



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

Justin Santagata, Esq.
(on behalf of Alexis Fitzsimmons)
Complainant

Complaint No.2011-265

v.
New Jersey Civil Service Commission
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 23, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian failed to bear his burden of proof under N.J.S.A. 47:1A-6 that he responded in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business days. Thus, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Notwithstanding the Custodian’s “deemed denial,” because the Custodian disclosed to the Complainant the approved layoff plan for the Bergen County Sheriff’s Office, the Custodian did not unlawfully deny access to said record pursuant to N.J.S.A. 47:1A-6.
3. Because the Custodian certified in the Statement of Information dated September 8, 2011 that no records responsive to the Complainant’s clarified request item number 2 exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said record pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian failed to bear his burden of proof under N.J.S.A. 47:1A-6 that he responded in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business days and thereby failed to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days which resulted in a “deemed” denial of the Complainant’s OPRA

request, the Custodian did disclose the record responsive to the Complainant's clarified request item number 1 and determined that no records responsive to the Complainant's clarified request item number 2 exist. Further, there is no evidence in the record to suggest that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian disclosed the record responsive to the Complainant's clarified request item number 1 and determined that no records responsive to the Complainant's clarified request item number 2 exist via e-mail on July 29, 2011, prior to the filing of the Denial of Access Complaint in this matter on August 10, 2011. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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

Final Decision Rendered by the
Government Records Council
On The 18th Day of December, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 20, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Justin Santagata, Esq.¹
(on behalf of Alexis Fitzsimmons)
Complainant

GRC Complaint No. 2011-265

v.

New Jersey Civil Service Commission²
Custodian of Records

Records Relevant to Complaint: All correspondence including documents, attachments, layoff plans, etc., between the Bergen County Sheriff's Office or any agent, representative, or officer thereof, and the New Jersey Department of Personnel and/or the Civil Service Commission since September 2010.³

Request Made: July 15, 2011

Response Made: July 22, 2011⁴

Custodian: Christopher Randazzo

GRC Complaint Filed: August 10, 2011⁵

Background

July 15, 2011

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

July 22, 2011

Custodian's response to the OPRA request. The Custodian responds verbally via telephone to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian informs the Complainant that he must clarify his request.

¹ The Complainant is an attorney with Kaufman, Semeraro, Bern, Deutsch & Leibman, LLP (Fort Lee, NJ).

² Represented by DAG Pamela Ullman, on behalf of the NJ Attorney General.

³ The records requested are different in the Denial of Access Complaint versus as stated in the original request.

⁴ The response was made on or about this date. The Custodian certified that he telephoned the Complainant for a clarification of the Complainant's OPRA request within five (5) business days of receiving the request, and July 22, 2011 was the fifth business day following the Custodian's receipt of the request. Further, the Complainant e-mailed the Custodian on July 22, 2011 clarifying his OPRA request.

⁵ The GRC received the Denial of Access Complaint on said date.

July 22, 2011

E-mail from the Complainant to the Custodian. The Complainant states that he is clarifying his e-mail request. The Complainant states that he is now requesting the following records:

1. All layoff plans submitted by the Bergen County Sheriff's Office to the Civil Service Commission/Department of Personnel since September 2010.
2. All correspondence, including attachments, between the Bergen County Sheriff's Office and the Civil Service Commission/Department of Personnel since September 2010 where the sender or recipient or copied parties are Michael Saudino, Ralph Kornfeld, Donna Pallatta, Diane Harris, Rosemary Freeman, Phyllis Sigona or Joe Hill, Jr., and which contains a subject line or contents with "Alexis Fitzsimmons," "Fitzsimmons," "Advanced Practice Nurse," "Jail," or "McGuire."

July 29, 2011

E-mail from the Complainant to the Custodian. The Complainant asks the Custodian for the status of his request and also asks for a clarification of the legal authority for denying him access to all layoff plans.⁶

July 29, 2011

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that he has received the Complainant's clarification of his OPRA request. The Custodian states that he is attaching a copy of the approved layoff plan for the Bergen County Sheriff's Office in response to the Complainant's clarified request item number 1. The Custodian states that with respect to the Complainant's clarified request item number 2, a search of the files has not resulted in any records responsive to the Complainant's request. The Custodian also informs the Complainant that proposed layoff plans are exempt from disclosure as inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1.

August 1, 2011

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian that he has received his response to the Complainant's modified requests. The Complainant asks the Custodian to refer him to a GRC or court decision which holds that unapproved layoff plans fall within the deliberative process privilege. The Complainant states that because the Civil Service Commission rejected a layoff plan it does not make the plan deliberative or consultative. The Complainant states that the Civil Service Commission's role is only to ensure procedural compliance with the layoff regulations, not to deliberate with the appointing authority on a particular layoff plan.⁷

⁶ By "all layoff plans" the Complainant is referring to both unapproved as well as final layoff plans.

⁷ The Complainant also makes a conclusive statement with respect to the likely analysis under the common law right of access.

August 10, 2011

E-mail from the Complainant to the Custodian. The Complainant states that he did not receive a reply to his e-mail dated August 1, 2011. The Complainant requests the Custodian clarify the basis for denying the Complainant access to unapproved layoff plans beyond the “generic deliberative process language in OPRA.”

August 10, 2011

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that he responded to the Complainant’s request on July 29, 2011, and that he has therefore met his obligation as the Custodian under OPRA. The Custodian also informs the Complainant that he does not intend to further clarify the basis for denying the Complainant’s request for unapproved layoff plans. The Custodian tells the Complainant that he can file a complaint with the GRC and is attaching the procedures for filing a complaint.

August 10, 2011

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

- Complainant’s OPRA request dated July 15, 2011
- E-mail from the Custodian to the Complainant dated July 29, 2011
- E-mail from the Complainant to the Custodian dated August 1, 2011
- E-mail from the Complainant to the Custodian dated August 10, 2011
- E-mail from the Custodian to the Complainant dated August 10, 2011

The Complainant states that he provided his OPRA request to the Custodian on July 15, 2011 and that the Custodian denied his request on August 1, 2011.⁸ The Complainant states that his argument alleging he was wrongfully denied access to the requested records is contained in his attached August 1, 2011 and August 10, 2011 e-mails to the Custodian.

The Complainant does not agree to mediate this complaint.

August 16, 2011

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

August 26, 2011

E-mail from the GRC to the Custodian’s Counsel. The GRC states that it is confirming the second and final extension of time for the Custodian to prepare and submit the SOI to the GRC. The GRC informs Counsel that the deadline for submission of the SOI is the close of business on September 8, 2011.⁹

⁸ There is nothing in the evidence of record to support the Complainant’s assertion that the Custodian denied his request on August 1, 2011.

⁹ The second extension of time for submission of the SOI to the GRC was approved by the GRC Secretary; however, there is nothing in the evidence of record to substantiate that the GRC ever approved a prior extension of time.

September 8, 2011

Custodian's SOI with the following attachments:

- NJ Civil Service Commission internal e-mail acknowledging receipt of the Complainant's OPRA request dated July 15, 2011
- E-mail from the Complainant to the Custodian dated July 22, 2011
- E-mail from the Complainant to the Custodian dated July 29, 2011
- E-mail from the Custodian to the Complainant dated July 29, 2011
- E-mail from the Complainant to the Custodian dated August 1, 2011
- E-mail from the Complainant to the Custodian dated August 10, 2011
- E-mail from the Custodian to the Complainant dated August 10, 2011

The Custodian certifies that his search for the requested records involved referring the request to State and Local Operations to check for records responsive to the Complainant's request.¹⁰ The Custodian further certifies that the employees of that division who are assigned to Bergen County searched their e-mails, phone logs and other correspondence for records responsive to the initial request and for records responsive to the clarified request.

The Custodian also certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services is not applicable.

The Custodian certifies that he received the Complainant's request on July 15, 2011. The Custodian further certifies that within five (5) business days of receiving the request he spoke via telephone with the Complainant whereupon he sought clarification of the Complainant's request. The Custodian certifies that he received an e-mail from the Complainant dated July 22, 2011, which confirmed the telephone conversation and clarified the Complainant's request. The Custodian certifies that by e-mail dated July 29, 2011, he disclosed an approved layoff plan for the Bergen County Sheriff's Office which was responsive to clarified item number 1 of the Complainant's request and informed the Complainant no records exist responsive to clarified item number 2 of the request. The Custodian also certifies that he informed the Complainant that proposed layoff plans are denied because they constitute ACD material pursuant to N.J.S.A. 47:1A-1.1.

The Custodian certifies that he received additional e-mails from the Complainant wherein the Complainant asked for a legal justification for the Custodian's denial of unapproved layoff plans. The Custodian certifies that he advised the Complainant by e-mail sent to the Complainant on August 10, 2011, that the legal justification was set forth in his e-mail to the Complainant dated July 29, 2011.

The Custodian certifies that although he initially informed the Complainant that unapproved layoff plans are exempt from disclosure as ACD material, in the instant case

¹⁰ This is a division within the Civil Service Commission.

no unapproved layoff plans exist because when Bergen County submitted its proposed layoff plan, it was approved without modification.

Analysis

Whether the Custodian timely responded to the Complainant's 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* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹¹ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, there is no dispute between the parties that the Complainant's OPRA request was submitted to the Custodian on July 15, 2011. The Custodian certified that he spoke with the Complainant via telephone on July 22, 2011, which was the fifth (5th) business day following receipt of such request, at which time he asked for a clarification of the request. There is nothing in the evidence of record, however, to indicate that the

¹¹ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Custodian responded in writing to the Complainant within the statutorily-mandated seven (7) business day period.

Therefore, the Custodian failed to bear his burden of proof under N.J.S.A. 47:1A-6 that he responded in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days. Thus, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

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 ... [t]he terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

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

Here, the Custodian requested a clarification of the Complainant's OPRA request and the Complainant clarified his request via e-mail dated July 22, 2011. The clarified request sought:

1. All layoff plans submitted by the Bergen County Sheriff's Office to the Civil Service Commission/Department of Personnel since September 2010.
2. All correspondence including attachments between the Bergen County Sheriff's Office and the Civil Service Commission/Department of Personnel since September 2010 where the sender or recipient or copied parties are Michael Saudino, Ralph Kornfeld, Donna Pallatta, Diane Harris, Rosemary Freeman, Phyllis Sigona or Joe Hill, Jr. and which contains a subject line or contents with "Alexis Fitzsimmons," "Fitzsimmons," "Advanced Practice Nurse," "Jail," or "McGuire."

The Custodian responded to the Complainant via e-mail dated July 29, 2011, by disclosing to the Complainant a copy of the approved layoff plan for the Bergen County Sheriff's Office which the Custodian determined was responsive to the Complainant's clarified request item number 1. The Custodian stated that a search of the files was made for clarified request item number 2; however, no such records responsive to the Complainant's request exist. Although the Custodian informed the Complainant that proposed layoff plans are exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1., he certified in the Statement of Information dated September 8, 2011, that no unapproved layoff plans exist because Bergen County's proposed layoff plan was approved without modification.

With respect to the record responsive to the Complainant's clarified request item number 1, the Custodian determined that the approved layoff plan for the Bergen County Sheriff's Office was responsive to the Complainant's request and he disclosed said record to the Complainant on July 29, 2011.

Therefore, notwithstanding the Custodian's "deemed denial," because the Custodian disclosed to the Complainant the approved layoff plan for the Bergen County Sheriff's Office, the Custodian did not unlawfully deny access to said record pursuant to N.J.S.A. 47:1A-6.

The Custodian certified in the SOI that the records responsive to the Complainant's clarified request item numbers 2 do not exist. Further, the Complainant provided no evidence to refute the Custodian's certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed and the complainant did not provide any evidence to refute the custodian's certification. The GRC determined that although the custodian failed to respond to the OPRA request in a timely manner, the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified in the SOI dated September 8, 2011, that no records responsive to the Complainant's clarified request item number 2 exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said record pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra.

Because the Custodian certified in the Statement of Information dated September 8, 2011, that no unapproved layoff plans which may be responsive to the Complainant's request exist, the Council need not analyze whether the Custodian unlawfully denied access to such record or records.

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).

In the instant complaint, although the Custodian failed to bear his burden of proof under N.J.S.A. 47:1A-6 that he responded in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days and thereby failed to respond in

writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days which resulted in a "deemed" denial of the Complainant's OPRA request, the Custodian did disclose the record responsive to the Complainant's clarified request item number 1 and determined that no records responsive to the Complainant's clarified request item number 2 exist. Further, there is no evidence in the record to suggest that the Custodian's actions had a positive element of conscious wrongdoing or were 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.*

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

spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

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

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

In the matter before the Council, the Custodian disclosed the record responsive to the Complainant’s clarified request item number 1 and determined that no records responsive to the Complainant’s clarified request item number 2 exist via e-mail on July 29, 2011; the Denial of Access Complaint in this matter was filed on August 10, 2011.

Thus, pursuant to Teeters, *supra*, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Additionally, pursuant to Mason, *supra*, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian disclosed the record responsive to the Complainant’s clarified request item number 1 and determined that no records responsive to the Complainant’s clarified request item number 2 exist via e-mail on July 29, 2011, prior to the filing of the Denial of Access Complaint in this matter on August 10, 2011. 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 failed to bear his burden of proof under N.J.S.A. 47:1A-6 that he responded in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days. Thus, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Notwithstanding the Custodian's "deemed denial," because the Custodian disclosed to the Complainant the approved layoff plan for the Bergen County Sheriff's Office, the Custodian did not unlawfully deny access to said record pursuant to N.J.S.A. 47:1A-6.
3. Because the Custodian certified in the Statement of Information dated September 8, 2011 that no records responsive to the Complainant's clarified request item number 2 exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said record pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian failed to bear his burden of proof under N.J.S.A. 47:1A-6 that he responded in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days and thereby failed to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days which resulted in a "deemed" denial of the Complainant's OPRA request, the Custodian did disclose the record responsive to the Complainant's clarified request item number 1 and determined that no records responsive to the Complainant's clarified request item number 2 exist. Further, there is no evidence in the record to suggest that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief

ultimately achieved. Specifically, the Custodian disclosed the record responsive to the Complainant's clarified request item number 1 and determined that no records responsive to the Complainant's clarified request item number 2 exist via e-mail on July 29, 2011, prior to the filing of the Denial of Access Complaint in this matter on August 10, 2011. 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: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 23, 2012¹²

¹² This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.