



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

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 28, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-204

v.

Borough of Chatham (Morris)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 Supplemental 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 this complaint be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law via letter from his legal counsel dated August 17, 2012. Therefore, no further adjudication is required.

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 28th Day of August, 2012

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: August 30, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-204

v.

**Borough of Chatham (Morris)²
Custodian of Records**

Records Relevant to Complaint: A copy of the actual existing official payroll record or the last pay stub showing the 2009 year end actual gross income earned for the Municipal Clerk.

Request Made: July 29, 2010

Response Made: August 2, 2010

Custodian: Susan Caljean

GRC Complaint Filed: August 9, 2010³

Background

January 31, 2012

Government Records Council's ("Council") Interim Order. At its January 31, 2012 public meeting, the Council considered the January 24, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian responded in writing to the Complainant's July 26, 2010 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i. Although the Custodian provided a specific legal basis for said denial of access, the Custodian's response did not explain the reason for the denial, the Custodian merely cited to a statute. Thus, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g., DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009) and Schwartz v. NJ Department of Human Services, GRC Complaint No. 2004-60 (Interim Order June 2, 2004). The GRC notes that denying access to payroll records pursuant to N.J.S.A. 47:1A-9.a. and 26 U.S.C. 6103 (2004) is not a lawful basis for denial of access to records requested under

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

² Represented by Joseph J. Bell, Esq. of the Bell Law Group, P.C. (Newark, NJ).

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

OPRA. Furthermore, payroll records are specifically listed as public records pursuant to N.J.S.A. 47:1A-10 and therefore are disclosable.

2. The Council declines to order disclosure of the records responsive to the Complainant's request for a copy of the actual existing official payroll record or the last pay stub showing the 2009 year end actual gross income earned for the Municipal Clerk because the Custodian provided the records responsive to the Complainant with the Statement of Information.
3. The Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for the denial of access. However, the requested payroll records were disclosed to the Complainant along with the Statement of Information. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian provided the payroll records responsive to the Complainant's OPRA request after the filing of the Denial of Access Complaint. Thus, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief achieved ultimately had a basis in law because the Borough violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-6. Therefore, the Complainant is a prevailing party and entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

February 3, 2012

Council's Interim Order distributed to the parties.

April 24, 2012

Complaint transmitted to the Office of Administrative Law ("OAL").

August 17, 2012

Letter from Complainant's Counsel to the Administrative Law Judge and the GRC. Counsel states that this matter has been resolved and the Complainant withdraws this complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law via letter from his legal counsel dated August 17, 2012. Therefore, no further adjudication is required.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

January 31, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-204

v.

Borough of Chatham (Morris)
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 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 responded in writing to the Complainant’s July 26, 2010 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i. Although the Custodian provided a specific legal basis for said denial of access, the Custodian’s response did not explain the reason for the denial, the Custodian merely cited to a statute. Thus, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g., DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009) and Schwartz v. NJ Department of Human Services, GRC Complaint No. 2004-60 (Interim Order June 2, 2004). The GRC notes that denying access to payroll records pursuant to N.J.S.A. 47:1A-9.a. and 26 U.S.C. 6103 (2004) is not a lawful basis for denial of access to records requested under OPRA. Furthermore, payroll records are specifically listed as public records pursuant to N.J.S.A. 47:1A-10 and therefore are disclosable.
2. The Council declines to order disclosure of the records responsive to the Complainant’s request for a copy of the actual existing official payroll record or the last pay stub showing the 2009 year end actual gross income earned for the Municipal Clerk because the Custodian provided the records responsive to the Complainant with the Statement of Information.
3. The Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for the denial of access. However, the requested payroll records were disclosed to the Complainant along with the Statement of Information. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.



4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Specifically, the Custodian provided the payroll records responsive to the Complainant’s OPRA request after the filing of the Denial of Access Complaint. Thus, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief achieved ultimately had a basis in law because the Borough violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-6.. Therefore, the Complainant is a prevailing party and entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees. Based on the New Jersey Supreme Court’s decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council’s decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of “unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]” this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 31st Day of January, 2012

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: February 3, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2012 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-204

v.

**Borough of Chatham (Morris)²
Custodian of Records**

Records Relevant to Complaint: A copy of the actual existing official payroll record or the last pay stub showing the 2009 year end actual gross income earned for the Municipal Clerk.

Request Made: July 29, 2010

Response Made: August 2, 2010

Custodian: Susan Caljean

GRC Complaint Filed: August 9, 2010³

Background

July 29, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA. The Complainant states that he wants the records responsive to the request in PDF format via e-mail.

August 2, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. The Custodian states that she is responding to the Complainant's request for a copy of the actual existing official payroll record or the last pay stub showing the 2009 year end actual gross income earned for the Municipal Clerk. The Custodian also states that after consulting with the Borough Attorney, the records responsive are exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a. and 26 U.S.C. 6103 (2004).

August 9, 2010

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

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

² Represented by Joseph J. Bell, Esq. of the Bell Law Group, P.C. (Rockaway, NJ).

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

- Complainant's OPRA request dated July 29, 2010
- E-mail from the Custodian to the Complainant dated August 2, 2010.

Complainant's Counsel states that the Complainant filed an OPRA request on July 29, 2010. Counsel also states that the Complainant requested a copy of the actual existing official payroll record or the last pay stub showing the 2009 year end actual gross income earned for the Municipal Clerk. Counsel further states that the Custodian denied access to the requested records because such record is exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a. and 26 U.S.C. 6103 (2004).⁴

Counsel states that payroll records are government records. Counsel asserts that while OPRA does not define what a "payroll record" is, the GRC has held:

"...we look to the ordinary meaning of that term, and are informed by other regulatory provisions defining that phrase. 'Payroll' is defined as a list of employees to be paid and the amount due to each of them. Black's Law Dictionary (7th Ed., 1999). It is also clear that documents included within the payroll record exception are, in part, records required by law to be maintained or reported in connection with payment of salary to employees and is adjunct to salary information required to be disclosed. In this regard, N.J.A.C. 12: 16-2.1, a Department of Labor regulation entitled 'Payroll records,' requires the following:

Every employing unit having workers in employment, regardless of whether such unit is or is not an 'employer' as defined in the Unemployment Compensation Law, shall keep payroll records that shall show, for each pay period:

1. The beginning and ending dates;
2. The full name of each employee and the day or days in each calendar week on which services for remuneration are performed;
3. The total amount of remuneration paid to each employee showing separately cash, including commissions and bonuses; the cash value of all compensation in any medium other than cash; gratuities received regularly in the course of employment if reported by the employee, or if not so reported, the minimum wage rate prescribed under applicable laws of this State or of the United States or the amount of remuneration actually received by the employee from his employing unit, whichever is the higher; and service charges collected by the employer and distributed to workers in lieu of gratuities and tips;
4. The total amount of all remuneration paid to all employees;
5. The number of weeks worked."

Pierone v. County of Warren, GRC Complaint No. 2008-195 (November 2009) (quoting Jackson v. Kean University, GRC Complaint No. 2002-98 (November 2003)).

⁴ The Custodian attaches a copy of 26 U.S.C. 6103 (2004).

Counsel states that the Custodian did not provide an official payroll record or the Municipal Clerk's last pay stub for 2009.

Counsel asserts that the Custodian attempted to justify its denial of access on 26 U.S.C. 6103 (2004). Counsel also asserts that Section 6103 declares that Internal Revenue Service ("IRS") "returns" and "return information" are confidential. Counsel further asserts that a "return" is defined as "any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement to, or part of, the return so filed." 26 U.S.C. 6103(b)(1). Counsel additionally asserts that tax returns filed with the IRS are confidential.

Counsel asserts that "return information" is defined in relevant part, as a "taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, *received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return* or with respect to the determination of the existence, or possible existence of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine forfeiture, or other imposition, or offense[.]" 26 U.S.C. 6103(b)(2)(A) (emphasis added). Counsel also asserts that the key issue is whether the data was received, recorded by, prepared by, furnished to or collected by the IRS. Counsel further asserts that records that would be considered confidential are 1040 tax returns and W-2 forms. *See Lucente v. City of Union City (Hudson)*, GRC Complaint No. 2005-213 (April 2006).

Counsel asserts that the Complainant is not requesting tax returns or tax return information. Counsel also asserts that the Complainant is requesting the Municipal Clerk's official payroll record or her last pay stub in 2009. Counsel further asserts that payroll records are not submitted to the IRS, unlike W-2 forms. Counsel additionally asserts that the Custodian's position would insulate all payroll records from public disclosure, including pay checks, overtime payments, reimbursements, pension payments, and contributions made by public agencies for health insurance, because this information is submitted to the IRS on W-2 forms that detail compensation. Counsel asserts that presumably, if the Complainant filed an OPRA request for overtime, received compensation for mileage or cell phone usage, the Custodian would have denied access to those records because records containing that information are eventually transmitted to the IRS. Counsel also asserts that if the Custodian's position were law, public employee compensation would be invisible to the public.

Counsel requests that the GRC order the Custodian to provide a copy of the requested payroll record showing the Municipal Clerk's pay, find that the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and award him a reasonable attorney's fee.

The Complainant does not agree to mediate this complaint.

August 10, 2010

Letter from Custodian's Counsel to Complainant's Counsel.⁵ Custodian's Counsel states that he is receipt of Complainant's Denial of Access Complaint. Custodian's Counsel also states that because the Complainant made two (2) separate OPRA requests there was a misunderstanding as to what records the Complainant was seeking. Custodian's Counsel further states that the Custodian denied the Complainant's OPRA request July 26, 2010 for the Custodian's W-2 forms pursuant to N.J.S.A. 47:1A-9.a. and 26 U.S.C. 6103 (2004).⁶ Custodian's Counsel additionally states that the Custodian relied the GRC's decision in Lucente v. City of Union City (Hudson), GRC Complaint No. 2005-213.

Custodian's Counsel states that because the Complainant has filed many other OPRA requests to the Borough, the OPRA request at issue in this complaint was overlooked. Custodian's Counsel also states that in an effort to resolve this matter expeditiously, the Custodian has forwarded the records responsive to Complainant's Counsel. Custodian's Counsel further states that since these records responsive were provided, Counsel requests that the Complainant withdraw his Denial of Access Complaint.

August 16, 2010

Letter from Complainant's Counsel to Custodian's Counsel. Complainant's Counsel states that he has reviewed the Complainant's OPRA request herein and is unsure how this request for a copy of the actual existing official payroll record or the last pay stub showing the 2009 year end actual gross income earned for the Municipal Clerk can reasonably be interpreted as a request for a W-2 form. Complainant's Counsel states that the Complainant asked that the records responsive be provided to him as a PDF document via e-mail. Complainant's Counsel also states that because the Custodian's Counsel provided the records responsive in paper format, the Complainant's request is still unsatisfied. Complainant's Counsel further states that the Complainant is still waiting for the records responsive to this request via e-mail as PDF attachments. Lastly, Complainant's Counsel states that he is not authorized to withdraw this Denial of Access Complaint.

August 19, 2010

E-mail from Counsel, Ms. Patricia Melia, Esq., (Ms. Melia),⁷ to Complainant's Counsel. Ms. Melia attaches a copy of the records responsive in PDF format to the Complainant's request. Ms. Melia requests Complainant's Counsel to inform her if these records satisfy the Complainant's OPRA request.

⁵ Custodian's Counsel provides the records responsive to the Complainant's OPRA request in paper format.

⁶ It appears from the evidence of record that the Complainant filed an OPRA request for the Custodian's W-2 forms on July 26, 2010, which is not at issue in this Denial of Access Complaint. The Complainant also filed an OPRA request on Jul 29, 2010 for the Municipal Clerk's payroll records, which is the subject of this Denial of Access Complaint.

⁷ Ms. Melia is an attorney within the law firm representing the Borough of Chatham.

August 30, 2010

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

September 3, 2010

Custodian’s SOI with the following attachments:⁸

- Complainant’s OPRA request dated July 29, 2010
- E-mail from the Custodian to the Complainant dated August 2, 2010
- Letter from Custodian’s Counsel to Complainant’s Counsel dated August 10, 2010
- Letter from Complainant’s Counsel to Custodian’s Counsel dated August 16, 2010
- E-mail from Ms. Melia to Complainant’s Counsel dated August 19, 2010.

The Custodian certifies that she searched the payroll records to locate the records responsive to the Complainant’s OPRA request. The Custodian also certifies that the records responsive to the request must be permanently maintained by the agency in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).

The Custodian argues that the denial of access to the records responsive in this matter was due to a misunderstanding. The Custodian certifies that the Complainant made several OPRA requests via numerous e-mails. The Custodian asserts that she believed the Complainant sought a copy of her W-2 form. The Custodian certifies that upon the advice of Custodian’s Counsel she denied the Complainant access to the W-2 form pursuant to N.J.S.A. 47:1A-9.a. and 26 U.S.C. 6103 (2004).

The Custodian certifies that when she realized that the Complainant’s OPRA request herein sought access to the Municipal Clerk’s payroll records, she immediately provided a paper copy to the Custodian’s Counsel to forward to the Complainant’s Counsel. The Custodian also certifies that once the Complainant’s Counsel requested an electronic copy of the records responsive, the Custodian e-mailed such records to the Custodian’s Counsel to forward to the Complainant’s Counsel. Lastly, the Custodian certifies that it is her understanding that the Complainant’s Counsel has been provided with copies of the records responsive in paper and PDF electronic format.

Analysis**Whether the Custodian properly denied access to the Complainant’s request for the Municipal Clerk’s payroll records?**

OPRA provides that:

⁸ The Custodian also includes a copy of an OPRA request dated July 26, 2010 which is not relevant to the adjudication of this complaint.

“...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 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. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” 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 ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request...*(Emphasis added.) N.J.S.A. 47:1A-5.i.

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.

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.⁹ 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).

OPRA provides that if a "...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" (Emphasis added.) N.J.S.A. 47:1A-5.g. In DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), the complainant argued in the Denial of Access Complaint that although the custodian responded in writing in a timely manner, the custodian failed to provide some of the records responsive and further failed to provide a specific lawful basis for denying access to the missing records.

The GRC held that:

"... the Council's decisions have repeatedly supported this statutory mandate by holding that custodians must provide a legally valid reason for any denial of access to records. *See Seabrook v. Cherry Hill Police Department*, GRC Complaint No. 2004-40 (April 2004), Rosenblum v. Borough of Closter, GRC Complaint No. 2005-16 (October 2005) and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (October 2005). The Council also held that for a denial of access to be in compliance with OPRA, it must be specific and must be sufficient to prove that a custodian's denial is authorized by OPRA. *See Morris v. Trenton Police Department*, GRC Complaint No. 2007-160 (May 2008). Here, while the Custodian's response to the Complainant's request was within the time allowed by N.J.S.A. 47:1A-5.i., his response was not in compliance with OPRA because it failed to provide a specific basis for denying the Complainant access to certain records pursuant to N.J.S.A. 47:1A-5.g. and the Council's decisions in Seabrook, *supra*, Rosenblum, *supra*, Paff, *supra* and Morris, *supra*." *Id.* at pg. 7.

In Schwartz v. NJ Department of Human Services, GRC Complaint No. 2004-60 (Interim Order June 2, 2004), the custodian certified that the complainant's request was denied pursuant to the Health Insurance Portability and Accountability Act of 1996 (PL 104-91) ("HIPAA"). The custodian argued that that HIPAA insures the confidentiality of health records and covers the confidentiality of documents regarding all people who receive services through the Department of Human Services. The Council held that, "the custodian has failed to explain with specificity the legal basis for the claimed non-disclosure of documents under HIPAA."

In the instant complaint the Complainant requested copy of the actual existing official payroll record or the last pay stub showing the 2009 year end actual gross income

⁹ 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.

earned for the Municipal Clerk. In the SOI, the Custodian asserted that she believed the Complainant sought a copy of the Custodian's W-2 form. The Custodian certified that upon the advice of Custodian's Counsel she denied the Complainant access to the requested records pursuant to N.J.S.A. 47:1A-9.a. and 26 U.S.C. 6103 (2004).

Therefore, the Custodian responded in writing to the Complainant's July 26, 2010 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i. Although the Custodian provided a specific legal basis for said denial of access, the Custodian's response did not explain the reason for the denial, the Custodian merely cited to a statute. Thus, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g., DeAppolonio, supra and Schwartz, supra. The GRC notes that denying access to payroll records pursuant to N.J.S.A. 47:1A-9.a. and 26 U.S.C. 6103 (2004) is not a lawful basis for denial of access to records requested under OPRA. Furthermore, payroll records are specifically listed as public records pursuant to N.J.S.A. 47:1A-10 and thus are disclosable.

However, the Council declines to order disclosure of the records responsive to the Complainant's request for a copy of the actual existing official payroll record or the last pay stub showing the 2009 year end actual gross income earned for the Municipal Clerk because the Custodian provided the records responsive to the Complainant with the SOI.

Whether the Custodian's insufficient response to the Complainant's OPRA request 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.

The evidence of record indicates that the Complainant filed his OPRA request on July 29, 2010. The evidence of record also indicates that the Custodian responded to the Complainant's OPRA request in writing on August 2, 2010, denying access to the requested records pursuant to N.J.S.A. 47:1A-9.a. and 26 U.S.C. 6103 (2004). The evidence of record further indicates that the Custodian believed that the Complainant was requesting a copy of the Municipal Clerk's W-2 form. However, the Custodian provided

the Complainant with a copy of the records responsive to his OPRA request along with the SOI.

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).

The Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for the denial of access. However, the requested payroll records were disclosed to the Complainant along with the SOI. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an 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)). The court in Buckhannon 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 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)."

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.¹⁰ 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)."

Pursuant to Teeters, *supra*, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian provided the payroll records responsive to the Complainant's OPRA request after the filing of the Denial of Access Complaint. Thus, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the

¹⁰ 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.

relief achieved ultimately had a basis in law because the Borough violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-6. Therefore, the Complainant is a prevailing party and entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian responded in writing to the Complainant's July 26, 2010 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i. Although the Custodian provided a specific legal basis for said denial of access, the Custodian's response did not explain the reason for the denial, the Custodian merely cited to a statute. Thus, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g., DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009) and Schwartz v. NJ Department of Human Services, GRC Complaint No. 2004-60 (Interim Order June 2, 2004). The GRC notes that denying access to payroll records pursuant to N.J.S.A. 47:1A-9.a. and 26 U.S.C. 6103 (2004) is not a lawful basis for denial of access to records requested under OPRA. Furthermore, payroll records are specifically listed as public records pursuant to N.J.S.A. 47:1A-10 and therefore are disclosable.
2. The Council declines to order disclosure of the records responsive to the Complainant's request for a copy of the actual existing official payroll record or the last pay stub showing the 2009 year end actual gross income earned for the Municipal Clerk because the Custodian provided the records responsive to the Complainant with the Statement of Information.
3. The Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for the denial of access. However, the requested payroll records were disclosed to the Complainant along with the Statement of Information. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Specifically, the Custodian provided the payroll records responsive to the Complainant’s OPRA request after the filing of the Denial of Access Complaint. Thus, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief achieved ultimately had a basis in law because the Borough violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-6. Therefore, the Complainant is a prevailing party and entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees. Based on the New Jersey Supreme Court’s decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council’s decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of “unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]” this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

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January 24, 2012