



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

December 18, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-205

v.

Township of East Hanover
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 23, 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 should be dismissed because the Complainant withdrew his complaint via letter to the GRC and the Office of Administrative Law dated September 27, 2012, as the parties have settled on all outstanding issues in this matter. 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 18th Day of December, 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: December 19, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-205

v.

**Township of East Hanover (Morris)²
Custodian of Records**

Records Relevant to Complaint:³ Copies of:

1. 2009 year end actual gross income earned for the Municipal Clerk.
2. Detail vendor activity report by vendor name for the Municipal Clerk from January 1, 2005 through present.
3. Current fully executed and signed employment contract between the municipality and the Municipal Clerk.
4. Municipal Clerk's resume on file with the Municipality.
5. Current Financial Disclosure Statement for the Municipal Clerk.⁴

Request Made: July 26, 2010

Response Made: August 2, 2010

Custodian: Paul Massaro

GRC Complaint Filed: August 7, 2010⁵

Background

January 31, 2012

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

1. Because the Custodian disclosed to the Complainant the requested records without redactions to the Clerk's address and provided certified confirmation of compliance to the Executive Director within five (5)

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

² Represented by Elizabeth Valandingham, Esq., (Morristown, NJ).

³ Additional records were requested which are not at issue in this complaint.

⁴ The Complainant requests the above records in electronic format via e-mail in PDF format, each as a labeled and separate attached file.

⁵ The GRC received the Denial of Access Complaint on August 9, 2010.

business days of the issuance of said Interim Order, the Custodian has complied with the Council's October 25, 2011 Interim Order.

2. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond and if able provide immediate access to the requested contract and salary information 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). In addition, the Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that the denial of access to the requested records was supported by law and unlawfully denied the Complainant's request because the Complainant did not use an official OPRA request form. *See* N.J.S.A. 47:1A-5.g.; Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). Finally, the Custodian's response to the Complainant's request violated 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. However, the Custodian provided certified confirmation of compliance with the Council's Order on November 4, 2011, certifying that the Township provided the Complainant with the requested records within the specified five (5) business days. 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.
3. 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. 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 exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters and Mason. 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, adjudicated concurrently herewith, 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.

December 1, 2012

Council's Interim Order distributed to the parties.

March 9, 2012

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

September 27, 2012

E-mail from Complainant's Counsel to the Honorable Caridad F. Rigo, A.L.J., with copy to the GRC. Counsel states that the parties have settled all outstanding issues in this matter and pursuant to that settlement; the Complainant withdraws his Denial of Access Complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this Complaint should be dismissed because the Complainant withdrew his complaint via letter to the GRC and the Office of Administrative Law dated September 27, 2012, as the parties have settled on all outstanding issues in this matter. Therefore, no further adjudication is required.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 23, 2012⁶

⁶ This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.



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
Acting Commissioner

INTERIM ORDER

January 31, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-205

v.

Township of East Hanover (Morris)
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 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:

1. Because the Custodian disclosed to the Complainant the requested records without redactions to the Clerk’s address and provided certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of said Interim Order, the Custodian has complied with the Council’s October 25, 2011 Interim Order.
2. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond and if able provide immediate access to the requested contract and salary information 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). In addition, the Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that the denial of access to the requested records was supported by law and unlawfully denied the Complainant’s request because the Complainant did not use an official OPRA request form. *See* N.J.S.A. 47:1A-5.g.; Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). Finally, the Custodian’s response to the Complainant’s request violated 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. However, the Custodian provided certified confirmation of compliance with the Council’s Order on November 4, 2011, certifying that the Township provided the Complainant with the requested records within the specified five (5) business days. 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.



3. 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. 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 exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters and Mason. 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, adjudicated concurrently herewith, 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**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-205

v.

**Township of East Hanover (Morris)²
Custodian of Records**

Records Relevant to Complaint:³ Copies of:

1. 2009 year end actual gross income earned for the Municipal Clerk.
2. Detail vendor activity report by vendor name for the Municipal Clerk from January 1, 2005 through present.
3. Current fully executed and signed employment contract between the municipality and the Municipal Clerk.
4. Municipal Clerk's resume on file with the Municipality.
5. Current Financial Disclosure Statement for the Municipal Clerk.⁴

Request Made: July 26, 2010

Response Made: August 2, 2010

Custodian: Paul Massaro

GRC Complaint Filed: August 7, 2010⁵

Background

October 25, 2011

At its October 25, 2011 public meeting, the Government Records Council ("Council") considered the October 18, 2011 Executive Director's Findings and Recommendations and all related documents 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 violated N.J.S.A. 47:1A-5.e. by failing to immediately respond and if able provide immediate access to the requested contract and salary information pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). *See also*

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

² Represented by Elizabeth Valandingham, Esq., (Morristown, NJ).

³ Additional records were requested which are not at issue in this complaint.

⁴ The Complainant requests the above records in electronic format via e-mail in PDF format, each as a labeled and separate attached file.

⁵ The GRC received the Denial of Access Complaint on August 9, 2010.

Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

2. The Custodian has certified that there are no records responsive to Items No. 3 and 4 of the Complainant's OPRA request. In addition, the Complainant has failed to present any competent, credible evidence to the contrary to refute the Custodian's certification. Accordingly, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to Items No. 3 and 4 of the Complainant's OPRA request.
3. A custodian may not refuse a request for records made under OPRA which is in writing and clearly invokes OPRA, and because the evidence of record indicates that the written request form used by the Complainant clearly invoked OPRA, the Custodian's denial of access to the requested records violates OPRA pursuant to N.J.S.A. 47:1A-5.g. and Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). Although the Custodian argued that the request did not contain all of the requirements of N.J.S.A. 47:1A-5.f., the Custodian failed to explain how the request did not comport with N.J.S.A. 47:1A-5.f. nor did she submit any competent, credible evidence to establish this point.
4. The Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that the denial of access to the requested salary information, vendor activity report, and Financial Disclosure Statement was supported by law. *See* N.J.S.A. 47:1A-5.g.; Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). The Custodian's response to the Complainant's request violated 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 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) and Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008).
5. The Custodian must disclose all of the requested records, specifically:
 - A copy of the 2009 year end actual gross income earned for the Municipal Clerk.
 - A copy of the detail vendor activity report by vendor name for the Municipal Clerk from January 1, 2005 through present.

- A copy of the current Financial Disclosure Statement for the Municipal Clerk.
6. **The Custodian shall disclose to the Complainant all of the requested records set forth at paragraph 5 above with any appropriate redactions and a detailed redaction index explaining the lawful basis for any such redactions within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director.**
 7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
 8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

October 28, 2011

Council's Interim Order distributed to the parties.

November 4, 2011

Custodian's certification of compliance with the following attachments:

- A copy of the 2009 year end [annual] actual gross income earned for the Municipal Clerk.
- A copy of the detail vendor activity report by vendor name for the Municipal Clerk from January 1, 2005 through present.
- An unredacted copy of the current Financial Disclosure Statement for the Municipal Clerk.

The Custodian certifies that in accordance with the Interim Order, the Township has adopted the GRC's model OPRA request form. The Custodian certifies that she received a copy of the Council's October 25, 2011 Interim Order on October 31, 2011. The Custodian also certifies that she complied with the Council's Interim Order by supplying the Complainant with the requested income statement (employee earnings record), vendor activity report, and financial disclosure statement on November 2, 2011.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Analysis

Whether the Custodian complied with the Council's October 24, 2011 Interim Order?

The Council's October 25, 2011 Interim Order specifically directed the Township to disclose the requested income statement (employee earnings record), vendor activity report, and financial disclosure statement within five (5) business days from receipt of said order. The order was distributed by the Council on October 28, 2011. The Custodian provided the Council with a certification of compliance on November 4, 2011, the fifth (5th) business day from receipt of the Council's Interim Order.

Because the Custodian disclosed to the Complainant the requested records without redactions to the Clerk's address and provided certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of said Interim Order, the Custodian has complied with the Council's October 28, 2011 Interim Order.

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

OPRA states that:

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

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

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

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

been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond and if able provide immediate access to the requested contract and salary information 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). In addition, the Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that the denial of access to the requested records was supported by law and unlawfully denied the Complainant's request because the Complainant did not use an official OPRA request form. *See* N.J.S.A. 47:1A-5.g.; Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). Furthermore, the Custodian's response to the Complainant's request violated 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.

However, the Custodian provided certified confirmation of compliance with the Council's Order on November 4, 2011, that the Township provided the Complainant with the requested records within the specified five (5) business days of receipt of the Council's Interim Order. 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 when the Complainant is an attorney?

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. 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.⁶ 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

⁶ 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.

ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, cert denied (1984).”

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

In the instant matter, the Complainant filed the Denial of Access Complaint on July 26, 2010, alleging that the Custodian unlawfully denied access to the requested income statement (employee earnings record), vendor activity report, and financial disclosure statement. The Council's October 25, 2011 Interim Order required the Custodian disclose all of the requested records, specifically:

- A copy of the 2009 year end actual gross income earned for the Municipal Clerk.
- A copy of the detail vendor activity report by vendor name for the Municipal Clerk from January 1, 2005 through present.
- A copy of the current Financial Disclosure Statement for the Municipal Clerk.

The Custodian provided a certification on November 4, 2011 that the Township provided the Complainant with the requested records on November 2, 2011.

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. 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 exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters and Mason. 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, adjudicated concurrently herewith, 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

Jesse Wolosky v. Township of East Hanover (Morris), 2010-205 - Supplemental Findings and Recommendations of the Executive Director

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. Because the Custodian disclosed to the Complainant the requested records without redactions to the Clerk’s address and provided certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of said Interim Order, the Custodian has complied with the Council’s October 25, 2011 Interim Order.
2. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond and if able provide immediate access to the requested contract and salary information 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). In addition, the Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that the denial of access to the requested records was supported by law and unlawfully denied the Complainant’s request because the Complainant did not use an official OPRA request form. *See* N.J.S.A. 47:1A-5.g.; Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). Finally, the Custodian’s response to the Complainant’s request violated 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. However, the Custodian provided certified confirmation of compliance with the Council’s Order on November 4, 2011, certifying that the Township provided the Complainant with the requested records within the specified five (5) business days. 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.
3. 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. 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 exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee

pursuant to N.J.S.A. 47:1A-6, Teeters and Mason. 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, adjudicated concurrently herewith, 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.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill
Executive Director

January 24, 2012



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

INTERIM ORDER

October 25, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-205

v.

Township of East Hanover (Morris)
Custodian of Record

At the October 25, 2011 public meeting, the Government Records Council (“Council”) considered the October 18, 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 violated N.J.S.A. 47:1A-5.e. by failing to immediately respond and if able provide immediate access to the requested contract and salary information 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. The Custodian has certified that there are no records responsive to Items No. 3 and 4 of the Complainant’s OPRA request. In addition, the Complainant has failed to present any competent, credible evidence to the contrary to refute the Custodian’s certification. Accordingly, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to Items No. 3 and 4 of the Complainant’s OPRA request.
3. A custodian may not refuse a request for records made under OPRA which is in writing and clearly invokes OPRA, and because the evidence of record indicates that the written request form used by the Complainant clearly invoked OPRA, the Custodian’s denial of access to the requested records violates OPRA pursuant to N.J.S.A. 47:1A-5.g. and Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). Although the Custodian argued that the request did not contain all of the requirements of N.J.S.A. 47:1A-5.f., the Custodian failed to explain how the request did not comport with N.J.S.A. 47:1A-5.f. nor did she submit any competent, credible evidence to establish this point.
4. The Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that the denial of access to the requested salary information, vendor activity



report, and Financial Disclosure Statement was supported by law. See N.J.S.A. 47:1A-5.g.; Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). The Custodian's response to the Complainant's request violated 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 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) and Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008).

5. The Custodian must disclose all of the requested records, specifically:
 - A copy of the 2009 year end actual gross income earned for the Municipal Clerk.¹
 - A copy of the detail vendor activity report by vendor name for the Municipal Clerk from January 1, 2005 through present.
 - A copy of the current Financial Disclosure Statement for the Municipal Clerk.
6. **The Custodian shall disclose to the Complainant all of the requested records set forth at paragraph 5 above with any appropriate redactions and a detailed redaction index explaining the lawful basis for any such redactions within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director.**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 25th Day of October, 2011

Robin Berg Tabakin, Chair
Government Records Council

¹ The Complainant withdrew his request for the Municipal Clerk's W-2 in his Denial of Access Complaint.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: October 28, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 25, 2011 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-205

v.

**Township of East Hanover (Morris)²
Custodian of Records**

Records Relevant to Complaint:³ Copies of:

1. 2009 year end actual gross income earned for the Municipal Clerk.
2. Detail vendor activity report by vendor name for the Municipal Clerk from January 1, 2005 through present.
3. Current fully executed and signed employment contract between the municipality and the Municipal Clerk.
4. Municipal Clerk's resume on file with the Municipality.
5. Current Financial Disclosure Statement for the Municipal Clerk.⁴

Request Made: July 26, 2010

Response Made: August 2, 2010

Custodian: Paul Massaro

GRC Complaint Filed: August 7, 2010⁵

Background

July 26, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint via e-mail correspondence. The Complainant states that the preferred method of delivery is in electronic format via e-mail in PDF format, each as a labeled and separate attached file.

August 2, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that access to the requested records is denied because the Complainant did not complete the Township's OPRA request form. The Custodian states

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

² Represented by Elizabeth Valandingham, Esq., (Morristown, NJ).

³ Additional records were requested which are not at issue in this complaint.

⁴ The Complainant requests the above records in electronic format via e-mail in PDF format, each as a labeled and separate attached file.

⁵ The GRC received the Denial of Access Complaint on August 9, 2010.

that enclosed with this letter is a copy of the Township's official OPRA request form. The Custodian states that any information requested by the Complainant will be provided by mail because the Complainant did not provide a telephone number.

August 9, 2010

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

- Complainant's OPRA request dated July 26, 2010
- Letter from the Custodian to the Complainant dated August 2, 2010

The Complainant's Counsel states that under OPRA, custodians must "promptly comply with a request to inspect, examine, copy, or provide a copy of a government record." N.J.S.A. 47:1A-5.g. Counsel states that OPRA provides that custodians must "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[.]" N.J.S.A. 47:1A-5.i. Counsel asserts that a failure to provide the records within seven (7) business days after the request is a "deemed denial." N.J.S.A. 47:1A-5.i. Counsel states that the custodian's duty to respond within seven (7) business days is relaxed only if "the requestor has elected not to provide a name, address, or telephone number, or other means of contacting the requestor[.]" *Id.* Counsel states that the records requested by the Complainant require immediate access as they include contracts, individual employment contracts and public employee salary and overtime information, pursuant to N.J.S.A. 47:1A-5.d.

Counsel argues that the Custodian utterly failed to fulfill her obligations under OPRA because instead of searching for and providing the Complainant with copies of the requested records, the Custodian admonished the Complainant for not submitting an OPRA request on the Township's official form. Counsel states that the Complainant is not required to use the Township's official form and the Custodian is required to provide the records requested by the Complainant pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009) (holding that no records custodian may withhold records if a written request is not proffered on a public agency's official form). Counsel states that the Custodian's failure to provide the records requested by the Complainant constituted a "deemed denial." N.J.S.A. 47:1A-5.i.

Counsel requests that the GRC order the Custodian to produce the requested records via e-mail as PDF attachments, investigate whether the Custodian knowingly and willfully violated OPRA, and find that the Complainant is a prevailing party entitled to an award of a reasonable attorneys' fee pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

August 16, 2010

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

September 9, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 26, 2010
- Custodian's response to the OPRA request dated August 2, 2010
- Complainant's Denial of Access Complaint
- Custodian's Earning Record⁶
- Township's Annual Vendor Activity Report⁷
- Custodian's Financial Disclosure Statement dated April 26, 2010

The Custodian certifies that the requested copy of the 2009 year end actual gross income earned for the Municipal Clerk must be permanently retained and has not been destroyed. The Custodian certifies that this record had to be redacted because the Municipal Clerk's social security number, personal checking account number, and voluntary deductions are non-disclosable. The Custodian further certifies that the requested copy of the detailed vendor activity report must be retained for six (6) years and has not been destroyed.

The Custodian also certifies that the requested employment contract between the municipality and the Municipal Clerk does not exist and has never existed. The Custodian certifies that the municipality does not have a copy of the Municipal Clerk's resume.

The Custodian certifies that her search yielded a copy of the requested current Financial Disclosure Statement for the Municipal Clerk and it has a retention schedule of six (6) years.⁸

The Custodian asserts that the requested records were gathered and prepared but were not provided to the Complainant because he failed to fill out the Township's official OPRA request form. The Custodian's Counsel argues that the Complainant's request mirrors exceptions in the statute and that the Complainant is aware that the items he requests are not public records. Counsel states that the Complainant's requests seek information specifically designed to make the Custodians uneasy, and as such, has requested the Clerk's resume, salary, contract and the like.

Counsel also states that the Complainant has made statements that he is unwilling to receive documents in any manner or format other than what he requests, while rejecting all offers to view the records in person or in a format that the Township is readily able to provide. Counsel maintains that the Complainant is combative and argumentative to the Township's staff and the Custodian. Counsel asserts that the Complainant continues to refuse the use of a mediator. Counsel states that, as the Council is aware, the purpose of OPRA is to ensure an open form of government and transparent records access, and is not intended to be a vessel to permit harassment of municipalities or the unnecessary expenditure of scarce municipal funds to defend frivolous complaints or requests for

⁶ The record attached to the SOI is not dated.

⁷ The record attached to the SOI is not dated.

⁸ The Custodian failed to certify as to the search undertaken to locate the requested records.

records that the requestor has no use for other than to hope to find an error or harass the municipal employees.

Counsel certifies that the Custodian compiled all of the government records legally permitted to be disclosed under N.J.S.A. 47:1A-5. Counsel states that in the matter before the Council, the Complainant would have been informed of any information that was not permitted to be disclosed or provided the record in a redacted format.

Counsel asserts that the Custodian's response to the Complainant's OPRA request stating that "since you have not provided a telephone number, all communication will be handled in this manner..." was not the basis for the denial of access. Counsel argues that this statement was merely an attempt to convey that because the Complainant could not be reached via telephone, the Custodian would correspond in writing.

Counsel contends that the Appellate Division's decision in Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), held that:

"...all requests for OPRA records must be in writing; that such requests shall utilize the forms provided by the custodian of records; however, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in N.J.S.A. 47:1A-5.f. Where the requestor fails to produce an equivalent writing that raises issues as to the nature or substance of the requested records, the custodian may require that the requestor complete the form generated by the custodian pursuant to N.J.S.A. 47:1A-5.g."

In addition, Counsel asserts that the Custodian did not withhold any records based on the lack of an official OPRA request form nor did she state that use of the form was a condition precedent to receiving government records. Counsel asserts that upon receipt of the Complainant's e-mail request for records, the Custodian determined that the "writing" did not contain the requisite information prescribed in N.J.S.A. 47:1A-5.f and accordingly, issues arose as to the nature and substance of the requested records. Counsel further asserts that the Custodian subsequently requested that the Complainant complete the Township's official OPRA request form pursuant to N.J.S.A. 47:1A-5.g. Counsel argues that the Complainant failed to do so and instead filed the instant Denial of Access Complaint in order to frustrate the legislative intent of the Open Public Records Act.

Counsel argues that the Complainant is not entitled to an attorney's fee. Counsel states that OPRA is designed to promote prompt access and to encourage requestors and agencies to work together. Counsel maintains that the Complainant's preference to file a Denial of Access Complaint rather than to receive the requested records should not be held against the Township because it was prompt and responsive to the request. Counsel maintains that the Custodian responded to the Complainant's request within seven (7) business days after receipt of the request and compiled the requested records. Counsel

states that the Complainant's Denial of Access Complaint was not the catalyst for the preparation of the records.

Counsel states that pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved "the desired result because this complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Counsel states that pursuant to Mason v. City Clerk of the City of Hoboken, 196 N.J. 51, 77 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the facts present at hand. Counsel states that he respectfully requests that the Complainant not be deemed a prevailing party and accordingly should not be entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters and Mason.

Analysis

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

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*..." (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Furthermore, 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. 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 time 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 (January 2010).

In addition, OPRA prescribes that:

"Immediate 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.

The immediate disclosure of records was discussed in Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007); where the GRC held that the "immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests 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 should respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

In the instant complaint, among the Complainant's record requests are Item No. 1: the "2009 year end actual gross income earned for the Municipal Clerk"; and Item No. 3: the "fully executed and signed employment contract between the municipality and the Municipal Clerk." Such records fall under the immediate access provision of N.J.S.A. 47:1A-5.e. as they constitute a request for public employee salary information and an individual employment contract. Here, the Custodian received the Complainant's OPRA request on July 26, 2010, but did not respond to the Custodian's request until August 2, 2010. Thus, the Custodian has violated N.J.S.A. 47:1A-5.e. because the Custodian had an obligation to respond to OPRA request Items No. 1 and No. 3 for immediate access records immediately, even if said records are part of a larger request containing a combination of records requiring a response within seven (7) business days and immediate access records requiring an immediate response, as was the case here. Accordingly, the Custodian should have immediately disclosed the requested contract and salary information as required under OPRA or immediately denied access to the requested information as appropriate.

Therefore, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond and if able provide immediate access to the requested contract and salary

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.

information 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).

Whether the Custodian unlawfully denied access to the requested contract and resume?

The Custodian certified that after undertaking the necessary search for responsive records, the requested employment contract (request Item No. 3) between the Township and the Clerk has never existed. In addition, the Custodian certified that the Township does not maintain a copy of the Clerk's resume (request Item No. 4). The Complainant has submitted no evidence to refute the Custodian's certification. Absent evidence to the contrary, the Custodian's inability to disclose the requested records is not an unlawful denial of access.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed. The complainant failed to submit any evidence to refute the custodian's certification. The GRC held that the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Here, the Custodian has certified that there are no records responsive to Items No. 3 and 4 of the Complainant's OPRA request. In addition, the Complainant has failed to present any competent, credible evidence to the contrary to refute the Custodian's certification. Accordingly, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian's has not unlawfully denied the Complainant access to Items No. 3 and 4 of the Complainant's OPRA request.

Whether the Custodian can demand the Complainant use an official OPRA request form?

In the instant matter, the Custodian denied the Complainant access to the requested records, stating that the Complainant had failed to use the Township's official OPRA request form. The Appellate Division of the New Jersey Superior Court and the GRC have held that a denial of access based solely upon a requestor's failure to utilize an official OPRA request form is unlawful.

OPRA provides that:

“[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government

record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

- (1) specific directions and procedures for requesting a record;
- (2) a statement as to whether prepayment of fees or a deposit is required;
- (3) the time period within which the public agency is required by [OPRA], to make the record available;
- (4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (5) space for the custodian to list reasons if a request is denied in whole or in part;
- (6) space for the requestor to sign and date the form;
- (7) space for the custodian to sign and date the form if the request is fulfilled or denied.” N.J.S.A. 47:1A-5.f.

In addition, 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).”

In Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), the Appellate Division held that although requestors shall continue to use public agencies’ OPRA request forms when making requests, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in the section of OPRA requiring custodians to adopt a form. *Id.* In effect, this permits requesters to write their own correspondence that requests records from a custodian, as long as the request properly invokes OPRA.

Furthermore, Renna holds that “where the requestor fails to produce an equivalent writing that raises issues as to the nature or substance of the requested records, the custodian may require that the requestor complete the form generated by the custodian pursuant to N.J.S.A. 47:1A-5.g.” The pertinent section of N.J.S.A. 47:1A-5.g. states that “a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.” *Id.*

In the instant matter, the evidence of record indicates that the Custodian denied the Complainant’s OPRA request because the Complainant failed to use the Township’s official OPRA request form. However, pursuant to the Appellate Division’s decision in Renna, supra, rendered May 21, 2009, a custodian may not refuse a request for records made under OPRA so long as the request is in writing and clearly invokes OPRA. *Id.* at 245. The evidence of record indicates that the Complainant’s request properly invoked OPRA. Moreover, the request sought specific identifiable government records. Although the Custodian argued that the request did not contain all of the requirements of N.J.S.A. 47:1A-5.f., the Custodian failed to explain how the request did not comport with N.J.S.A. 47:1A-5.f. nor did she submit any competent, credible evidence to establish this point.

Accordingly, the Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that the denial of access to the requested records was supported by law. *See N.J.S.A. 47:1A-5.g.*; Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). Additionally, Custodian’s response to the Complainant’s request violated 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 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) and Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008).

Therefore, the Custodian shall disclose the requested salary information, vendor activity report, and Financial Disclosure Statement with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g. If no records responsive to the Complainant’s OPRA request exist, the Custodian must provide a certification stating as such to the GRC.

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond and if able provide immediate access to the requested contract and salary information 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. The Custodian has certified that there are no records responsive to Items No. 3 and 4 of the Complainant’s OPRA request. In addition, the Complainant has failed to present any competent, credible evidence to the contrary to refute the Custodian’s certification. Accordingly, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to Items No. 3 and 4 of the Complainant’s OPRA request.
3. A custodian may not refuse a request for records made under OPRA which is in writing and clearly invokes OPRA, and because the evidence of record indicates that the written request form used by the Complainant clearly invoked OPRA, the Custodian’s denial of access to the requested records violates OPRA pursuant to N.J.S.A. 47:1A-5.g. and Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). Although the Custodian argued that the request did not contain all of the requirements of N.J.S.A. 47:1A-5.f., the Custodian failed to explain how the request did not comport with N.J.S.A. 47:1A-5.f. nor did she submit any competent, credible evidence to establish this point.
4. The Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that the denial of access to the requested salary information, vendor activity report, and Financial Disclosure Statement was supported by law. *See* N.J.S.A. 47:1A-5.g.; Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). The Custodian’s response to the Complainant’s request violated 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 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) and Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008).

5. The Custodian must disclose all of the requested records, specifically:
 - A copy of the 2009 year end actual gross income earned for the Municipal Clerk.¹⁰
 - A copy of the detail vendor activity report by vendor name for the Municipal Clerk from January 1, 2005 through present.
 - A copy of the current Financial Disclosure Statement for the Municipal Clerk.
6. **The Custodian shall disclose to the Complainant all of the requested records set forth at paragraph 5 above with any appropriate redactions and a detailed redaction index explaining the lawful basis for any such redactions within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director.**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

¹⁰ The Complainant withdrew his request for the Municipal Clerk's W-2 in his Denial of Access Complaint.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

October 18, 2011