



**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. 2010-210

v.

Borough of Mount Arlington (Morris)  
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, accepts the Administrative Law Judge’s Initial Decision dated October 10, 2012 in which the Administrative Law Judge approved the Stipulation of Dismissal signed by the parties or their representatives.

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 18<sup>th</sup> 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 Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-210**

v.

**Borough of Mount Arlington (Morris)<sup>2</sup>  
Custodian of Records**

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

1. 2009 year end actual gross income earned for the Custodian. If no record exists, then the last paystub for 2009 or a W-2 form.
2. The detailed vendor activity report by vendor name for the Custodian from January 1, 2005 until the present time.
3. The current fully executed and signed employment contract between the Borough of Mount Arlington (“Borough”) and the Custodian.
4. The Custodian’s resume on file with the Borough.
5. The current financial disclosure statement for the Custodian.

**Request Made:** July 26, 2010

**Response Made:** August 4, 2010

**Custodian:** Linda DeSantis

**GRC Complaint Filed:** August 16, 2010<sup>3</sup>

**Background**

**November 29, 2011**

Government Records Council’s (“Council”) Interim Order. At its November 29, 2011 public meeting, the Council considered the November 22, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian failed to immediately grant or deny access to the requested salary information and contract, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A.

---

<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ). Previously represented by Jonathan E. McMeen, Esq., of the Law Office of Jonathan E. McMeen, Esq. (Sparta, NJ).

<sup>2</sup> Represented by Levi J. Kool, Esq. (Morristown, NJ). Represented by Matt O’Donnell, Esq. (Morristown, NJ).

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

47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

2. The Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide to the Complainant copies of the available records responsive to the Complainant's OPRA request Items No. 1, No. 4 and No. 5 although such records were readily available for disclosure. Additionally, pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving that her request for clarification effectively stayed her obligation to provide access to said records, because such a stay would place an unnecessary limitation on the public's right to access. N.J.S.A. 47:1A-1. However, the Council declines to order disclosure of the records responsive to these request items because the Borough provided the Complainant with access to same on August 18, 2010.
3. The Custodian initially responded stating that no records responsive to the Complainant's OPRA request Items No. 2 and No. 3 existed and subsequently certified in the Statement of Information that no record responsive existed. Additionally, there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to those records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request Item No. 2 for salary information and No. 3 for a contract and the Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide to the Complainant copies of the available records responsive to request Items No. 1, No. 4 and No. 5 at the time of her written response. However, the Custodian did not unlawfully deny access to the records responsive to request Items No. 2 and No. 3 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), because no records responsive exist and the Custodian provided access to all other records that existed on August 18, 2010. 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 unreasonable denial of access under the totality of the circumstances.
5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has 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. Specifically, the Custodian did not physically provide to the Complainant the records responsive to his OPRA request Items No. 1, No. 4 and No. 5, until after the filing of this complaint. Further, the

relief ultimately achieved did have 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, 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, 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, 2011**

Council's Interim Order distributed to the parties.

**March 8, 2012**

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

**September 12, 2012**

Letter from the Custodian's Counsel to the GRC attaching an executed Stipulation of Dismissal.<sup>4</sup> The Custodian's Counsel states that pursuant to the attached Stipulation of Dismissal, this complaint has been settled by the parties and is hereby withdrawn.

**September 13, 2012**

E-mail from the GRC to Ms. Randye Bloom, OAL attaching the Stipulation of Dismissal. The GRC states that attached is a Stipulation of Dismissal regarding this complaint.

**October 10, 2012**

Administrative Law Judge's ("ALJ") Initial Decision. The ALJ **FINDS** that:

1. "[t]he parties have voluntarily agreed to the Stipulation of Dismissal as evidenced by the signatures of the parties or their representatives.
2. The Stipulation of Dismissal fully disposes of all issues in controversy and is consistent with the law."

As such, the ALJ **CONCLUDES** that "the agreement meets the safeguard requirements of *N.J.A.C. 1:1-19.1* and, accordingly...approves the settlement." The ALJ **ORDERS** "the parties [to] comply with the settlement terms and that these proceedings be concluded."

---

<sup>4</sup> The Custodian's Counsel did not copy the OAL on this letter.

### Analysis

No analysis required.

### Conclusions and Recommendations

The Executive Director respectfully recommends that the Council accept the Administrative Law Judge's Initial Decision dated October 10, 2012 in which the Administrative Law Judge approved the Stipulation of Dismissal signed by the parties or their representatives.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

October 23, 2012<sup>5</sup>

---

<sup>5</sup> 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 meeting was cancelled due to lack of quorum.  
Jesse Wolosky v. Borough of Mount Arlington (Morris), 2010-210 – Supplemental Findings and Recommendations of the Executive Director



**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**

**November 29, 2011 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2010-210

v.

Borough of Mount Arlington (Morris)  
Custodian of Record

At the November 29, 2011 public meeting, the Government Records Council (“Council”) considered the November 22, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to immediately grant or deny access to the requested salary information and contract, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).
2. The Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide to the Complainant copies of the available records responsive to the Complainant’s OPRA request Items No. 1, No. 4 and No. 5 although such records were readily available for disclosure. Additionally, pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving that her request for clarification effectively stayed her obligation to provide access to said records, because such a stay would place an unnecessary limitation on the public’s right to access. N.J.S.A. 47:1A-1. However, the Council declines to order disclosure of the records responsive to these request items because the Borough provided the Complainant with access to same on August 18, 2010.
3. The Custodian initially responded stating that no records responsive to the Complainant’s OPRA request Items No. 2 and No. 3 existed and subsequently certified in the Statement of Information that no record responsive existed. Additionally, there is no credible evidence in the record to refute the Custodian’s certification. Therefore, the Custodian did not unlawfully deny access to those records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant’s OPRA request Item No. 2 for salary information and No. 3 for a contract and the Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide to the



Complainant copies of the available records responsive to request Items No. 1, No. 4 and No. 5 at the time of her written response. However, the Custodian did not unlawfully deny access to the records responsive to request Items No. 2 and No. 3 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), because no records responsive exist and the Custodian provided access to all other records that existed on August 18, 2010. 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 unreasonable denial of access under the totality of the circumstances.

5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has 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. Specifically, the Custodian did not physically provide to the Complainant the records responsive to his OPRA request Items No. 1, No. 4 and No. 5, until after the filing of this complaint. Further, the relief ultimately achieved did have 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, *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, 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 29<sup>th</sup> Day of November, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: December 1, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-210**

v.

**Borough of Mount Arlington (Morris)<sup>2</sup>  
Custodian of Records**

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

1. 2009 year end actual gross income earned for the Custodian. If no record exists, then the last paystub for 2009 or a W-2 form.
2. The detailed vendor activity report by vendor name for the Custodian from January 1, 2005 until the present time.
3. The current fully executed and signed employment contract between the Borough of Mount Arlington (“Borough”) and the Custodian.
4. The Custodian’s resume on file with the Borough.
5. The current financial disclosure statement for the Custodian.

**Request Made:** July 26, 2010

**Response Made:** August 4, 2010

**Custodian:** Linda DeSantis

**GRC Complaint Filed:** August 16, 2010<sup>3</sup>

**Background**

**July 26, 2010**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant states that the preferred method of delivery is via e-mail in individual .pdf files.

**August 4, 2010**

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request. The Custodian states that the Borough received the Complainant’s OPRA request on July 26, 2010. The Custodian states that the Complainant’s OPRA request comprises five (5) items.

---

<sup>1</sup> Represented by Jonathan E. McMeen, Esq., of the Law Offices of Jonathan E. McMeen, Esq. (Sparta, NJ).

<sup>2</sup> Represented by Matt O’Donnell, Esq. (Morristown, NJ).

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



The Custodian states that access to request Item No. 1 is granted. The Custodian states that the Borough can provide a copy of the last payroll distribution of the 2009 year end gross income earned in .pdf format. The Custodian notes that the payroll record has been redacted to remove social security numbers contained therein pursuant to N.J.S.A. 47:1A-1 et seq.

The Custodian states that regarding request Item No. 2, the Borough does not maintain records which list vendor activity by department. The Custodian requests clarification of this request item by providing a vendor name. The Custodian states that as an alternative, the Borough can provide records in the form of a monthly check register that shows payments to vendors used by the Custodian in .pdf format.

The Custodian states that access to request Item No. 3 is denied because no contract exists. The Custodian states that if the Complainant wishes to clarify this request item, the Borough can provide a hiring resolution in .pdf format.

The Custodian states that access to request Item No. 4 is granted in .pdf format. The Custodian states that her resume has been redacted to remove the telephone number contained therein pursuant to N.J.S.A. 47:1A-1 et seq.

The Custodian states that access to request Item No. 5 is granted in .pdf format.

The Custodian requests that the Complainant provide his clarification to request Items No. 2 and No. 3.

### **August 16, 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 4, 2010.

The Complainant’s Counsel states that this complaint is being filed because the Custodian has failed to provide the Complainant with access to the requested records within the statutorily mandated time frame, constituting a “deemed” denial pursuant to N.J.S.A. 47:1A-5.i.

Counsel states that the Complainant submitted an OPRA request on July 26, 2010. Counsel states that the Complainant further indicated that his preferred method of delivery was in separate .pdf files for each request item. Counsel states that the Custodian responded in writing on August 4, 2010 acknowledging receipt of the Complainant’s OPRA request. Counsel states that the Custodian further granted access to request Items No. 1, No. 4 and No. 5 and stated that no records responsive to request Items No. 2 and No. 3 exist. Counsel states that to date, no records have been provided to the Complainant.

Counsel submits a letter brief in support of the Complainant’s position. Counsel states that OPRA mandates that “government records shall be readily accessible for

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

Counsel states that the custodian of record must bear the burden of proof in any proceeding under OPRA. N.J.S.A. 47:1A-6 and Paff v. Township of Lawnside (Camden), GRC Complaint No. 2009-155 (October 2010). Counsel states that there is no doubt that the records sought by the Complainant are government records as defined under OPRA. N.J.S.A. 47:1A-1.1.

Moreover, Counsel states that 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 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. Further, Counsel states that a failure to provide the records within seven (7) business days after the request is a “deemed” denial. *Id.* Counsel states that a custodian’s obligation to respond in writing within the statutorily mandated time frame is only relaxed when a requestor is anonymous. *Id.* Counsel states that the Complainant also requested contracts and salary information, which are deemed immediate access records. N.J.S.A. 47:1A-5.e.

Counsel argues that the Custodian violated N.J.S.A. 47:1A-5.i by failing to provide the records responsive to request Items No. 1, No. 4 and No. 5 within seven (7) business days. Counsel argues that although the Custodian responded in writing identifying those records available for disclosure, N.J.S.A. 47:1A-5.i requires that the Custodian “grant access” to said records. Counsel argues that this means that the Custodian’s response would have been proper had the Custodian physically provided to the Complainant those records ready for disclosure at the time of the Borough’s August 4, 2010 response.

Counsel requests the following relief:

1. A determination that the Custodian provide the available records responsive to request Items No. 1, No. 4 and No. 5 to the Complainant in the requested format.
2. A determination that the Complainant is a prevailing party entitled to reasonable attorney’s fees. N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

**August 18, 2010**

E-mail from Ms. Tina M. Mayer (“Ms. Mayer”), Assistant Borough Clerk, to the Complainant attaching the records responsive to the Complainant’s OPRA request Items No. 1, No. 4 and No. 5.

Ms. Mayer states that the Borough received the Complainant’s OPRA request on July 26, 2010. Ms. Mayer states that the Custodian responded in writing to the Complainant on August 4, 2010 granting access to request Items No. 1, No. 4 and No. 5 and requesting clarification of request Items No. 2 and No. 3. Ms. Mayer states that the Borough is awaiting the Complainant’s clarification and did not deny the Complainant access to any records. Ms. Mayer further states that the Complainant’s OPRA request did not indicate that the Complainant was willing to accept records in a piecemeal fashion.

Ms. Mayer states that the Borough hereby provides those records which can be disclosed to the Complainant at this time. Ms. Mayer states that she is also providing the Custodian’s hiring resolution since she does not maintain a contract with the Borough. Ms. Mayer acknowledges that although the Complainant did not request this record, it may be of use to him.<sup>4</sup>

Additionally, Ms. Mayer states that it is the Borough’s understanding that the Complainant filed a Denial of Access Complaint with the GRC. Ms. Mayer requests that the Complainant withdraw his complaint because the Borough initially responded in a timely manner requesting clarification of two (2) request items and has provided those records which are available.

**August 19, 2010**

E-mail from the Complainant to the Custodian. The Complainant states that to clarify his request Item No. 2, the Complainant is seeking the report that shows the Custodian’s reimbursements.

**August 24, 2010**

E-mail from the Ms. Mayer to the Complainant (with attachments). Ms. Mayer states that attached are six (6) .pdf reports each entitled “Budget Transaction Audit Trail.” Ms. Mayer states that the attached reports contain all vendor activity for the Municipal Clerk’s Office including the name of the vendor used, a description of the vendor’s purpose, the amount of the transaction and a specific line item that the transaction was assigned.

**August 30, 2010**

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

**September 2, 2010**

E-mail from the Custodian’s Counsel to the GRC. Counsel requests a five (5) business day extension of time to submit the requested SOI.

---

<sup>4</sup> This e-mail does not indicate that the resolution was sent to the Complainant with the rest of the attachments.

**September 2, 2010**

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until September 14, 2010 to submit the requested SOI.

**September 14, 2010**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 26, 2010.
- Letter from the Custodian to the Complainant dated August 4, 2010.
- E-mail from Ms. Mayer to the Complainant dated August 18, 2010.
- E-mail from the Complainant to the Custodian dated August 19, 2010.
- E-mail from Ms. Mayer to the Complainant dated August 24, 2010 (with attachments).

The Custodian certifies that whether any records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable.<sup>5</sup>

The Custodian certifies that she received the Complainant's OPRA request on July 26, 2010. The Custodian certifies that she initially responded on August 4, 2010 stating that records responsive to request Items No. 1, No. 4 and No. 5 were available for disclosure as .pdf files. The Custodian certifies that she also stated that records responsive to request Items No. 2 and No. 3 did not exist but that the Complainant may clarify both items in order to obtain records that may contain the information sought by the Complainant. The Custodian certifies that she requested that the Complainant advise in writing whether he wished to submit clarification for request Items No. 2 and No. 3.

The Custodian certifies that Ms. Mayer e-mailed the Complainant on August 18, 2010 stating that the Complainant had not yet provided clarification of request Items No 2 and No. 3. The Custodian certifies that Ms. Mayer further noted that the Complainant's OPRA request did not indicate that the Complainant would accept the responsive records in piecemeal fashion. The Custodian certifies that Ms. Mayer further stated that the Borough was providing access to the records responsive to request Items No. 1, No. 4 and No. 5 in the format requested. The Custodian certifies that Ms. Mayer also advised the Complainant that she was attaching the Custodian's hiring resolution as an accommodation to request Item No. 3 because the Custodian has no contract with the Borough. The Custodian certifies that Ms. Mayer further acknowledged that the Complainant filed this complaint with the GRC and requested that the Complainant withdraw said complaint because the Borough responded in a timely manner and provided the records identified as available for disclosure.

The Custodian certifies that the Complainant wrote to the Custodian on August 19, 2010 clarifying request Item No. 2 to seek the report that shows the Custodian's

---

<sup>5</sup> The Custodian did not certify to the search undertaken to locate the requested record as was required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).  
Jesse Wolosky v. Borough of Mount Arlington (Morris), 2010-210 – Findings and Recommendations of the Executive Director

reimbursements. The Custodian certifies that Ms. Mayer responded via e-mail on August 24, 2010 providing access to six (6) reports in .pdf format.

The Custodian's Counsel submits a letter brief in support of the Borough's position. Counsel recapitulates the facts of this complaint. Counsel states that on August 16, 2010, the Complainant filed this complaint alleging that the Custodian should have provided records to the Complainant within seven (7) business days and violated OPRA by providing the records on August 18, 2010, notwithstanding a pending request for clarification.

Counsel asserts that the instant complaint should be dismissed because the Custodian responded to the Complainant's OPRA request in a timely manner. Counsel states that the Council has recognized that a custodian may need to obtain clarification of the request from a requestor or may need an extension of time to comply with said request. See Leibel v. Manalapan Englishtown Regional Board of Education, GRC Complaint No. 2004-51 (September 2004) and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010). Counsel states that N.J.S.A. 47:1A-5.i. provides for "access to a government record" within the statutorily mandated time frame without defining the term "access." Counsel states that notwithstanding this vague term, OPRA explicitly provides 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. If 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." N.J.S.A. 47:1A-5.g.

Counsel states that the Council has interpreted this to mean that if a custodian requires additional time or if the request requires clarification, N.J.S.A. 47:1A-5.g. allows for the custodian to seek an extension of time or request clarification. Counsel states that to this end, the time frame for the actual production of records is stayed if there is a reasonable need for clarification.

Counsel states that the Supreme Court of New Jersey held in State v. Drury, 190 N.J. 197, 209 (2006):

"As always, when interpreting a statute's meaning, we attempt to discern and implement the Legislature's intent. See State v. Reiner, 180 N.J. 307, 311, 850 A.2d 1252 (2004). Basic techniques of statutory interpretation first require us to look at a statute's plain meaning, and, '[i]f the meaning of the text is clear and unambiguous on its face, [we] enforce that meaning.' *Ibid.* If the language is ambiguous or 'admits to more than one reasonable interpretation, we may look to sources outside the language to ascertain the Legislature's intent.' *Ibid.* Such extrinsic sources, in general, may include the statute's purpose, to the extent that it is known, and the relevant legislative history. See State v. Thomas, 166 N.J. 560, 567, 767 A.2d 459 (2001). Where available, '[t]he official legislative history and

legislative statements serve as valuable interpretive aid[s] in determining the Legislature's intent.' State v. McQuaid, 147 N.J. 464, 480, 688 A.2d 584 (1997)." *Id.*

Counsel contends that here, the Complainant's OPRA request consisted of five (5) items, two (2) of which required clarification. Counsel contends that the Custodian's request for clarification was reasonable because the Borough lacked sufficient understanding of the Complainant's request Item No. 2 seeking "detail vendor activity report by vendor name." Counsel contends that request Item No. 3 seeking an employment contract was confusing because it is unusual for a contract to exist, because a term appointed employee is not required to have a contract pursuant to N.J.S.A. 40A:9-133 et seq. Counsel states that the Custodian ultimately provided a copy of the resolution of appointment in an attempt to accommodate the Complainant.

Counsel asserts that the Custodian in this complaint complied with OPRA. Counsel contends that OPRA has not been interpreted to require a custodian to respond to part of an OPRA request, but rather the OPRA request in its entirety. Counsel argues that in this regard, the Custodian timely complied with the Complainant's OPRA request and ultimately provided access to the responsive records in a timely manner based on the fact that the Borough was awaiting the Complainant's clarification of request Items No. 2 and No. 3 prior to providing access to all records. Counsel asserts that if the GRC were to require the Borough to treat each request item as a separate OPRA request, it would impose an administrative burden on municipalities not required by the express language of OPRA.

### Analysis

#### **Whether the Custodian timely responded to the Complainant's OPRA request for immediate access records?**

OPRA provides 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 Complainant's OPRA request Items No. 1 and No. 3 sought the 2009 income earned by the Custodian and the fully executed contract between the Borough and the Custodian, respectively. The requested salary information and contract are specifically classified under OPRA as "immediate access" records pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that "immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggest that the Custodian was still obligated to immediately notify the Complainant..." Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

Here, the Custodian responded to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day after receipt of said request. 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.

Therefore, because the Custodian failed to immediately grant or deny access to the requested salary information and contract, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron, supra. See also Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or 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 further 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 also provides that:

"a custodian of a government record *shall grant access* to a government record or deny access to a government record *as soon as possible, but not later than seven business days after receiving the request*, provided that the record is currently available and not in storage or archived...." (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.

The Complainant filed this complaint arguing that the Custodian failed to provide him with the records responsive to request Items No. 1, No. 4 and No. 5 within the statutorily mandated time frame. The Complainant’s Counsel, arguing in support of the Complainant’s position, asserted that N.J.S.A. 47:1A-5.i. requires a custodian to provide access to records within seven (7) business days. Counsel further argued that the appropriate response would have been for the Custodian to provide those records available at the time of her response.

In the SOI, the Custodian asserted that the Complainant did not indicate in his OPRA request that the Borough could provide records in a piecemeal manner: that is, provide access to the records responsive to request Items No. 1, No. 4 and No. 5 while awaiting clarification of request Items No. 2 and No. 3. The Custodian’s Counsel, in support of the Custodian’s position, argued that the Council previously recognized that a custodian may need to seek clarification, thus effectively staying the custodian’s obligation to provide the responsive records until clarification is obtained. Counsel argued that the Custodian properly responded in a timely manner and subsequently provided access to the responsive records on August 18, 2010 and August 24, 2010 (after receiving clarification from the Complainant). Counsel further argued that an additional burden would be imposed on municipalities if the Council determined that each individual request item should be treated as a separate request.

The Council has previously ruled that where an OPRA request contains multiple request items, a custodian is required to respond to each item individually. In Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the complainant’s counsel asserted that the custodian violated OPRA by failing to respond to each of the complainant’s request items individually within seven (7) business days. The Council examined how the facts in Paff applied to its prior holding in O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005)(finding that the custodian’s initial response stating that the complainant’s request was a duplicate of a previous request to the complainant’s June 22, 2007 request was legally insufficient because the custodian has a duty to answer each request individually). The Council reasoned that “[b]ased on OPRA and the GRC’s holding in O’Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request.” The Council ultimately held that:



“[a]lthough the Custodian responded in writing to the Complainant’s August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.” *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-166 (April 2009) and Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).”

Thus, the Council has already held that a custodian is required to respond to each individual item of an OPRA request individually. Additionally, a custodian must respond to individual OPRA request items when immediate access records are part of a request. Specifically, when a request for multiple items contains some immediate access records, the Custodian has an obligation to respond to those items seeking immediate access records immediately.

In this matter, the evidence of record indicates that the Custodian definitively responded in writing to each item stating that either the records responsive to request Items No. 1, No. 4 and No. 5 was available for production in the medium requested and that records responsive to request Items No. 2 and No. 3 did not exist. However, the Custodian failed to provide to the Complainant copies of the available records requested and argued in the SOI that this occurred because she was awaiting clarification on certain request items and because the Complainant did not authorize a “piecemeal” response.

This complaint is distinguishable from Paff, in that the Custodian complied with N.J.S.A. 47:1A-5.g. by responding in writing to each request item (which the Custodian in Paff failed to do). Here, the GRC must determine whether the Custodian was required to produce the records available for disclosure at the time of her response or whether her request for clarification effectively stayed the Custodian from having to provide the records available until after receiving clarification from the Complainant.

OPRA mandates that “government records *shall be readily accessible for inspection, copying, or examination* by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] ... shall be *construed in favor of the public's right of access.*” (Emphasis added.) N.J.S.A. 47:1A-1. Moreover, OPRA provides that a custodian must respond to an OPRA request in writing granting or denying 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. The Council has expanded on the response options available to a custodian to include requesting clarification and seeking an extension of time. *See Kelley, supra.*

As previously stated, the Custodian had an obligation to respond to each item of an OPRA request individually, and she in fact did so. *See Paff, supra.* However, the Custodian failed to provide copies of those records responsive to the Complainant’s OPRA request Items No. 1, No. 4 and No. 5 which were available “as soon as possible” pursuant to OPRA’s mandate to make government records “readily accessible for

inspection, copying or examination.” N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-1. Further, the Custodian’s withholding of those records which were available for disclosure at the time of the Custodian’s response until the Custodian received clarification on other items placed an unnecessary limitation on “... the public's right of access.” N.J.S.A. 47:1A-1.

Therefore, the Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide to the Complainant copies of the available records responsive to the Complainant’s OPRA request Items No. 1, No. 4 and No. 5 although such records were readily available for disclosure. Additionally, pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving that her request for clarification effectively stayed her obligation to provide access to said records, because such a stay would place an unnecessary limitation on the public’s right to access. N.J.S.A. 47:1A-1. However, the Council declines to order disclosure of the records responsive to these request items because the Borough provided the Complainant with access to same on August 18, 2010.

As to the Complainant’s OPRA request Items No. 2 and No. 3, the Custodian responded stating that the records responsive to these items did not exist. The Custodian further certified to same in the SOI and the Complainant did not dispute this fact. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian’s certification. The Council subsequently determined that “[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access.”

Similarly, in this complaint, the Custodian initially responded stating that no records responsive to the Complainant’s OPRA request Items No. 2 and No. 3 existed and subsequently certified in the SOI that no record responsive existed. Additionally, there is no credible evidence in the record to refute the Custodian’s certification. Therefore, the Custodian did not unlawfully deny access to those records pursuant to Pusterhofer, *supra*.

**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 (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.e. by failing to immediately respond to the Complainant’s OPRA request Item No. 2 for salary information and No. 3 for a contract and the Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide to the Complainant copies of the available records responsive to request Items No. 1, No. 4 and No. 5 at the time of her written response. However, the Custodian did not unlawfully deny access to the records responsive to request Items No. 2 and No. 3 pursuant to Pusterhofer, *supra*, because no records responsive exist and the Custodian provided access to all other records that existed on August 18, 2010. 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 unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, supra, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

As the New Jersey Supreme Court noted in Mason, Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing Teeters, supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate,

we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court then examined the catalyst theory within the context of New Jersey law, stating that:

“New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); *see also* Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of

Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon ... " *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.<sup>6</sup> Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can

---

<sup>6</sup> The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

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

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

The Complainant filed this complaint on August 16, 2010 arguing that the Custodian failed to provide access to records within the statutorily mandated time frame and seeking the following relief:

1. A determination that the Custodian provide the available records responsive to request Items No. 1, No. 4 and No. 5 to the Complainant in the requested format.
2. A determination that the Complainant is a prevailing party entitled to reasonable attorney’s fees. N.J.S.A. 47:1A-6.

Subsequent to the filing of this complaint, on August 18, 2010, Ms. Mayer contacted the Complainant providing access to the records responsive to request Items No. 1, No. 4, and No. 5. Ms. Mayer further noted that the Borough was awaiting the Complainant’s clarification of his OPRA request Items No. 2 and No. 3 prior to physically providing the records responsive to all items. Ms. Mayer also acknowledged that the Borough was aware that a complaint had been filed and asked the Complainant to withdraw same in light of the fact that the Borough initially granted access to the records at issue and subsequently have provided same.

The Council determined that the Custodian violated N.J.S.A. 47:1A-5.i. by not physically providing access to the records available at the time of the Custodian’s response. However, the Council did not order disclosure of any records because the records were provided to the Complainant on August 18, 2010.

In order for the Complainant to be deemed a prevailing party, this complaint must have brought about a change (voluntary or otherwise) in the custodian’s conduct. Here, the Custodian initially responded granting access to the records responsive to the Complainant’s OPRA request Items No. 1, No. 4 and No. 5, but failed to provide to the Complainant copies of the available records requested. It was not until after this complaint was filed on August 16, 2010 that the Borough physically provided access to those records on August 18, 2010. Additionally, Ms. Mayer acknowledged the filing of this complaint in her August 18, 2010 e-mail to the Complainant attaching the responsive records. Based on the foregoing, it appears that this complaint prompted the Borough to change its conduct by physically providing access to records it previously withheld

pending the Complainant's clarification of request Items No. 2 and No. 3. Thus, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee.

Therefore, 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. Additionally, 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. Specifically, the Custodian did not physically provide to the Complainant the records responsive to his OPRA request Items No. 1, No. 4 and No. 5, until after the filing of this complaint. Further, the relief ultimately achieved did have 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, 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, 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to immediately grant or deny access to the requested salary information and contract, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).
2. The Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide to the Complainant copies of the available records responsive to the Complainant's OPRA request Items No. 1, No. 4 and No. 5 although such records were readily available for disclosure. Additionally, pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving that her request for clarification effectively stayed her obligation to provide access to said records, because such a stay would place an unnecessary limitation on the public's right to access. N.J.S.A. 47:1A-1. However, the Council declines to order disclosure of the records responsive to these request items because the Borough provided the Complainant with access to same on August 18, 2010.



3. The Custodian initially responded stating that no records responsive to the Complainant's OPRA request Items No. 2 and No. 3 existed and subsequently certified in the Statement of Information that no record responsive existed. Additionally, there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to those records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request Item No. 2 for salary information and No. 3 for a contract and the Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide to the Complainant copies of the available records responsive to request Items No. 1, No. 4 and No. 5 at the time of her written response. However, the Custodian did not unlawfully deny access to the records responsive to request Items No. 2 and No. 3 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), because no records responsive exist and the Custodian provided access to all other records that existed on August 18, 2010. 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 unreasonable denial of access under the totality of the circumstances.
5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has 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. Specifically, the Custodian did not physically provide to the Complainant the records responsive to his OPRA request Items No. 1, No. 4 and No. 5, until after the filing of this complaint. Further, the relief ultimately achieved did have 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, *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, 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: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

November 22, 2011