



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

September 29, 2016 Government Records Council Meeting

Michael I. Inzelbuch, Esq.
(o/b/o Center for Education)
Complainant

Complaint No. 2015-68

v.

Lakewood Board of Education (Ocean)
Custodian of Record

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although Ms. Piasentini timely responded in writing to the Complainant’s September 9, 2014 OPRA request on three occasions, a portion of her October 9, 2014 response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008), because she failed to provide a date certain upon which she would respond to the Complainant. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013). However, the GRC declines to order disclosure of the “Y.W.” contract or any other record responsive to OPRA request item No. 3 because the Custodian certified that he provided all responsive records to the Complainant in response to an unrelated OPRA request.
2. The Complainant’s request item Nos. 1, 2, and 7 are invalid because they failed to seek identifiable government records and would have required the Custodian to research fifteen (15) months of records to determine whether any reasonably fit within the criteria. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Edwards v. Hous. Auth. of Plainfiel (Union), GRC Complaint No. 2008-183 *et seq.* (Final Decision dated April 25, 2012); Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012). Additionally, requested item Nos. 5 and 8 are invalid because they failed to contain all necessary criteria required to be valid requests for e-mails and correspondence. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010); Tracey-Coll v. Elmwood Park Bd. of Educ.



(Bergen), GRC Complaint No. 2009-206 (June 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014). Thus, the Custodian did not unlawfully deny access to these items. N.J.S.A. 47:1A-6.

3. The Custodian has borne his burden of proving that he did not unreasonably deny access to any minutes, agendas, or “approvals” responsive to OPRA request item No. 4. N.J.S.A. 47:1A-6. Specifically, Ms. Piasentini provided to the Complainant a link to the Lakewood Board of Education’s homepage where the responsive records were readily available. See Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014).
4. Ms. Piasentini, as the primary respondent, insufficiently responded to a portion of the Complainant’s OPRA request item No. 3. However, the Complainant’s request item Nos. 1, 2, 5, 7, and 8 were invalid. Further, the Custodian, through Ms. Piasentini, disclosed records responsive to OPRA request item No. 3 on two occasions and properly directed the Complainant to the Lakewood Board of Education’s website for records responsive to OPRA request item No. 4. Additionally, the evidence of record does not indicate that Ms. Piasentini’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, no individual’s actions, including those of the Custodian, rose to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
5. 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. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the GRC has declined to grant the Complainant’s requested relief based on the evidence of record. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

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 29th Day of September, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: October 4, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2016 Council Meeting**

Michael I. Inzelbuch, Esq.¹
(On behalf of Center for Education)
Complainant

GRC Complaint No. 2015-68

v.

Lakewood Board of Education (Ocean)²
Custodial Agency

Records Relevant to Complaint: Pickup of:

1. Any and all documentation evidencing any and all communications with the New Jersey Department of Education (“DOE”) regarding the “Special Children’s Center” (“SCC”) from June 2013 to present.
2. Any and all documentation evidencing any and all payments made to SCC from September 2011 to present.
3. Any and all agreements, understandings, and letters of intent between the Lakewood Board of Education (“BOE”) and SCC from September 2011 to present.
4. Any and all BOE minutes, agendas, and approvals regarding item Nos. 2 and 3 above.
5. Any and all e-mails authored by Helen Tobia, Eli Freund, or the case managers for the children whose authorizations are attached from June 2013 to present.³
6. Any and all e-mails authored by the Custodian, Michael Azzara, Ms. Tobia, Laura Winters, and Mr. Freund regarding the SCC and/or Chaya Bender from June 2013 to present.
7. Any and all written statements completed by the BOE as to the “need” for SCC and all accompanying documentation from June 2013 to present.
8. Any and all documentation, e-mails, and correspondence regarding the SCC’s attempts to obtain a license from DOE.

Custodian of Record: Thomas D’Ambola
Request Received by Custodian: September 10, 2014
Response Made by Custodian: September 19, 2014
GRC Complaint Received: March 11, 2015

¹ No legal representation listed on record.

² Represented by James Eric Andrews, Esq., of Schenck, Price, Smith & King, LLP (Florham Park, NJ).

³ The Complainant attached thirty-eight (38) authorization forms for individual children.

Michael I. Inzelbuch, Esq., (On behalf of Center for Education) v. Lakewood Board of Education (Ocean), 2015-68 – Findings and Recommendations of the Executive Director

Background⁴

Request and Response:

On September 9, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 19, 2014, Diane Piasentini responded in writing on behalf of the Custodian, requesting an extension until October 1, 2014, given the complexity of the request. Ms. Piasentini noted that redactions may be necessary and that the Complainant can review minutes and agendas on the BOE’s website (www.lakewoodpiners.org).

On October 1, 2014, Ms. Piasentini responded on behalf of the Custodian stating that an extension until October 8, 2014, was necessary due to the voluminous nature of responsive records. On October 8, 2014, Ms. Piasentini sent a formal response to the Complainant, addressing each request item as follows:

1. Ms. Piasentini denied the request item, claiming that it is overly broad. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). “The BOE cannot search for all communications with DOE without knowing the author(s).”
2. Ms. Piasentini disclosed a vendor analysis list (7 pages) for 2012, 2013, and 2014.
3. Ms. Piasentini directed the Complainant to the Supervisor of the Child Study Teams to obtain access to student records. Ms. Piasentini noted that, according to “student record regulations,” only certified school district personnel with assigned educational responsibility for the students in question have access to student records.
4. Ms. Piasentini directed the Complainant to the BOE’s website for agendas and approvals.
5. See response to item No. 3.
6. Ms. Piasentini stated that the BOE was reviewing the responsive records for “inter-agency or intra-agency advisory, consultative, or deliberative” (“ACD”) material and would provide the records with redactions, if necessary, by October 9, 2014.
7. Ms. Piasentini denied the request item, claiming that it is overly broad. MAG, 375 N.J. Super. 534. The BOE would be required to research its records to locate those records referring to the “need” for the SCC.
8. Ms. Piasentini denied the request item, claiming that it is overly broad. MAG, 375 N.J. Super. 534. The BOE would be required to research its records to locate those records referring to the SCC’s “attempts to obtain a license.”

On October 9, 2014, Ms. Piasentini e-mailed the Complainant on behalf of the Custodian, granting access to 113 pages of contracts responsive the Complainant’s request item No. 3. Ms. Piasentini stated that she originally deemed the records exempt from access but noted that the BOE’s position later changed. Additionally, Ms. Piasentini noted that the BOE could not locate the contract for “Y.W.” (also responsive to item No. 3) but would forward same to the Complainant once it was located.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Michael I. Inzelbuch, Esq., (On behalf of Center for Education) v. Lakewood Board of Education (Ocean), 2015-68 – Findings and Recommendations of the Executive Director

Ms. Piasentini also sent the Complainant a second (2nd) e-mail, granting access to records responsive to the Complainant's request item No. 6 (26 pages). Ms. Piasentini noted that the BOE redacted student initials and names to protect student confidentiality.

On March 6, 2015, the Complainant e-mailed the Custodian. Therein, he provided clarification for item No. 1 as follows: known authors are Ms. Tobia, Ms. Winters, Mr. Freund or the Custodian and their staff members. The Complainant noted that these individuals also pertain to request item Nos. 7 and 8. Additionally, presumably in relation to item No. 3, the Complainant stated that he appreciated the BOE's position that it did not handle student records. However, the Complainant averred that some of the records concerned monies and that the BOE should be in possession of records regarding same. The Complainant noted that Custodian Counsel's colleagues apprised him that they were "working on" obtaining responsive records. Finally, the Complainant noted that he never received a follow-up response to item No. 6. The Complainant requested that the Custodian advise him of the status of this item by March 9, 2015, or he would file a Denial of Access Complaint. On March 9, 2015, the Custodian's Counsel e-mailed the Complainant a response to item No. 6, noting that he redacted student initials and some family names.

Denial of Access Complaint:

On March 11, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian did not receive any records until October 9, 2014; however, the disclosure was partial and incomplete. The Complainant contended that, after not receiving records the Custodian had promised him, he contacted the BOE on March 6, 2015. The Custodian alleged that the Custodian responded by providing additional limited records on March 9, 2015.

The Complainant alleged that the Custodian unlawfully denied access to responsive records. Specifically, the Complainant argued that the Custodian violated OPRA by unlawfully denying access or belatedly providing multiple records. The Custodian also contended that the Custodian failed to provide records responsive to all request items, although the Custodian did provide partial responses to his request item Nos. 3 and 6.

Statement of Information:

On April 15, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on September 10, 2014. The Custodian certified that Ms. Piasentini responded on his behalf obtaining two (2) extensions. The Custodian certified that BOE staff searched for responsive records, to exclude student records maintained by the Supervisor for Special Education Services. The Custodian affirmed that he also asked the Information Technology Department to perform a search for e-mails responsive to request item No. 6. The Custodian certified that Ms. Piasentini responded on October 8, and October 9, 2014, providing access to records in response to item Nos. 2, 3, and 6 (with redactions) and directed the Complainant to the BOE's website for item No. 4. The Custodian certified that Ms. Piasentini also denied access to request item Nos. 1, 7, and 8 as

overly broad and directed the Complainant to contact the Supervisor of Child Study Teams for item No. 5.

The Custodian averred that the BOE did not provide records responsive to item No. 1 because the request was invalid. The Custodian noted that the Complainant provided clarification on March 6, 2015, which he initially did not realize related to the subject OPRA request. The Custodian affirmed that the BOE was conducting a search for responsive records, utilizing the Complainant's clarification.

The Custodian affirmed that, although the BOE originally denied access to records responsive to item No. 3, Ms. Piasentini later believed that she might be able to access responsive records. Thus, on October 9, 2014, she disclosed records she believed were responsive to the requested item. The Custodian certified that the records provided, however, were responsive to a separate OPRA request that the Complainant submitted to the BOE on September 9, 2014. The Custodian averred that, after the Complainant submitted an unrelated OPRA request on March 11, 2015, identical to item No. 3 at issue here, the BOE searched for and located agreements between the SCC and BOE (113 pages). The Custodian certified that he redacted student names to protect their confidentiality and disclosed them to the Complainant on this day. The Custodian noted that he believed the Complainant might have already received the agreements from insurance counsel in connection with litigation involving the SCC.

The Custodian asserted that the BOE lawfully directed the Complainant to its website to locate records responsive to item No. 4, consistent with Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014). Further, the Custodian argued that the BOE lawfully directed the Complainant to contact the Supervisor of the Child Study Teams to obtain records responsive to item No. 5.

The Custodian certified that Ms. Piasentini disclosed records responsive to item No. 6 to the Complainant via e-mail on October 9, 2014. However, the Custodian affirmed that the Custodian's Counsel resent the records on March 9, 2015, as a precaution due to the lack of evidence indicating that the Complainant received the BOE's October 9, 2014 e-mail. The Custodian noted that the BOE also disclosed the records because the Complainant threatened to file a complaint with the GRC if he did not receive a response.

Finally, the Custodian certified that the BOE denied access to request item Nos. 7 and 8 as overly broad because the Custodian would have needed to conduct research in order to fulfill the request. Specifically, the Custodian argued that the items failed to identify specific government records. MAG, 375 N.J. Super. 534; NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007).

Analysis

Issues Presented

Initially, the GRC believes it necessary to address briefly the fact that the Complainant submitted clarification of his OPRA request item Nos. 1, 7, and 8 nearly five (5) months after

Ms. Piasentini, on behalf of the Custodian, denied same as invalid. Notwithstanding the seemingly unreasonable delay in clarifying the request, Ms. Piasentini never sought clarification when denying the three (3) items. Ms. Piasentini's denial here is comparable to the facts in Lagerkvist v. NJ Office of the Governor, 443 N.J. Super. 230 (App. Div. 2015). Specifically, the Appellate Division affirmed the trial court's decision holding that defendants properly denied access to the request as invalid and had no obligation to attempt to accommodate the plaintiff beyond the denial. The GRC thus declines to address whether the Custodian was required to address the Complainant's March 6, 2015 clarification.

Further, the GRC will not address OPRA request item No. 6 because the evidence of record supports that the Custodian, via Ms. Piasentini, disclosed responsive records on October 9, 2014, and again on March 9, 2015.

Sufficiency of Response

OPRA provides that a custodian may have an extension of time to respond to a complainant's OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008), the custodian provided the complainant with a written response to the complainant's OPRA request. In the response, the custodian requested an extension of time to respond to said request but failed to provide a date certain upon which the requested records would be provided. The Council held that the custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i).

Here, the Complainant contended in the Denial of Access Complaint that the Custodian agreed to provide additional records to the Complainant in October 2014. The Complainant further asserted that he contacted the Custodian on March 6, 2015, because he had not received any of the promised records. The Complainant asserted that he subsequently received a partial response. However, the Custodian certified in the SOI that Ms. Piasentini twice requested an extension of time through October 8, 2014, and responded to each requested item on said date. Additionally, Ms. Piasentini sought one (1) additional day until October 9, 2014, to respond to requested item No. 6. Ms. Piasentini subsequently responded in writing on October 9, 2014, providing records responsive to item No. 6.

However, at the time of her October 9, 2014 response, Ms. Piasentini advised the Complainant that the BOE was still searching for a contract pertaining to "Y.W." (responsive to item No. 3) and noted that she would forward it once located. In extending the time frame *de facto* to provide the "Y.W." contract, Ms. Piasentini failed to provide a date certain on which the BOE would ultimately respond. For this particular record, the Custodian's failure to provide a date certain on which she would respond resulted in an insufficient response.⁵

⁵ The GRC notes that the "Y.W." contract fell within the definition of an "immediate access" record. N.J.S.A. 47:1A-5(e). However, the GRC will not address the issue because the Complainant did not raise it in his Denial of Access Complaint.

Michael I. Inzelbuch, Esq., (On behalf of Center for Education) v. Lakewood Board of Education (Ocean), 2015-68 – Findings and Recommendations of the Executive Director

Therefore, although Ms. Piasentini timely responded in writing to the Complainant's September 9, 2014 OPRA request on three occasions, a portion of her October 9, 2014 response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick, GRC 2007-164, because she failed to provide a date certain upon which she would respond to the Complainant. *See also Bentz v. Borough of Paramus (Bergen)*, GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013). However, the GRC declines to order disclosure of the "Y.W." contract or any other record responsive to OPRA request item No. 3 because the Custodian certified that he provided all responsive records to the Complainant in response to an unrelated OPRA request.

Unlawful Denial of Access

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.

OPRA Request Item Nos. 1, 2, 5, 7, and 8

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1.

MAG, 375 N.J. Super. at 546 (emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . .* In short, OPRA does not countenance open-ended searches of an agency’s files.” *Id.* at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁶ NJ Builders, 390 N.J. Super. at 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Regarding requests for generic records, such as “documents,” the request at issue in MAG sought “all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.” *Id.* at 539-540. The Court did note that plaintiffs failed to include additional identifiers such as a case name or docket number. *See also* Edwards v. Hous. Auth. of Plainfiel (Union), GRC Complaint No. 2008-183 *et seq.* (Final Decision dated April 25, 2012)(accepting the ALJ’s decision holding that a newspaper article attached to a subject OPRA request related to the records sought did not cure the deficiencies present in the request) *Id.* at 12-13; Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012)(holding that the complainant’s request item No. 2 seeking “[p]roof of submission . . .” was invalid).

Moreover, the GRC has established criteria deemed necessary under OPRA to request an e-mail communication. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. *See also* Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. *See* Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011).

In Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010), the complainant’s OPRA request sought all e-mails to or from a particular e-mail account for a specific time period. The custodian’s counsel responded, advising the complainant that his OPRA request was invalid because it represented an open-ended search of the Borough’s files. The Council held that the complainant’s request was invalid under Elcavage, GRC 2009-07, because it did not include a subject or content. *Id.* at 7. The GRC notes that the Council has routinely determined that requests omitting the specific date or range of dates are invalid. *See* Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen), GRC Complaint No. 2009-206 (June 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014).

Here, the Complainant’s request item Nos. 1, 2, and 7 sought “[a]ny and all documentation evidencing” communications or payments and “written statements . . . as to the ‘need’ for” the SCC respectively, over a fifteen (15) month or longer time period. These request

⁶ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).
Michael I. Inzelbuch, Esq., (On behalf of Center for Education) v. Lakewood Board of Education (Ocean), 2015-68 – Findings and Recommendations of the Executive Director

items clearly failed to identify a government record, and the Custodian had no obligation to research all records for a fifteen (15) month period to locate same. *See also* Steinhauer-Kula, GRC 2010-198 (holding that the complainant’s request item No. 2 seeking “[p]roof of submission . . .” was invalid). Moreover, the Complainant’s request item Nos. 5 and 8 sought “all e-mails” devoid of a subject and “all documentation, e-mails and correspondence” devoid of senders/recipients or a time frame, respectively.⁷

Accordingly, the Complainant’s request item Nos. 1, 2, and 7 are invalid because they failed to seek identifiable government records and would have required the Custodian to research fifteen (15) months of records to determine whether any reasonably fit within the criteria. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151. *See also* Edwards, 2008-183; Steinhauer-Kula, GRC 2010-198. Additionally, the Complainant’s requested item Nos. 5 and 8 are invalid because they failed to contain all necessary criteria required to be valid requests for e-mails and correspondence. Elcavage, GRC 2009-07; Verry, GRC 2009-124; Tracey-Coll, GRC 2009-206; Kohn, GRC 2013-118. Thus, the Custodian did not unlawfully deny access to these items. N.J.S.A. 47:1A-6.

OPRA request Item No. 4

In Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014), the Council reversed its prior, longstanding policy that barred a custodian from merely directing a requestor to an agency’s website to obtain records responsive to an OPRA request. In reaching the new conclusion, the Council noted that “[t]he Legislature incorporated the notion of “reasonableness” into several sections of OPRA.” Id. at 4 (*citing* N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-5(c)-(d); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-6, 7(f)). The Council thus set a reasonable policy by which a custodian may direct a requestor to records on the Internet:

[A] custodian shall direct a requestor, with reasonable clarity, to the specific location on the Internet where the responsive records reside. This shall include, if necessary, directions for accessing the responsive document that would be comprehensible to a reasonable person, including but not limited to providing a link to the exact location of the requested document. However, a custodian’s ability to direct a requestor to the specific location of a government record on the Internet is contingent upon on the requestor’s ability to electronically access the records. Thus, a custodian is not absolved from providing the record in hardcopy if the requestor is unable to obtain the information from the Internet and makes it known to the custodian within seven (7) business days after receipt of the custodian’s response, in which case the custodian will have seven (7) business days from the date of such notice to disclose the record(s) in hardcopy.

Id. at 4 (footnote omitted).

⁷ The GRC notes that the Complainant provided clarification of requested item Nos. 7 and 8 nearly five (5) months after the Custodian denied same. However, the Custodian had no obligation to make any further responses after denying these items as invalid. *See* Lagerkvist v. Office of the Governor of N.J. & Javier Diaz, 443 N.J. Super. 230, 235 (App. Div. 2015).

Michael I. Inzelbuch, Esq., (On behalf of Center for Education) v. Lakewood Board of Education (Ocean), 2015-68 – Findings and Recommendations of the Executive Director

In the instant matter, the Complainant's OPRA request item No. 4 sought "minutes, agendas, and approvals" related to the topics identified in item Nos. 2 and 3 of his OPRA request.⁸ The Custodian provided a timely response, via e-mail, directing the Complainant to www.lakewoodpiners.org for "agendas and approvals." The Custodians subsequently certified in the SOI that the BOE lawfully directed the Complainant to the website in accordance with Rodriguez, GRC 2013-69. The GRC is satisfied that this response is consistent with Rodriguez, because minutes and agendas are readily identifiable from the BOE's home page. Moreover, although "approvals" is a rather vague terms, there is a substantial likelihood that any "approvals" ratified at BOE meetings are present in the minutes. Finally, the Complainant has not disputed that he could not access these records at any point thereafter.

Therefore, the Custodian has borne his burden of proving that he did not unreasonably deny access to any minutes, agendas, or "approvals" responsive to OPRA request item No. 4. N.J.S.A. 47:1A-6. Specifically, Ms. Piasentini provided to the Complainant a link to the BOE's homepage, where the responsive records were readily available. *See* Rodriguez, GRC 2013-69.

Knowing & Willful

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, "[i]f 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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

⁸ The GRC notes that it has previously determined that such a request was invalid because it required research to locate responsive records. *See* Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2012-329 (August 2013); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012). Michael I. Inzelbuch, Esq., (On behalf of Center for Education) v. Lakewood Board of Education (Ocean), 2015-68 – Findings and Recommendations of the Executive Director

Here, Ms. Piasentini, as the primary respondent, insufficiently responded to a portion of the Complainant's OPRA request item No. 3. However, requested item Nos. 1, 2, 5, 7, and 8 were invalid. Further, the Custodian, through Ms. Piasentini, disclosed records responsive to OPRA request item No. 3 on two occasions and properly directed the Complainant to the BOE's website for records responsive to OPRA request item No. 4. Additionally, the evidence of record does not indicate that Ms. Piasentini's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, no individual's actions, including those of the Custodian, rose to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party 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 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, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 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 that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 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.

Mason at 73-76 (2008).

The Court in Mason further held that:

[R]equestors 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).

Id. at 76.

In this matter, the Complainant alleged that the Custodian unlawfully denied access to a number of records and failed to follow-up after requesting an extension until October 9, 2014. However, the GRC has not granted the requested relief. Specifically, the evidence of record supports that the Custodian, through Ms. Piasentini, responded on October 9, 2014 as promised. Further, the Complainant's request item Nos. 1, 2, 5, 7, and 8 were invalid. Finally, the Custodian, through Ms. Piasentini, properly directed the Complainant to the BOE's website for records responsive to OPRA request item No. 4. Finally, the GRC is not ordering disclosure of any records responsive to OPRA request item No. 3 and did not address OPRA request item No. 6 for the reasons stated at the beginning of its analysis. Accordingly, the Complainant could not have prevailed in this complaint and is not entitled to an award of reasonable attorney's fees.

Therefore, 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. Teeters, 387 N.J.

Super. 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the GRC has declined to grant the Complainant's requested relief based on the evidence of record. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although Ms. Piasentini timely responded in writing to the Complainant's September 9, 2014 OPRA request on three occasions, a portion of her October 9, 2014 response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008), because she failed to provide a date certain upon which she would respond to the Complainant. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013). However, the GRC declines to order disclosure of the "Y.W." contract or any other record responsive to OPRA request item No. 3 because the Custodian certified that he provided all responsive records to the Complainant in response to an unrelated OPRA request.
2. The Complainant's request item Nos. 1, 2, and 7 are invalid because they failed to seek identifiable government records and would have required the Custodian to research fifteen (15) months of records to determine whether any reasonably fit within the criteria. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Edwards v. Hous. Auth. of Plainfiel (Union), GRC Complaint No. 2008-183 *et seq.* (Final Decision dated April 25, 2012); Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012). Additionally, requested item Nos. 5 and 8 are invalid because they failed to contain all necessary criteria required to be valid requests for e-mails and correspondence. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010); Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen), GRC Complaint No. 2009-206 (June 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014). Thus, the Custodian did not unlawfully deny access to these items. N.J.S.A. 47:1A-6.
3. The Custodian has borne his burden of proving that he did not unreasonably deny access to any minutes, agendas, or "approvals" responsive to OPRA request item No. 4. N.J.S.A. 47:1A-6. Specifically, Ms. Piasentini provided to the Complainant a link to the Lakewood Board of Education's homepage where the responsive records were

readily available. *See Rodriguez v. Kean Univ.*, GRC Complaint No. 2013-69 (March 2014).

4. Ms. Piasentini, as the primary respondent, insufficiently responded to a portion of the Complainant's OPRA request item No. 3. However, the Complainant's request items Nos. 1, 2, 5, 7, and 8 were invalid. Further, the Custodian, through Ms. Piasentini, disclosed records responsive to OPRA request item No. 3 on two occasions and properly directed the Complainant to the Lakewood Board of Education's website for records responsive to OPRA request item No. 4. Additionally, the evidence of record does not indicate that Ms. Piasentini's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, no individual's actions, including those of the Custodian, rose to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
5. 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. *Teeters v. DYFS*, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. *Mason v. City of Hoboken and City Clerk of the City of Hoboken*, 196 N.J. 51 (2008). Specifically, the GRC has declined to grant the Complainant's requested relief based on the evidence of record. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See N.J.S.A. 47:1A-6, Teeters*, 387 N.J. Super. at 432, and *Mason*, 196 N.J. at 51.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

September 22, 2016