



## State of New Jersey

GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

### FINAL DECISION

#### September 27, 2011 Government Records Council Meeting

Robert A. Verry  
Complainant

Complaint No. 2010-135

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the September 27, 2011 public meeting, the Government Records Council (“Council”) considered the August 23, 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. Although the Complainant’s request Items No. 1 and No. 2 identified specific types of records, the request does not name specifically identifiable government records and the Custodian is not required to conduct research in response to a request. *See Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-70 and 2008-71 (February 2009). As such, the Complainant’s request Items No. 1 and No. 2 are invalid under OPRA and the Custodian has not unlawfully denied access to the requested records pursuant to *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546 (App. Div. 2005), *Bent v. Stafford Police Department*, 381 N.J. Super. 30, 37 (App. Div. 2005), *New Jersey Builders Association v. New Jersey Council on Affordable Housing*, 390 N.J. Super. 166, 180 (App. Div. 2007), and *Schuler v. Borough of Bloomsbury*, GRC Complaint No. 2007-151 (February 2009).
2. Although the Complainant’s request identifies a specific identifiable type of record, the Custodian would be required to research twenty (20) years of records through many different files in an attempt to identify letters sent to the Borough by the four (4) listed individuals and determine whether said letters refer to benefits. Under OPRA, the Custodian is not obligated to conduct research. *See Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-70 and 2008-71 (February 2009). As such, the Complainant’s request Item No. 3 is invalid under OPRA and the Custodian has not unlawfully denied access to the requested records pursuant to *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546 (App. Div. 2005), *Bent v. Stafford Police Department*, 381 N.J. Super. 30, 37 (App. Div. 2005), *New Jersey Builders Association v. New Jersey Council on Affordable Housing*, 390 N.J. Super. 166, 180 (App. Div. 2007), and *Schuler v. Borough of Bloomsbury*, GRC Complaint No. 2007-151 (February 2009).



3. Because the Custodian herein certified in the Statement of Information that no records responsive to the Complainant's request Item No. 4 exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the Complainant's OPRA request Item No. 4 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. 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." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the Complainant did not achieve the relief sought. 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

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 27<sup>th</sup> Day of September, 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: October 3, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 27, 2011 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-135**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of:

1. Ordinances, resolutions, policy, procedure, rule, regulation or the equivalent mandating Borough of South Bound Brook (“Borough”) police officers who retire submit a letter in order to receive their contractual medical benefits.
2. Minutes of any meeting wherein the Mayor and Council voted to approve an ordinance or resolution requiring Borough police officers who retire submit a letter in order to receive their contractual medical benefits.
3. Copy of every letter submitted since July 1990 by Chief Mignella (ret.), Chief Henry (ret.), Lieutenant Mignella (ret.) and ex-Sergeant Bozinta associated with the receipt of their annual/bi-annual contractual medical benefits.
4. 1990 job description of the Borough’s municipal clerk and payroll clerk.

**Request Made:** June 11, 2010

**Response Made:** June 22, 2010

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** July 1, 2010<sup>3</sup>

**Background**

**June 11, 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 delivery method is via facsimile.

**June 22, 2010**

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the seventh (7<sup>th</sup>) business day following receipt of

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previous counsel was William T. Cooper III, Esq. (Somerville, NJ), who advised the GRC on May 6, 2011 that he no longer represented the Borough.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

such request. The Custodian requests an extension until June 30, 2010 to respond to the Complainant's OPRA request.

**June 22, 2010**

E-mail from the Complainant to the Custodian. The Complainant acknowledges that the Custodian will respond by June 30, 2010.

**June 30, 2010**

Letter from the Custodian's Counsel to the Complainant. Counsel states that this letter will acknowledge receipt of the Complainant's June 11, 2010 OPRA request. Counsel states that the Complainant previously granted the Custodian an extension until this date to respond to the Complainant's OPRA request. Counsel states that in said request, the Complainant sought four (4) items.

Counsel states that request Items No. 1 through No. 3 are invalid under OPRA. Counsel states that these request items do not identify specific government records sought. Counsel states that OPRA does not countenance open-ended searches of an agency's files. MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005). Counsel further states that a custodian is not required to conduct research among its records and correlate data from various government records in the custodian's possession. Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005).

Counsel also states that the Borough does not have a specific job description responsive to request Item No. 4. Counsel states that the Complainant may wish to consult the appropriate statute regarding each of the identified positions.

**July 1, 2010**

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

- Complainant's OPRA request dated June 11, 2010.
- E-mail from the Custodian to the Complainant dated June 22, 2010.
- E-mail from the Complainant to the Custodian dated June 22, 2010.

The Complainant states that he submitted an OPRA request to the Custodian on June 11, 2010. The Complainant states that the Custodian responded in writing on June 22, 2010 requesting an extension until June 30, 2010 to respond. The Complainant states that he granted the Custodian's request for an extension. The Complainant states that as of the filing of this complaint, the Custodian has not provided any records responsive to the Complainant's OPRA request.

The Complainant does not agree to mediate this complaint.

**August 6, 2010**

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

**August 12, 2010**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until August 18, 2010 to submit the requested SOI.

**August 12, 2010**

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until August 18, 2010 to submit the requested SOI.

**August 16, 2010**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 11, 2010.
- Letter from the Custodian's Counsel to the Complainant dated June 30, 2010.

The Custodian certifies that he received the Complainant's OPRA request on June 11, 2010. The Custodian certifies that he requested an extension until June 30, 2010 to respond to the Complainant's OPRA request. The Custodian certifies that the Custodian's Counsel responded in writing to the Complainant on June 30, 2010 stating that request Items No. 1 through No. 3 were invalid under OPRA and that no records responsive to request Item No. 4 exist.

The Custodian further certifies that he is not aware of any records that are responsive to request Items No. 1, No. 2 and No. 4. The Custodian asserts that past correspondence involving prior chiefs exists, but the Complainant failed to specify a time period within which the Custodian could narrow his search for responsive records.<sup>4</sup>

**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*

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<sup>4</sup> The Custodian does not certify to the search undertaken for records responsive. Additionally, the Custodian did not certify as to the last date upon which 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 ("DARM").  
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*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.

#### Complainant's request Items No. 1, No. 2 and No. 3

The Complainant's request Items No. 1 and No. 2 sought ordinances, resolutions, policy, procedure, rule, regulation or the equivalent mandating Borough police officers who retire submit a letter in order to receive their contractual medical benefits and meeting minutes wherein the Mayor and Council voted to approve an ordinance or resolution requiring Borough police officers who retire submit a letter in order to receive their contractual medical benefits. The Custodian's Counsel responded on behalf of the Custodian within the extended time frame to respond stating that request Items No. 1 and No. 2 were invalid under OPRA because they are overly broad requests that do not identify specific government records.

The Complainant's request Item No. 3 sought every letter submitted by Chief Mignella (ret.), Chief Henry (ret.), Lieutenant Mignella (ret.) and ex-Sergeant Bozinta since July 1990 associated with the receipt of their annual/bi-annual contractual medical benefits. The Custodian's Counsel responded on behalf of the Custodian within the extended time frame to respond stating that request Item No. 3 was invalid under OPRA because it was overly broad and did not identify specific government records.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

In determining that MAG Entertainment's request for "all documents or records" from the Division of Alcoholic Beverage Control pertaining to selective enforcement was invalid under OPRA, the Appellate Division noted that:

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

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>5</sup> the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."<sup>6</sup>

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

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

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<sup>5</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>6</sup> As stated in Bent, *supra*.

The Complainant's request Items No. 1 and No. 2 fail to identify specific government records. Although these request items seek specific types of records, the request would require the Custodian to conduct an open-ended search of the Borough's files to locate those "[o]rdinances, resolutions, policy, procedure, rule, regulation ..." and "meeting minutes..." that mandate that police officers submit yearly letters to obtain contractual benefits. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009)(holding that the Complainant's OPRA request for "minutes, correspondence, e-mails and phone records" referring to "checks" is invalid because the Custodian is not required to conduct research pursuant to Donato, supra). Additionally, the addition of "or the equivalent ..." in request Item No. 1 would force the Custodian to evaluate the possible equivalents to "[o]rdinances, resolutions, policy, procedure, rule, regulation ..." and "meeting minutes..." The Custodian is not required to search his records and make this kind of evaluation to determine whether records exist.

Moreover, this matter is substantially different from the facts presented in Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). In Burnett, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of "[a]ny and all *settlements, releases or similar documents* entered into, approved or accepted from 1/1/2006 to present." *Id.* at 508. (Emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. *Id.* at 515-16.

In Burnett, the plaintiff sought "settlements, releases or similar documents." Here, however, the Complainant requested ordinances, resolutions, policy, procedure, rule, regulation or the equivalent; these types of records are not similar to each other and would require the Custodian to research many different types of records over an unspecified time period in order to locate those that mandated Borough police officers who retire submit a letter in order to receive their contractual medical benefits. Thus, Burnett does not apply to the instant case.

Therefore, although the Complainant's request Items No. 1 and No. 2 identified specific types of records, the request does not name specifically identifiable government records and the Custodian is not required to conduct research in response to a request. See Verry, supra. As such, the Complainant's request Items No. 1 and No. 2 are invalid under OPRA and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra.

Regarding the Complainant's request Item No. 3, the Complainant's request seeks letters from four (4) individuals over a twenty (20) year period regarding medical benefits. The basic proposition set forth by the Court in MAG, supra, and Bent, supra, is that a requestor's OPRA request should identify a record with enough specificity for the custodian to know exactly what record the requestor is seeking and where the record can be found. In the instant request item, the Custodian would have to search through all of the Borough's files, whether personnel, general correspondence or otherwise, in an attempt to locate letters from the four (4) individuals identified in the request over a



twenty (20) year period. The Custodian would then be required to evaluate whether the letter pertains to medical benefits.

Based on the foregoing, the Complainant's request Item No. 3 would require the Custodian to research every file in the Borough to locate letters written since 1990 by the four (4) individuals identified and evaluate whether said letters refer to medical benefits. OPRA does not require the Custodian to conduct this type of open-ended search. *See MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra.*

Therefore, although the Complainant's request identifies a specific identifiable type of record, the Custodian would be required to research twenty (20) years of records through many different files in an attempt to identify letters sent to the Borough by the four (4) listed individuals and determine whether said letters refer to benefits. Under OPRA, the Custodian is not obligated to conduct research. *See Verry, supra.* As such, the Complainant's request Item No. 3 is invalid under OPRA and the Custodian has not unlawfully denied access to the requested records pursuant to *MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra.*<sup>7</sup>

#### Complainant's OPRA request Item No. 4

The Complainant's request Item No. 4 sought the 1990 job description of the Borough's municipal clerk and payroll clerk. The Custodian's Counsel responded in writing on behalf of the Custodian within the extended time to respond stating that no records responsive to request Item No. 4 exists. Additionally, the Custodian certified in the SOI that no records responsive to this request item exist. Moreover, the Complainant has submitted no evidence to refute the Custodian's certification.

In *Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded, stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The Complainant submitted no evidence to refute the Custodian's certification. The GRC determined that, because the Custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Therefore, because the Custodian herein certified in the SOI that no records responsive to the Complainant's request Item No. 4 exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the Complainant's OPRA request Item No. 4 pursuant to *Pusterhofer, supra.*

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<sup>7</sup> The GRC notes that in *Armenti v. Robbinsville Board of Education (Mercer)*, GRC Complaint No. 2009-154 (May 2011), the GRC was tasked with deciding whether a request for e-mails and letters was valid under OPRA. The GRC looked to its determination in *Elcavage v. West Milford Twp.*, GRC Complaint Nos. 2009-07 and 2009-08 (March 2010) holding that valid OPRA requests for e-mails must contain the subject matter, date range, and sender and/or receiver. The GRC in turn found that the complainant's request for e-mails was invalid because it did not contain the required criteria.

**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 (7<sup>th</sup> 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.<sup>8</sup> 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.

In the instant complaint, Custodian's Counsel responded to the Complainant's OPRA request within the extended time frame to do so stating that request Items No. 1 through No. 3 were invalid under OPRA. Counsel further stated that no record responsive to request Item No. 4 existed. In the SOI, the Custodian asserted that the Complainant's request items No. 1 through No. 3 were invalid under OPRA and further certified that no record responsive to request Item No. 4 existed. The GRC found that the Complainant's request Items No. 1 through No. 3 were invalid under OPRA and that the Custodian did not unlawfully deny access to request Item No. 4 pursuant to Pusterhofer, *supra*.

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.” *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. Further, the Complainant did not achieve the relief sought. 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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<sup>8</sup> 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.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Complainant's request Items No. 1 and No. 2 identified specific types of records, the request does not name specifically identifiable government records and the Custodian is not required to conduct research in response to a request. *See Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-70 and 2008-71 (February 2009). As such, the Complainant's request Items No. 1 and No. 2 are invalid under OPRA and the Custodian has not unlawfully denied access to the requested records pursuant to *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546 (App. Div. 2005), *Bent v. Stafford Police Department*, 381 N.J. Super. 30, 37 (App. Div. 2005), *New Jersey Builders Association v. New Jersey Council on Affordable Housing*, 390 N.J. Super. 166, 180 (App. Div. 2007), and *Schuler v. Borough of Bloomsbury*, GRC Complaint No. 2007-151 (February 2009).
2. Although the Complainant's request identifies a specific identifiable type of record, the Custodian would be required to research twenty (20) years of records through many different files in an attempt to identify letters sent to the Borough by the four (4) listed individuals and determine whether said letters refer to benefits. Under OPRA, the Custodian is not obligated to conduct research. *See Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-70 and 2008-71 (February 2009). As such, the Complainant's request Item No. 3 is invalid under OPRA and the Custodian has not unlawfully denied access to the requested records pursuant to *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546 (App. Div. 2005), *Bent v. Stafford Police Department*, 381 N.J. Super. 30, 37 (App. Div. 2005), *New Jersey Builders Association v. New Jersey Council on Affordable Housing*, 390 N.J. Super. 166, 180 (App. Div. 2007), and *Schuler v. Borough of Bloomsbury*, GRC Complaint No. 2007-151 (February 2009).
3. Because the Custodian herein certified in the Statement of Information that no records responsive to the Complainant's request Item No. 4 exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the Complainant's OPRA request Item No. 4 pursuant to *Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).
4. 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." *Id.* at 432. Additionally, pursuant to *Mason v. City of Hoboken and City Clerk of the City of Hoboken*, 196 N.J. 51 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the Complainant did

not achieve the relief sought. 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

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