S.A. 47:1A-6. As previously stated, a custodian's failure to respond in within the extended time frame results in a "deemed" denial of access N.J.S.A. 47:1A-5.i. Here, the Custodian has failed to provide adequate evidence of his timely response within the extended time frame and has thus failed to bear the burden of proving he responded in a timely manner. Thus, the Custodian failed to respond in writing granting access, denying access, requesting clarification or seeking a second (2nd) extension of time within that extended deadline.

Therefore, although the Custodian timely responded to the Complainant's first (1st) OPRA request in writing requesting an extension of time until May 6, 2011 to respond to said request, the Custodian's failure to timely respond in writing within the extended deadline results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn, *supra*. *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).

Further, the GRC notes that the Custodian and Complainant disputed whether a requestor may place conditions on a request for an extension of time. In Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council determined in pertinent part that "because the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant's OPRA request and providing a date certain, on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian's request

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

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

The Custodian responded to the Complainant's second (2nd) OPRA request in a timely manner stating that he did not physically possess the responsive records because the responsive e-mails were sent to Cooper & Cooper. The Custodian further noted that he contacted the Complainant's Counsel regarding the subject e-mails, but that Counsel has not responded.

In Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007), the custodian provided a written response to the complainant's request; however, said response did not explicitly grant or deny access to the requested record. The Council held that the custodian's response represented a "deemed" denial of access:

> "[a]lthough the Custodian responded in writing within the statutory time period under OPRA the Custodian's response to the request for the sign that references the PHA's desire for Spanish-speaking tenants to bring their own interpreter was so vague that it could not be determined if the requested sign did not exist or if the request was being denied."

Subsequent to Bart, *supra*, the Council was again tasked with determining whether a custodian sufficiently responded to an OPRA request based on a similarly vague response. In Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009), the complainant's request Item No. 1 sought "… the ordinance creating the position of Municipal Administrator." The custodian responded in writing in a timely manner to the complainant's OPRA request Item No. 1 stating that he believed no ordinance existed. However, the custodian then stated that because the position of Municipal Clerk is noted in the salary ordinance, an ordinance creating the position of Municipal Clerk may exist. The complainant subsequently filed a complaint disputing the custodian's response. The Council thus held that:

> "N.J.S.A. 47:1A-5.g. states that if a Custodian is 'unable to comply with a request for access, then the Custodian shall indicate the specific basis' for noncompliance. Although the Custodian responded in writing to Item No. 1 in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because he failed to provide a definitive response

as to whether the record requested in Item No. 1 existed. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g." *Id.* at pg. 5.

The Council's holding in Verry, *supra*, applies to the instant complaint because the Custodian responded in writing but failed to state definitively whether he was granting access, denying access, seeking clarification or requesting an extension of time to respond. Specifically, the Custodian stated that he did not possess physical custody of the records, but that he had contacted the Complainant's Counsel in an attempt to obtain the responsive records. The Custodian's response on its face is clearly deficient.

The GRC recognizes that it has previously expanded the custodian's options for responding to an OPRA request granting access, denying access, seeking clarification or requesting an extension of time; however, a custodian's response must definitively state as much with sufficient clarity, especially in an instance where a custodian is seeking clarification. *See* Kelley, *supra*. In this complaint, the Custodian's statement does not achieve this purpose: the Custodian stated that he did not have physical custody of the e-mails because the e-mails were sent by the Complainant's Counsel directly to Cooper & Cooper. The Custodian further advised the Complainant that he contacted the Complainant's Counsel about obtaining the e-mails but received no response. This statement could be construed as the Custodian seeking an extension of time to receive a response from the Complainant's Counsel, but is extremely vague taken *in toto* with the rest of the Custodian's response that he is not in physical possession of the records. Simply put, the Custodian did not sufficiently request an extension of time nor did the Custodian grant access, deny access or seek clarification.

Therefore, although the Custodian provided a written response to the Complainant's second (2nd) OPRA request within the statutorily mandated seven (7) business days, said response is insufficient pursuant to OPRA because it does not grant access, deny access, seek clarification, or request an extension of time. N.J.S.A. 47:1A-5.g., Bart, *supra*, *and* Verry, *supra*.

The GRC notes that in Caggiano, *supra*, the Council held that "OPRA does not limit the number of times a requestor may ask for the same record even when the record was previously provided." Notwithstanding the Council's long standing position on the issue, the facts of this complaint depart from this position. Specifically, the Complainant submitted a second (2nd) OPRA request for the same e-mails on the same day that he filed a complaint for the first (1st) OPRA request. Thus, the Complainant's actions give the appearance that he attempted to use the GRC's complaint process as pressure exerted upon the Custodian to produce a different result in response to the Complainant's second (2nd) OPRA request for the same records. Additionally, notwithstanding the Custodian's failure to provide adequate evidence that he provided the responsive record on May 6, 2011, the timing of the Complainant's second (2nd) OPRA request and GRC Complaint No. 2011-160 essentially caused the Custodian's insufficient response.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records 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 crux of the instant complaint is two-fold. First, there is a question as to the location of a record and whether the Custodian adequately proved that he made an attempt to obtain records from another location in order to respond to the Complainant's two (2) OPRA requests. Second, there is a question as to whether the Complainant's requests are overly broad based on previous GRC case law.

Regarding the location of a record, well-settled case law requires a custodian to attempt to obtain responsive records regardless of their location. *See* Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) and Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). When a complaint is filed, a custodian bears the burden of proving that he or she attempted to obtain access to records not physically maintained by the custodian. In Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-107 (Interim Order dated July 25, 2007), the custodian made documented attempts to obtain responsive records from a local councilman with no success. The Council determined that "… her response to the Complainant that Councilman Sharkey had not responded to the Custodian's memo dated November 9, 2006 was insufficient … The Custodian has failed to bear the burden of proving that her denial of access was lawful pursuant to N.J.S.A. 47:1A-6." *Id.* at pg. 4. The Council further determined that the custodian did not knowingly and willfully violate OPRA.

This complaint mirrors Johnson, *supra*, in that the Custodian certified that he did not have physical possession of the records. Further, the Custodian responded to the Complainant's second (2nd) OPRA request noting that he attempted to obtain records but received no response. However, the Custodian did not include any evidence of correspondence (whether memos, e-mails, letters, etc.) indicating that he attempted to obtain records from Cooper & Cooper. The Council has already determined that the Custodian's response to the Complainant's second (2nd) OPRA request was insufficient.

However, this complaint departs from Johnson, *supra*, in that the GRC has previously determined that request items identical to the requests at issue herein were invalid. Specifically, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (July 2012), the complainant (who is the same Complainant in the matter now before the Council) sought, among other records, the same two (2) undated e-mails from the Complainant's Counsel to Cooper & Cooper, as noted on a Cooper & Cooper invoice dated March 3, 2011. In that complaint, the custodian's counsel denied access to the Complainant's OPRA request, including the request items for the records also at issue herein, advising that same was invalid. The Council determined that the complainant's OPRA request items:

> "… are invalid under OPRA because they fail to identify specific dates or ranges of dates for the responsive e-mails and because the request items require research beyond the scope of a custodian's duties pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010)" *Id.* at pg. 9.

In reaching its decision, the Council reasoned that "… each request item did not contain a date or time frame other than the date of the entry on the invoice. These entry dates are not necessarily the dates of the e-mails sought. *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (May 2012)(The custodian provided five (5) records to the GRC for an *in camera* review and certified that the actual dates of the records differed from the billing date contained on the invoice that the complainant used to request same)." *Id.* at pg. 6-7.

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

The GRC thus takes judicial notice of GRC Complaint No. 2011-119. Although the Custodian herein attempted to locate and obtain nondescript records from Cooper & Cooper, there are no facts present in these complaints that would ultimately change the Council's first (1st) decision regarding these complaints. Specifically, the Complainant's OPRA request sought e-mails devoid of dates or time frames as required pursuant to Elcavage, *supra*, that would easily enable the Custodian to provide access to same. Thus, the GRC adopts its determination in GRC Complaint No. 2011-119. Based on this determination, the Custodian could not have unlawfully denied access to an invalid OPRA request.

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

Finally, the GRC notes that the Complainant's actions in these two (2) complaints put the GRC in a position to adjudicate essentially the same complaint not once, but three (3) times when considering the Council's decision in GRC Complaint No. 2011-119. In fact, although the Complainant argued that the Custodian has a pattern of non-responsiveness, which was not the case herein, the Complainant has created his own pattern of continuously filing identical OPRA requests and subsequent complaints in a short amount of time. *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2011-128 et seq. (July 2012); 2011-161 et seq. (Interim Order dated August 28, 2012); 2011-194 (Interim Order dated August 28, 2012); 2011-119 (Interim Order dated August 28, 2012); 2011-158 & 2011-193; 2011-159 & 2011-195. In all instances, the Complainant submitted OPRA requests for the same records, complaints based on those requests and subsequently filed more requests and complaints over again even though complaints concerning those records were pending before the Council. The duplicative complaints filed by the Complainant have essentially required the Council to adjudicate the same issue numerous times, which has resulted in the unnecessary expenditure of scarce administrative resources.

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

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (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's failure to respond in writing to the Complainant's first (1st) OPRA request within the extended time frame results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. and the Custodian's response to the Complainant's second (2nd) OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g., Bart, *supra*, *and* Verry, *supra*, the Complainant's requests are invalid and the Custodian did not unlawfully deny the Complainant access to any records. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a "prevailing party" if he/she achieves the desired result because the

complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

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

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

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

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

> "New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).
>
> Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); see also Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id*. at 422.
>
> This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to

find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id*. at 153.

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

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

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

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

In these complaints, the Complainant requested that the Council order disclosure of the responsive records and find that the Custodian knowingly and willfully violated OPRA. However, the Council has determined that the Complainant's requests are invalid

and that the Custodian did not unlawfully deny access to any records. Therefore, the Complainant is not a prevailing party entitled to an aware of reasonable attorney's fees.

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian timely responded to the Complainant's first (1st) OPRA request in writing requesting an extension of time until May 6, 2011 to respond to said request, the Custodian's failure to timely respond in writing within the extended deadline results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009)

2. Although the Custodian provided a written response to the Complainant's second (2nd) OPRA request within the statutorily mandated seven (7) business days, said response is insufficient pursuant to OPRA because it does not grant access, deny access, seek clarification, or request an extension of time. N.J.S.A. 47:1A-5.g., Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007), *and* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009).

3. Because the Complainant's two (2) requests fail to identify with reasonable clarity the specific government records sought, these request items are invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (July 2012). Thus, the Custodian has not unlawfully denied access to any records. N.J.S.A. 47:1A-6.

4. Although the Custodian's failure to respond in writing to the Complainant's first (1st) OPRA request within the extended time frame results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. and the Custodian's response to the Complainant's second (2nd) OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g., Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007), *and* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009), the Complainant's requests are invalid and the Custodian did not unlawfully deny the Complainant access to any records. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of these Denial of Access Complaints and the relief ultimately achieved. Specifically, the Complainant's two (2) requests are invalid and the Custodian did not unlawfully deny access to any records. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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September 18, 2012