



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-242

v.

Township of Rockaway (Morris)
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian’s response to the Complainant’s OPRA request is insufficient because she failed to grant access to the records specifically requested by the Complainant pursuant to N.J.S.A. 47:1A-5.g., Bart v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), and Riley v. City of West Orange, GRC Complaint No. 2008-27 (April 2009), the Custodian’s denial of access to the requested first fifty (50) OPRA requests made to the Custodian from January 1, 2010 until August 25, 2010 was not unlawful under OPRA. N.J.S.A. 47:1A-6.
2. Although the Custodian violated N.J.S.A. 47:1A-5.g. by not providing access to the records responsive to the Complainant’s OPRA request, the evidence of record indicates that the Custodian’s failure to provide the requested records was inadvertent; specifically, the Custodian certified in her Statement of Information that the wrong document was provided to the Complainant by mistake and further certified that she immediately provided the responsive records to the Complainant upon being advised of her error; thus, the Custodian’s denial of access to the requested records was not unlawful. 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 not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant’s filing of a Denial of



Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: March 1, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-242

v.

**Township of Rockaway (Morris)²
Custodian of Records**

Records Relevant to Complaint:

1. A copy of the OPRA log sheets from January 1, 2010 until August 25, 2010.
2. A copy of the first fifty (50) OPRA requests made to the Custodian from January 1, 2010 until August 25, 2010, excluding those made by Jesse Wolosky.

Request Made: August 25, 2010

Response Made: August 30, 2010

Custodian: Mary Cilurso

GRC Complaint Filed: September 15, 2010³

Background

August 25, 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.

August 30, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that the Township is not in possession of any OPRA log sheets from January 1, 2010 through August 25, 2010. The Custodian states that the requested first fifty (50) OPRA requests made to the Township Custodian are attached.

September 15, 2010

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

- Complainant's OPRA request dated August 25, 2010
- Custodian's response to the OPRA request dated August 30, 2010

¹ Represented by Walter M. Luers, Esq., Law Office of Walter M. Luers (Clinton, NJ).

² Represented by Tiena M. Cofoni, Esq., The Buzak Law Group, LLC (Montville, NJ).

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

- A copy of the Township of Rockaway’s Board of Adjustment July 13, 2010 Resolution

The Complainant’s Counsel states that the Complainant requested the first fifty (50) OPRA requests filed with the Township in 2010 and instead was provided with a copy of a resolution passed by the Rockaway Township Board of Adjustment. Counsel asserts that this action constitutes a “deemed denial” under OPRA. Counsel requests that the GRC order the Custodian to provide the Complainant with the requested records and award the Complainant a reasonable attorney’s fee as a prevailing party pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

October 1, 2010

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

October 7, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated August 25, 2010
- Custodian’s response to the OPRA request dated August 30, 2010

The Custodian certifies that she responded to the Complainant’s OPRA request on August 30, 2010 and September 16, 2010. The Custodian certifies that she sought after OPRA requests from January 1, 2010 through August 25, 2010 have a three (3) year retention schedule. The Custodian further certifies that she was not aware that she had attached the incorrect PDF file. The Custodian certifies that immediately upon receiving the Complainant’s Denial of Access Complaint on September 16, 2010, she provided the Complainant with the correct PDF file. The Custodian argues that had the Complainant really wished to get the requested records, he would have informed her of the mistake instead of filing a complaint. The Custodian certifies that this was an inadvertent error and that there has been no intentional violation of the law. The Custodian requests that the GRC find that the Complainant is not a prevailing party and that he is not entitled to an attorney’s fee.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA 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.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

In addition N.J.S.A. 47:1A-5.g. states that if a Custodian is “unable to comply with a request for access, then the Custodian shall indicate the specific basis” for noncompliance.

In the matter before the Council, the Complainant alleged that the Custodian unlawfully failed to provide a copy of the first fifty (50) OPRA requests made to the Custodian from January 1, 2010 until August 25, 2010 and asserts that the Custodian instead provided a copy of the Township’s July 13, 2010 Resolution of the Board of Adjustment. The Custodian asserted that the incorrect records were mistakenly provided to the Complainant and that immediately upon receiving the Complainant’s Denial of Access Complaint on September 16, 2010, she provided the Complainant with the correct PDF file containing the responsive records.

The Council has held that such actions on the part of custodians constitute an insufficient response to an OPRA request.

In Bart v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), on the seventh (7th) business day following the custodian’s receipt of the complainant’s OPRA request, the complainant received a response from the custodian granting access to records that were not responsive to the complainant’s request. Because the custodian provided records that were not responsive to the Complainant’s request, the GRC found that the custodian’s written response to the complainant’s OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g.

The Council found the same in the matter of Riley v. City of West Orange, GRC Complaint No. 2008-27 (April 2009). In Riley, the Complainant sought a veteran’s property tax deduction claim form from 1976. In response, the Custodian provided a veteran’s property tax deduction claim form from an incorrect year. Although the Council recognized that the Custodian’s provision of the incorrect record was a mistake, the Council held that the Custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5.g. because she failed to grant access to the record specifically requested by the Complainant.

As in Bart and Riley, the Custodian herein made a timely response to the OPRA request granting access to records requested, but inadvertently provided a record which was not responsive to the request. Pursuant to N.J.S.A. 47:1A-5.g., the Custodian’s response is insufficient because she failed to provide access to the record specifically requested by the Complainant.

However, although the Custodian's response to the Complainant's OPRA request was insufficient, she did not unlawfully deny access to the requested records. The evidence of record indicates that the Custodian reasonably believed that she was granting access to the requested records when she responded to the OPRA request in writing on the third (3rd) business day after receipt thereof; the Custodian did not assert that the requested records were exempt from disclosure under OPRA. Moreover, the Custodian certified in the SOI that when she became aware of her mistake, she immediately provided the requested records to the Complainant. The Complainant has submitted no evidence to refute the Custodian's certification in this regard. Thus, the evidence of record indicates that the Custodian's denial of access to the requested first fifty (50) OPRA requests made to the Custodian from January 1, 2010 until August 25, 2010 was not unlawful under OPRA. N.J.S.A. 47:1A-6.

Therefore, although the Custodian's response to the Complainant's OPRA request is insufficient because she failed to grant access to the records specifically requested by the Complainant pursuant to N.J.S.A. 47:1A-5.g., Bart v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), and Riley v. City of West Orange, GRC Complaint No. 2008-27 (April 2009), the Custodian's denial of access to the requested first fifty (50) OPRA requests made to the Custodian from January 1, 2010 until August 25, 2010 was not unlawful under OPRA. N.J.S.A. 47:1A-6.

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, Jesse Wolosky v. Township of Rockaway (Morris), 2010-242 – Findings and Recommendations of the Executive Director

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, although the Custodian violated N.J.S.A. 47:1A-5.g. by not providing access to the specific records responsive to the Complainant's OPRA request, the evidence of record indicates that the Custodian's failure to provide the requested records was inadvertent; specifically, the Custodian certified in her SOI that the wrong document was provided to the Complainant by mistake and further certified that she immediately provided the responsive records to the Complainant upon being advised of her error; thus, the Custodian's denial of access to the requested records was not unlawful. 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. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

As previously established, the Court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" Singer v. State, 95 N.J. 487, 495, cert denied (1984)." Furthermore, the Court held that the shifting of this burden to a custodian only occurs when offending the agency has failed to respond *at all* to a request within the seven (7) business days prescribed in OPRA. Mason, 196 N.J. at 76.

The Court determined that the catalyst theory's requirement of the establishment of a causal nexus maintains the "cooperative balance OPRA strives to attain," as it constitutes a subjective test that can be conducted on a case-by-case basis to ensure that attorney's fees are awarded when they are appropriate. *Id.* at 78. The Court noted that "[t]he statute (OPRA) is designed both to promote prompt access to government records and to encourage requestors and agencies to work together toward that end by accommodating one another." *Id.* The Court expressed fears that judging cases by more objective merits would tarnish the statute's intent. *Id.*

Specifically, the Court reasoned that:

"[P]laintiffs would have an incentive to file suit immediately after a request for disclosure is denied or not responded to in a timely fashion,

based in part on the expectation of an award of attorney's fees. Agencies, in turn, would have reason not to disclose documents voluntarily after the filing of a lawsuit. If they did, they would be presumed liable for fees. As a result, courts could expect to see more aggressive litigation tactics and fewer efforts at accommodation. And in the former instances, OPRA cases designed to obtain swift access to government records would end up as battles over attorney's fees." *Id.* at 78-79.

The Court's concerns were well placed in light of the evidence of record in this matter. Here, the Complainant filed the Denial of Access Complaint on September 15, 2010 alleging that the records provided by the Custodian on August 30, 2010 were not responsive to his August 25, 2010 OPRA request. The evidence of record indicates that the Custodian timely responded to the Complainant's request, providing access to what she believed were the responsive records via a PDF attachment to an e-mail addressed to the Complainant. The Custodian certified in the SOI that when she became aware of her error, she immediately provided the responsive records to the Complainant; the Complainant has not disputed the Custodian's certification. Moreover, the Custodian certified that she was not informed of her error until she received the Complainant's Denial of Access Complaint. The Custodian certified in the SOI that had she been made aware of the error prior to the filing of the Complaint, she would have provided the Complainant with the correct PDF file containing the records responsive to his request.

Absent any evidence disputing the Custodian's certification, the Council finds the Complainant's conduct to be the very embodiment of the overly litigious activity feared by the New Jersey Supreme Court in Mason, *supra*. A finding that the Complainant's filing of the Denial of Access Complaint qualifies as the legitimate causal nexus for the release of the requested records would fly in the face of the "cooperative balance" that Mason sought to protect.

Moreover, the New Jersey Office of Administrative Law ("OAL") and the GRC have held that good faith efforts of communication between custodians and complainants are paramount and are essential to promoting the spirit of OPRA. In Wolosky v. Township of Stillwater (Sussex), GRC Complaint No. 2009-22 (September 2011), the Council adopted Administrative Law Judge ("ALJ") Jeff S. Masin's Initial Decision wherein he cited Mason for the proposition that custodians and complainants must work together and compromise to resolve problematic requests and held that the absence of such collaboration is a crucial factor in determining the actual catalyst of the relief achieved. *Id.*

In Wolosky, the Complainant submitted a request for items, including an audio CD, on December 2, 2008. In response, the Complainant was advised of the \$5 fee for the disk. On December 9, 2008, he e-mailed clerk typist Kathy Wunder as to the reason for the \$5 charge. On December 10, 2008 the ordinance containing the charge was faxed to the Complainant, who informed the Custodian that 'I would not like it to be mailed and I will not be picking it up.' In the Initial Decision, ALJ Masin observed that the Custodian noted that it was not unusual for someone to make an OPRA request and then decide not to pick up the requested materials, and that given the Complainant's response, the Custodian thought that the request was 'done.' ALJ Masin further observed that the

evidence indicated that the Complainant never responded to the Custodian or any other official that the cost for the CD was too high or illegal. ALJ Masin found that the Complainant filed his Denial of Access Complaint on January 6, 2009. ALJ Masin further found that Stillwater Township's Council met on January 20, 2009 and again on February 3, 2009, and determined that only actual cost could be charged for CDs pursuant to OPRA. ALJ Masin also found that on February 5, 2009, the GRC transmitted a request for a Statement of Information to the Custodian; the Custodian testified that she received a copy of the Denial of Access Complaint on or about February 11, 2009. Finally, ALJ Masin found that a new fee ordinance was introduced on March 3, 2009 and adopted on March 17, 2009.

In denying the complainant's request for attorney's fees, the ALJ held:

“[The Complainant's] direct filing of the complaint might be seen as ignoring [an] element of what the Supreme Court in Mason recognized as an important aspect of the OPRA process, for it noted that while ‘OPRA requires that an agency provide access or a denial no later than seven business days after a request’, it also added, ‘[t]he statute also encourages compromise and efforts to work through certain problematic requests.’ Perhaps had [the Complainant] objected to the Township about the fee before he filed the Complaint he might have received a positive response and the matter might have been resolved without the need for this aspect to be a part of the more general [c]omplaint ... He might have found that his mere informal objection might have rung bells with officials cognizant of what was occurring elsewhere. Perhaps he would not have received a response or at least a positive one. In the end, he chose a different path.”
Id. at ___.

The Council takes judicial notice that the Complainant in the matter before the Council is the same complainant in Wolosky, supra. As such, the Complainant should be aware that this pattern of dealing with custodians is an egregious departure from those practices dictated by the Supreme Court in Mason. As in Wolosky, supra, the Complainant's filing of this complaint ignores the elements of compromise and collaborative effort which ALJ Masin observed was an inherent part of the Court's decision in Mason.

Moreover, based on the facts in evidence, the Council determines that the filing of the complaint in this matter was not the catalyst for the relief ultimately achieved, nor did the relief ultimately achieved have a basis in the law. Teeters, supra, Mason, supra.

A review of the facts before the Council reveals that the Custodian reasonably believed that she granted access to the requested records on the third (3rd) day after receipt of the Complainant's OPRA request, although the records which she attached to her responsive e-mail were not the records specifically sought by the Complainant. Importantly, the Custodian never asserted that the requested records were exempt from disclosure under OPRA; instead, the evidence indicates that the Custodian timely granted access to what she thought were the records responsive to the request. The evidence of record is clear that when the Custodian became aware that the records attached to her

responsive e-mail were not the records requested, she immediately provided access to the responsive records. There is no evidence in the record that the Custodian affirmatively attempted to deny access to the requested records at any time; her failure to provide the records which were responsive to the Complainant's OPRA request was inadvertent and therefore not unlawful. Moreover, consistent with the certification in the Custodian's SOI, there is no evidence in the record that the Complainant attempted to inform the Custodian of this error prior to filing the Denial of Access Complaint in this matter. The Council observes that this administrative matter may have been avoided had the Complainant engaged in the cooperative balance contemplated by the Supreme Court in Mason.

Therefore, pursuant to Teeters, *supra*, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason, *supra*, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian's response to the Complainant's OPRA request is insufficient because she failed to grant access to the records specifically requested by the Complainant pursuant to N.J.S.A. 47:1A-5.g., Bart v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), and Riley v. City of West Orange, GRC Complaint No. 2008-27 (April 2009), the Custodian's denial of access to the requested first fifty (50) OPRA requests made to the Custodian from January 1, 2010 until August 25, 2010 was not unlawful under OPRA. N.J.S.A. 47:1A-6.
2. Although the Custodian violated N.J.S.A. 47:1A-5.g. by not providing access to the records responsive to the Complainant's OPRA request, the evidence of record indicates that the Custodian's failure to provide the requested records was inadvertent; specifically, the Custodian certified in her Statement of Information that the wrong document was provided to the Complainant by mistake and further certified that she immediately provided the responsive records to the Complainant upon being advised of her error; thus, the Custodian's denial of access to the requested records was not unlawful. 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 not achieved the desired result because the complaint did not

bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra.

Prepared By: Darryl C. Rhone
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Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012