



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

November 29, 2011 Government Records Council Meeting

Kenneth Vercammen
Complainant

Complaint No. 2010-115

v.

Lodi Police Department (Bergen)
Custodian of Record

At the November 29, 2011 public meeting, the Government Records Council ("Council") considered the November 22, 2011 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 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian's proposed copying cost of \$21.50 for 56 pages of paper copies of records is unreasonable because at the time the Custodian provided access to said records on November 8, 2010 he failed to charge the appropriate "actual cost" pursuant to the Court's decision in Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010), which went into effect on July 1, 2010.
3. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010), and O'Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008) the Custodian's charge of \$50.00 per CD provided to the Complainant is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. See also O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185. Further, the Custodian failed to bear his burden of proving that the charge represented actual cost incurred by the Lodi Police Department pursuant to N.J.S.A. 47:1A-6. The GRC notes that because the Complainant received the responsive records on November 8, 2010, there is no need to order disclosure of same.



4. Although the Custodian's proposed copying cost is in violation of Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010) and N.J.S.A. 47:1A-5.b., the evidence of record indicates that the Complainant paid none of the proposed copying costs prior to receiving the requested records. Therefore, the GRC declines to require the Custodian to provide a new estimated copying cost to the Complainant because the responsive records were already provided to the Complainant on November 8, 2010 without payment from the Complainant.
5. The Custodian's failure to respond in writing resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007), and the Custodian's proposed copying costs were unreasonable pursuant to Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010), and N.J.S.A. 47:1A-5.b. However, the Custodian provided the Complainant with all records responsive to the request on November 8, 2010. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
6. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian attempted to obtain clarification of the Complainant's OPRA request prior to the filing of this complaint and there is no evidence in the record to indicate that the Complainant provided same. 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 29th Day of November 29, 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: December 5, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 29, 2011 Council Meeting**

**Kenneth Vercammen¹
Complainant**

GRC Complaint No. 2010-115

v.

**Lodi Police Department (Bergen)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. "All Dräger Certificates of Accuracy" for Alcotest® machine Serial Number ARXE-0073.
2. "Certificate of Analysis" for the .10% simulator solution lot used for the Alcotest® machine Serial Number ARXE-0073.
3. "Calibration Record" for the last calibration (must be within the last six months) for the Alcotest® machine Serial Number ARXE-0073.
4. "Certificate of Analysis" for the .10% simulator solution lot identified on the "Calibration Record" document for the Alcotest® machine Serial Number ARXE-0073.
5. "Certificate of Accuracy" for the CU-34 identified on the "Calibration Record" document for the Alcotest® machine Serial Number ARXE-0073.
6. If the "Calibration Record" has a "Black Key Temperature Probe" identified by serial number, then the "Certificate of Accuracy" for such for the Alcotest® machine Serial Number ARXE-0073.
7. "Part I – Control Tests" from the last calibration for the Alcotest® machine Serial Number ARXE-0073.
8. "Certificate of Analysis" for the .10% simulator solution lot identified on the "Part I – Control Tests" document for the Alcotest® machine Serial Number ARXE-0073.
9. "Certificate of Accuracy" for the CU-34 identified on the "Part I – Control Tests" document for the Alcotest® machine Serial Number ARXE-0073.
10. "Part II – Linearity Tests" from the last calibration for the Alcotest® machine Serial Number ARXE-0073.
11. "Certificate of Analysis" for the .04% simulator solution lot identified on the "Part II – Linearity Tests" document for the Alcotest® machine Serial Number ARXE-0073.
12. "Certificate of Analysis" for the .08% simulator solution lot identified on the "Part II – Linearity Tests" document for the Alcotest® machine Serial Number ARXE-0073.

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by Alan Spiniello, Esq., (Hackensack, NJ).

13. "Certificate of Analysis" for the .16% simulator solution lot identified on the "Part II – Linearity Tests" document for the Alcotest® machine Serial Number ARXE-0073.
14. "Certificate of Accuracy" for the CU-34 using .04% simulator solution lot identified on the "Part II – Linearity Tests" document for the Alcotest® machine Serial Number ARXE-0073.
15. "Certificate of Accuracy" for the CU-34 using .08% simulator solution lot identified on the "Part II – Linearity Tests" document for the Alcotest® machine Serial Number ARXE-0073.
16. "Certificate of Accuracy" for the CU-34 using .16% simulator solution lot identified on the "Part II – Linearity Tests" document for the Alcotest® machine Serial Number ARXE-0073.
17. "Ertco-Hart (or other "NIST traceable thermometer) Report of Calibration" for the Alcotest® machine Serial Number ARXE-0073.
18. "New Standard Solution Report" from the simulator solution change performed immediately after the last calibration for the Alcotest® machine Serial Number ARXE-0073.
19. "New Standard Solution Report" form the last simulator solution change performed for the for the Alcotest® used to test defendant's breath, prior to the test for the Alcotest® machine Serial Number ARXE-0073.
20. "Certificate of Analysis" for the .10% simulator solution lot identified on the "New Standard Solution Report" for the Alcotest® machine Serial Number ARXE-0073.
21. "Certificate of Accuracy" for the CU-34 identified on the "New Standard Solution Report" for the Alcotest® machine Serial Number ARXE-0073.
22. All Alcotest® certification cards for any officials named on either the "Alcohol Influence Report," the "Calibration Record/Control Tests/Linearity Tests," or the "New Standard Solution Reports" for the Alcotest® machine Serial Number ARXE-0073.
23. "Certificate of Accuracy" for the CU-34 calibrating unit used for the Alcotest® machine Serial Number ARXE-0073 in September 2009.
24. "Certificate of Analysis" for the .10% simulator solution lot identified on the "New Standard Solution Report" for the Alcotest® machine Serial Number ARXE-0073 in September 2009.
25. "Certificate of Accuracy" for the CU-34 identified on the "New Standard Solution Report" for the Alcotest® machine Serial Number ARXE-0073.
26. "Certificate of Accuracy" for the "Temperature Probe," identified by serial number, for each "New Standard Solution Report" for the Alcotest® machine Serial Number ARXE-0073.
27. All available Alcotest® data downloads for the Alcotest® machine Serial Number ARXE-0073.
28. Date of fuel cell ("EC") replacement, if any for the Alcotest® machine Serial Number ARXE-0073.
29. Complete service and repair record from the Lodi Police Department ("PD") and Dräger for the Alcotest® instrument for the Alcotest® machine Serial Number ARXE-0073.

Request Made: April 28, 2010
Response Made: May 14, 2010
Custodian: Robert Salerno
GRC Complaint Filed: June 2, 2010³

Background

April 28, 2010

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

May 12, 2010

Facsimile from the Complainant to the Custodian. The Complainant resubmits his OPRA request to the Custodian.⁴

May 14, 2010

Custodian's response to the OPRA request. The Custodian responds verbally via telephone to the Complainant's OPRA request on the twelfth (12th) business day following receipt of such request. The Custodian requests clarification regarding whether the request is for a specific defendant.

May 16, 2010

Telephone call from the Complainant to the Custodian.⁵

June 2, 2010

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

- Complainant's OPRA request dated April 28, 2010.
- Handwritten note dated May 14, 2010.⁶
- Handwritten note dated May 16, 2010.⁷

The Complainant states that he submitted an OPRA request to the Lodi Police Department ("LPD") on April 28, 2010. The Complainant states that he resubmitted his request via facsimile on May 12, 2010 after receiving no written response. The Complainant states that to date, he has not received a written response.

The Complainant argues that all of the records requested are required to be maintained by police departments pursuant to the Court's holding in State v. Chun, 194 N.J. 54 (2008).

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

⁴ The Complainant resubmitted his request after receiving no response from the Custodian.

⁵ According to a handwritten note attached to the Complainant's Denial of Access Complaint and the Custodian's certification in the Statement of Information, the Complainant left a message for the Custodian on this date, a Sunday. The Complainant failed to indicate to the GRC the substance of the message.

⁶ The Complainant memorialized his conversation with the Custodian on a sheet of copy paper.

⁷ The Complainant memorialized his telephone call to the Custodian on a sheet of copy paper.

The Complainant agrees to mediate this complaint.

June 30, 2010

Offer of Mediation sent to the Custodian.

July 6, 2010

The Custodian agrees to mediate this complaint.

July 20, 2010

Letter from the Custodian's Counsel to the Complainant. Counsel states that it is his understanding that the Complainant has made an OPRA request to LPD regarding their Alcotest® machine. Counsel states that LPD was under the impression that the Complainant's OPRA request was for a specific defendant and summons and believed the Complainant's OPRA request should have been a discovery request made to the local prosecutor in accordance with the rules and procedures governing the municipal court. Counsel acknowledges that this apparently was not the case: it is now clear to LPD that the Complainant sought general information regarding LPD's Alcotest® machine.

Counsel states that LPD will provide the requested records if they have not already done so if the Complainant agrees to withdraw the instant complaint with prejudice and without cost to either party.

July 28, 2010

Complaint referred to mediation.

November 15, 2010

Complaint referred back from mediation.

November 18, 2010

Letter from the Custodian's Counsel to the Complainant. Counsel states that it is his understanding that LPD fully complied with the Complainant's OPRA request. Counsel states that in the event that any records are missing, Counsel asks the Complainant to advise so that LPD can attempt to obtain same.

Counsel states that with regard to the proposed copying cost, LPD charged the appropriate fees permitted under OPRA. Counsel states that the amendments made to N.J.S.A. 47:1A-5.b. did not take effect until after the responsive documents were sent to the Complainant.

Counsel states that the Custodian was initially under the impression that the Complainant sought records regarding a specific defendant and summons and as a result thought that the request should have been made as a discovery request to the local prosecutor in accordance with the rules and procedures governing the municipal courts. Counsel acknowledges that this was not the case and instead the Complainant's OPRA request sought general records pertaining to LPD's Alcotest® machine.

Counsel states that because the Complainant has received the requested records, this complaint should be withdrawn with prejudice and without costs to either party. Counsel further states that with regard to prevailing party attorney's fees, the Complainant is not entitled to such fees. Counsel states that the GRC previously held in Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006), that:

“[b]ased on the fact that the courts of the [S]tate have determined that the [S]tate's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff not an attorney who is the plaintiff representing himself, the Complainant is not entitled to reasonable attorney's fees pursuant to OPRA.” *Id.*

Counsel further states that in accordance with MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005), the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

December 16, 2010

Letter from the GRC to the Complainant. The GRC informs the Complainant that he has the opportunity to amend this Denial of Access Complaint prior to the GRC's request for the Statement of Information from the Custodian. The GRC states that the Complainant's response is due by close of business on December 23, 2010.

December 28, 2010

Complainant's amended Denial of Access Complaint attaching the Complainant's initial Denial of Access Complaint.

The Complainant asserts that the Custodian delayed his response for several months. The Complainant contends that the Custodian is charging an excessive fee for paper copies and compact disc (“CD”) copies of records.

January 26, 2011

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

February 1, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 28, 2010.
- Letter from the Custodian's Counsel to the Complainant dated November 18, 2010.
- Complainant's Amended Denial of Access Complaint dated December 28, 2010.⁸

⁸ The Custodian attached additional records memorializing events that occurred during mediation. Pursuant to the GRC regulations (*N.J.A.C.* 5:105-2.5(j)) and the Uniform Mediation Act (*N.J.S.A.* 2A:23C-1 et seq.), the GRC cannot consider any submissions of records or arguments made by either party during mediation.

The Custodian certifies that LPD received the Complainant's OPRA request on April 28, 2010. The Custodian certifies that the Complainant's OPRA request sought information regarding LPD's Alcotest® machine used when processing a Driving While Intoxicated ("DWI") arrest in order to determine the Blood Alcohol Level ("BAC") of a defendant. The Custodian certifies that upon receiving the Complainant's OPRA request, he determined whether the records sought were subject to disclosure under OPRA. The Custodian certifies that he also attempted to contact the Complainant's office to clarify whether the request was for a particular case. The Custodian certifies that the Complainant returned his call at 5:30 p.m. on May, 16, 2010, a Sunday. The Custodian certifies that he attempted to return the Complainant's telephone call and never received a return call thereafter.

The Custodian certifies that he was under the impression that the Complainant's OPRA request concerned a specific defendant and summons. The Custodian certifies that as a result, he believed that the Complainant's OPRA request should have been a discovery request made to the local prosecutor in accordance with the rules and procedures governing the municipal court.

The Custodian certifies that he received notice of this complaint on May 28, 2010. The Custodian certifies that he received an offer of mediation from the GRC on June 30, 2010 and returned the agreement to engage in mediation to the GRC.

The Custodian states that, after the complaint was referred back to the GRC from mediation, the Custodian's Counsel sent a letter to the Complainant on November 18, 2010. The Custodian states that in said letter, Counsel stated that LPD fully complied with the Complainant's OPRA request and that the proposed copying cost was consistent with OPRA at the time the Complainant submitted his request. The Custodian states that Counsel further stated that the Custodian did not knowingly and willfully violate OPRA, that the Complainant was not entitled to prevailing party attorney's fees pursuant to Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006) and Counsel requested that the Complainant withdraw the instant complaint.⁹

April 4, 2011

Letter from the Complainant's Counsel to the GRC. The Complainant's Counsel states that attached is an executed substitution of counsel.

June 27, 2011

Letter from the GRC to the Custodian. The GRC states that it has reviewed the SOI and found that the Custodian included correspondence that took place during mediation. The GRC advises that pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during mediation are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. The GRC states that all communications which occur during mediation are privileged from disclosure and

⁹ The Custodian did not certify to the search undertaken to locate responsive records or whether records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

may not be used in any judicial, administrative or legislative proceeding, or in any arbitration. N.J.S.A. 2A:23C-4. The GRC states that based on the foregoing, it cannot consider any of the communications submitted by parties that took place during mediation.

The GRC states that additional information is needed in order to properly adjudicate this complaint. The GRC requests that the Custodian legally certify to the following:

1. Whether the Complainant has received the records responsive to his OPRA request?

The GRC requests that the Custodian submit a cost breakdown of the proposed copying cost for the records responsive to the Complainant's OPRA request. The GRC requests that the breakdown include the per page cost of paper copies and any additional costs, such as tapes, CDs, etc.

The GRC requests that the Custodian provide the requested legal certification by close of business on June 29, 2011.

June 28, 2011

Custodian's legal certification. The Custodian certifies that all records responsive to the Complainant's OPRA request were sent to the Complainant's office on November 8, 2010. The Custodian certifies that the records were sent via certified mail and that the notification card was received back by LPD.

The Custodian certifies that the Complainant was charged the previous statutory fees of \$0.75/0.50/0.25 per page for 56 pages of copied material. The Custodian certifies that the Complainant was provided with two (2) CDs at an estimated cost of \$50.00 per CD. The Custodian certifies that the charge for each CD included the time and materials of each. The Custodian certifies that to date, the Complainant has not paid the estimated total charge of \$121.50.

The Custodian contends that these charges were valid under OPRA at the time of production of the records because the amendment altering N.J.S.A. 47:1A-5.b. was not yet in effect.

August 9, 2011

E-mail from the GRC to the Custodian. The GRC states that it is in receipt of the Custodian's June 27, 2011 legal certification and wanted to clarify one point. The GRC states that the Custodian certified that LPD imposed a charge of \$50.00 per CD for time and material spent for copying each CD. The GRC requests that the Custodian certify to the following:

1. Whether the charge of \$50.00 per CD represents a flat fee or a proposed special service charge?

The GRC requests that the Custodian provide the requested legal certification by close of business on August 10, 2011.

August 15, 2011

Custodian's legal certification. The Custodian certifies that the \$50.00 fee represented a flat rate for CDs at the time of the Complainant's OPRA request.

Analysis

Whether the Custodian responded to the Complainant's OPRA request in a timely manner?

OPRA provides that:

"[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ..." N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ..." (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁰ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

¹⁰ 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 the matter currently before the Council, the Complainant submitted an OPRA request to the Custodian on April 28, 2010. The Complainant resubmitted his OPRA request to the Custodian on May 12, 2010. The Custodian responded verbally on May 14, 2010, or twelve (12) business days following receipt of the Complainant's OPRA request. Thus, the evidence of record indicates that the Custodian failed to respond in writing to the Complainant within the statutorily mandated seven (7) business day time frame.

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

Whether the Custodian charged the appropriate copying fees consistent with OPRA at the time of the Complainant's OPRA request?

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.

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.

Following an attempt to mediate the instant complaint, the Complainant submitted an amended complaint arguing that the Custodian's proposed copying cost for paper copies and CD copies of records was excessive.

The Custodian certified in the SOI that the Complainant received the requested records via U.S. Mail on November 8, 2010; however the Complainant failed to submit the appropriate copying cost associated with production of same. The Custodian subsequently certified to the GRC on June 27, 2011 that the Complainant was charged \$0.75 for the first ten (10) pages, \$0.50 for the next ten (10) pages and \$0.25 for each additional page thereafter for paper copies and \$50.00 per CD. The Custodian further certified that the total cost owed by the Complainant was \$121.50 (\$21.50 for 56 pages of records and \$100.00 for 2 CDs). The Custodian asserted that the proposed cost was consistent with OPRA prior to the November 5, 2010 enactment of amendments that changed OPRA's fee schedule.

The GRC first addresses whether the Custodian appropriately charged the lawful copying cost for paper copies of the records responsive to the Complainant's OPRA request.

At the time of the Complainant's April 28, 2010 OPRA request, OPRA provided that:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the *actual cost* of duplicating the record. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following:

- *First page to tenth page, \$0.75 per page;*
- *Eleventh page to twentieth page, \$0.50 per page;*
- *All pages over twenty, \$0.25 per page.*

The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.” (Emphasis added). N.J.S.A. 47:1A-5.b.

OPRA further provided that:

“[a] custodian shall permit access to a government record and *provide a copy thereof in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium...” (Emphasis added.) N.J.S.A. 47:1A-5.d.

In Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010), which was decided on February 10, 2010, the Appellate Division held that beginning July 1, 2010, unless and until the Legislature amends OPRA to specify otherwise or some other statute or regulation applies, public agencies must charge requestors of government records no more than the reasonably approximated “actual cost” of copying such records.

The GRC interpreted such “actual cost” to be limited to the cost of paper and toner only, specifically excluding the costs of labor and other overhead expenses pursuant to N.J.S.A. 47:1A-5.b. “Overhead” is thus interpreted to mean “[b]usiness expenses (such as rent, utilities or support-staff salaries) that cannot be allocated to a particular product or service, fixed or ordinary operating costs.” Black’s Law Dictionary, (8th Ed. 1999), at 1136. *See also* http://www.irs.gov/pub/cmpsrc/learn_more/ab_a76_terms.pdf (explaining that “[o]verhead includes two major categories of cost, operations overhead and general and administrative overhead. Operations overhead includes costs that are not 100 percent attributable to the activity being competed but are generally associated with the recurring management or support of the activity. General and administrative overhead includes salaries, equipment, space, and other tasks related to headquarters management, accounting, personnel, legal support, data processing management, and similar common services performed external to the activity, but in support of the activity being competed.”).

Thus as of July 1, 2010 and consistent with the Court’s decision in Smith, public agencies were to calculate their per-page copy costs on an annual basis based on only the per-page costs of paper and toner in the computation of actual costs. The GRC determined that the appropriate calculation for determining the “actual cost” of paper copies is “the total cost of paper purchased for 1 year (calendar or fiscal) + the total cost of toner purchased (calendar or fiscal) ÷ the annual copying volume.” *See* GRC’s OPRA Alert Volume 2, Issue 3 (June 2010).

The Legislature subsequently amended OPRA to set rates of \$0.05 for letter sized paper copies and \$0.07 for legal sized paper copies. This amendment took effect on November 9, 2010.

The submission of an OPRA request represents a snapshot in time wherein a custodian has an obligation to respond based on the law in effect at that time. In this instance, the copying costs at the time of the Complainant’s OPRA request were the fees enumerated in N.J.S.A. 47:1A-5.b. (\$0.75/\$0.50/\$0.25) at that time. However, no records responsive to said request were provided to the Complainant until November 8, 2010. This date is significant because the fees for providing paper copies changed on July 1, 2010 pursuant to Smith.¹¹ Therefore, the lawful copying cost in effect at the time the Custodian provided the responsive records to the Complainant was the “actual cost” associated with providing paper copies. Thus, the Custodian should have charged the “actual cost” of providing 56 pages of paper copies of records to the Complainant pursuant to Smith.

¹¹ This date is also one (1) day before the new copying costs of \$0.05 and \$0.07 went into effect. Kenneth Vercammen v. Lodi Police Department (Bergen), 2010-115 – Findings and Recommendations of the Executive Director 11

Therefore, the Custodian's proposed copying cost of \$21.50 for 56 pages of paper copies of records is unreasonable because at the time the Custodian provided access to said records on November 8, 2010 he failed to charge the appropriate "actual cost" of paper copies pursuant to the Court's decision in Smith, *supra*, which went into effect on July 1, 2010.

The GRC next addresses whether the Custodian's proposed copying charge of \$50.00 per CD is appropriate under OPRA.

OPRA provides that government records may be purchased upon payment of the actual cost of duplicating the record. N.J.S.A. 47:1A-5.b. Said provision defines "actual cost" as "the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section..."

Thus, it appears that the Legislature included the central theme throughout OPRA that duplication cost should equal actual cost and when actual cost cannot be applied, the duplication cost should be reasonable. See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006).

In Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Township of Edison charged \$55.00 for a computer diskette containing Township Council meeting minutes. The plaintiff asserted that the fee was excessive and not related to the actual cost of duplicating the record. The defendant argued that the plaintiff's assertion is moot because the fee was never imposed and the requested records were available on the Township's website free of charge. The Court held that "...the appeal is not moot, and the \$55 fee established by the Township of Edison for duplicating the minutes of the Township Council meeting onto a computer diskette is unreasonable and unsanctioned by explicit provisions of OPRA." The Court stated that:

"[i]n adopting OPRA, the Legislature made clear 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] as amended and supplemented, shall be construed in favor of the public's right of access.' N.J.S.A. 47:1A-1. The imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication. N.J.S.A. 47:1A-5.b."

The Court also stated that "...although plaintiffs have obtained access to the actual records requested, the legal question remains viable, because it is clearly capable of repetition. See New Jersey Div. of Youth & Family Servs. v. J.B., 120 N.J. 112, 118-19, 576 A.2d 261 (1990)." Further, the Court stated that "...the fee imposed by the Township of Edison creates an unreasonable burden upon plaintiff's right of access and is not rationally related to the actual cost of reproducing the records."

Further, in Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Court cited Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), by stating that "[w]hen copies of public records are purchased under the common law right of access doctrine, the public officer may charge only the actual cost of copying, which ordinarily should not include a charge for labor ... Thus, the fees allowable under the common law doctrine are consistent with those allowable under OPRA." 376 N.J. Super. at 279.

Additionally, in O'Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008), the custodian responded to the complainant's OPRA request for an audio recording of the Council's May 14, 2007 public and executive session in a timely manner stating that the cost for a meeting disc would be \$35.00. The custodian also requested that the complainant indicate whether he would like the custodian to prepare the record. Subsequently, the complainant filed a Denial of Access Complaint arguing that the proposed fee did not represent the "actual cost," and that copying fees prescribed in a Township ordinance, Chapter 250, Article II § 250.9(E), appear to violate OPRA.

In O'Shea, the custodian argued in the SOI that she did not deny access because she provided the complainant with the cost to produce the requested record and never received a response. The complainant's counsel advised the GRC on December 5, 2009 that the Township amended its ordinance to reflect copying of audio and video tapes and photographs to actual cost. Counsel argued that the amended ordinance amounted to the Township's admission that the prior charges violated OPRA. Thus, the Council was tasked with determining whether the custodian violated OPRA by charging the fee enumerated in the Township's ordinance rather than the actual cost of duplication of the requested record. The Council held that:

"... pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962) and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the actual cost of duplicating the requested records. As such, the Custodian's charge of \$35.00 for an audio recording of the requested meeting minutes is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must provide the requested records to the Complainant and charge the actual cost of the audiotape and shall not include the cost of labor or other overhead expenses associated with making the copy."

In this instant complaint, the Custodian certified that LPD charged a flat copying fee of \$50.00 per CD; however, the Custodian provided no evidence to indicate that the charge represented the actual cost to LPD to produce a CD with data on it. Additionally, although the amendment to OPRA effective November 9, 2010 specifically provides that a public agency must charge the "actual cost of any needed supplies such as computer disks," the Court's holding in Libertarian Party, *supra*, indicates that "actual cost" for

materials such as CDs should have been provided from that point forward. As previously discussed, the fees applicable to the Complainant's OPRA request were those fees in effect at the time the Custodian provided the responsive records on November 8, 2010. In this instance and according to Libertarian Party, supra, and Smith, supra, the actual cost for the CD that the Custodian could charge at the time of the Complainant's OPRA request was "the cost of materials and supplies used to make a copy of the record." N.J.S.A. 47:1A-5.b.

Therefore, pursuant to Spaulding, supra, Libertarian Party, supra, Dugan, supra, Smith, supra, and O'Shea, supra, the Custodian's copying cost of \$50.00 per CD provided to the Complainant is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. See also O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185. Further, the Custodian failed to bear his burden of proving that the charge represented the actual cost incurred by LPD pursuant to N.J.S.A. 47:1A-6. The GRC notes that because the Complainant received the responsive records on November 8, 2010, there is no need to order disclosure of same.

Moreover, the GRC has previously held that a custodian need not provide responsive records until payment of the appropriate copying cost is remitted. In Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), the custodian responded to the complainant's February 6, 2005 OPRA request stating that the requested record would be made available upon payment of copying costs. The Council held that: "...the Custodian is...not required to release said records until payment is received pursuant to N.J.S.A. 47:1A-5.b., Santos v. New Jersey State Parole Board, GRC Case No. 2004-74 (August, 2004) and Cuba v. Northern State Prison, GRC Case No. 2004-146 (February, 2005)."

In Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008), the Council referred to Paff in reaffirming that the custodian was "not required to release the requested records until payment is received..." *Id.* at pg. 8. The Council subsequently held in Leak v. Union County Prosecutor's Office, GRC Complaint No. 2007-148 (June 2009) that the custodian had complied in part with the Council's February 25, 2009 Interim Order "by advising that the requested records would be provided upon payment of copying costs ... pursuant to N.J.S.A. 47:1A-5.b., [Paff], and Mejias v. New Jersey Department of Corrections, GRC Complaint No. 2007- 181 (July 2008)." *Id.* at pg. 4 (Council's June 11, 2009 Final Decision).

Here, the Custodian has already provided access to the responsive records without payment of the copying cost by the Complainant. Under OPRA and prevailing case law, the Custodian was not required to disclose the responsive records until payment for same was received.

Thus, although the Custodian's proposed copying cost is in violation of Smith and N.J.S.A. 47:1A-5.b., the evidence of record indicates that the Complainant paid none of the proposed copying costs prior to receiving the requested records. Therefore, the GRC declines to require the Custodian to provide a new estimated copying cost to the Complainant because the responsive records were already provided to the Complainant on November 8, 2010 without payment from the Complainant.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Felder 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).

The Custodian's failure to respond in writing resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra, and the Custodian's proposed copying costs were unreasonable pursuant to Smith, supra, and N.J.S.A. 47:1A-5.b. However, the Custodian provided the Complainant with all records responsive to the request on November 8, 2010. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

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

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.¹² 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)."

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.

The GRC notes that in a letter from the Custodian Counsel to the Complainant dated November 18, 2010, Counsel noted that the GRC previously held in Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006), that:

"[b]ased on the fact that the courts of the [S]tate have determined that the [S]tate's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff not an attorney who is the plaintiff representing himself, the Complainant is not entitled to reasonable attorney's fees pursuant to OPRA." *Id.*

Subsequent to this letter, on April 4, 2011, the Complainant's Counsel submitted an executed substitution of counsel. In Mason, *supra*, the Court held that:

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

¹² 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.

(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 [\$500.00] cap on fees and permit a reasonable, and quite likely higher, fee award. [Footnote omitted.] Those changes expand counsel fee awards under OPRA.*" (Emphasis added.) *Id.* at 73-76.

Based on the Court's specific language in Mason, *supra*, a complainant need not request that the Council determine whether he/she is a prevailing party entitled to reasonable attorney's fees because the provision is not permissive; rather, it is mandatory. Thus, the GRC must address this issue because the Complainant has retained Counsel.

A "deemed" denial of access shifts the burden of proving that the filing of the complaint was not a catalyst for the Custodian's disclosing of the records to the Complainant on November 8, 2010. *See* Mason.

The evidence of record in the matter herein indicates that the Custodian responded verbally to the Complainant's OPRA request prior to the filing of this complaint. The Custodian certified in the SOI that prior to the filing of this complaint he made several attempts to contact the Complainant via telephone seeking clarification regarding the Complainant's OPRA request. The Custodian further certified that he sought clarification of the Complainant's OPRA request because he was unsure whether said request sought records regarding a specific case. The Custodian also certified that the only contact he received from the Complainant was a message left for the Custodian on May 16, 2010, a Sunday, but there is no evidence indicating the substance of that message. Further, there is no evidence in the record to indicate that the Complainant provided clarification of the OPRA request at that time or at any point prior to the filing of this complaint. The Complainant filed this complaint on June 2, 2010.

The Council has expanded on the response options available to a custodian to include requesting clarification and seeking an extension of time. *See* Kelley, *supra*. Here, the Custodian verbally sought clarification of the Complainant's OPRA request prior to the filing of this complaint. Further, there is no evidence to indicate that the Complainant provided same. Regardless of the fact that the Custodian did not provide access to the requested records until November 8, 2010, the Custodian's May 14, 2010 request for clarification clearly indicates his willingness to provide the appropriate records that would satisfy the Complainant's OPRA request. Additionally, the Custodian would have been unable to provide access to any records in the absence of clarification from the Complainant. Therefore, the Custodian has met his burden of proving that the filing of this complaint was not a catalyst for the Custodian's disclosure of the records to the Complainant on November 8, 2010.

Pursuant to Teeters, *supra*, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason, *supra*, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian attempted to obtain clarification of the Complainant's OPRA request prior to the filing of this complaint and there is no evidence in the record to indicate that the Complainant provided same. 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 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian's proposed copying cost of \$21.50 for 56 pages of paper copies of records is unreasonable because at the time the Custodian provided access to said records on November 8, 2010 he failed to charge the appropriate "actual cost" pursuant to the Court's decision in Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010), which went into effect on July 1, 2010.
3. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010), and O'Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008) the Custodian's charge of \$50.00 per CD provided to the Complainant is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. See also O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185. Further, the Custodian failed to bear his burden of proving that the charge represented actual cost incurred by the Lodi Police Department pursuant to N.J.S.A. 47:1A-6. The GRC notes that because the Complainant received the responsive records on November 8, 2010, there is no need to order disclosure of same.
4. Although the Custodian's proposed copying cost is in violation of Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010) and N.J.S.A. 47:1A-5.b., the evidence of record indicates that the Complainant paid none of the proposed copying costs prior to receiving the requested records. Therefore, the GRC declines to require the Custodian to provide a new estimated copying cost to the Complainant because the responsive records were already provided to the Complainant on November 8, 2010 without payment from the Complainant.
5. The Custodian's failure to respond in writing resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31,

2007), and the Custodian's proposed copying costs were unreasonable pursuant to Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010), and N.J.S.A. 47:1A-5.b. However, the Custodian provided the Complainant with all records responsive to the request on November 8, 2010. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

6. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian attempted to obtain clarification of the Complainant's OPRA request prior to the filing of this complaint and there is no evidence in the record to indicate that the Complainant provided same. 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 22, 2011