State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 28, 2018 Government Records Council Meeting

Jeff Carter
Complainant
v.
NJ Department of Community Affairs,
Division of Local Government Services
Custodian of Record

Complaint No. 2016-262

At the August 28, 2018 public meeting, the Government Records Council ("Council") considered the August 21, 2018 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Complainant's request seeking Notices for a five (5) year period alleging a violation of N.J.S.A. 40A:9-22.9 is invalid because it required research. The Custodian had no legal duty to research her files, or cause research, to locate records potentially responsive to the request. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2011-147, 2011-157, 2011-172, and 2011-181 (July 2012). Thus, the Custodian lawfully denied access to the subject OPRA request. N.J.S.A. 47:1A-6.

2. 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 Complainant's request was invalid and no responsive records existed. 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. 432, and Mason, 196 N.J. 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 28th Day of August, 2018

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: August 30, 2018

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Council Staff
August 28, 2018 Council Meeting

Jeff Carter[1] **GRC Complaint No. 2016-262**
Complainant

v.

New Jersey Department of Community Affairs,[2]
Division of Local Government Services
Custodial Agency

Records Relevant to Complaint: Electronic copies of any and all "Notice of Docketing" ("Notices") records issued by the Superior Court, Appellate Division, resulting from an appeal (per N.J.S.A. 40A:9-22.9) of any Local Finance Board ("LFB") final decision from August 9, 2011 through August 9, 2016.

Custodian of Record: Colleen M. Kelly
Request Received by Custodian: August 10, 2016
Response Made by Custodian: August 16, 2016
GRC Complaint Received: September 14, 2016

Background[3]

Request and Response:

On August 9, 2016, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On August 10, 2016, the Custodian forwarded the OPRA request to Patricia McNamara of the LBF. On August 15, 2016, Ms. McNamara e-mailed the Custodian stating that the "[Notices are] not a record that LFB staff maintains."

On August 16, 2016, the Custodian responded in writing denying the Complainant's OPRA request because no records were "maintained by the Division of Local Government Services [("LGS")]." On the same day, the Complainant sought clarification of the Custodian's response. Specifically, the Complainant asserted that the Custodian was required to contact legal counsel and obtain responsive records not in LBF's physical possession. The Complainant thus again

[1] Represented by John A. Bermingham, Esq. (Mount Bethel, PA).
[2] Represented by Deputy Attorney General Steven M. Gleeson. Previously represented by Deputy Attorney General Melanie R. Walter.
[3] 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

requested that the Custodian disclose responsive records or provide a specific lawful basis for denying access.

On August 18, 2016, the Custodian responded again denying access because LGS did not maintain any responsive records. The Custodian additionally stated that neither LGS nor the Division of Law maintained a database that could be organized by description of the records sought. The Custodian thus stated that the Complainant's OPRA request was overly broad and invalid because it failed to provide identifiers such as case name, party name, or docket number. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533, 541 (App. Div. 2014); Lagerkvist v. Office of the Governor of N.J., 443 N.J. Super. 230, 236-237 (App. Div. 2015).

Denial of Access Complaint:

On September 14, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant argued that the Custodian unlawfully denied access to the records responsive to his OPRA request because it is valid. The Complainant argued that the OPRA request contained multiple identifiers for the Custodian to conduct a reasonable search. The Complainant contended that his OPRA request identified at least one party to each of the appeals for which records were sought; the LFB was a *de facto* party as the "respondent" in accordance with N.J.S.A. 40A:9-22.9. The Complainant further noted that his OPRA request sought a single type of record (Notices). Finally, the Complainant stated that his OPRA request contained a time frame. The Complainant argued that his OPRA request was valid in a similar manner to those in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012) and Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), if not more so. The Complainant argued that in each instance, plaintiff identified a type of record and contained enough identifiers requiring a custodian to perform a search. The Complainant contended that in each instance, the court declined to determine that the OPRA requests at issue in both cases were invalid.

The Complainant noted that Burnett, 415 N.J. Super. 506 is especially relevant here because the Appellate Division held that defendants were required to obtain and disclose records even if they did not directly possess them. The Complainant contended that even if LBF was not physically maintaining the responsive records, they had an obligation to reach out to legal counsel and obtain same. See also Meyers v. Borough of Fairlawn, GRC Complaint No. 2005-127 (May 2006); Burdick v. Twp. of Franklin (Hunterdon), GRC Complaint No. 2010-99 (Interim Order dated June 26, 2012); Henry v. Twp. of Hamilton Police Dep't (Atlantic), GRC Complaint No. 2015-155 (Interim Order dated May 24, 2016). The Complainant contended that the subject request merely required a search of Notices to identify: 1) that the respondent was LBF; 2) that the Notices were issued between the two (2) identified dates; and 3) that LBF "own[s] those records as set forth in ACPE Opinion 692 on R.P.C. 1.15 *et seq*. (discussing client's property/ownership of legal records)." The Complainant noted that he was aware of at least three responsive records because he possessed a Notice for Bhalla v. Local Fin. Bd. 2016 N.J. Super. Unpub. LEXIS 1432 (App. Div. 2016) and two Notices for IMO Appeal of the Decision of Franklin Twp. Ethics. Bd. in FTEB Complaint No. 11-01, Docket No. A-2561-15T3.[4] The Complainant also alleged that LGS and

[4] The Complainant noted that because he possessed these three (3) Notices, the Council need not order disclosure of them.

LFB knew that responsive records existed, but meant "to deliberately and intentionally *stonewall release* . . . because [the Complainant] may use them" in an appeal of LBF's decision. (Emphasis in original).

Finally, the Complainant contended that resolution of this complaint was a matter of significant of importance because it implicated the integrity of New Jersey's "Local Government Ethics Law ("LGEL"). The Complainant alleged that a State agency not maintaining its own appeal records was "*shocking to the senses*." (Emphasis in original). The Complainant reiterated that LGS had a self-serving reason to deny access (citing Bhalla and alleging that the LBF was issuing decisions in direct violation of quorum requirements at N.J.S.A.40A:9-22.9). The Complainant also noted that three (3) days after submission of the subject OPRA request, the LFB sought, and was later denied, remand in the appeal to which he is a party in attempt to cure a quorum issue. The Complainant also contended that the Custodian's denials were converse to OPRA and alarming coming from the agency charged with "safeguarding" the LGEL

The Complainant thus requested that the Council: 1) determine that the Custodian violated OPRA by unlawfully denying access to the responsive records; 2) order immediate disclosure of those records; 3) determine whether the Custodian knowingly and willfully violated OPRA warranting a civil penalty; and 4) determine that the Complainant was a prevailing party entitled to a fee award.

Statement of Information:

On October 4, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on August 10, 2016. The Custodian certified that her search for the records involved forwarding the request to Ms. McNamara, who advised her on August 15, 2016 that Notices were not a record the LBF maintained. The Custodian certified that she responded in writing on August 16, 2016 advising the Complainant that LBF maintained no responsive records. The Custodian certified that she received the Complainant's clarification and forwarded it to Counsel. The Custodian affirmed that she again responded in writing on August 18, 2016 reasserting her denial and adding that the OPRA request was invalid.

The Custodian argued that OPRA did not allow for blanket requests seeking every document maintained by a public agency. Gannett New Jersey P'ship v. Cnty. of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005); MAG, 375 N.J. Super. at 549; Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian stated that New Jersey's courts have determined that requests seeking "any and all" records are invalid. Spectraserv, Inc. v. Middlesex Cnty. Util. Auth., 416 N.J. Super. 565, 576 (App. Div. 2010); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 178-179 (App. Div. 2007). Finally, the Custodian stated that the New Jersey Superior Court, Appellate Division most recently held that a custodian was not required to perform multiple steps of collecting, evaluating, and compiling information to locate responsive records. Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015) ("OPRA does not convert a custodian into a researcher").

The Custodian contended that the GRC should uphold her denial of access because the Complainant's OPRA request was invalid. The Custodian argued that Burke, 429 N.J. Super. 169 confirms that the request here was invalid. The Custodian notes that there, the subject request sought a specific type of record (correspondence) with a clearly defined subject matter (EZ Pass benefits provided to Port Authority retirees). The Custodian contended that unlike the request in Burke, the Complainant's OPRA request sought Notices for a broad range of LBF matters over a five (5) year period. Additionally, Custodian further argued that, contrary to the Complainant's assertion in the subject OPRA request, the description "resulting in an appeal (pursuant to N.J.S.A. 40A:9-22.9). . ." was insufficient. Further, the Custodian asserted that she would have to contact LBF's counsel at the Division of Law ("DOL") because the LBF did not maintain any records. The Custodian argued that the Complainant's OPRA request failed to include a definitive list of case names, numbers, parties, or a reasonable time frame within which specific records could be identified.

The Custodian argued that there are "thousands of [LBF] matters" for which decisions have been rendered during the identified five (5) year time period. The Custodian further argued that a substantial percentage of those cases could have arisen from ethics issues. The Custodian contended that neither LGS nor DOL maintained a database that was searchable by date, subject matter, or appeal status. The Custodian thus argued that it would be virtually impossible to identify responsive Notices and was distinguishable from the request at issue in Burke, 429 N.J. Super. 169.

The Custodian also argued that the Complainant failed to identify "who may have responsive records" resulting in her having to conduct research. The Custodian contended that this research would have included identifying the staff members and deputy attorney generals possessing records over the last five (5) years. The Custodian asserted that she would then have to contact each individual to determine if they addressed an LBF matter regarding a N.J.S.A. 40A:9-1 violation which was appealed. The Custodian contended that she would then have to review each file to determine if a Notice was issued. The Custodian argued that OPRA did not require her to engage in such actions; rather, she was only required to perform a routine search. Lagerkvist, 443 N.J. Super. at 236-237. The Custodian asserted that the Complainant, a highly sophisticated and educated individual, was fully capable of identifying the records sought, but failed to do so.

Additional Submissions

On October 12, 2016, Complainant's Counsel submitted a letter brief responding to the SOI. Therein, Counsel initially requested that the GRC order disclosure of the records in an expedited manner and determine that this complaint contained "contested facts" warranting a knowing and willful hearing. N.J.S.A. 47:1A-6; N.J.A.C. 1:1-4.1(a).[5]

[5] Complainant's Counsel subsequently submitted multiple correspondence requesting that the GRC follow N.J.A.C. 1:1-4.1(a) by rending a decision that this complaint contained "contested facts" within thirty (30) days, essentially requiring this complaint to be addressed prior to multiple other complaints filed prior to this one. However, the GRC's established policy does not provide a process for complainants to request an expedited adjudication. The GRC instead adjudicates complaints in the order that they are received. Both the Complainant and Counsel are intrinsically aware of this fact given their experience with the GRC. The GRC notes that Counsel submitted multiple briefs during the pendency of this complaint reiterating the argument.

Counsel contended that the Custodian never claimed that responding to the instant request would cause a substantial disruption of agency operations "thereby warranting the imposition of a special service charge." N.J.S.A. 47:1A- 5(c); 5(g). Counsel also argued that the Custodian never sought an extension to address the request. Counsel also argued that the Complainant had no obligation to identify the individuals that may possess responsive records. Counsel contended that the obligation to search for records rested solely with the Custodian.

Counsel further contended that New Jersey courts have twice upheld "any and all" requests; thus negating the Custodian's SOI argument that the request was invalid for this reason. See Burke, 429 N.J. Super. at 176 (citing Burnett, 415 N.J. Super. at 508). Counsel instead argued that the subject OPRA request conformed to the GRC's longstanding precedent regarding a proper request for correspondence. Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No, 2009-154 (Interim Order dated May 24, 2011)(citing Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-7 (April 2010)). Counsel argued that the subject OPRA request contained a sender/ recipient (Appellate Division/LBF), date or range of dates (August 9, 2011 through August 9, 2016), and subject or content (appeals from decision regarding a N.J.A.C. 40A:9-22.9 violation). Counsel further argued that the GRC previously validated broader OPRA requests than the one at issue here. See Weiner v. Cnty. of Essex, GRC Complaint No. 2015-20 (Interim Order dated September 29, 2015).

Counsel next argued that both Burnett and Burke were fatal to the Custodian's position that the subject request was invalid. Counsel contended that the Burnett court required defendants to obtain and disclose settlements regardless of party identifiers. Counsel argued that LBF was always *de facto* respondents to appeals from their decisions. Counsel also argued that Complainant's OPRA request clearly sought Notices stemming from N.J.S.A. 40A:9-22.9 involving LBF and any party for a five (5) year period. Counsel argued that the Custodian's argument here was similar to the one rejected in Burnett. Counsel also alleged that even if the defendant in Burke refused to conduct a search, the court still determined that the request was valid.

Finally, Counsel argued that LBF's failure to maintain its own appeal records and assert that it was unable to readily identify appeals initiated through N.J.S.A. 40A:9-22.9 bespeaks of the exact type of mismanagement OPRA was intended to expose. Counsel also argued that following erroneous legal advice was not a valid defense. See Blanchard v. Rahway Bd. of Educ., GRC Complaint No. 2003-57 (October 2003). Counsel further argued that the Custodian failed to adhere to the GRC's regulations by not copying him on her SOI submission. Counsel contended that the Custodian's actions, based on the forgoing, were knowing and willful in nature.[6]

[6] Counsel also reiterated his request that this complaint be sent to the Office of Administrative Law ("OAL") for a hearing due to "contested facts." N.J.A.C. 1:1-4.1(a). Those facts Counsel points to were alleged LBF quorum issues and their failure to maintain certain records with the agency. Counsel contended that this "breach of duty" was determined to be a question of fact by the Supreme Court. See Jerkins v. Anderson, 191 N.J. 285, 305 (2007). However, GRC precedent is clear that quorum issues under the Open Public Meetings Act and an agency's obligation to "maintain" records are not within its authority to adjudicate. N.J.S.A. 47:1A-7(b); Scheeler Jr. v. Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-60 (January 2015); Toscano v. N.J. Dep't of Labor, Div. of Vocational Rehabilitation Serv., GRC Complaint No. 2010-58 (June 2011). Thus, such issues are not pertinent to the GRC's adjudication of this complaint and are not considered "contested facts" warranting referral to the OAL.

On February 27, 2017, Complainant's Counsel submitted a letter brief arguing that the Appellate Division's decision in Scheeler, Jr. v. Office of the Governor, et al, 448 N.J. Super. 333 (App. Div. 2017) "eviscerate[d]" the Custodian's denial of access here. Counsel stated that there, the court affirmed the trial court's holding that plaintiff's requests seeking access to all third-party OPRA requests for a certain period of time were valid. Counsel argued that the Custodian's arguments here were similar to those in Scheeler, but was roundly rejected by both courts. Counsel also reiterated that the Custodian was obligated to obtain records from DOL. See DeRobertis v. Twp. of Montclair (Essex), GRC Complaint No. 2012-199 (Interim Order dated October 29, 2013); Scutro v. City of Linden (Union), GRC Complaint No. 2014-254 (October 2015).

On July 7, 2017, Complainant's Counsel submitted a letter brief to the GRC adding Paff v. Galloway Twp., 229 N.J. 340 (2017) and Chester v. Pleasantville Hous. Auth. (Atlantic), GRC Complaint No. 2015-50 (Interim Order dated March 28, 2017) as dispositive here. On August 8, 2017, Complainant's Counsel submitted a letter brief to the GRC adding Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285 (2017) and North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017) as dispositive to the instant complaint. On January 9, 2018, Complainant's Counsel submitted another letter brief adding Wronko v. Twp. of Jackson, 2017 N.J. Super. Unpub. LEXIS 3058 (App. Div. 2017) and Libertarians for Transparent Gov't v. Ocean Cnty. Prosecutor's Office, 2018 N.J. Super. Unpub LEXIS 25 (App. Div. 2018) to the record as relevant to this complaint. On February 28, 2018, Complainant's Counsel submitted another letter brief adding Hopkins v. Borough of Englishtown (Monmouth), GRC Complaint No. 2014-23 (Interim Order dated October 31, 2017) to the record as dispositive here.

Analysis

Validity of Request

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.*
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> [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.
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> [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. (emphasis added). Bent, 381 N.J. Super. at 37,[7] N.J. Builders Assoc., 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG, a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

> Pursuant to [MAG], the Custodian is obligated to search her files to find the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to research her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word search is defined as "to go or look through carefully in order to find something missing or lost." The word research, on the other hand, means "a close and careful study to find new facts or information." (Footnotes omitted.)
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> [Id.]

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad ("any and all," requests seeking "records" generically, *etc.*) because it fails to identify specific records, thus requiring a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato, GRC 2005-182. The second is those requests seeking information or asking questions. See *e.g.* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See *e.g.* Naples v. N.J. Motor Vehicle Comm'n, GRC Complaint No. 2008-97 (December 2008).

Regarding requests requiring research, the distinction between search and research can be miniscule at times. That is, there are instances where the very specificity of a request requires only a search, as would the case would be with OPRA requests for communications properly containing all three (3) criteria set forth in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No.

[7] Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

2009-7 (April 2010). To that end, the Council has provided guidance on how requests containing the Elcavage criteria do not require research:

> [A] valid OPRA request requires a search, not research. An OPRA request is thus only valid if the subject of the request can be readily identifiable based on the request. Whether a subject can be readily identifiable will need to be made on a case-by-case basis. When it comes to e-mails or documents stored on a computer, a simple keyword search may be sufficient to identify any records that may be responsive to a request. As to correspondence, a custodian may be required to search an appropriate file relevant to the subject. In both cases, e-mails and correspondence, a completed "subject" or "regarding" line may be sufficient to determine whether the record relates to the described subject. Again, what will be sufficient to determine a proper search will depend on how detailed the OPRA request is, and will differ on a case-by-case basis. What a custodian is not required to do, however, is to actually read through numerous e-mails and correspondence to determine if same is responsive: in other words, conduct research.
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> [Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013).]

Additionally, the court in Burnett, 415 N.J. Super. 506, evaluated a request for "[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present." Id. at 508. The Appellate Division determined that the request was not overly broad because it sought a specific type of document, despite failing to specify a particular case to which such document pertained. Id. at 515-16. Likewise, the court in Burke, 429 N.J. Super. 169 found a request for communications regarding the E-Z Pass benefits of Port Authority retirees to be valid because it was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information. Id. at 176.

Conversely, there are instances where a request can be specific enough to induce research, thus rendering it invalid. For instance, in Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2011-147, 2011-157, 2011-172, and 2011-181 (July 2012), the complainant submitted four (4) OPRA requests seeking copies of meeting minutes containing motions to approve other minutes. The Council, citing Taylor v. Cherry Hill Bd. of Educ. (Camden), GRC Complaint No. 2008-258 (August 2009) and Ray v. Freedom Academy Charter Sch. (Camden), GRC Complaint No. 2009-185 (August 2010), determined that the requests were overly broad:

> [S]aid requests do not specify the date or time frame of the minutes sought. Rather, the requests seek those minutes at which the UCBOE motioned to approve meeting minutes for four (4) other meetings. Similar to the facts of both Taylor and Ray, the requests herein *seek minutes that refer to a topic and would require the Custodian to research the UCBOE's meeting minutes in order to locate the particular sets of minutes that are responsive to the Complainant's requests* . . . because the Complainant's four (4) requests for minutes "that include a motion made by the Union City Board of Education to approve the minutes" from other meetings fail to identify the specific dates of the minutes sought and would require the Custodian

> to conduct research in order to locate the responsive records, the Complainant's requests are invalid under OPRA.
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> [Valdes, GRC 2011-147 *et seq*. (emphasis added) (citing N.J. Builders Ass'n, 390 N.J. Super. at 180; Bent, 381 N.J. Super. 30 (App. Div. 2005); MAG, 375 N.J. Super. at 546; Schuler, GRC 2007-151; Donato, GRC 2005-182. See also Valdes v. Gov't Records Council, GRC Complaint No. 2013-278 (September 2014).]

The Lagerkvist court's rational of what amounted to research supports the Council's decision in Valdes. There, the court reasoned that the plaintiff's request:

> . . . would have had to make a preliminary determination as to which travel records correlated to the governor and to his senior officials, past and present, over a span of years. The custodian would then have had to attempt to single out those which were third-party funded events. Next, he would have had to collect all documents corresponding to those events and search to ensure he had accumulated everything, including both paper and electronic correspondence. OPRA does not convert a custodian into a researcher,
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> Id. at 237.

The request at issue here sought Notices from the Appellate Division for LBF decisions addressing violations of N.J.S.A. 40A:9-22.9 for a five (5) year period. The Custodian first responded that LBF maintained no responsive records. In a subsequent response, the Custodian denied the request as invalid because it failed to provide certain identifiers. This complaint followed, wherein the Complainant argued that his request was valid and that the Custodian was accordingly required to obtain records from DOL and disclose them. The Complainant also noted that he was aware of at least three (3) responsive records because he possessed them. The Complainant included these Notices as attachments, and indicated that the Council need not order disclosure of them.

In the SOI, the Custodian asserted that Burke, 429 N.J. Super. 169 confirmed her denial of access. The Custodian contended that the request would have required her to perform research over five (5) years of LBF decisions, number in the thousands, to determine 1) whether the decisions addressed a N.J.S.A. 40A:9-22.9 violation; and 2) whether the decisions were appealed. The Custodian argued that the Lagerkvist court recently held that she was not required to perform these multiple steps to address an OPRA request. Id. at 236-237. In multiple responses to the SOI, Complainant's Counsel provided a number of decisions from the GRC and New Jersey Courts arguing that each supported that the request at issue here was valid. Counsel also contended that, contrary to the Custodian's assertion, Burke actively refuted her denial of access.

In reviewing the subject request, all arguments, and the case law relevant to invalid requests requiring research, the GRC is satisfied that the Custodian lawfully determined that the request was invalid. Specifically, the request here is most similar to the requests at issue in Valdes, GRC 2011-147, *et seq*. in that the custodian there would have been required to research sets of minutes to find those inclusive of a particular subject. Here, the Custodian set forth the process required to

locate appeals of LBF decisions regarding quorum violations under N.J.S.A. 40A:9-22.9. Those steps included reviewing and identifying LBF decision for a five (5) year period, determining whether the decision was appealed, reading further into each appeal to see whether the appellant asserted a violation under that particular statute, and then causing the relevant DAG to locate the responsive notice. Such actions are clearly similar to both the process the GRC determined to be research in Valdes, as well as the process that the Lagerkvist court considered to be research. To go further, the Custodian's actions would be the opposite of those considered to be a reasonable search by the GRC in Verry. The Custodian here would not have the benefit of retrieving and briefly reviewing the existing Notices to see if they refer to N.J.S.A. 40A:9-22.9. This fact is confirmed by reviewing the Notices the Complainant attached to the Denial of Access Complaint, which are form letters that in no way refer to the relevant statute or issue appealed.

Finally, the GRC's review of the multiple cases Complainant's Counsel incorporated into his arguments share one common bond: each sought a certain type of record over a certain time frame with no further identifiers. For instance, the requests at issue in Scheeler, Jr., 448 N.J Super. 333, sought third-party OPRA requests submitted for a period of time. The OPRA requests in Wronko, 2017 N.J Super. Unpub. LEXIS 25 and Burnett, 415 N.J. Super. 506 sought settlement agreements for a specific period of time. In each instance, the requests did not include further limiting information requiring the custodian to perform "a close and careful study to find new facts or information." See Donato, GRC 2005-182.

Accordingly, the Complainant's request seeking Notices for a five (5) year period alleging a violation of N.J.S.A. 40A:9-22.9 is invalid because it required research. The Custodian had no legal duty to research her files, or cause research, to locate records potentially responsive to the request. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Lagerkvist, 443 N.J. Super. at 236-237; Schuler, GRC 2007-151; Donato, GRC 2005-182; Valdes, GRC 2011-147, *et seq*. Thus, the Custodian lawfully denied access to the subject OPRA request. N.J.S.A. 47:1A-6.

In closing, the GRC notes its agreement with the Complainant that a custodian is required to locate and disclose records regardless of their location. See Burnett, 415 N.J. Super. 506; Meyers v. Borough of Fairlawn, GRC Complaint No. 2005-127 (May 2006). Thus, had the Council determined that the subject request was valid, the Custodian would have been obligated to contact DOL, who may have been maintaining responsive records on LBF's behalf.

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. Further, the Supreme Court expressed 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.
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> [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).
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> [Id. at 76.]

Here, the Complainant filed the instant complaint arguing that, contrary to the Custodian's denial of access, the subject OPRA request was valid. In the SOI, the Custodian provided a detailed argument regarding her position that the request was invalid. The GRC has concluded that the request was invalid; thus, the Complainant is not a prevailing party entitled to an award of 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 Complainant's request was invalid. 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. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Complainant's request seeking Notices for a five (5) year period alleging a violation of N.J.S.A. 40A:9-22.9 is invalid because it required research. The Custodian had no legal duty to research her files, or cause research, to locate records potentially responsive to the request. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2011-147, 2011-157, 2011-172, and 2011-181 (July 2012). Thus, the Custodian lawfully denied access to the subject OPRA request. N.J.S.A. 47:1A-6.

2. 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 Complainant's request was invalid and no responsive records existed. 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. 432, and Mason, 196 N.J. 51.

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