



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

May 27, 2010 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2009-175

v.

Bloomfield Board of Education (Essex)
Custodian of Record

At the May 27, 2010 public meeting, the Government Records Council ("Council") considered the May 20, 2010 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. Because the Custodian provided the Complainant with a written response within the statutorily mandated seven (7) business days indicating that the Complainant's request item no. 2 was "not approved" because the Board of Education has not ratified an agreement for Board Attorney as of the date of the Complainant's request, and because the Custodian certified that there are no records responsive to request item no. 2, the Custodian has not unlawfully denied access to said request item pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Because request items no. 1 and 3 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Complainant's assertion that the Custodian violated N.J.S.A. 47:1A-5.b. by improperly assessing a \$0.75 fee to provide a record responsive to request item no. 1 via e-mail is moot since said request is invalid. Nevertheless, the Council has previously held that there is generally no charge incurred by an agency to transmit records electronically. See McBride v. Borough of



Mantoloking (Ocean), GRC Complaint No. 2009-138 (April 2010) (holding that “the Custodian must disclose to the Complainant the requested records at the actual cost, pursuant to N.J.S.A. 47:1A-5.b., which is \$0.00 because there is no cost incurred by the Borough to transmit the requested records electronically”).

3. While the Custodian may have engaged in an unfriendly telephone conversation with the Complainant, the Custodian did not unlawfully deny access to request item no. 2, and request items no. 1 and 3 are invalid. 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.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant is not a “prevailing party” entitled to an award of reasonable attorney’s fees. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian’s conduct. Additionally, using the catalyst theory discussed in Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), there is no factual causal nexus between the filing of the Complainant’s Denial of Access Complaint and the relief ultimately achieved because the Complainant did not receive any relief. The Custodian did not unlawfully deny access to the requested records and the Complainant’s challenge of the \$0.75 fee is moot since said request item is invalid.

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 27th Day of May, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 3, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 27, 2010 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2009-175

v.

**Bloomfield Board of Education (Essex)²
Custodian of Records**

Records Relevant to Complaint:

1. A copy of any record that includes the amount of fees paid by the Bloomfield School District to the law firm of Schwartz, Simon, Edelstein, Celso & Kessler between the period beginning April 1, 2008 through April 30, 2009.
2. A copy of any agreement for legal services between Schwartz, Simon, Edelstein, Celso & Kessler and the Bloomfield School District for the period beginning July 1, 2009 through June 30, 2010.
3. A copy of any record that includes fees the Bloomfield School District charges for audio and video recordings of its minutes.

Request Made: May 5, 2009

Response Made: May 5, 2009

Custodian: Michael A. Derderian

GRC Complaint Filed: May 27, 2009³

Background

May 5, 2009

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.

May 5, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same date he received said request. In response to request item no. 1, the Custodian states that the dates provided by the Complainant are incorrect since they do not reflect the dates of the school year; however, the Custodian states that there is one (1) page responsive dated April 1, 2008 through June 30, 2008.

¹ Represented by Eric Taylor, Esq., of Taylor & Mitchell, LLC (Audubon, NJ).

² Represented by Nicholas J. Dotoli, Esq., of Schwartz, Simon, Edelstein, Celso & Zitomer, LLC (Morristown, NJ).

³ The GRC received the Denial of Access Complaint on said date.

The Custodian states that he cannot attach said record via e-mail until the Complainant remits payment of \$0.75. The Custodian also states that request item no. 2 is “not approved” because the Board of Education (“BOE”) has not ratified an agreement for Board Attorney as of the date of the Complainant’s request. Additionally, in response to request item no. 3, the Custodian states that the fee for audio recordings is not available and the fee for DVD recordings is \$5.95.

May 5, 2009

E-mail from Complainant to Custodian. The Complainant states that he will do as the Custodian suggested and file a Denial of Access Complaint with the Government Records Council.

May 27, 2009

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

- Complainant’s OPRA request dated May 5, 2009 with fax transmittal sheet
- Custodian’s response to the Complainant’s OPRA request dated May 5, 2009
- E-mail from Complainant to Custodian dated May 5, 2009

The Complainant states that he faxed his OPRA request to the Custodian on May 5, 2009. The Complainant states that he noted in his request that he preferred to receive the records as an attachment to an e-mail. The Complainant states that the Custodian contacted him by telephone on May 5, 2009 and indicated that request item no. 3 was available on the BOE’s website. However, the Complainant states that said record was not located on the webpage the Custodian said it was.

Additionally, the Complainant states that the Custodian provided him with a written response via e-mail on May 5, 2009 regarding request item no. 1 and indicated that he would not attach the record responsive to the e-mail until the Complainant submitted payment of \$0.75. The Complainant also states that the Custodian indicated that request item no. 2 was not approved because the BOE has not ratified an agreement for Board Attorney as of the date of the Complainant’s request. The Complainant states that as of the date of this complaint, he has not received the requested records or a notice of a denial of access from the Custodian.

The Complainant contends that the Custodian violated N.J.S.A. 47:1A-5.i. because the Custodian failed to grant access or deny access to request items no. 1 and 3 within the statutorily mandated seven (7) business days. As such, the Complainant seeks the following from the Council: a declaration that the Complainant’s OPRA request is “deemed” denied pursuant to N.J.S.A. 47:1A-5.i.; a declaration that the Custodian unlawfully denied access to the Complainant’s OPRA request; an Order directing the Custodian to provide the requested records in the medium requested; and an award of attorney’s fees pursuant to N.J.S.A. 47:1A-6.

The Complainant also asserts that the Custodian violated N.J.S.A. 47:1A-5.b. by improperly assessing a \$0.75 fee to provide records via e-mail. As such, the Complainant seeks the following relief from the Council: a declaration that the Custodian violated

OPRA by assessing a fee in violation of N.J.S.A. 47:1A-5.b. by requiring payment of \$0.75 to provide records via e-mail; an Order directing the Custodian to provide the requested records in the medium requested without the payment of a fee; and an award of attorney's fees pursuant to N.J.S.A. 47:1A-6.

Further, the Complainant contends that the Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a notice of non-compliance⁴ with his OPRA request, but rather sent an e-mail indicating that the Complainant's request was not approved because the BOE has not ratified an agreement for Board Attorney as of the date of the Complainant's request. As such, the Complainant seeks the following relief from the Council: a declaration that the Custodian violated OPRA by failing to provide a notice of non-compliance pursuant to N.J.S.A. 47:1A-5.g.; a declaration whether the Custodian's handling of this request constitutes a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances; and an award of attorney's fees pursuant to N.J.S.A. 47:1A-6.

Additionally, the Complainant declines to participate in mediation.

June 4, 2009

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

May 8, 2009

Custodian's SOI with the following attachments:

- Printout of purchase orders issued against Schwartz Simon Edelstein Celso for services rendered in July 2008 to September 2008
- Complainant's OPRA request dated May 5, 2009
- Custodian's response to the Complainant's OPRA request dated May 5, 2009
- E-mail from Complainant to Custodian dated May 5, 2009

The Custodian certifies that he received the Complainant's OPRA request on May 5, 2009. The Custodian certifies that he provided the Complainant with a written response on said date and indicated that he would provide the one (1) page responsive to request item no. 1 upon the Complainant's payment of the \$0.75 copy fee; however, the dates the Complainant provided are incorrect because the school year runs July 1st to June 30th. The Custodian also certifies that he denied item no. 2 because no agreement existed at the time of the request. The Custodian certifies that the agreement was ratified on May 12, 2009. Additionally, the Complainant certifies that he notified the Complainant in said response that the fee for audio recordings is not available and the fee for DVD recordings is \$5.95.

The Custodian also certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management, records responsive to the Complainant's OPRA request must be retained for ten (10) years.

⁴ It appears that the Complainant suggests the Custodian failed to provide a written denial of access.
Martin O'Shea v. Bloomfield Board of Education (Essex), 2009-175 – Findings and Recommendations of the Executive Director

June 26, 2009

Complainant's Certification in response to the Custodian's SOI. The Complainant certifies that on May 5, 2009 he had a telephone conversation with the Custodian regarding the Complainant's OPRA request. The Complainant certifies that he questioned the appropriateness of the fee assessed by the Custodian to provide records via e-mail attachment. The Complainant certifies that the Custodian suggested he pursue the matter "in Trenton" and hung up the phone.

July 1, 2009

The Complainant Counsel's response to the Custodian's SOI. Counsel asserts that the Complainant's certification dated June 26, 2009 coupled with the Complainant's e-mail to the Custodian dated May 5, 2009 demonstrates the Custodian's blatant disregard of his responsibilities under OPRA. Counsel states that the Custodian's statement that the school year runs from July 1st to June 30th is irrelevant since the Complainant requested payments made during the period of April 1, 2008 to April 30, 2009. Counsel also states the document included in the Custodian's SOI that shows purchase orders issued in July 2008 to September 2008 does not address the remainder of the Complainant's request item. Counsel asserts that the Custodian's failure to address the remainder of the request is a violation of N.J.S.A. 47:1A-5.g. Further, Counsel contends that a listing of purchase orders is not responsive to the Complainant's request since said list only shows the amounts billed, not the amounts actually paid.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA provides that

"[a] copy or copies of a government record may be purchased by any person...*upon payment of the actual cost of duplicating the record... The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other*

overhead expenses associated with making the copy...” (Emphasis added).
N.J.S.A. 47:1A-5.b.

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.

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.⁵ 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 (October 2007).

The Complainant stated that he submitted his OPRA request via facsimile on May 5, 2009. The Custodian certified that he received said request on May 5, 2009. The Custodian also certified that he provided the Complainant with a written response via e-mail on said date in which the Custodian provided the following responses to the Complainant’s request items:

- Request item no. 1 - the dates provided by the Complainant are incorrect; however, there is one (1) page responsive dated April 1, 2008 through June 30, 2008. The Custodian stated that he could not attach the record to the e-mail until the Complainant remitted payment of \$0.75.
- Request item no. 2 - “not approved” because the BOE has not ratified an agreement for Board Attorney as of the date of the Complainant’s request.
- Request item no. 3 - the fee for audio recordings is not available and the fee for DVD recordings is \$5.95.

⁵ 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.

The Complainant contends that the Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a notice of non-compliance⁶ to item no. 2 of his request, but rather the Custodian sent an e-mail indicating that said request was not approved because the BOE has not ratified an agreement for Board Attorney as of the date of the Complainant's request. The Custodian certified in his SOI that at the time of the Complainant's request no records responsive existed because the agreement was not ratified until May 12, 2009.

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. The Council determined that, because the Custodian certified that no records responsive to the request existed, the Custodian did not unlawfully deny access to the requested records.

Similarly in this instant complaint, the Custodian provided a written response on the same date that he received the Complainant's OPRA request and indicated that request item no. 2 was "not approved" because the BOE has not ratified an agreement for Board Attorney as of the date of the Complainant's request. The Custodian's statement clearly indicates that there are no records responsive to said request item. The Custodian further certified in his SOI that no records responsive existed at the time of the Complainant's OPRA request.

Therefore, because the Custodian provided the Complainant with a written response within the statutorily mandated seven (7) business days indicating that the Complainant's request item no. 2 was "not approved" because the BOE has not ratified an agreement for Board Attorney as of the date of the Complainant's request, and because the Custodian certified that there are no records responsive to request item no. 2, the Custodian has not unlawfully denied access to said request item pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, *supra*.

Regarding request items no. 1 and 3, the Complainant contends that the Custodian violated N.J.S.A. 47:1A-5.i. because the Custodian failed to grant access or deny access to said request items within the statutorily mandated seven (7) business days. The Custodian made a record available to the Complainant regarding request item no. 1 on the same date he received the Complainant's request, but stated that he would not release said record until he received payment of \$0.75. In response to request item no. 3 the Custodian provided the Complainant with the cost of a DVD and stated that the cost for audio was not available.

However, both the courts and the GRC have discussed the level of specificity required for an OPRA request to be considered valid. Specifically, the New Jersey Superior Court has held that "[w]hile 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*

⁶ It appears that the Complainant suggests the Custodian failed to provide a written denial of access.
Martin O'Shea v. Bloomfield Board of Education (Essex), 2009-175 – Findings and Recommendations of the Executive Director 6

'readily accessible for inspection, copying, or examination.' N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). 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." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁷ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁸

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005)."

In this instant complaint, request item no. 1 of the Complainant's OPRA request sought "a copy of *any record* that includes the amount of fees paid by the Bloomfield School District to the law firm of Schwartz, Simon, Edelstein, Celso & Kessler between the period beginning April 1, 2008 through April 30, 2009" (emphasis added). The Complainant does not name any identifiable government record. Any record that includes the amount of fees could include purchase orders, check stubs, spreadsheets, etc. In fact, the Custodian included a record in his SOI that contained a listing of purchase orders and corresponding check numbers and check amounts paid to Schwartz, Simon, Edelstein, Celso & Kessler. The Complainant's Counsel contends that a listing of purchase orders is not responsive to his request since said list only shows the amounts billed, not the amounts actually paid. Counsel's statement supports the finding that request item no. 1 is not a valid OPRA request because the purchase order listing is technically "any record that includes the amount of fees paid by the Bloomfield School District to the law firm of Schwartz, Simon, Edelstein, Celso & Kessler" but was not deemed to be responsive by the Complainant's Counsel.⁹

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

⁸ As stated in Bent, *supra*.

⁹ The GRC notes that the record included in the Custodian's SOI does not include the specific date range requested by the Complainant.

Similarly, request item no. 3 sought “a copy of *any record* that includes fees the Bloomfield School District charges for audio and video recordings of its minutes” (emphasis added). Again, the Complainant failed to identify a specific government record.

Therefore, because request items no. 1 and 3 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra. As such, the Complainant’s assertion that the Custodian violated N.J.S.A. 47:1A-5.b. by improperly assessing a \$0.75 fee to provide a record responsive to request item no. 1 via e-mail is moot since said request is invalid. Nevertheless, the Council has previously held that there is generally no charge incurred by an agency to transmit records electronically. *See McBride v. Borough of Mantoloking (Ocean)*, GRC Complaint No. 2009-138 (April 2010) (holding that “the Custodian must disclose to the Complainant the requested records at the actual cost, pursuant to N.J.S.A. 47:1A-5.b., which is \$0.00 because there is no cost incurred by the Borough to transmit the requested records electronically”).

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.

The Complainant seeks a declaration whether the Custodian’s handling of his OPRA request constitutes a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. The Complainant certified that on May 5, 2009 he had a telephone conversation with the Custodian regarding the Complainant’s OPRA request. The Complainant certified that he questioned the appropriateness of the fee assessed by the Custodian to provide records via e-mail attachment. The Complainant certified that the Custodian suggested he pursue the matter “in Trenton” and hung up the phone. The Complainant’s Counsel asserted that the Complainant’s certification coupled with the Complainant’s e-mail to the Custodian dated May 5, 2009 demonstrates the Custodian’s blatant disregard of his responsibilities under OPRA.

However, as previously stated, because the Custodian provided the Complainant with a written response within the statutorily mandated seven (7) business days indicating that the Complainant's request item no. 2 was "not approved" because the BOE has not ratified an agreement for Board Attorney as of the date of the Complainant's request, and because the Custodian certified that there are no records responsive to request item no. 2, the Custodian has not unlawfully denied access to said request item pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra.

Additionally, because request items no. 1 and 3 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra. As such, the Complainant's assertion that the Custodian violated N.J.S.A. 47:1A-5.b. by improperly assessing a \$0.75 fee to provide a record responsive to request item no. 1 via e-mail is moot since said request is invalid.

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).

While the Custodian may have engaged in an unfriendly telephone conversation with the Complainant, the Custodian did not unlawfully deny access to request item no. 2, and request items no. 1 and 3 are invalid. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

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

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

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

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

we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

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

“New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); *see also* Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of

Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.¹⁰ Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can

¹⁰ The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

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 Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight business days later, or one day beyond the statutory limit. *Id.* at 79. As a result, the Court shifted the burden to Hoboken to prove that the plaintiff’s lawsuit, filed on March 4, was not the catalyst behind the City’s voluntary disclosure. *Id.* Because Hoboken’s February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff’s lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

In this instant complaint, the Complainant asserted that the Custodian improperly denied access to his OPRA request and sought an Order from the Council directing the Custodian to provide the requested records in the medium requested without the payment of a fee (the Custodian assessed a \$0.75 fee to provide a record via e-mail). However, as previously stated, because request items no. 1 and 3 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra. As such, the Complainant’s assertion that the Custodian violated N.J.S.A. 47:1A-5.b. by improperly assessing a \$0.75 fee to provide a record responsive to request item no. 1 via e-mail is moot since said request is invalid. Nevertheless, the Council has previously held that there is generally no charge incurred by an agency to transmit records electronically. *See McBride v. Borough of Mantoloking (Ocean)*, GRC Complaint No. 2009-138 (April 2010) (holding that “the Custodian must disclose to the Complainant the requested records at the actual cost, pursuant to N.J.S.A. 47:1A-5.b., which is \$0.00 because there is no cost incurred by the Borough to transmit the requested records electronically”).

Additionally, because the Custodian provided the Complainant with a written response within the statutorily mandated seven (7) business days indicating that the Complainant’s request item no. 2 was “not approved” because the BOE has not ratified an agreement for Board Attorney as of the date of the Complainant’s request, and because the Custodian certified that there are no records responsive to request item no. 2, the Custodian has not unlawfully denied access to said request item pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra.

Therefore, pursuant to Teeters, supra, the Complainant is not a “prevailing party” entitled to an award of reasonable attorney’s fees. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian’s conduct. Additionally, using the catalyst theory discussed in Mason, supra, there is no factual causal nexus between the filing of the Complainant’s Denial of Access Complaint and the relief ultimately achieved because the Complainant did not receive any relief. The Custodian did not unlawfully deny access to the requested records and the Complainant’s challenge of the \$0.75 fee is moot since said request item is invalid.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided the Complainant with a written response within the statutorily mandated seven (7) business days indicating that the Complainant's request item no. 2 was "not approved" because the Board of Education has not ratified an agreement for Board Attorney as of the date of the Complainant's request, and because the Custodian certified that there are no records responsive to request item no. 2, the Custodian has not unlawfully denied access to said request item pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Because request items no. 1 and 3 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Complainant's assertion that the Custodian violated N.J.S.A. 47:1A-5.b. by improperly assessing a \$0.75 fee to provide a record responsive to request item no. 1 via e-mail is moot since said request is invalid. Nevertheless, the Council has previously held that there is generally no charge incurred by an agency to transmit records electronically. See McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (April 2010) (holding that "the Custodian must disclose to the Complainant the requested records at the actual cost, pursuant to N.J.S.A. 47:1A-5.b., which is \$0.00 because there is no cost incurred by the Borough to transmit the requested records electronically").
3. While the Custodian may have engaged in an unfriendly telephone conversation with the Complainant, the Custodian did not unlawfully deny access to request item no. 2, and request items no. 1 and 3 are invalid. 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.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant is not a "prevailing party" entitled to an award of reasonable attorney's fees. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct. Additionally, using the catalyst theory discussed in Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), there is no factual causal nexus between the filing of the Complainant's Denial of Access Complaint and the relief ultimately achieved because the Complainant did not receive any relief. The

Custodian did not unlawfully deny access to the requested records and the Complainant's challenge of the \$0.75 fee is moot since said request item is invalid.

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Executive Director

May 20, 2010