State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

November 29, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant
v.
Sparta Board of Education (Sussex)
Custodian of Record

Complaint No. 2010-193

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). Moreover, because the Custodian failed to immediately grant access to the requested contracts or request additional time to respond to the Complainant's OPRA request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

2. Because the Custodian provided access to the requested records in the medium requested (.pdf) pursuant to N.J.S.A. 47:1A-5.d. via the Complainant's preferred method of delivery (e-mail), the Custodian has not unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. *See* O'Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008). Specifically, the Custodian was under no obligation to engage in clerical work to provide the Complainant with the requested records in separate individual .pdf files with specific titles as per the Complainant's directives.

3. Because the evidence of record indicates that the Complainant's request Item No. 2 sought draft contracts, and because draft documents in their entirety exempt from disclosure under OPRA as advisory, consultative or deliberative material, the Custodian was not required to provide access to those contracts pursuant to N.J.S.A. 47:1A-1.1. In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), Beck and . Kean v. O'Hare, Superior Court of New Jersey, Law Division – Mercer County,

Docket No. MER-L-2411-07 (November 26, 2007) and Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009).

4. Although the Custodian's failure to respond within the statutorily mandated time frame resulted in a "deemed" denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the Custodian violated N.J.S.A. 47:1A-5.e. by failing to respond immediately to the Complainant's OPRA request for contracts, the Custodian did not unlawfully deny access to the requested records pursuant to N.J.S.A. 47:1A-6 because OPRA does not require a custodian to separate and organize files to a requestor's specifications and draft contracts are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Additionally, the evidence of record does not indicate that the Custodian's violations 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.

5. 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), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian did not unlawfully deny access to the requested records because he provided same in the medium sought via the Complainant's preferred method of delivery and was under no obligation to organize the requested records consistent with the Complainant's directives. Further, the relief ultimately achieved did not have a basis in law. 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 2, 2011

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

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

Jesse Wolosky[1] **GRC Complaint No. 2010-193**
Complainant

v.

Sparta Board of Education (Sussex)[2]
Custodian of Records

Records Relevant to Complaint: Copies of:

1. Current fully executed and signed employment contract between the Sparta Board of Education ("BOE") and Dr. Thomas Morton ("Dr. Morton").
2. All draft copies of the current contract between the BOE and Dr. Morton before being fully executed and signed.
3. Each previous fully executed and signed employment contract between the BOE and Dr. Morton.
4. Current fully executed and signed employment contract between the BOE and the Custodian.

Request Made: July 19, 2010
Response Made: July 29, 2010
Custodian: Warren Ceurvels
GRC Complaint Filed: August 3, 2010[3]

Background

July 19, 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 the preferred method of delivery is via e-mail. The Complainant further requests that he receive each record in a separate .pdf file individually identified by specific file name to correspond with the record being provided.

July 29, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the eighth (8th) business day following receipt of such request. The Custodian states that attached are the requested records.[4]

[1] Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).
[2] Represented by Rodney T. Hara, Esq., of Fogarty and Hara (Fair Lawn, NJ).
[3] The GRC received the Denial of Access Complaint on said date.
[4] All records were provided in one (1) .pdf file entitled "SCAN1489_000.pdf."

August 3, 2010

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

- Complainant's OPRA request dated July 19, 2010.
- E-mail from the Custodian to the Complainant dated July 29, 2010 attaching "SCAN1489_000.pdf."[5]

The Complainant's Counsel states that this complaint is being brought against the Sparta Board of Education ("BOE") because the Custodian has not provided the Complainant with electronic versions of the requested records according to the Complainant's directives.

Counsel states that the Custodian submitted an OPRA request to the BOE on July 19, 2010. Counsel states that the Complainant asked for the records in a specific electronic format and that each item be provided in "separate attached files" labeled with a specific file name. Counsel states that although the Custodian responded providing access to the requested records, the Custodian followed none of the Complainant's directives: he provided one large attached .pdf file that was not broken down into separate attached files and labeled "SCAN1489_000.pdf," rather than an identifiable title. Counsel asserts that the Complainant, who does not have the ability to separate .pdf files into individual files, specifically requested the records to be separated in order to file them individually rather than as one large file.

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] … 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 there is no doubt that the records requested are government records based on the broad definition of a "government record" in OPRA. N.J.S.A. 47:1A-1.1. Counsel argues that just as public agencies collate and staple responsive records, the Complainant asked that the records at issue be sent to him in individual .pdf files. Counsel argues that the BOE would not have expended much effort in complying with the Complainant's directives by scanning each record individually and creating separate .pdf files instead of feeding all records responsive through the scanner at once. Counsel argued that receiving one large file is worse than receiving an unstapled stack of paper copies of records because at least those records can be sorted and stapled. Counsel

[5] The Complainant also included copies of the records provided.

argues that here, the Complainant has no way to break up the .pdf file into individual components for filing purposes.

Counsel contends that the GRC should apply Paff v. County of Camden, GRC Complaint No. 2009-25 (January 2010) to the instant complaint. Counsel states that in Paff, *supra*, the complainant requested the Code of Ethics for the County of Camden in a text file, word-processing file or non-scanned .pdf file. Counsel states that the custodian provided access to the record in hardcopy, as opposed to electronically per the Complainant's OPRA request. Counsel states that the GRC held that it was incumbent upon the custodian to either provide the document in the medium requested by the complainant or make arrangements to have the record converted into the requested medium pursuant to N.J.S.A. 47:1A-5.d.

Counsel argues that the Complainant here provided specific directives to the Custodian regarding the medium in which the Complainant wished to receive the requested records, as is required by OPRA and the model OPRA request form created by the GRC. Counsel argues that the Custodian instead chose to send a single .pdf file with all records lumped together. Counsel argues that the Custodian clearly had the ability to send the Complainant properly titled individual files and chose not to.

Counsel requests that the GRC order the Custodian to provide the requested records to the Complainant in accordance with the Complainant's specific directives. Counsel further requests that the GRC determine 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

E-mail from the Custodian to the Complainant with the following attachments:

- "Morton current contract" in .pdf format.
- "Morton draft contracts" in .pdf format.
- "Morton previous contracts" in .pdf format.
- "Ceurvels current contract" in .pdf format.

The Custodian states that in response to the Complainant's OPRA request, the BOE maintains that it already provided the Complainant with the requested records in a meaningful medium and in full compliance with N.J.S.A. 47:1A-5.d. The Custodian states that he was not required to further organize the records according to the Complainant's directives. The Custodian states that in order to ensure timely compliance with the Complainant's OPRA request, the requested records were scanned together and sent as one .pdf file. The Custodian states that notwithstanding the BOE's disagreement with the Complainant's stance on the issues, the Custodian is extending the courtesy of accommodating the Complainant's OPRA request since the Complainant alleged he was inconvenienced by receiving the requested records in one file. The Custodian states that the requested records have been scanned separately and are attached as individual files.

August 6, 2010

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

August 9, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel requests a two (2) week extension of time to submit the requested SOI because the Custodian is away on vacation.

August 9, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC states that although it will generally grant one (1) extension of five (5) business days to submit an SOI, the GRC will grant Counsel an extension of ten (10) business days, or until August 27, 2010, to submit the requested SOI.

August 27, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 19, 2010.
- E-mail from the Custodian to the Complainant dated July 29, 2010 attaching "SCAN1489_000.pdf."

The Custodian certifies that his search for the requested records involved reviewing the Complainant's OPRA request and gathering all of the responsive records within the BOE's possession.

The Custodian also certifies that whether any 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 is not applicable in this complaint.

The Custodian certifies that the Complainant submitted an OPRA request to the BOE on July 19, 2010. The Custodian certifies that the Complainant's OPRA request sought employment contracts as follows: individually scanned .pdf files with specific titles identifying those records contained in each file.

The Custodian certifies that he provided access to the requested records on July 29, 2010. The Custodian certifies that because the requested records were not maintained electronically, the Custodian converted the records into .pdf format by scanning same. The Custodian certifies that in order to ensure timely compliance, the Custodian scanned each record successively and provided the resulting .pdf to the Complainant via e-mail. The Custodian certifies that he did not organize and label the respective records in the matter directed by the Complainant.

The Custodian states that the Complainant filed this complaint with the GRC alleging that the Custodian violated OPRA by not providing the Complainant with electronic versions of the records in accordance with the Complainant's directives. The Custodian contends that notwithstanding the fact that the Complainant received the responsive records in the medium requested and in a timely manner, the Complainant

claims the Custodian's failure to individually scan and title said records in accordance with the Complainant's directives represents a violation of OPRA. The Custodian contends that the BOE timely responded providing access to the requested records in a meaningful medium pursuant to N.J.S.A. 47:1A-5.d. and was not required to further organize the records according to the Complainant's personal directive.

The Custodian states that OPRA requires a custodian to "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." N.J.S.A. 47:1A-5.d. The Custodian states that OPRA further requires that "[i]f 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." *Id.* The Custodian argues that the BOE did not maintain the responsive records in the requested medium; therefore, the Custodian converted the records into the requested medium and provided same to the Complainant via e-mail. The Custodian contends that the Complainant's belief that the Custodian was further required to organize and label the files according to the Complainant's directives is above and beyond the duties of a custodian under OPRA and should be rejected by the GRC.

The Custodian states that the GRC has previously addressed the legislative meaning of the word "medium" as used in this context through consultation of various dictionary and encyclopedia references. *See* NJ Libertarian Party v. NJ Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-114 (April 2006) and Fosque v. New Jersey Department of Corrections, GRC Complaint No. 2008-185 (June 2009). The Custodian states that the GRC held that:

> "The American Heritage Dictionary of the English Language, Fourth Edition (Copyright 2000 by Houghton Mifflin Company) defines medium as 'an intervening substance through which something else is transmitted or carried on.' And, its plural abstraction 'media' is defined in the same dictionary as 'an object or device, such as a disk, on which data is stored.' Further, the Wikipedia (free encyclopedia) (Copyright 2001-2005) describes a 'recording medium' as 'a physical material that holds information expressed in any of the existing recording formats.'" *Id.*

The Custodian argues that applying the plain language of N.J.S.A. 47:1A-5.d. and the definition of "medium" referenced in NJ Libertarian, *supra*, it is clear that "medium" contemplated in OPRA represents the actual device or format in which a government record is stored and/or transmitted and does not encompass the organizational preferences of a requestor.

The Custodian asserts that to expand on the definition of "medium" as proposed by the Complainant would create an additional burden on custodians by requiring them to organize, format, label and/or collate records according to a requestor's personal preference. The Custodian asserts that custodians could then be required to comply with requests to alphabetize documents, separate documents into labeled folders according to subject matter and/or color-code documents in order to properly respond to an OPRA request. The Custodian argues that these types of clerical actions exceed the scope and

intent of OPRA, which is to provide the public with access to government records in a meaningful medium. The Custodian asserts that OPRA does not impose an obligation on the part of public agencies to augment and/or categorize government records in any configuration deemed preferable and convenient to a requestor.

The Custodian contends that in this complaint, the five (5) records responsive to the Complainant's OPRA request were sequentially scanned into an electronic file and sent to the Complainant in the requested medium rending them fully accessible, identifiable and meaningful. The Custodian argues that the Complainant's suggestion that the Custodian's failure to label the electronic file by a specific title, thus rendering identification of the records unintelligible, is directly belied by the fact that the Custodian clearly informed the Complainant in his response e-mail that the requested contracts were attached.

The Custodian argues that the Complainant further errs by contending that providing the records in a single electronic file, which the Complainant likened to an unstapled stack of paper copies, violates OPRA. The Custodian asserts that the Complainant was provided with the records requested in the medium of his choice, which when opened clearly contains each contract in a consecutive and unmistakably identifiable order. The Custodian argues that (as evidenced by the fact that the Complainant attached the records at issue to the Denial of Access Complaint) the Complainant was clearly able to access, review and store the requested records in the provided medium. The Custodian argues that this is consistent with OPRA's objective to provide the public with meaningful access to government records. The Custodian contends that being inconvenienced by having the records transmitted as a single file does not constitute a violation of OPRA.

The Custodian argues that the Complainant's reliance on Paff v. County of Camden, GRC Complaint No. 2009-25 (January 2010) is similarly misplaced. The Custodian states that in Paff, *supra*, the GRC rejected the custodian's argument that she did not maintain the record in the medium requested and determined that the custodian should have explored options for converting the record into the requested medium with any costs incurred shifting to the complainant. The Custodian argues that the issue in Paff, *supra*, was whether a custodian is required to convert a record to another medium, not whether a custodian is required to organize and label records consistent with a requestor's personal directives within a single type of responsive medium, as erroneously argued by the Complainant.

The Custodian argues that this distinction is critical to the instant complaint. The Custodian argues that unlike the facts in Paff, *supra*, the Custodian here converted the records from paper into a .pdf file (the Complainant's requested medium) and provided the resulting file via e-mail (the Complainant's preferred method of delivery). The Custodian argues that the Council's holding in Paff, *supra*, does not require nor even suggest that the Custodian was also required to organize and label the converted records in accordance with Complainant's directives. The Custodian asserts that based on all of the foregoing, the BOE complied with OPRA and appropriately responded to the Complainant's OPRA request by providing the requested records in the requested medium.

The Custodian notes that although not required by OPRA, the Custodian subsequently extended the Complainant the courtesy of providing the records in accordance with the Complainant's directives. The Custodian asserts that he was not able to accommodate the Complainant's directives within the statutorily mandated time frame due to other demands including complying with additional OPRA requests submitted by the Complainant. The Custodian asserts that when time permitted, the Custodian was able to address the Complainant's alleged inconvenience by providing the Complainant with the records per his directives on August 6, 2010. The Custodian asserts that this does not serve as an admission or acknowledgment that the Complainant was entitled to the records as directed: the BOE maintains the Custodian timely provided the Complainant with the requested records in a meaningful medium on July 29, 2010, as required by N.J.S.A. 47:1A-5.d.

Analysis

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

OPRA provides that:

> "*[i]mmediate access ordinarily shall be granted to* budgets, bills, vouchers, contracts, including collective negotiations agreements and *individual employment contracts*, and public employee salary and overtime information." (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also 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 … If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record." (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA further 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 to a government record or deny a request for access to a government record as soon as possible, *but not later than seven business days after receiving the request*, provided that the record is currently available and not in storage or archived. 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.

Although the Complainant did not raise the issue of whether the Custodian responded in a timely manner, the GRC must address this issue.

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.[6] 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).

In the instant complaint, the Custodian certified that he received the Complainant's OPRA request on July 19, 2010 and responded in writing on July 29, 2010. The Custodian argued that he responded in a timely manner; however, the Custodian responded on the eighth (8th) business day after receipt of the Complainant's OPRA request, or one (1) business day after the expiration of the statutorily mandated time frame. The Custodian further provided no evidence to support that his response was timely, such as whether the BOE was closed for business on one of the days between July 19, 2010 and July 29, 2010.

Additionally, the responsive contracts are specifically classified under OPRA as "immediate access" records pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that "immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggest that the Custodian was still obligated to immediately notify the Complainant…" Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

The evidence of record indicates that the Custodian did not conform to his statutory obligation under OPRA to grant access to the requested contracts or request an extension of time to provide same immediately. Instead, the Custodian did not provide the requested contracts until the eighth (8th) business day after receipt of the Complainant's OPRA request. Thus, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.e.

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

[6] 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.

"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*. Moreover, because the Custodian failed to immediately grant access to the requested contracts or request additional time to respond to the Complainant's OPRA request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron, *supra*. *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

Whether the Custodian violated OPRA by not providing the requested records in accordance with the Complainant's directives?

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.

Regarding various mediums, OPRA provides 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." N.J.S.A. 47:1A-5.d.

The Complainant herein contended that the Custodian violated OPRA by failing to provide the requested records according to the Complainant's directives: separate .pdf files each individually identified by a specific title. The Complainant's Counsel contended that the Custodian instead provided the records in a single .pdf file with no specific title. Counsel argued that the Custodian's conduct was akin to providing a stack of unstapled papers, except that in this case the Complainant could not split the .pdf file into separate files for easier filing purposes. Counsel argued that the GRC should apply Paff v. County of Camden, GRC Complaint No. 2009-25 (January 2010) to the instant complaint and hold that the Custodian violated OPRA by failing to provide the Complainant the requested records per the specific directives of the Complainant.

The Custodian argued that OPRA does not require that a custodian organize and label files according to a requestor's directives. The Custodian argued that based on the definitions of "medium" contemplated by the GRC in NJ Libertarian Party v. NJ Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-114 (April 2006) and Fosque v. New Jersey Department of Corrections, GRC Complaint No. 2008-185 (June 2009) and the plain language of N.J.S.A. 47:1A-5.d., the term "medium" referred to the actual format or device on which a government record is stored and/or transmitted and does not encompass organizational preferences of a requestor. The Custodian further argued that to expand the definition to include such directives would place on custodians an additional burden to organize, format, label and collate: an obligation which is not required under OPRA.

The Custodian also argued that the Complainant's reliance on Paff, *supra*, was erroneous because the facts of Paff, *supra*, are inapposite to the facts of this complaint. The Custodian asserted that the BOE fully complied with OPRA by providing access to the requested records in a .pdf file (the Complainant's requested medium) via e-mail (the Complainant's preferred method of delivery).[7]

The GRC agrees with the Custodian's argument that the Complainant erroneously relied on the Council's decision in Paff. Specifically, in Paff, the custodian responded to the OPRA request simply stating that she did not possess the record sought in the medium requested and further failed to adhere to N.J.S.A. 47:1A-5.d., which allows a custodian to contact a vendor for medium conversion and pass the cost for such medium conversion onto the requestor should they chose to accept same. Here, the Custodian converted the requested records from paper copies to a .pdf file and e-mailed the file to the Complainant. The Custodian herein converted the record from one medium to another while the custodian in Paff, *supra*, certified that no Code of Ethics existed because the record was not maintained in the requested medium. Thus, the Council's decision in Paff, *supra*, does not apply to this complaint.

The GRC acknowledges that aside from providing a record in the "medium" sought pursuant to N.J.S.A. 47:1A-5.d., a custodian is also required to provide records in

[7] The GRC notes that after the filing of this complaint, the Custodian contacted the Complainant on August 6, 2010 and provided the records to the Complainant organized as the Complainant specified. The Custodian noted in the SOI that providing the records in this manner did not amount to an admission of the BOE's guilt, as the BOE still contended that it responded properly to the Complainant's OPRA request.

the preferred method of delivery if one is indicated by the requestor. *See* O'Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008).

OPRA requires 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.

The Legislature did not define what the term "medium" would encompass; thus, the GRC contemplated the definition of "medium" from three separate sources:

> "The American Heritage Dictionary of the English Language, Fourth Edition (Copyright 2000 by Houghton Mifflin Company) defines medium as 'an intervening substance through which something else is transmitted or carried on.' And, its plural abstraction 'media' is defined in the same dictionary as 'an object or device, such as a disk, on which data is stored.' Further, the Wikipedia (free encyclopedia) (Copyright 2001-2005) describes a 'recording medium' as 'a physical material that holds information expressed in any of the existing recording formats.'" *See* NJ Libertarian Party v. NJ Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-114 (April 2006) *and* Fosque v. New Jersey Department of Corrections, GRC Complaint No. 2008-185 (June 2009).

Based on the foregoing, the medium sought in this instant is a .pdf file. Notwithstanding the fact that the Complainant clearly stated the medium sought, the Complainant also provided a specific set of directives. These requirements for the Custodian to provide separate specifically titled .pdf files for each request item is an issue of the manner in which the records are arranged or organized for disclosure. Thus, this is not an issue of "medium," or whether a custodian is only obligated to provide the record in the requested medium via the preferred method of delivery; rather, the issue is whether N.J.S.A. 47:1A-5.d. obligates a custodian to arrange or organize records according to a requestor's directives. Thus, the GRC must decide whether the Complainant's right of access to government records under OPRA was impeded because the Custodian did not organize the records provided to the Complainant in the manner specified by the Complainant.

As cited by the Complainant's Counsel, the Court in Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) noted 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.'" (quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). In the instant complaint, the Custodian provided access to the requested records in a .pdf file as requested by the Complainant. Although the records

were not provided in individual files with specific titles, this did not impede the Complainant's right of access to the requested records. The Complainant could clearly view the records and identify each contract within the single .pdf file. OPRA does not require a custodian to separate and organize files to a requestor's specifications.

Therefore, because the Custodian provided access to the requested records in the medium requested (.pdf) pursuant to N.J.S.A. 47:1A-5.d. via the Complainant's preferred method of delivery (e-mail), the Custodian has not unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. *See* O'Shea *supra*. Specifically, the Custodian was under no obligation to engage in clerical work to provide the Complainant with the requested records in separate individual .pdf files with specific titles as per the Complainant's directives.

Moreover, the draft contracts which the Complainant requested at Item No. 2 are not government records pursuant to OPRA. Thus, the Custodian was not obligated to provide such contracts to the Complainant.

OPRA provides that the definition of a government record "shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1.

In O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the complainant requested handwritten notes taken by the school board secretary during a Board of Education meeting. The Council concluded that the Board Secretary's handwritten notes taken during the June 22, 2004 executive session meeting are exempt from disclosure under the "inter-agency, intra-agency advisory, consultative, or deliberative" privilege pursuant to N.J.S.A. 47:1A-1.1.

In doing so, the Council stated that "neither the statute nor the courts have defined the terms… 'advisory, consultative, or deliberative' in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA's ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In Re Readoption with Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign

has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), In Re Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

> "[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. … Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. … Purely factual material that does not reflect deliberative processes is not protected. … Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure." (Citations omitted.) Id. at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

> "[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies." In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, citing McClain, *supra*, 99 N.J. at 361-62, 492 A.2d 991.

In In Re Liquidation of Integrity, *supra*, 165 N.J. at 84-5, the judiciary set forth the legal standard for applying the deliberative process privilege as follows:

(1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.

a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.

b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.

i. Deliberative materials do not include purely factual materials.

ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.

c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.

d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.

e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency*.

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass'n, v. Dinkins, 807 F. Supp., 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn.App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it "'reflect[s] that aspect of the agency's function that precedes formal and informed decision making.'" *Id*. at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

The New Jersey Appellate Division has also reached this conclusion with regard to draft documents. In Home News v. Board of Education of the Borough of Spotswood, 286 N.J. Super. 380 (App. Div. 1996), a reporter sought access to the Board's 1994 budget workbook which the trial court characterized as "…worksheets reflecting presentations and analyses of budgetary information, gathered by the business administrator and others…" *Id.* at 387. The Court in Home News, affirming the trial Court's holding that the newspaper was not entitled to disclosure of the workbook, noted "…[the workbook] was no more subject to disclosure than any other papers reflecting

work in progress toward the goal of producing a document that will eventually become a public record." *Id.* at 387-88.

More recently, in the unpublished opinion Beck and Kean v. O'Hare, Superior Court of New Jersey, Law Division – Mercer County, Docket No. MER-L-2411-07 (November 26, 2007), the Court reviewed an action to challenge an OPRA request that was denied in part by the custodian because one of the records, a draft final report, was determined to be exempt from disclosure as inter-agency or intra-agency advisory, consultative or deliberative ("ACD") material. After finding that the withheld record was intra-agency, the Court turned to the issue of whether the record fell within the ACD exemption. In considering this issue, the Court found Home News relevant, observing "…Home News…support[s] the notion that preliminary or draft reports are exempt from disclosure." *Id* at 21.

In Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council determined that because the evidence of record indicated that the Special Police Committee Report requested by the Complainant was a draft document, and because draft documents in their entirety comprise of ACD material, the Custodian lawfully denied the Complainant access to the Special Police Committee Report pursuant to N.J.S.A. 47:1A-1.1.

In the instant complaint, it is clear that the Complainant's OPRA request Item No. 2 sought draft contracts. Although the Custodian provided same, he was not required to do so according to the foregoing case law because draft records are exempt from disclosure under OPRA as ACD material.

Therefore, because the evidence of record indicates that the Complainant's request Item No. 2 sought draft contracts, and because draft documents in their entirety are exempt from disclosure under OPRA as ACD material, the Custodian was not required to provide access to those contracts pursuant to N.J.S.A. 47:1A-1.1, In Re Liquidation of Integrity, *supra*, Beck, *supra*, and Dalesky, *supra*.

Whether the Custodian's "deemed" denial of access to the requested records and failure to respond immediately to the Complainant's OPRA request for contracts rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

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

Although the Custodian's failure to respond within the statutorily mandated time frame resulted in a "deemed" denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the Custodian violated N.J.S.A. 47:1A-5.e. by failing to respond immediately to the Complainant's OPRA request for contracts, the Custodian did not unlawfully deny access to the requested records pursuant to N.J.S.A. 47:1A-6 because OPRA does not require a custodian to separate and organize files to a requestor's specifications and draft contracts are exempt from disclosure as ACD pursuant to N.J.S.A. 47:1A-1.1. Additionally, the evidence of record does not indicate that the Custodian's violations 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.[8] 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

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

demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.' Singer v. State, 95 N.J. 487, 495, cert denied (1984)."

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

The Complainant here argued that the Custodian unlawfully denied access to the requested records because he failed to provide same in accordance with the Complainant's specified directives. The Complainant's Counsel requested that the GRC order the Custodian provide the records in accordance with the Complainant's directives and find that the Complainant was a prevailing party pursuant to N.J.S.A. 47:1A-6.

However, the Council has determined that the Custodian did not unlawfully deny access to the requested records because the Custodian provided the records in the medium sought via the Complainant's preferred method of delivery and was under no obligation to organize the requested records consistent with the Complainant's directives. Thus, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee.

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*, a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian did not unlawfully deny access to the requested records because he provided same in the medium sought via the Complainant's preferred method of delivery and was under no obligation to organize the requested records consistent with the Complainant's directives. Further, the relief ultimately achieved did not have a basis in law. 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). Moreover, because the Custodian failed to immediately grant access to the requested contracts or request additional time to respond to the Complainant's OPRA request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

2. Because the Custodian provided access to the requested records in the medium requested (.pdf) pursuant to N.J.S.A. 47:1A-5.d. via the Complainant's preferred method of delivery (e-mail), the Custodian has not unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. *See* O'Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008). Specifically, the Custodian was under no obligation to engage in clerical work to provide the Complainant with the requested records in separate individual .pdf files with specific titles as per the Complainant's directives.

3. Because the evidence of record indicates that the Complainant's request Item No. 2 sought draft contracts, and because draft documents in their entirety exempt from disclosure under OPRA as advisory, consultative or deliberative material, the Custodian was not required to provide access to those contracts pursuant to N.J.S.A. 47:1A-1.1. In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), Beck and . Kean v. O'Hare, Superior Court of New Jersey, Law Division – Mercer County, Docket No. MER-L-2411-07 (November 26, 2007) and Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009).

4. Although the Custodian's failure to respond within the statutorily mandated time frame resulted in a "deemed" denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the Custodian violated N.J.S.A. 47:1A-5.e. by failing to respond immediately to the Complainant's OPRA request for contracts, the Custodian did not unlawfully deny access to the requested records pursuant to N.J.S.A. 47:1A-6 because OPRA does not require a custodian to separate and organize files to a requestor's specifications and draft contracts are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Additionally, the evidence of record does not indicate that the Custodian's violations 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.

5. 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), a factual causal nexus does not exist

between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian did not unlawfully deny access to the requested records because he provided same in the medium sought via the Complainant's preferred method of delivery and was under no obligation to organize the requested records consistent with the Complainant's directives. Further, the relief ultimately achieved did not have a basis in law. 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*.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 22, 2011