



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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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. 2010-174

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. Because the Custodian certified in the Statement of Information and on June 10, 2011 that no records responsive to the Complainant’s OPRA request exist and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. 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. Specifically, because the Custodian certified that no record responsive to the Complainant’s OPRA request exist and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). 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 27th 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. Verry¹
Complainant**

GRC Complaint No. 2010-174

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies of every Borough of South Bound Brook (“Borough”) summons issued to Ms. Valerie Conner (“Ms. Conner”) since December 2009.³

Request Made: May 24, 2010

Response Made: May 28, 2010

Custodian: Donald E. Kazar

GRC Complaint Filed: July 28, 2010⁴

Background

May 24, 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 facsimile.

May 28, 2010

Custodian Counsel’s response to the OPRA request. On behalf of the Custodian, Counsel responds in writing to the Complainant’s OPRA request on the fourth (4th) business day following receipt of such request. Counsel requests an extension of time until June 4, 2010 to respond to the Complainant’s OPRA request. Counsel states that he is awaiting clarification from Borough officials and will not be able to meet the statutorily mandated time frame to comply.

June 3, 2010

Letter from the Custodian’s Counsel to the Complainant. Counsel states that no records responsive to the Complainant’s OPRA request exist.

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

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

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

July 28, 2010

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

- Complainant’s OPRA request dated May 24, 2010.
- E-mail from the Custodian’s Counsel to the Complainant dated May 28, 2010.
- Letter from the Custodian’s Counsel to the Complainant dated June 3, 2010.

The Complainant’s Counsel states that he brought this complaint before the GRC because the Custodian failed to disclose a copy of the requested summons.

Counsel states that the Complainant submitted an OPRA request to the Custodian on May 24, 2010. Counsel states that the Custodian’s Counsel responded in writing on May 28, 2010 requesting an extension of seven (7) days, or to June 4, 2010, to respond to the Complainant’s OPRA request. Counsel states that the Custodian’s Counsel responded on June 3, 2010 stating that no records responsive exist.

Counsel states that OPRA mandates that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public's right of access.” Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006)(citing N.J.S.A. 47:1A-1). Further, Counsel states that “[t]he purpose of OPRA is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.” Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004). Counsel states that in any action under OPRA, the burden of proof rests with the public agency. N.J.S.A. 47:1A-6.

Counsel asserts that according to information received by the Complainant, such a summons does exist and was issued by the Borough in February 2010. Counsel contends that a copy of this summons issued to Ms. Conner in February 2010 should have been provided to the Complainant.

Counsel requests the following relief:

1. A determination ordering the Custodian to disclose the responsive summons; and
2. A determination that the Complainant is a prevailing party entitled to reasonable attorney’s fees pursuant to N.J.S.A. 47:1A-6.

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:

- Summons issued to Ms. Conner dated February 14, 2010.
- Complainant's OPRA request dated May 24, 2010.
- Letter from the Custodian's Counsel to the Complainant dated June 3, 2010.
- Complainant's New Jersey Judiciary Records Request Form date June 7, 2010.⁵

The Custodian certifies that he received the Complainant's OPRA request on May 24, 2010. The Custodian certifies that Custodian's Counsel responded on the Custodian's behalf on May 28, 2010 requesting an extension of seven (7) business days. The Custodian certifies that Custodian's Counsel subsequently responded on June 3, 2010 stating that no records responsive exist.

The Custodian certifies that he maintains no records responsive to the Complainant's OPRA request. The Custodian certifies that upon information and belief, the summons sought by the Complainant and attached to the SOI was available through the Borough Municipal Court.

The Custodian argues that OPRA does not apply to this matter because the records were maintained by the Borough Municipal Court, which is a judiciary branch institution. The Custodian asserts that judicial records are controlled by N.J. Court Rule 1:38-1. The Custodian certifies that the Complainant subsequently obtained the records at issue in this complaint after making a request to the Borough Municipal Court.⁶

November 24, 2010

The Complainant's legal certification. The Complainant certifies that he held every rank including the rank of Chief of Police for the South Bound Brook Borough Police Department ("SBBPD"). The Complainant certifies that his OPRA request sought a summons that was issued to Ms. Conner between December 2009 and the date of his OPRA request. The Complainant certifies that the Custodian advised him that no records responsive exist.

⁵ The Custodian also included one (1) additional summons that predated the time period identified by the Complainant in his OPRA request.

⁶ The Custodian did not certify to the search undertaken nor 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").

The Complainant certifies that Ms. Conner was issued Summons No. 10-0842 on February 14, 2010 for failure to remove snow and was ordered to appear before the Borough Municipal Court three (3) days later, on February 17, 2010. The Complainant certifies that the summons was issued by Officer Vladyka. The Complainant certifies that summonses such as the one at issue in this complaint are maintained by the SBBPD, which is an entity of the Borough. The Complainant certifies that although the same summons was available at the Borough Municipal Court, this fact does not relieve the Borough of its obligation to provide a copy of the record maintained by the SBBPD to the Complainant.

May 19, 2011

E-mail from the GRC to the Custodian. The GRC states that it needs additional information. The GRC recapitulates the facts of the complaint and notes that the Complainant stated that after making a New Jersey Judiciary Records Request to the Borough Municipal Court on June 7, 2010, he received from the Borough Municipal Court the summons responsive to his request. The GRC further states that the Custodian failed to certify to the search undertaken to locate the records.

The GRC states that the Complainant submitted a legal certification refuting the Custodian's certification that no records responsive to the request exist on November 24, 2010. The GRC states that in said certification, the Complainant certified that the SBBPD should have maintained the summons at issue that the Complainant received from the court. The GRC requests that the Custodian submit a legal certification answering the following:

1. Please describe the search undertaken to locate the summons responsive to the Complainant's May 24, 2010 OPRA request to include whether the Custodian contacted the South Bound Brook Police Department.
2. Whether the South Bound Brook Police Department maintained the summons responsive to aforementioned request?
3. If the Custodian did not contact the South Bound Brook Police Department regarding this request, please provide the reasons why.

The GRC requests that the Custodian provide the requested legal certification by May 23, 2011.

May 23, 2011

The Custodian's legal certification attaching the following:

- Memorandum from Philip S. Carchman, J.A.D., dated November 4, 2005 attaching the New Jersey Judiciary Open Records: Policies and Procedures for Access to Case-Related Court Records – Staff Guidelines.
- New Jersey Judiciary Records Request form.

The Custodian certifies that he received the Complainant's OPRA request on May 24, 2010. The Custodian certifies that he responded to the Complainant stating that the Borough did not maintain the record responsive to the Complainant's OPRA request, that

the Borough Municipal Court maintained the requested record and that a summons were issued by the Police Department.⁷

The Custodian certifies that at the time of his response, he checked with Ms. Genoveva Castaneda (“Ms. Castaneda”), Court Administrator, regarding the Complainant’s OPRA request. The Custodian certifies that Ms. Castaneda informed him that responsive summons cannot be disclosed under OPRA but a request may be made to the Borough Municipal Court under the New Jersey Judiciary Open Records: Policies and Procedures for Access to Case-Related Court Records – Staff Guidelines. The Custodian certifies that the Complainant subsequently made a request on June 7, 2010 to the Borough Municipal Court and received the summons.

The Custodian certifies that based on his length of service with the Borough and knowledge of its practices, he did not contact the SBBPD to pursue the requested records. The Custodian certifies that the SBBPD does not record summonses, and thus has no record of the issuance of summonses. The Custodian certifies that if the Complainant had initially provided the Custodian with the name of the officer issuing the summons sought, he could have contacted that officer directly as the officer may have kept copies of the summons. The Custodian certifies that the Borough Municipal Court is the only true repository of summonses.

The Custodian certifies that because he is aware of the Borough’s internal summons record-keeping procedure, he spoke directly with Ms. Castaneda at the Borough’s Municipal Court and performed the subject search regarding the summons sought by the Complainant. The Custodian reiterates that the Complainant received the records responsive to his OPRA request after the Complainant made the appropriate request to the Borough Municipal Court.

June 7, 2011

E-mail from the GRC to the Custodian’s Counsel. The GRC states that it is in receipt of the Custodian’s legal certification dated May 23, 2011. The GRC states that it has reviewed the Custodian’s certification and found that it does not clearly articulate whether the SBBPD maintained the summons responsive to the Complainant’s OPRA request at the time of such request. The GRC states that the Custodian’s certification indicates that the Custodian never contacted the SBBPD regarding the responsive summons.

The GRC requests that both the Custodian and the current Chief of Police for the SBBPD submit legal certifications answering the following:

1. Whether the SBBPD maintained the summons responsive to the Complainant’s OPRA request at the time of said request?

⁷ The evidence of record does not support this statement. The evidence indicates that the Custodian’s previous Counsel responded to the OPRA request in writing stating only that no records responsive to the Complainant’s OPRA request exist.

The GRC requests that the Custodian and Chief of Police provide the requested certifications by close of business on June 10, 2011.

June 10, 2011

Custodian’s legal certification. The Custodian certifies that the SBBPD did not maintain the summons responsive to the Complainant’s OPRA request at the time of said request.

Chief William King (“Chief King”), Chief of Police, certifies that he is aware of the Complainant’s OPRA request seeking “... every Borough summons issued to [Ms. Conner] since December 2009.” Chief King certifies that the SBBPD did not maintain the summons responsive to the Complainant’s OPRA request at the time of said request.

July 29, 2011

E-mail from the GRC to the Custodian. The GRC states that it is in need of additional information. The GRC states that the Custodian and Chief King certified that the summons responsive to the Complainant’s OPRA request were not maintained by either the Borough or the SBBPD at the time of the Complainant’s OPRA request. Further, the GRC states that the Custodian attached copies of the Complainant’s judicial request form and responsive summons to the SOI; however, it is unclear how the Custodian obtained these documents. The GRC requests that the Custodian legally certify to the following:

1. Exactly how did the Custodian come into possession of the Complainant’s judicial request and responsive summons that were attached to the SOI? Please also provide the specific date.

The GRC requests that the Custodian submit the requested certification by close of business on August 2, 2011.

August 1, 2011⁸

Custodian’s legal certification. The Custodian certifies that he received a copy of the Complainant’s judicial request materials, including the summons at issue, from Ms. Castaneda, the court administrator, after Ms. Castaneda completed the Complainant’s request. The Custodian certifies that he obtained these copies on June 9, 2010.

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.

⁸ Additional correspondence was submitted by the parties. However, said correspondence restates assertions already presented to the GRC.
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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.

The Complainant’s OPRA request sought, among other records, copies of every summons issued to Ms. Conner since December 2009. On May 28, 2010, the Custodian’s Counsel responded in writing on behalf of the Custodian requesting an extension until June 4, 2010 to respond to the Complainant’s OPRA request. The Custodian’s Counsel subsequently responded on June 3, 2010 stating that no records responsive to the Complainant’s OPRA request exist. The Complainant filed a Denial of Access Complaint arguing that according to information received, Ms. Conner received a summons in February 2010 and that the Custodian should have provided the summons to the Complainant. The Custodian certified in the SOI that no summons responsive existed and that summonses are available through the Borough Municipal Court. The Custodian further certified that the Complainant received the summons after making a request for same to the Borough Municipal Court.

On November 24, 2010, the Complainant certified that he held every position including Chief of Police with the SBBPD. The Complainant further certified that summonses similar to the one requested are maintained by the SBBPD. The Complainant argued that the Custodian was obligated to obtain the requested summons from the SBBPD and provide same to the Complainant. On May 23, 2011, the Custodian certified that based on his length of service, he did not contact the SBBPD regarding the Complainant’s request because the Borough Municipal Court is the only true repository of summonses. On June 10, 2011, the Custodian and Chief King certified that the SBBPD did not maintain the summons sought by the Complainant at the time of the Complainant’s OPRA request.

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 failed to submit any evidence to refute the custodian's certification. The GRC held that the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

In the matter before the Council, the Custodian certified in the SOI and again on June 10, 2011 that no records responsive to the Complainant's OPRA request were maintained by the Borough. Additionally, Chief King also certified that the SBBPD did not maintain the requested summons at the time of the Complainant's OPRA request. Conversely, the Complainant certified that the SBBPD maintained the summons sought based on his previous work experience in the SBBPD. Although the Complainant may have past knowledge of what records were held at the SBBPD, said knowledge is not dispositive of what records the SBBPD currently maintains. The Complainant's certification therefore does not rise to the level of competent, credible evidence sufficient to refute the Custodian's certifications that no records responsive to the Complainant's request exist.

Therefore, because the Custodian certified in the SOI and on June 10, 2011 that no records responsive to the Complainant's OPRA request exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer, supra.

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.⁹ 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 (8) business days later, or one day beyond the statutory

⁹ 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.

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 Complainant filed this Denial of Access Complaint arguing that the Borough maintained the summons requested, contrary to the Custodian Counsel's response that no records responsive exist. The Complainant's Counsel requested that the GRC order the Custodian to provide the requested summons to the Complainant. The Complainant's Counsel also requested that the GRC determine that the Complainant is a prevailing party entitled to reasonable attorney's fees. N.J.S.A. 47:1A-6. However, the GRC has determined that the Custodian did not unlawfully deny access to the requested summons because the Custodian certified that no summons responsive to the request was maintained by the Borough and SBBPD at the time of the Complainant's OPRA request, and the Complainant failed to present competent, credible evidence sufficient to refute such certification.

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. Specifically, because the Custodian certified that no record responsive to the Complainant's OPRA request exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested record pursuant to Pusterhofer, supra. 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. Because the Custodian certified in the Statement of Information and on June 10, 2011 that no records responsive to the Complainant's OPRA request exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. 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. Specifically, because the Custodian certified that no record responsive to the Complainant's OPRA request exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). 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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Executive Director

August 23, 2011