



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

July 26, 2011 Government Records Council Meeting

Martin E. O'Boyle, Jr.
Complainant

Complaint No. 2010-107

v.

Borough of Longport (Atlantic)
Custodian of Record

At the July 26, 2011 public meeting, the Government Records Council ("Council") considered the July 19, 2011 *Reconsideration* 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 because the Complainant has failed to establish in his request for reconsideration of the Council's November 30, 2010 Findings and Recommendations regarding the award of attorney's fees were 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 26th Day of July, 2011

Robin Berg Tabakin, Chair
Government Records Council



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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: July 27, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
July 26, 2011 Council Meeting

Martin E. O'Boyle, Jr.¹
Complainant

GRC Complaint No. 2010-107

v.

Borough of Longport (Atlantic)²
Custodian of Records

Records Relevant to Complaint:

First OPRA request:³

1. Copies of all lawsuits ("lawsuits") naming the Borough of Longport, including any of its departments and employees in their official capacity, filed since January 1, 2008;
2. Copies of all tort notices ("tort notices") naming the Borough of Longport, including any of its departments and employees in their official capacity, filed since January 1, 2008;
3. Copies of all legal fees applicable to each lawsuit and each tort notice referenced above.

Second OPRA request:⁴

1. Provide a copy of each pleading filed in each lawsuit referenced above;
2. Provide copies of all discovery provided to or by any of the parties, including third parties, for each of the lawsuits referenced above;
3. Provide copies of all deposition transcripts for each of the lawsuits referenced above.

Request Made: October 14, 2009

Response Made: October 20, 2009 and April 6, 2010

Custodian: Thomas D. Hiltner

GRC Complaint Filed: May 21, 2010⁵

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Oxford, NJ). Complainant notes on the Denial of Access Complaint that he is a member of Citizens for Open Government, LLC.

² Represented by Pacifico S. Agnellini, Esq., Sterns & Weinroth (Absecon, NJ).

³ The Complainant refers to this request as #0102CFOG.

⁴ The Complainant refers to this request #0103CFOG.

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

Background

November 30, 2010

Government Records Council's ("Council") Order. At its November 30, 2010 public meeting, the Council considered the November 23, 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, found that:

1. The Custodian's failure to respond in writing to the Complainant's first (1st) 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).
2. Pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, 2007-220 (April 2008), the Custodian unlawfully denied the Complainant access to the records responsive to request item no. 1 of the second OPRA request because the Custodian mistakenly informed the Complainant that there were no records responsive to his request. *See also* Oskay v. New Jersey State Parole Board, 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), 2008-90 (June 2009).
3. The Custodian's October 20, 2009 response to the second OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008) because he failed to individually address each of the Complainant's three (3) request items contained in the second OPRA request.
4. With regard to item No. 1 of the Complainant's first OPRA request, which sought copies of all lawsuits naming the Borough of Longport, including any of its departments and employees in their official capacity, filed since January 1, 2008, the evidence of record indicates that the Custodian provided access to copies of records responsive to this request item on April 22, 2010 and April 18, 2010. Such access was within the extended time period of April 30, 2010 granted by the Complainant in his letter to the Custodian dated April 20, 2010. Thus, the Custodian has not unlawfully denied access to the requested records. N.J.S.A. 47:1A-6.
5. With regard to item No. 2 of the Complainant's first OPRA request, which sought copies of all tort notices naming the Borough of Longport, including any of its departments and employees in their official capacity, filed since January 1, 2008, the evidence of record indicates that the Custodian provided access to copies of records responsive to this request item on June 22, 2010. Such access was within the extended time period of April 30, 2010 granted by the Complainant in his letter to the Custodian dated April 20, 2010. Thus, the

Custodian has not unlawfully denied access to the requested records. N.J.S.A. 47:1A-6.

6. With regard to item No. 3 of the Complainant's first OPRA request, which sought copies of all legal fees applicable to each lawsuit and each tort notice referenced in item Nos. 1 and 2 of the request, the evidence of record indicates that the Complainant withdrew his request for records responsive to this request item in a letter to the Custodian dated April 20, 2010. The Custodian has not, therefore, unlawfully denied access to the records requested. N.J.S.A. 47:1A-6.
7. With regard to the Complainant's second OPRA request, the evidence of record indicates that the Complainant modified such request by letter to the Custodian dated April 20, 2010, in which the Complainant stated that "we would modify the Request and ask only for the Complaints and Answers for each of the lawsuits [defined in the first OPRA request]." The evidence of record further indicates that the Custodian provided access to copies of records responsive to this request on May 11, 2010, May 18, 2010, May 26, 2010, June 4, 2010, June 10, 2010, June 11, 2010, and June 22, 2010. The Custodian has not, therefore, unlawfully denied access to the records requested. N.J.S.A. 47:1A-6.
8. Although the Custodian violated N.J.S.A. 47:1A-5.g. by failing to respond in writing to the Complainant's first OPRA request within the statutorily mandated seven (7) business days and provided an insufficient response to the Complainant's second OPRA request pursuant to N.J.S.A. 47:1A-5.g., and conducted an insufficient search in response to the Complainant's second OPRA request, the Custodian provided the Complainant with all records responsive to the modified first and second requests within the agreed-upon extension of time for such response. 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.
9. Therefore, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) the Complainant has not achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

December 6, 2010

Council's Order distributed to the parties.

December 20, 2010

Letter from Complainant's Counsel to the GRC. Complainant's Counsel requests that the GRC reconsider its November 30, 2010 Findings and Recommendations determining that the Complainant is not the prevailing party in this matter.

Counsel asserts that in this case, the GRC determined that the Complainant was not the prevailing party because of its factual determination that on May 11, 2010 the Custodian informed the Complainant that she was working on gathering the answers to the Complainant's OPRA request. Complainant's Counsel asserts that the "answers" referred to were the formal Answers filed in litigation that involved the Borough of Longport. Counsel asserts that the original OPRA request that formed the basis of the Complainant's Denial of Access Complaint was filed on October 14, 2009 and the Borough had originally denied that request by stating that "the records you requested do not exist." Counsel asserts that after several rounds of clarification and partial disclosure by the Custodian, the Custodian still had not provided copies of the requested Answers. Counsel states that on March 31, 2010, the Custodian asserted the need to charge a special service charge for access, which the Custodian later dropped. Counsel states that the Complainant made it clear in correspondence dated May 4, 2010 that his patience had been exhausted and that if the Answers were not received by the end of the week, enforcement action would be taken. Counsel states that in response to said letter, the Custodian stated that they were currently working on gathering the Answers. Counsel asserts that the Custodian did not ask for an extension of time to provide the Answers, and none was given, nor did the Custodian provide a deadline for her response. Counsel states that based on this, the GRC should not have concluded that the Custodian was in the process of providing the requested Answers. Counsel states that no Answers had been provided prior to the filing of the Denial of Access Complaint.

Counsel states that if the Complainant filed the within action on October 21, 2009, which was the day after the Custodian initially stated that there were no records responsive to the Complainant's OPRA request, the Complainant would have won that action, the Answers would have been disclosed and the GRC would have held that the Complainant was the prevailing party. Counsel further states that instead, the Complainant continued to contact the Custodian, negotiated and clarified his request, and after seven (7) months, filed this action to compel production of records which the Custodian initially stated did not exist.

Counsel states that because the Complainant's request for Answers was initially denied by the Custodian, and the production of the requested Answers only began after this action was filed, the GRC's determination that there was no causal nexus between the production of the Answers and the filing of this Complaint was in error. Counsel states that at the very least, because the burden of proof is on the Custodian, the finding that there was no causal nexus should be based on something more substantial than the Custodian's promise in early May 2010 to produce records sometime in the indefinite future, when the request was made in October 2009. Counsel asserts that under the GRC's analysis, the Complainant is not the prevailing party because seven (7) months after his initial request, the Custodian promised to provide the records sometime in the future.

Counsel asserts that the timeline for the Custodian's production of the requested records was accelerated substantially by the filing of this Denial of Access Complaint. Counsel states that, at worst, the GRC should refer this matter to the Office of Administrative Law to determine what role the filing of the complaint had in this matter and to what extent it instigated the production of records which had been requested seven (7) months earlier.

December 21, 2010

Letter from Custodian's Counsel to the GRC. Custodian's Counsel objects to the Complainant's request for reconsideration of the Council's November 30, 2010 Decision. Counsel states that reconsideration is neither appropriate nor necessary.

Counsel states that he became the solicitor for the Borough on January 1, 2010, and that the OPRA request in question and the response thereto was one of the items which he reviewed at that time. Counsel states that by letter dated March 31, 2010, on behalf of the Borough, Counsel informed the Complainant that portions of the original request did not cover government records.

Counsel states that the Complainant modified the original OPRA request by letter dated April 20, 2010 to seek copies of law suits naming the Borough and Answers filed with respect thereto. Counsel states that most of these actions involved actions initiated by the Complainant or on his behalf and contained records that the Complainant or his Counsel already had in their possession.

Counsel states that on April 22, 2010, two (2) days after modification of the OPRA request, the Borough provided the Complainant with twenty four (24) pleadings consisting of 172 pages. Counsel also states that on May 18, 2010, the Custodian provided four (4) additional pleadings, totaling 113 pages. Counsel further states that on May 26, 2010, an additional six (6) pleadings comprising 42 pages were provided to the Complainant, and then on June 4, 2010 through June 22, 2010, additional pleadings were provided.⁶

Counsel asserts that the complaint at issue was filed on May 20, 2010 and received by the Borough on May 21, 2010; most of the records requested had been provided to the Complainant prior to that date and assurances had been made to the Complainant that the Borough was collecting the information in question from third parties and would provide them as they were obtained. Counsel asserts that numerous e-mails were sent to the Complainant advising of the status of the various pleadings requested.

Counsel states that the Borough provided records responsive to the request within two (2) days of receipt of the modified request and continued to provide the records through the end of June, 2010. Counsel states that records were provided to the Complainant prior to and after the filing of the instant complaint. Counsel states that the only conclusion that can be reached is that the filing of the instant Denial of Access

⁶ Custodian's Counsel does not specify the number of responsive records provided or the number of pages provided.
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Complaint did not cause compliance with the request or that it was even causally related to compliance with the request.

Counsel states that most of the records requested were not in the possession of the Borough and that as those records were obtained by the Borough, they were provided to the Complainant. Counsel states that although perhaps the records requested should have been in the Borough's possession, the filing of the instant complaint did not cause the Borough to provide the requested records.

Counsel therefore asserts that the GRC's decision was proper and that reconsideration is unnecessary; further, referral to the Office of Administrative Law is neither necessary nor appropriate.

December 27, 2010

Letter from Complainant's Counsel to the GRC. Counsel responds to the Custodian's December 21, 2010 opposition to the request for reconsideration.

Counsel states that neither he nor the Complainant has a record of receiving any records in response to the Complainant's OPRA request on May 18, 2010. Counsel refers the GRC to Exhibit B of the Custodian's SOI, which is a June 22, 2010 e-mail from the Chief Financial Officer/Registrar of the Borough to Michael Barker, in which Ms. Kelly "wonder[ed] if it is possible to get a copy of the answer filed in two lawsuits that you handed for the Borough."

Counsel states that there is no evidence in the record that any attempt was made to collect the requested Answers prior to the filing of the Complainant's Denial of Access Complaint. Counsel states that there is also no evidence that any Answers were provided to the Complainant prior to May 21, 2010. Finally, Counsel states that the Custodian provided responsive records to the Complainant as late as August 11, 2010.⁷

Counsel states that based on these facts and the arguments presented in the request for reconsideration, the Complainant believes that GRC should reconsider its November 30, 2010 Findings and Recommendations.

Analysis

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

Applicable case law holds that:

⁷ Counsel attaches copies of e-mails from the Custodian's Counsel to the Complainant's Counsel which purport to include records responsive to the Complainant's OPRA request herein. *Martin E. O'Boyle, Jr. v. Borough of Longport (Atlantic), 2010-107 – Supplemental Findings and Recommendations of the Executive Director*

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D’Atria, *supra*, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of the request for reconsideration, Complainant’s Counsel argued that the Council’s determination that the Complainant was not a prevailing party in this matter because the Complainant did not achieve “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct” and because its finding that a factual causal nexus does not exist between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved, was not based on the substantial weight of the evidence in the record.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*.

Under OPRA, “the public agency shall have the burden of proving that the denial of access is authorized by law.” N.J.S.A. 47:1A-6. Moreover, preponderance of the evidence is “the usual burden of proof for establishing claims before state agencies in contested administrative adjudications.” In re Polk License Revocation, 90 N.J. 550, 560 (1982); State v. Seven Thousand Dollars, 136 N.J. 223, 238 (1994) (“In civil cases, the standard of proof is a preponderance of evidence.”); see also 2 McCormick on Evidence § 339 (Strong ed., 5th ed. 1999) (stating that, except “in certain exceptional controversies,” preponderance of evidence standard typically applies in civil cases); 9 Wigmore on Evidence § 2498 (3d ed. 1940) (same).

Under the preponderance standard, “a litigant must establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met.” Biunno, *Current N.J. Rules of Evidence*, comment 5a on N.J.R.E. 101(b)(1) (2005); see also McCormick on Evidence, *supra*, § 339 (“The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads

the jury to find that the existence of the contested fact is more probable than its nonexistence.”).

As the Council noted in its November 30, 2010 Findings and Recommendations, 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.

With regard to prevailing party attorney’s fees, 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.*

Moreover, in Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), the New Jersey Supreme Court held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, cert denied (1984).” *Id.* at 76.

Thus, if the preponderance of the evidence in the record indicates either 1) the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” (Teeters, *supra*, at 432) or 2) a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved (Mason, *supra*, at 80), then the Complainant is a prevailing party and is entitled to an award of a reasonable attorney’s fee under OPRA.

Therefore, in determining the propriety of an award of attorney fees, the court must first determine whether one qualifies as a prevailing party. A requestor under OPRA is not a prevailing party for purposes of award of attorney's fees simply because the agency produced documents after an OPRA suit was filed; rather, a complainant is a prevailing party if he or she achieves the desired result because the complaint brought about change, voluntary or otherwise, in the custodian's conduct. N.J.S.A. 47:1A-6,

47:1A-11. Spectraserv, Inc. v. Middlesex County Utilities Authority, 416 N.J.Super. 565, 583 (App. Div. 2010).⁸

In Spectraserv, the Superior Court of New Jersey, Appellate Division, determined that a requestor was not prevailing party entitled to award of attorney's fees in an action against the Middlesex County Utilities Authority ("MCUA") arising from denial of records requested pursuant to OPRA. In doing so, the court noted that in its initial response to Spectraserv's letter request for records, the MCUA acknowledged its obligation to produce non-exempt documents and, in fact, made many of these documents available for inspection in advance of any court intervention or directive. Moreover, the evidence showed that three weeks before Spectraserv filed its OPRA complaint, the MCUA proposed the very solution ultimately adopted by the trial court to address disclosure issues common to both lawsuits; the evidence also showed that the MCUA immediately took steps to cull and isolate from its voluminous records those it deemed privileged and confidential and made other records available as soon as confidentiality was no longer an issue. "Thus, under the circumstances, it cannot be said that Spectraserv's OPRA complaint caused the production of documents that would not have been produced otherwise." *Id.* at 584.

In its November 30, 2010 Findings and Recommendations, the Council determined that:

"In the matter before the Council, the Complainant filed two (2) OPRA requests on October 14, 2009. Although the Custodian responded in writing to the second OPRA request on the fourth (4th) business day following receipt thereof, the Custodian did not respond to the first OPRA request until April 6, 2010, the one hundred and fourteenth (114th) business day following receipt thereof. Thereafter, the evidence of record indicates that the Complainant modified his OPRA requests on April 20, 2010 and requested production of the revised records requested in the first OPRA request by April 30, 2010. The evidence of record indicates that the Custodian provided the records sought in the modified request within the extended time period to do so.

However, with regard to the second OPRA request, the evidence of record indicates that the Complainant modified such request in his letter to the Custodian dated April 20, 2010 and asked that the Custodian notify the Complainant when he could expect receipt of the requested records. The evidence of record also indicates that the Custodian sent an e-mail to the Complainant dated May 11, 2010 in which the Custodian indicated that he had forwarded the requested Complaints to the Complainant and was working on gathering the requested Answers. The evidence of record further indicates that the Custodian provided additional records responsive to the request on May 18, 2010. The Complainant filed the instant Denial of Access Complaint on May 21, 2010. The evidence of record shows, however, that the Custodian continued to provide responsive records to the

⁸ The Appellate Division issued its decision on November 18, 2010. *Martin E. O'Boyle, Jr. v. Borough of Longport (Atlantic)*, 2010-107 – Supplemental Findings and Recommendations of the Executive Director

Complainant on May 26, 2010, June 4, 2010, June 10, 2010, June 11, 2010, and June 22, 2010.

Thus, *the evidence of record indicates that the [Custodian] indicated an intention to provide responsive records on May 11, 2010*, prior to the filing of the Denial of Access Complaint and in fact provided such records both prior to and after the filing of the Denial of Access Complaint herein. Therefore, the evidence of record shows that the filing of this Complaint was not the catalyst for the release of the requested records.” [Emphasis added].

As noted by the Council in its Findings and Recommendations dated November 30, 2010, the evidence of record in the matter before the Council indicates that the Custodian sent an e-mail to the Complainant dated May 11, 2010 in which the Custodian indicated that he had forwarded the requested Complaints responsive to the Complainant’s second OPRA request to the Complainant and was working on gathering the requested Answers. The evidence of record further indicates that the Custodian provided additional records responsive to the request on May 18, 2010. The Complainant filed the instant Denial of Access Complaint on May 21, 2010. The evidence of record shows, moreover, that the Custodian continued to provide responsive records to the Complainant on May 26, 2010, June 4, 2010, June 10, 2010, June 11, 2010, and June 22, 2010.

Although Complainant’s Counsel stated in his letter to the GRC dated December 27, 2010 that neither he nor the Complainant has a record of receiving any records in response to the Complainant’s OPRA request on May 18, 2010, the GRC notes that this uncertified allegation does not rise to the level of competent, credible evidence. Moreover, in the same correspondence, Complainant’s Counsel referred the GRC to Exhibit B of the Custodian’s SOI, a June 22, 2010 e-mail from the Chief Financial Officer/Registrar of the Borough to Michael Barker, in which Ms. Kelly “wonder[ed] if it is possible to get a copy of the answer filed in two lawsuits that you handed for the Borough[,]” in support of the contention that the Custodian did not provide all responsive records to the Complainant prior to the filing of the Denial of Access Complaint on May 21, 2010. However, under Spectraserv, *supra*, the issue is not whether the Custodian provided all of the records responsive to the request prior to the filing of the complaint in this matter, but whether the Custodian evinced an intention to provide such records and took steps to do so.

Because the preponderance of the evidence of record supports the Council’s conclusion that the filing of the Complainant’s Denial of Access Complaint on May 21, 2010 did not cause the production of documents that would not have been produced otherwise, the Complainant is not a prevailing party entitled to an award of reasonable attorney’s fees. Spectraserv, Inc. v. Middlesex County Utilities Authority, 416 N.J. Super. 565, 583 (App. Div. 2010); Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

The Complainant, therefore, has failed to establish that the Council's November 30, 2010 Findings and Recommendations regarding the award of attorney's fees was 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence.

Therefore, because the Complainant has failed to establish in his motion for reconsideration that the Council's November 30, 2010 Findings and Recommendations regarding the award of attorney's fees was 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant has failed to establish in his request for reconsideration of the Council's November 30, 2010 Findings and Recommendations regarding the award of attorney's fees were 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

July 19, 2011



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
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FINAL DECISION

November 30, 2010 Government Records Council Meeting

Martin E. O'Boyle, Jr.
Complainant

Complaint No. 2010-107

v.

Borough of Longport (Atlantic)
Custodian of Record

At the November 30, 2010 public meeting, the Government Records Council ("Council") considered the November 23, 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. The Custodian's failure to respond in writing to the Complainant's first (1st) 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).
2. Pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, 2007-220 (April 2008), the Custodian unlawfully denied the Complainant access to the records responsive to request item no. 1 of the second (2nd) OPRA request because the Custodian mistakenly informed the Complainant that there were no records responsive to his request. *See also* Oskay v. New Jersey State Parole Board, 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), 2008-90 (June 2009).
3. The Custodian's October 20, 2009 response to the second (2nd) OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008) because he failed to individually address each of the Complainant's three (3) request items contained in the second (2nd) OPRA request.
4. With regard to item No. 1 of the Complainant's first (1st) OPRA request, which sought copies of all lawsuits naming the Borough of Longport, including any of its



departments and employees in their official capacity, filed since January 1, 2008, the evidence of record indicates that the Custodian provided access to copies of records responsive to this request item on April 22, 2010 and April 18, 2010. Such access was within the extended time period of April 30, 2010 granted by the Complainant in his letter to the Custodian dated April 20, 2010. Thus, the Custodian has not unlawfully denied access to the requested records. N.J.S.A. 47:1A-6.

5. With regard to Item No. 2 of the Complainant's first (1st) OPRA request, which sought copies of all tort notices naming the Borough of Longport, including any of its departments and employees in their official capacity, filed since January 1, 2008, the evidence of record indicates that the Custodian provided access to copies of records responsive to this request item on June 22, 2010. Such access was within the extended time period of April 30, 2010 granted by the Complainant in his letter to the Custodian dated April 20, 2010. Thus, the Custodian has not unlawfully denied access to the requested records. N.J.S.A. 47:1A-6.
6. With regard to Item No. 3 of the Complainant's first (1st) OPRA request, which sought copies of all legal fees applicable to each lawsuit and each tort notice referenced in Item Nos. 1 and 2 of the request, the evidence of record indicates that the Complainant withdrew his request for records responsive to this request item in a letter to the Custodian dated April 20, 2010. The Custodian has not, therefore, unlawfully denied access to the records requested. N.J.S.A. 47:1A-6.
7. With regard to the Complainant's second (2nd) OPRA request, the evidence of record indicates that the Complainant modified such request by letter to the Custodian dated April 20, 2010, in which the Complainant stated that "we would modify the Request and ask only for the Complaints and Answers for each of the lawsuits [defined in the first (1st) OPRA request]." The evidence of record further indicates that the Custodian provided access to copies of records responsive to this request on May 11, 2010, May 18, 2010, May 26, 2010, June 4, 2010, June 10, 2010, June 11, 2010, and June 22, 2010. The Custodian has not, therefore, unlawfully denied access to the records requested. N.J.S.A. 47:1A-6.
8. Although the Custodian violated N.J.S.A. 47:1A-5.g. by failing to respond in writing to the Complainant's first (1st) OPRA request within the statutorily mandated seven (7) business days and provided an insufficient response to the Complainant's second (2nd) OPRA request pursuant to N.J.S.A. 47:1A-5.g., and conducted an insufficient search in response to the Complainant's second (2nd) OPRA request, the Custodian provided the Complainant with all records responsive to the modified first (1st) and second (2nd) requests within the agreed-upon extension of time for such response. 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.
9. The evidence of record indicates that the Complainant indicated in writing an intention to provide responsive records on May 11, 2010, prior to the filing of the Denial of Access Complaint and in fact provided such records both prior to and after the filing of the Denial of Access Complaint herein. Therefore, the evidence of record shows that the filing of this Complaint was not the catalyst for the release of the requested records. Therefore, pursuant to Teeters v. DYFS, 387 N.J. Super. 423

(App. Div. 2006) the Complainant has not achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), a factual causal nexus does not exist between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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

Final Decision Rendered by the
Government Records Council
On The 30th Day of November, 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: December 6, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 30, 2010 Council Meeting**

Martin E. O’Boyle, Jr.¹
Complainant

GRC Complaint No. 2010-107

v.

Borough of Longport (Atlantic)²
Custodian of Records

Records Relevant to Complaint:

First OPRA request:³

1. Copies of all lawsuits (“lawsuits”) naming the Borough of Longport, including any of its departments and employees in their official capacity, filed since January 1, 2008;
2. Copies of all tort notices (“tort notices”) naming the Borough of Longport, including any of its departments and employees in their official capacity, filed since January 1, 2008;
3. Copies of all legal fees applicable to each lawsuit and each tort notice referenced above.

Second OPRA request:⁴

1. Provide a copy of each pleading filed in each lawsuit referenced above;
2. Provide copies of all discovery provided to or by any of the parties, including third parties, for each of the lawsuits referenced above;
3. Provide copies of all deposition transcripts for each of the lawsuits referenced above.

Request Made: October 14, 2009

Response Made: October 20, 2009 and April 6, 2010

Custodian: Thomas D. Hiltner

GRC Complaint Filed: May 21, 2010⁵

Background

October 14, 2009

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above in an attachment to an official OPRA request form.⁶

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Oxford, NJ). Complainant notes on the Denial of Access Complaint that he is a member of Citizens for Open Government, LLC.

² Represented by Pacifico S. Agnellini, Esq., Sterns & Weinroth (Absecon, NJ).

³ The Complainant refers to this request as #0102CFOG.

⁴ The Complainant refers to this request #0103CFOG.

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

October 20, 2009

Custodian's response to the second (2nd) OPRA request.⁷ The Custodian responds in writing via e-mail on the fourth (4th) business day following receipt of such request. The Custodian states that access to the requested records is denied because no records responsive exist.

February 17, 2010

Letter from the Complainant to the Custodian.⁸ The Complainant states that in reference to the second (2nd) OPRA request, the Complainant disputes the Custodian's allegation in the response to such OPRA request, dated October 20, 2009, that no records responsive exist. The Complainant asserts that he is aware that pleadings responsive to the request exist and asserts that such pleadings are government records pursuant to OPRA. The Complainant inquires whether the Custodian's e-mail dated October 20, 2009 is an oversight or the Borough intends to provide the requested records.

March 31, 2010

Letter from Custodian's Counsel to the Custodian. Custodian's Counsel states that he has reviewed the Complainant's OPRA requests and requests that the Custodian advise the Complainant that, notwithstanding the prior response, the Borough will provide copies of the information requested in Items No. 1 and 2 of the first (1st) OPRA request.⁹ Custodian's Counsel states that the request pertaining to Item No. 3 of the first (1st) OPRA request is unclear and states Counsel's assumption that the request item refers to legal bills. Counsel requests that the Custodian confirm this assumption with the Complainant. Counsel states that if his assumption is correct, the responsive records are government records under OPRA. Counsel further states that based on prior conversations with the Custodian, Counsel believes that the Complainant received such records; Counsel asks the Custodian to confirm with the Complainant that he did in fact receive such records or advise Counsel otherwise.

Counsel further states that the documents requested in the Complainant's second OPRA request are not typically records which are maintained by Borough employees but instead are records which are maintained by Borough Counsel. Complainant's Counsel states that while such records are arguably government records under OPRA, it does not appear that any Borough employee has such records. Counsel states that it will therefore be necessary for the Borough to contact outside counsel and request that such counsel compile the records set forth in the request. Counsel states that, given the overly broad natures of the request and the fact that outside counsel costs will be incurred by the Borough in responding to the request, Counsel recommends that the Custodian advise the Complainant that a special service charge of \$175 per hour be assessed, said figure

⁶ The attachment to the OPRA request notes that "if there are any questions regarding this request, please contact Brenda Russell." Subsequent correspondence to and from Ms. Russell to the Custodian will therefore be attributed herein to the Complainant.

⁷ The Custodian's response specifically refers to the Complainant's second (2nd) OPRA request by the request number which the Complainant assigned to it.

⁸ The Complainant attaches a copy of the second (2nd) OPRA request dated October 14, 2009, as well as the Custodian's e-mail dated October 20, 2009.

⁹ The GRC has altered the numbering of the paragraphs as stated to comport with the recitation of the records relevant to this Denial of Access Complaint.

representing outside counsel's rate. Counsel further states that, if possible, the lower applicable paralegal rate should be charged. Counsel states that if the Complainant agrees to such special service charge prior to compiling the responsive records, Counsel will obtain an estimate of the costs and provide same to the Custodian so that he may get prior approval from the Complainant.

April 6, 2010

E-mail from the Custodian to the Complainant, attaching the above-referenced letter from the Custodian's Counsel to the Custodian dated March 31, 2010.¹⁰

April 9, 2010

Letter from the Complainant to the Custodian. The Complainant states that he writes in response to the e-mail dated April 6, 2010 from the Custodian, as well as to the Custodian Counsel's letter to the Custodian dated March 31, 2010.

The Complainant requests that the Custodian not forward correspondence from Custodian's Counsel and asserts the belief that this is a method used by Custodian's Counsel to attempt to deal directly with a represented party, which the Complainant believes is an ethical violation; Complainant states that should this occur again, the Complainant will file the appropriate ethics complaint.

The Complainant requests that the Custodian confirm that the Borough is compiling the records responsive to the requests as asserted by Custodian's Counsel. Complainant states that he awaits the Custodian's response to the OPRA requests and asks the Custodian to provide an outside date upon which the Complainant can expect to receive the requested records.

The Complainant confirms that Item No. 3 of the first (1st) OPRA request seeks legal bills and requests that the Custodian provide a date upon which the Complainant can expect to receive the requested records.

The Complainant states that he expects that the Custodian will grant or deny access to the records sought in the second (2nd) OPRA request. The Complainant asks the Custodian to let him know if the Custodian will be fulfilling the request and states that if this is not the case, the Custodian should deny the request as soon as possible.

April 20, 2010

Letter from the Complainant to the Custodian. The Complainant states that with regard to the first (1st) OPRA request, the Complainant acknowledges receipt of an e-mail from the Custodian dated April 6, 2010, together with the letter from Custodian's Counsel to Custodian dated March 31, 2010.

The Complainant states that, in reference to the letter from Custodian's Counsel to Custodian dated March 31, 2010, the Complainant asks that the Custodian provide the

¹⁰ This e-mail represents the Custodian's written response to the Complainant's first (1st) OPRA request on the one hundred and fourteenth (114th) business day following receipt thereof. Although this e-mail is sent from the mailbox denoted "OPRA Custodian," it is signed by "Jenna" and notes that the Custodian requested that Jenna send the attached letter to the Complainant.

records requested in Items No. 1 and 2 of the first (1st) OPRA request. The Complainant states that he is agreeable to extending the period for production of the records responsive to such request to April 30, 2010. The Complainant states that he looks forward to the prompt receipt of the records responsive to such request.

The Complainant also states that, with regard to the records sought in Item No. 3 of the first (1st) OPRA request, the Complainant withdraws such request.

April 20, 2010

Letter from the Complainant to the Custodian.¹¹ The Complainant states that with regard to the second (2nd) OPRA request, the Complainant acknowledges receipt of an e-mail from the Custodian dated April 6, 2010 and the letter from Custodian's Counsel dated March 31, 2010.

The Complainant asks that the Custodian accept the instant letter as a modification to the second (2nd) OPRA request. The Complainant states that he now seeks only the Complaints and Answers for each of the lawsuits as defined in the first (1st) OPRA request.

The Complainant states that with the modification of this request, the Complainant does not believe that any type of special service charge is appropriate. The Complainant requests that the Custodian inform him when the Complainant may expect the records responsive to the modified request. The Complainant states that if the Custodian does not respond within seven (7) business days, the Complainant will consider that the Custodian has denied the modified request.

May 4, 2010

Letter from the Complainant to the Custodian. The Complainant states that in the Complainant's letter to the Custodian dated April 20, 2010, he modified the second (2nd) OPRA request. The Complainant further states that to date he has not received a response to the request. The Complainant states that he feels that he is entitled to a response and should have received such a response long ago. The Complainant states that with regard to any responsive records, the Complainant does not believe that any type of special service charge is appropriate, particularly the special service charge of \$175 per hour referenced in the letter dated March 31, 2010 from Custodian's Counsel to Custodian. The Complainant states that he has been very patient but if he does not receive the requested records by the end of the week, the Complainant will re-evaluate his options, which will include asking the courts to order the Borough to produce the requested records.

May 11, 2010

E-mail from the Custodian to the Complainant. The Custodian states that he has forwarded the requested Complaints to the Complainant and is currently working on gathering the requested Answers.¹²

¹¹ The Complainant notes that a copy of the second OPRA request is attached for reference.

¹² The Custodian's e-mail also refers to the provision of records pursuant to other OPRA requests which are not at issue herein. Again, this e-mail is signed "Jenna Kelly" although it appears to originate from the Custodian's e-mail address.

May 21, 2010

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

- Complainant’s two (2) OPRA requests dated October 14, 2009
- E-mail from the Custodian to the Complainant dated October 20, 2009
- Letter from the Complainant to the Custodian dated February 17, 2010
- E-mail from Custodian to the Complainant dated April 6, 2010
- Letter from Custodian’s Counsel to Custodian dated March 31, 2010
- Letter from the Complainant to the Custodian dated April 9, 2010
- Letter from the Complainant to the Custodian dated April 20, 2010
- Letter from the Complainant to the Custodian dated May 4, 2010
- E-mail from the Custodian to the Complainant dated May 11, 2010

Complainant asserts that on October 14, 2009, he submitted an OPRA request to the Borough in which he requested, among other things, copies of each pleading filed in each lawsuit in which the Borough has been named since January 1, 2008. The Complainant also asserts that the Custodian initially denied access to all of the records requested stating that no records responsive exist. The Complainant further asserts that he wrote to the Custodian on February 17, 2010 to advise that the Complainant had not received any of the requested pleadings and reiterating his request for such records. The Complainant asserts that on April 6, 2010, the Custodian forwarded to him a letter dated March 31, 2010 from the Borough’s Counsel to the Custodian in which Counsel recommended that a special service charge be assessed of \$175 per hour for attorney time or, if possible, a lower rate representing paralegal services, to retrieve the requested pleadings.

The Complainant further asserts that on April 9, 2010, he again wrote to the Custodian stating that because the Custodian did not specifically grant or deny access to the requested pleadings, the OPRA request was still pending. The Complainant also asserts that on April 20, 2010, he again wrote to the Custodian noting that he had not yet received the requested pleadings and clarifying that his request only sought complaints and answers in cases filed against the Borough since January 1, 2008. The Complainant further asserts that he reiterated this position in writing to the Custodian on May 4, 2010.

The Complainant contends that to date, although the Custodian provided the requested Complaints, he has not provided the requested Answers.

The Complainant argues that OPRA mandates that “government records shall be readily accessible for inspection, copying or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] ... shall be construed in favor of the public’s right of access.” Libertarian Party of Central NJ v. Murphy, 384 N.J.Super. 136, 139 (App. Div. 2006)(citations omitted). “The purpose of OPRA ‘is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” Time of Trenton Publ’g Corp. v. Lafayette Yard, 183 N.J. 519, 535 (2005)(citations omitted).

The Complainant also argues that there is no doubt that the records requested herein are public records under OPRA. The Complainant further argues that based on the broad definition of a public record at N.J.S.A. 47:1A-1.1, Answers filed in court where the Borough is a defendant would be a public record. The Complainant contends that the Custodian admitted as much in her letter to the Complainant dated May 11, 2010 wherein she stated that the Borough was “currently working on gathering the answers.”

The Complainant contends that because the Custodian has not provided the requested Answers, the GRC should:

- 1) find that the Borough initially violated OPRA when it claimed that no responsive records existed when, in fact, responsive records did exist;
- 2) find that the Borough violated OPRA when it did not provide the requested records or ask for an extension of time to comply within seven (7) business days of receiving the Complainant’s OPRA request;
- 3) direct that the requested records be produced; and
- 4) find that the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-11 and award him a reasonable attorneys’ fee.

The Complainant does not agree to mediate this complaint.

May 26, 2010

E-mail from the Custodian to the Complainant. The Custodian attaches copies of requested Answers responsive to Item No. 1 of the Complainant’s second (2nd) OPRA request. The Custodian states that these are only some of the Answers to the requested Complaints, and that the Custodian is continuing to compile the additional Answers to the remaining Complaints. The Custodian apologizes for the delay.

June 4, 2010

E-mail from the Custodian to the Complainant. The Custodian states that additional records responsive to Item No. 1 of the Complainant’s second (2nd) OPRA request are attached.

June 10, 2010

E-mail from the Custodian to the Complainant. The Custodian states that an additional record responsive to Item No. 1 of the Complainant’s second (2nd) OPRA request is attached.

June 10, 2010

E-mail from the Custodian to the Complainant. The Custodian states that with regard to the remaining records responsive to the first OPRA request, the Custodian is currently contacting the appropriate people to obtain responsive records and will forward any Complaints as they are received. The Custodian states that the Complainant should have received the most recent responsive record this morning.

June 11, 2010

E-mail from the Custodian to the Complainant. The Custodian states that several Answers to Complaints requested by the Complainant are attached. The Custodian also states that no Answers have been filed for two (2) of the requested Complaints: Rosewood Properties, Inv. & Newport Deerfield, Inc., v. Borough of Longport, et als., Docket No. ATL-L-257-10 and Newport Deerfield, Inc., v. Borough of Longport, et. als., Docket No. ATL-L-1176-10. The Custodian states that he will continue to work on retrieving the remaining Answers.

June 14, 2010

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

June 22, 2010

E-mail from Jenna Kelly, Chief Financial Officer/Registrar, to Michael Barker. Ms. Kelly asks if it is possible to get a copy of the Answer filed in two (2) lawsuits that Mr. Barker has handled for the Borough and states that the Borough does not have a copy of such Answers. Ms. Kelly further states that the two lawsuits in question are O’Boyle v. Borough of Longport, Docket No. ATL-L-1168-08 and O’Boyle v. Isen, Docket No. ATL –L- 2341-08.

June 22, 2010

E-mail from the Custodian to the Complainant. The Custodian states that an additional record responsive to the Complainant’s first (1st) OPRA request is attached. The Custodian states that as additional responsive records are received, the Custodian will forward same to the Complainant.

June 23, 2010

Telephone call from the Custodian to the GRC. The Custodian has questions regarding how to complete the document index. The Custodian states that he is working on the SOI and will file it with the GRC shortly.

June 25, 2010

Custodian’s SOI with the following attachments:

- Complainant’s two (2) OPRA requests dated October 14, 2009
- E-mail from the Custodian to the Complainant dated October 20, 2009
- Letter from the Complainant to the Custodian dated February 17, 2010
- Letter from the Custodian’s Counsel to the Custodian dated March 31, 2010
- E-mail from the Custodian to the Complainant dated April 6, 2010
- Letter from the Complainant to the Custodian dated April 20, 2010
- Letter from the Complainant to the Custodian dated May 4, 2010
- E-mail from the Custodian to the Complainant dated May 26, 2010
- E-mail from the Custodian to the Complainant dated June 4, 2010
- E-mail from the Custodian to the Complainant dated June 10, 2010
- E-mail from the Custodian to the Complainant dated June 10, 2010
- E-mail from the Custodian to the Complainant dated June 11, 2010
- E-mail from Jenna Kelly, Chief Financial Officer/Registrar to Michael Barker dated June 22, 2010

- E-mail from the Custodian to the Complainant dated June 22, 2010

In a cover letter accompanying the SOI, the Custodian states that after reviewing the initial request, responses from the Borough and the Complainant’s subsequent amended request, the Custodian believes that the issue at hand is whether the Borough provided copies of Complaints and tort notices received by it, as well as Answers filed on its behalf in matters occurring during a particular time period. The Custodian states that a review of the Borough’s records revealed that a significant amount of the records requested were not in the possession of the Borough, its employees or elected officials. The Custodian states that the Borough provided to the Complainant all of the records requested which were in its possession. The Custodian also states that at his direction, inquiries were made of third parties who might have records responsive to the request in their possession; the Custodian states that these inquiries sought copies of the requested records so that such records could be provided to the Complainant. The Custodian states that over the last several months, responsive records have been provided to the Complainant as they have been obtained by the Borough.

In the SOI, the Custodian certifies that records pertaining to litigation must be retained for twenty (20) years after the conclusion of the litigation in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).

The Custodian provided the following document index as part of the SOI:

List of All Records Responsive to Request	Records Retention & Disposition Schedule	List of All Records Provided (provide date)	Redactions	Records Denied	List of Explanation of Records Denied
Tort Claim – Susan Sheridan (5 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
Tort Claim – Craig Hamilton (11 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
Tort Claim – Joseph Viola (8 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
Tort Claim – Chris Ricciotti (1 pg)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
Tort Claim – Katrina Brady	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A

Tort Claim – Eve A. and Marc Wagner (2 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
Tort Claim – Robert Hibbert (4 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
Tort Claim – Sheila and Martin O’Boyle, Children (2 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
Tort Claim – Frank Maniscalco (1 pg)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
Tort Claim – Martin & Sheila O’Boyle (1 pg)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
Lawsuit – <u>Underwriters of Lloyds of London v. Frank Maniscalco v. Borough of Longport et als.</u> (22 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
Lawsuit – <u>Ocean Bay Condo Ass’n v. Frank Maniscalco</u> (1 pg)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
Lawsuit – <u>Hersch and Enid Kozlov v. Borough of Longport, et als.</u> (7 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
Lawsuit –	20 years	April 22,	None	N/A	N/A

<u>Marc Silver v. Borough of Longport</u> (3 pgs)	after conclusion of litigation	2010			
<u>Lawsuit -- Lisa Cress individually and as guardian for minors KC and CC, and Daniel Lombardi v. Ventnor, Margate, Longport, et als.</u> (51 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
<u>Lawsuit – Martin E. O’Boyle v. Peter Isen individually and in his official capacity in the Borough of Longport</u> (4 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
<u>Lawsuit – Frank Alfano v. Longport Borough, Thomas Hiltner, Clerk and Ellen Chialastri</u> (3 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
<u>Lawsuit – Martin E. O’Boyle v. Borough of Longport</u> (6 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
<u>Lawsuit – Frank Alfano v.</u>	20 years after conclusion	April 22, 2010	None	N/A	N/A

<u>Longport Police Dep't, et als.</u> (6 pgs)	of litigation				
Lawsuit – <u>Citizens for Open Government v. Longport Borough, Thomas Hiltner, Clerk and Ellen Chialastri</u> (4 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
Lawsuit – <u>John Paff, Susan O'Neill and Martin E. O'Boyle v. Trenton, Borough of Longport</u> (14 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
Lawsuit – <u>Steve Woods v. Borough of Longport</u> (4 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A
Lawsuit – <u>Rosewood Properties, Inc. and Newport-Deerfield, Inc. v. Borough of Longport, Amy Strawder, Custodian of Records, Thomas Hiltner, Clerk</u> (4 pgs)	20 years after conclusion of litigation	April 22, 2010	None	N/A	N/A

Lawsuit – <u>O’Boyle v. Longport</u> (21 pgs)	20 years after conclusion of litigation	May 18, 2010	None	N/A	N/A
Lawsuit – <u>O’Boyle v. Longport</u> (14 pgs)	20 years after conclusion of litigation	May 18, 2010	None	N/A	N/A
Lawsuit – <u>John Paff v. Absecon Custodian</u> (58 pgs)	20 years after conclusion of litigation	May 18, 2010	None	N/A	N/A
Lawsuit – <u>Joe Viola v. Borough of Longport</u> (20 pgs)	20 years after conclusion of litigation	May 18, 2010	None	N/A	N/A
Answer - <u>John Paff, Susan O’Neill and Martin E. O’Boyle v. Trenton, Borough of Longport</u> (14 pgs)	20 years after conclusion of litigation	May 26, 2010	None	N/A	N/A
Answer – <u>Marc Silver v. Borough of Longport</u> (5 pgs)	20 years after conclusion of litigation	May 26, 2010	None	N/A	N/A
Answer – <u>Martin O’Boyle v. Borough of Longport</u> (7 pgs)	20 years after conclusion of litigation	May 26, 2010	None	N/A	N/A
Answer – <u>Citizens for Open Government v. Borough of Longport, Tom Hiltner, Clerk and Ellen</u>	20 years after conclusion of litigation	May 26, 2010	None	N/A	N/A

<u>Chialastri</u> (4 pgs)						
Answer – <u>Frank Alfano v. Longport Borough, Tom Hiltner, Clerk and Ellen Chialastri</u> (6 pgs)	20 years after conclusion of litigation	May 26, 2010	None	N/A	N/A	
Answer -- <u>Martin O’Boyle v. Borough of Longport, Tom Hiltner, Clerk and Ellen Chialastri</u> (7 pgs)	20 years after conclusion of litigation	May 26, 2010	None	N/A	N/A	
Answer – <u>Steve Woods v. Borough of Longport</u> (8 pgs)	20 years after conclusion of litigation	June 4, 2010	None	N/A	N/A	
Answer – <u>Joe Viola v. Borough of Longport</u> (18 pgs)	20 years after conclusion of litigation	June 10, 2010	None	N/A	N/A	
Answer -- <u>Underwriters of Lloyds of London v. Frank Maniscalco v. Borough of Longport et als.</u> (16 pgs)	20 years after conclusion of litigation	June 11, 2010	None	N/A	N/A	
Answer – <u>Lisa Cress individually and as guardian for</u>	20 years after conclusion of litigation	June 11, 2010	None	N/A	N/A	

<u>minors KC and CC, and Daniel Lombardi v. Ventnor, Margate, Longport, et als.</u> (32 pgs)					
Answer – <u>John Paff v. Absecon Custodian</u> (4 pgs)	20 years after conclusion of litigation	June 22, 2010	None	N/A	N/A

Additionally, the Custodian certifies that no Answer was filed in the following matters: Kozlov v. Longport (Custodian certifies that Complainant was so informed in an e-mail dated June 11, 2010); Rosewood Properties, Inc. and Newport-Deerfield, Inc. v. Longport (Custodian certifies that Complainant was so informed in an e-mail dated June 11, 2010); Newport Deerfield, Inc. v. Longport (Custodian certifies that Complainant was so informed in an e-mail dated June 11, 2010).

The Custodian further certifies that he could not locate an Answer to the following matters: O’Boyle v. Longport (Custodian certifies that Complainant was so informed in an e-mail dated June 22, 2010); Martin E. O’Boyle v. Peter Isen (Custodian certifies that Complainant was so informed in an e-mail dated June 22, 2010); Frank Alfano, Jr. v. Longport Police Department; Frank Alfano, Jr. v. Longport Police Department.¹³

September 10, 2010

E-mail from the GRC to the Custodian. The GRC states that in reviewing the above-referenced matter, it is unclear from the SOI submitted to the GRC whether certain records sought by the Complainant were provided to him. Specifically, the GRC states that it is not clear whether the following records were provided or that access was specifically denied to:

- 1) Copies of all legal fees applicable to each lawsuit and each tort notice sought (OPRA request #0102 CFOG)
- 2) Copies of all discovery provided to or by any of the parties, including third parties, for each of the lawsuits sought (OPRA request #0103 CFOG);
- 3) Copies of all deposition transcripts for each of the lawsuits sought (OPRA request #0103 CFOG).

The GRC requests that the Custodian complete and provide a legal certification detailing whether copies of the records listed above were provided to the Complainant and if so, the date upon which they were provided. If copies of such records were not provided, the GRC requests that the Custodian provide the reason why such records were not provided.

¹³ The Custodian did not provide any information as to when the Complainant was informed of the Custodian’s inability to locate Answers in these matters.

September 15, 2010

Letter from the Custodian to the GRC, attaching the following:¹⁴

- Letter from the Complainant to the Custodian dated April 20, 2010
- Letter from the Complainant to the Custodian dated April 20, 2010

The Custodian states that in these letters, the Complainant modified his OPRA requests by withdrawing his request for certain classifications of records, and further states that this modification was made prior to the filing of the instant Denial of Access Complaint.

The Custodian also states that while a significant portion of the invoices for legal services related to litigation were in fact delivered to the Complainant, the Custodian cannot say for sure that all invoices for legal services were in fact turned over prior to the Complainant withdrawing his request for such records.

The Custodian further states that, as for the requested discovery and deposition transcripts, those records were not provided prior to the Complainant modifying/withdrawing his request.

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 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.

¹⁴ Although the GRC specifically requested that the Custodian provide a certification to the facts contained in such letter, the Custodian did not provide a certification to the facts set forth in this letter.
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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.

In the matter before the Council, the evidence of record shows that the Complainant submitted two (2) OPRA requests on official OPRA request forms to the Custodian on October 14, 2009. Moreover, the evidence of record indicates that the Custodian responded in writing via e-mail to the second (2nd) OPRA request on the fourth (4th) business day following receipt of such request, stating that access to the requested records is denied because no records responsive exist. In so doing, the Custodian’s response specifically referred to the Complainant’s second (2nd) OPRA request by the request number which the Complainant assigned to it. The evidence of record indicates that the Custodian responded to the Complainant’s first (1st) OPRA request in writing via e-mail on April 6, 2010 enclosing a copy of a letter from Custodian’s Counsel to Custodian dated March 31, 2010. Such response occurred on the one hundred and fourteenth (114th) business day following receipt of such request.

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.¹⁵ 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).

Therefore, the Custodian’s failure to respond in writing to the Complainant’s first (1st) 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).

Although the Custodian’s October 20, 2009 response to the second (2nd) OPRA request stated that no records responsive to the request existed, the evidence of record indicates that searches later performed by the Custodian disclosed records responsive to the request.

¹⁵ 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.

In Schneble v. New Jersey Department of Environmental Protection, 2007-220 (April 2008), the custodian initially responded to the complainant's OPRA request by stating that no records responsive existed. The complainant, however, submitted e-mails which were responsive to her request with the Denial of Access Complaint. The custodian certified that, upon receipt of the e-mails attached to the Denial of Access Complaint, the custodian again searched through DEP files and this time located records responsive to this request. The GRC held that because the custodian performed an inadequate initial search, the custodian unlawfully denied the Complainant access to the requested records. *See also* Schiano v. Township of Lower (Cape May), 2008-90 (June 2009).

Like the custodian in Schneble, *supra*, the Custodian in the instant matter mistakenly informed the Complainant that there were no records responsive, and records responsive to request Item No. 1 of the second (2nd) OPRA request were discovered during a subsequent search. As in Schneble, *supra*, the Custodian in the instant matter disclosed the record to the Complainant as soon as he realized the existence of the responsive record.

Therefore, pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, 2007-220 (April 2008), the Custodian unlawfully denied the Complainant access to the records responsive to request Item No. 1 of the second (2nd) OPRA request because the Custodian mistakenly informed the Complainant that there were no records responsive to his request. *See also* Oskay v. New Jersey State Parole Board, 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), 2008-90 (June 2009).

Moreover, the Custodian's October 20, 2009 response to the second (2nd) OPRA request failed to address each of the three (3) request items of the OPRA request individually.

In Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Complainant's Counsel asserted that the Custodian violated OPRA by failing to respond to each of the Complainant's request items individually within seven (7) business days. The GRC examined how the facts in Paff applied to its prior holding in O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005) (finding that the Custodian's initial response stating that the Complainant's request was a duplicate of a previous request to the Complainant's June 22, 2007 request was legally insufficient because the Custodian has a duty to answer each request individually). The Council reasoned that, "[b]ased on OPRA and the GRC's holding in O'Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request." The GRC ultimately held that:

"[a]lthough the Custodian responded in writing to the Complainant's August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because he failed to respond to each request item

individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.” See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009) and Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).

The commonality between the complaints above and the instant complaint is clear. The GRC has previously held that N.J.S.A. 47:1A-5.g. requires that a custodian address all elements contained in an OPRA request when responding to an OPRA request.

Therefore, the Custodian’s October 20, 2009 response to the second (2nd) OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g., and Paff, *supra*, because he failed to individually address each of the Complainant’s three (3) request items contained in the second (2nd) OPRA request.

With regard to Item No. 1 of the Complainant’s first (1st) OPRA request, which sought copies of all lawsuits naming the Borough of Longport, including any of its departments and employees in their official capacity, filed since January 1, 2008, the evidence of record indicates that the Custodian provided access to copies of records responsive to this request item on April 22, 2010 and April 18, 2010. Such access was within the extended time period of April 30, 2010 granted by the Complainant in his letter to the Custodian dated April 20, 2010. Thus, the Custodian has not unlawfully denied access to the requested records. N.J.S.A. 47:1A-6.

With regard to Item No. 2 of the Complainant’s first (1st) OPRA request, which sought copies of all tort notices naming the Borough of Longport, including any of its departments and employees in their official capacity, filed since January 1, 2008, the evidence of record indicates that the Custodian provided access to copies of records responsive to this request item on June 22, 2010. Such access was within the extended time period of April 30, 2010 granted by the Complainant in his letter to the Custodian dated April 20, 2010. Thus, the Custodian has not unlawfully denied access to the requested records. N.J.S.A. 47:1A-6.

With regard to Item No. 3 of the Complainant’s first (1st) OPRA request, which sought copies of all legal fees applicable to each lawsuit and each tort notice referenced in item Nos. 1 and 2 of the request, the evidence of record indicates that the Complainant withdrew his request for records responsive to this request item in a letter to the Custodian dated April 20, 2010. The Custodian has not, therefore, unlawfully denied access to the records requested. N.J.S.A. 47:1A-6.¹⁶

With regard to the Complainant’s second (2nd) OPRA request, the evidence of record indicates that the Complainant modified such request by letter to the Custodian

¹⁶ The GRC notes that legal bills are ordinarily classified as records to which immediate access must ordinarily be provided pursuant to N.J.S.A. 47:1A-5.e. However, because the evidence of record is clear that the Complainant specifically withdrew his request for such records, the question of whether the Custodian violated OPRA by failing to provide immediate access to copies of the requested legal bills is moot.

dated April 20, 2010, in which the Complainant stated that “we would modify the Request and ask only for the Complaints and Answers for each of the lawsuits [defined in the first OPRA request].” The evidence of record further indicates that the Custodian provided access to copies of records responsive to this request on May 11, 2010, May 18, 2010, May 26, 2010, June 4, 2010, June 10, 2010, June 11, 2010, and June 22, 2010. The Custodian has not, therefore, unlawfully denied access to the records requested. N.J.S.A. 47:1A-6.

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

Although the Custodian violated N.J.S.A. 47:1A-5.g. by failing to respond in writing to the Complainant’s first OPRA request within the statutorily mandated seven (7) business days and provided an insufficient response to the Complainant’s second (2nd) OPRA request pursuant to N.J.S.A. 47:1A-5.g., and conducted an insufficient search in response to the Complainant’s second (2nd) OPRA request, the Custodian provided the Complainant with all records responsive to the modified first (1st) and second (2nd) requests within the agreed-upon extension of time for such response. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful

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violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought

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

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

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

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

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); *see also* Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart

"generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather

than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.¹⁷ 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 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).”

However, in Mason, the New Jersey Supreme Court shifted the traditional burden of proof to the responding agency in one category of cases: when an agency has failed to respond *at all* to a request within seven business days. The Court noted that:

“OPRA requires that an agency provide access or a denial no later than seven business days after a request. The statute also encourages compromise and efforts to work through certain problematic requests. But under the terms of the statute, the agency must start that process with some form of response within seven business days of a request. *If an agency fails to respond at all within that time frame, but voluntarily discloses records after a requestor files suit, the agency should be required to prove that the lawsuit was not the catalyst for the agency's belated disclosure.* Such an approach is faithful to OPRA's clear command that an agency not sit silently once a request is made.” [Emphasis added]. Mason v. City Clerk of the City of Hoboken, 196 N.J. 51, 77 (2008).

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 the matter before the Council, the Complainant filed two (2) OPRA requests on October 14, 2009. Although the Custodian responded in writing to the second (2nd) OPRA request on the fourth (4th) business day following receipt thereof, the Custodian did not respond to the first (1st) OPRA request until April 6, 2010, the one hundred and fourteenth (114th) business day following receipt thereof. Thereafter, the evidence of

¹⁷ 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.

record indicates that the Complainant modified his OPRA requests on April 20, 2010 and requested production of the revised records requested in the first (1st) OPRA request by April 30, 2010. The evidence of record indicates that the Custodian provided the records sought in the modified request within the extended time period to do so.

However, with regard to the second (2nd) OPRA request, the evidence of record indicates that the Complainant modified such request in his letter to the Custodian dated April 20, 2010 and asked that the Custodian notify the Complainant when he could expect receipt of the requested records. The evidence of record also indicates that the Custodian sent an e-mail to the Complainant dated May 11, 2010 in which the Custodian indicated that he had forwarded the requested Complaints to the Complainant and was working on gathering the requested Answers. The evidence of record further indicates that the Custodian provided additional records responsive to the request on May 18, 2010. The Complainant filed the instant Denial of Access Complaint on May 21, 2010. The evidence of record shows, however, that the Custodian continued to provide responsive records to the Complainant on May 26, 2010, June 4, 2010, June 10, 2010, June 11, 2010, and June 22, 2010.

Thus, the evidence of record indicates that the Complainant indicated in writing an intention to provide responsive records on May 11, 2010, prior to the filing of the Denial of Access Complaint and in fact provided such records both prior to and after the filing of the Denial of Access Complaint herein. Therefore, the evidence of record shows that the filing of this Complaint was not the catalyst for the release of the requested records.

Therefore, pursuant to Teeters, *supra*, the Complainant has not achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus does not exist between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to respond in writing to the Complainant’s first (1st) 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).
2. Pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, 2007-220 (April 2008), the Custodian unlawfully denied the Complainant access to the records responsive to request item no. 1 of the second (2nd) OPRA request because the Custodian mistakenly informed

the Complainant that there were no records responsive to his request. *See also* Oskay v. New Jersey State Parole Board, 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), 2008-90 (June 2009).

3. The Custodian's October 20, 2009 response to the second (2nd) OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008) because he failed to individually address each of the Complainant's three (3) request items contained in the second (2nd) OPRA request.
4. With regard to item No. 1 of the Complainant's first (1st) OPRA request, which sought copies of all lawsuits naming the Borough of Longport, including any of its departments and employees in their official capacity, filed since January 1, 2008, the evidence of record indicates that the Custodian provided access to copies of records responsive to this request item on April 22, 2010 and April 18, 2010. Such access was within the extended time period of April 30, 2010 granted by the Complainant in his letter to the Custodian dated April 20, 2010. Thus, the Custodian has not unlawfully denied access to the requested records. N.J.S.A. 47:1A-6.
5. With regard to Item No. 2 of the Complainant's first (1st) OPRA request, which sought copies of all tort notices naming the Borough of Longport, including any of its departments and employees in their official capacity, filed since January 1, 2008, the evidence of record indicates that the Custodian provided access to copies of records responsive to this request item on June 22, 2010. Such access was within the extended time period of April 30, 2010 granted by the Complainant in his letter to the Custodian dated April 20, 2010. Thus, the Custodian has not unlawfully denied access to the requested records. N.J.S.A. 47:1A-6.
6. With regard to Item No. 3 of the Complainant's first (1st) OPRA request, which sought copies of all legal fees applicable to each lawsuit and each tort notice referenced in Item Nos. 1 and 2 of the request, the evidence of record indicates that the Complainant withdrew his request for records responsive to this request item in a letter to the Custodian dated April 20, 2010. The Custodian has not, therefore, unlawfully denied access to the records requested. N.J.S.A. 47:1A-6.
7. With regard to the Complainant's second (2nd) OPRA request, the evidence of record indicates that the Complainant modified such request by letter to the Custodian dated April 20, 2010, in which the Complainant stated that "we would modify the Request and ask only for the Complaints and Answers for each of the lawsuits [defined in the first (1st) OPRA request]." The evidence of record further indicates that the Custodian provided access to copies of records responsive to this request on May 11, 2010, May 18, 2010, May 26, 2010, June 4, 2010, June 10, 2010, June 11, 2010, and June 22, 2010. The Custodian has not, therefore, unlawfully denied access to the records requested. N.J.S.A. 47:1A-6.

8. Although the Custodian violated N.J.S.A. 47:1A-5.g. by failing to respond in writing to the Complainant's first (1st) OPRA request within the statutorily mandated seven (7) business days and provided an insufficient response to the Complainant's second (2nd) OPRA request pursuant to N.J.S.A. 47:1A-5.g., and conducted an insufficient search in response to the Complainant's second (2nd) OPRA request, the Custodian provided the Complainant with all records responsive to the modified first (1st) and second (2nd) requests within the agreed-upon extension of time for such response. 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.

9. The evidence of record indicates that the Complainant indicated in writing an intention to provide responsive records on May 11, 2010, prior to the filing of the Denial of Access Complaint and in fact provided such records both prior to and after the filing of the Denial of Access Complaint herein. Therefore, the evidence of record shows that the filing of this Complaint was not the catalyst for the release of the requested records. Therefore, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) the Complainant has not achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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Executive Director

November 23, 2010