



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

November 19, 2013 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-274

v.

City of Newark (Essex)
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council (“Council”) considered the November 12, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed because the Complainant withdrew his complaint via e-mail to the GRC dated October 22, 2013 (via legal counsel) because the parties have reached settlement in this matter. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 19th Day of November, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council



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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 21, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 19, 2013 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-274

v.

**City of Newark (Essex)²
Custodian of Records**

Records Relevant to Complaint: Itemized attorney billings for all attorneys and firms that worked on a matter relevant to a civil suit filed by former City of Newark (“City”) Police Officer Darren Nance against the City.³

Custodian of Record: Robert P. Marasco
Request Received by Custodian: July 15, 2010
Response Made by Custodian: July 20, 2010
GRC Complaint Received: October 21, 2010

Background

August 27, 2013 Council Meeting:

At its August 27, 2013 public meeting, the Council considered the August 20, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council’s May 28, 2013 Interim Order by providing the Complainant with access to the records responsive to the subject OPRA request pending payment of the applicable copy cost and providing certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. The Custodian’s failure to respond immediately to the Complainant’s OPRA request seeking invoices resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). However, the Custodian fully complied with the Council’s May 28, 2013 Interim Order.

¹ Represented by Thomas W. McLeod, Esq., and Edward Barocas, Esq., of the American Civil Liberties Union of New Jersey (Newark, NJ).

² Represented by Guenther Waldow, Esq. (Newark, NJ).

³ The Complainant references a Newark Star Ledger newspaper article that states in part, “Bianchi said extensive discovery and changes in the city’s legal department between the James and Booker administrations kept the trial out of a courtroom until June 9, 2010. The trial lasted two weeks.”

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, the Custodian's actions did 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 the Council's May 28, 2013 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council determined that the Complainant's OPRA request was valid and ordered the Custodian to disclose responsive records. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Procedural History:

On August 28, 2013, the Council distributed its Interim Order to all parties. On September 20, 2013, the Complainant's Counsel submitted a fee application. On October 17, 2013, the Custodian's Counsel advised the GRC that the parties agreed to a settlement. On October 22, 2013, the Complainant's Counsel advised that pursuant to a Stipulation of Dismissal, the parties have agreed to settle this complaint and the Complainant withdraws same.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew his complaint via e-mail to the GRC dated October 22, 2013 (via legal counsel) because the parties have reached settlement in this matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

November 12, 2013



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

INTERIM ORDER

August 27, 2013 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-274

v.

City of Newark (Essex)
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council (“Council”) considered the August 20, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s May 28, 2013 Interim Order by providing the Complainant with access to the records responsive to the subject OPRA request pending payment of the applicable copy cost and providing certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. The Custodian’s failure to respond immediately to the Complainant’s OPRA request seeking invoices resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). However, the Custodian fully complied with the Council’s May 28, 2013 Interim Order. 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, the Custodian’s actions did 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 the Council’s May 28, 2013 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), at 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council determined that the Complainant’s OPRA request was valid and ordered the Custodian to disclose responsive records. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the**



date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).

Interim Order Rendered by the
Government Records Council
On The 27th Day of August, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: August 28, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 27, 2013 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-274

v.

**City of Newark (Essex)²
Custodian of Records**

Records Relevant to Complaint: Itemized attorney billings for all attorneys and firms that worked on a matter relevant to a civil suit filed by former City of Newark's ("City") Police Officer Darren Nance against the City.³

Request Made: July 15, 2010

Response Made: July 20, 2010

GRC Complaint Filed: October 21, 2010⁴

Background

May 28, 2013 Council Meeting:

At its May 28, 2013 public meeting, the Council considered the May 21, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Council reconsiders its April 25, 2012 Final Decision to determine whether the Complainant's OPRA request was invalid based on the Court's holding in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012).
2. The Council reverses its April 25, 2012 Final Decision at conclusion No. 2 to hold that the Complainant's OPRA request is valid under OPRA because the request contained enough identifiers to allow the Custodian to search for and identify responsive records. Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). Thus, the Custodian must disclose all responsive records with the exception of those

¹ Represented by Thomas W. McLeod, Esq., and Edward Barocas, Esq., of the American Civil Liberties Union of New Jersey (Newark, NJ).

² Robert P. Marasco, Custodian of Records. Represented by Guenther Waldow, Esq. (Newark, NJ).

³ The Complainant references a Newark Star Ledger newspaper article that states in part, "Bianchi said extensive discovery and changes in the city's legal department between the James and Booker administrations kept the trial out of a courtroom until June 9, 2010. The trial lasted two weeks."

⁴ The GRC received the Denial of Access Complaint on said date.

previously provided. If no further records exist, the Custodian must certify to this fact.

3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director.⁶**
4. Since the Council has reversed conclusion No. 2, the Council should abandon its April 25, 2012 Final Decision as to conclusion Nos. 3 and 4 regarding the knowing and willful violation of OPRA and award of prevailing party attorney's fees.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On May 31, 2013, the Council distributed its Interim Order to all parties. On June 7, 2013, the Custodian's Counsel sought an extension of five (5) business days to comply with the Council's Order. On the same day, the GRC responded granting an extension until June 17, 2013.

On June 14, 2013, the Custodian responded to the Council's Interim Order. The Custodian certifies that upon receipt of the Council's Order, the City Law Department conducted a search for all responsive records. The Custodian certifies that Counsel also contacted the three (3) law firms that represented the City on the Nance matter: Akin and Associates; Schwartz, Simon, Edelstein & Celso, LLC; and Hardin, Kundla, McKeon & Poletto.

The Custodian certifies that Counsel has not heard back from Akin. The Custodian certifies that Schwartz contacted Counsel advising that they would not assist the City to obtain invoices. The Custodian certifies that Hardin provided billing records for all three (3) firms that were in its possession. The Custodian certifies that on June 13, 2013, Counsel provided the Custodian with all records he received and Counsel sent a letter to the Complainant's Counsel advising that 396 pages of records were available for pickup at a cost of \$19.80.

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

⁶ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Analysis

Compliance

At its May 28, 2013 meeting, the Council ordered the Custodian to disclose the records responsive to the Complainant's July 15, 2010 OPRA request "... **within five (5) business days from receipt of the Council's Interim Order ... and simultaneously provide certified confirmation of compliance ... to the Executive Director.**" The Custodian responded on June 14, 2013, within the extended time frame to comply, certifying that Counsel advised the Complainant's Counsel on June 13, 2013 that 396 pages of records responsive to the request were available for disclosure and further provided certified confirmation of compliance to the Executive Director.⁷

Therefore, the Custodian complied with the Council's May 28, 2013 Interim Order by providing the Complainant with access to the records responsive to the subject OPRA request pending payment of the applicable copy cost and providing certified confirmation of compliance to the Executive Director within the extended time frame to comply.

Knowing & Willful

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 "... [i]f 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)).

⁷ On August 1, 2013, Complainant's Counsel provided the GRC with verbal confirmation that the Complainant would not contest the Custodian's compliance.

The Custodian's failure to respond immediately to the Complainant's OPRA request seeking invoices resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). However, the Custodian fully complied with the Council's May 28, 2013 Interim Order. 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, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party 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.*

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 Supreme 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.

However, the Court noted in Mason, *supra*, that 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 accepted the application of the catalyst theory within the context of OPRA, stating that:

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 at 73-76 (2008).

The Court in Mason, *supra*, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).”

Here, the Council initially determined that the Complainant’s OPRA request was invalid. However, following an appeal of this complaint, the Appellate Division rendered its decision in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), at which point the Council requested remand in light of Burke. The Council subsequently determined that the Complainant’s OPRA request was valid and that the Custodian shall disclose responsive records; the Custodian did so on June 14, 2013 in compliance with the Council’s May 28, 2013 Order. Thus, the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

Therefore, pursuant to the Council’s May 28, 2013 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, *supra*, at 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, *supra*. Specifically, the Council determined that the Complainant’s

OPRA request was valid and ordered the Custodian to disclose responsive records. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's May 28, 2013 Interim Order by providing the Complainant with access to the records responsive to the subject OPRA request pending payment of the applicable copy cost and providing certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. The Custodian's failure to respond immediately to the Complainant's OPRA request seeking invoices resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). However, the Custodian fully complied with the Council's May 28, 2013 Interim Order. 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, the Custodian's actions did 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 the Council's May 28, 2013 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council determined that the Complainant's OPRA request was valid and ordered the Custodian to disclose responsive records. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

August 20, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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INTERIM ORDER

May 28, 2013 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-274

v.

City of Newark (Essex)
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council ("Council") considered the May 21, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council reconsiders its April 25, 2012 Final Decision to determine whether the Complainant's OPRA request was invalid based on the Court's holding in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012).
2. The Council reverses its April 25, 2012 Final Decision at conclusion No. 2 to hold that the Complainant's OPRA request is valid under OPRA because the request contained enough identifiers to allow the Custodian to search for and identify responsive records. Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). Thus, the Custodian must disclose all responsive records with the exception of those previously provided. If no further records exist, the Custodian must certify to this fact.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



4. Since the Council has reversed conclusion No. 2, the Council should abandon its April 25, 2012 Final Decision as to conclusion Nos. 3 and 4 regarding the knowing and willful violation of OPRA and award of prevailing party attorney's fees.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of May, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: May 31, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-274

v.

**City of Newark (Essex)²
Custodian of Records**

Records Relevant to Complaint: Itemized attorney billings for all attorneys and firms that worked on a matter relevant to a civil suit filed by former City of Newark's ("City") Police Officer Darren Nance against the City.³

Request Made: July 15, 2010

Response Made: July 20, 2010

GRC Complaint Filed: October 21, 2010⁴

Background

April 25, 2012 Council Meeting:

At its April 25, 2012 public meeting, the Government Records Council ("Council") considered the April 18, 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, finding that:

1. The Custodian violated N.J.S.A. 47:1A-5(e) by failing to immediately respond to the Complainant's request for the itemized attorney billing information pursuant to Herron v. Township of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).
2. Because the Complainant's request fails to identify a specific government record and would require the Custodian to conduct research, such request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.

¹ Represented by Thomas W. McLeod, Esq. of the American Civil Liberties Union of New Jersey (Newark, NJ).

² Robert P. Marasco, Custodian of Records. Represented by Avion M. Benjamin, Esq. (Newark, NJ).

³ The Complainant references a Newark Star Ledger newspaper article that states in part, "Bianchi said extensive discovery and changes in the city's legal department between the James and Booker administrations kept the trial out of a courtroom until June 9, 2010. The trial lasted two weeks."

⁴ The GRC received the Denial of Access Complaint on said date.

Super. 30, 37 (App. Div. 2005), *New Jersey Builders Association v. New Jersey Council on Affordable Housing*, 390 N.J. Super. 166 (App. Div. 2007), and *Schuler v. Borough of Bloomsbury*, GRC Complaint No. 2007-151 (February 2009).

3. The Custodian violated N.J.S.A. 47:1A-5(e) by failing to immediately respond to the Complainant's OPRA request. However, the Complainant's OPRA request fails to specifically identify a government record and would require the Custodian to conduct research to locate a responsive record. Additionally, the evidence of record does not indicate that the former 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 did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to *Teeters v. DYFS*, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has 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 nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. 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*.

Procedural History:

On April 30, 2012, the Council distributed its Final Decision to all parties. On June 6, 2012, the Complainant filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division. On December 7, 2012, the Appellate Division decided *Burke v. Brandes*, 429 N.J. Super. 169 (App. Div. 2012), which supports the Complainant claim that his OPRA request was valid. On December 21, 2012, the Council requested remand of this complaint from the Appellate Division in light of *Burke*. On January 9, 2013, the Appellate Division granted the GRC's request for remand.

Complainant's Reliance on *Burke v. Brandes*:

On April 4, 2013, the Complainant's Counsel submitted a letter to the GRC arguing that the Complainant's OPRA request provided enough identifiers for the Custodian to easily identify and provide the responsive invoices. Counsel notes that the Custodian never asserted that the Complainant's OPRA request was broad or unclear; rather, the Custodian's Statement of Information makes it clear that the Custodian knew the records the Complainant sought. Counsel also asserts that the Custodian further proved that he could identify the responsive records because he provided over three (3) years of invoices after the filing of this complaint.

Counsel asserts that *Burke* supports the Complainant's claims that his request was valid. Counsel states that in *Burke*, plaintiff sought correspondence between the Office of the Governor and Port Authority of New York and New Jersey related to "EZ-Pass benefits afforded to retirees

of the Port Authority.” *Id.* at 177-178. Counsel states that although defendant denied plaintiff’s request as overly broad, the Court rejected the State’s claim that plaintiff’s OPRA request lacked specificity and was overly broad. *Id.* at 178.

Counsel relies on Burke’s analysis of the terms “reasonable clarity” and “research” as previously used in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). Counsel states that the Court recognized that an OPRA request does not require an exact description of records; rather, the “reasonable clarity” standard is satisfied if a requestor identifies a subject or senders/recipients. Counsel states that the Court noted that “... correspondence [of one government entity] with another government entity ...” is a request for “... particularized identifiable government records ... rather than [for] information generally.” *Id.* at 176. Counsel states that the Court further reasoned that such a request is sufficient because there is no further need to “... *analyze and evaluate information* to respond ...” (Emphasis added.) *Id.* at 175.

Counsel asserts that here, the Complainant’s OPRA request fits within the parameters set forth in Burke: the request seeks attorney-billing records regarding a particular lawsuit for a timeframe referenced in an attached newspaper article. Counsel contends that the request reasonably identified those records sought and did not require the Custodian to conduct research. Counsel further indicates that, as in Burke, the Custodian performed a search and was able to locate and identify responsive records, thus belying any assertion that the request was overly broad.⁵

Counsel thus requests that; (1) the GRC reverse its determination that the Complainant’s OPRA request was invalid; (2) the GRC order disclosure of the responsive records; (3) the GRC determine that the Custodian knowingly and willfully violated OPRA under the totality of the circumstances; and (4) the GRC determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

Analysis

Reconsideration

The Council “at its own discretion, may reconsider any decision it renders.” *N.J.A.C.* 5:105-2.10(a). On January 9, 2012, the Appellate Division granted the GRC’s request for remand of this complaint in order to reconsider the validity of the Complainant’s OPRA request in light of the Court’s recent holding in Burke, *supra*. Therefore, the Council should reconsider its April 25, 2012 Final Decision to determine whether the Complainant’s OPRA request was invalid based on the Court’s holding in Burke.

The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’* *N.J.S.A. 47:1A-1.*” (Emphasis

⁵ The Custodian provided the Complainant with three (3) years of records in December 2010.

added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court reasoned that:

“[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.” [Emphasis added]. *Id.* at 549.

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.” (Emphasis added.) *Id.* at 549. *See also Bent v. Stafford Police Department*, 381 N.J. Super. 30, 37 (App. Div. 2005),⁶ New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

However, in Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), the Court found an “any and all” request to be sufficiently specific. In that case, plaintiff submitted a request to the County on March 14, 2008, asking for “[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present.” *Id.* at 508-09. The Court determined that the fact that plaintiff did not specify matters to which the settlements related “did not render his request a general request for information obtained through research, rather than a request for a specific record.” *Id.* at 513-14.

Additionally, in Burke, *supra*, the Court noted that plaintiff's request was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information, namely, EZ-Pass benefits provided to Port Authority retirees. The Court determined that, as in Burnett, *supra*, the request was limited to particularized, identifiable government records, namely, correspondence with another government entity, rather than information generally. The Court further held that the defendant “performed a search and was able to locate records responsive ...” which “... belied any assertion that the request was lacking in specificity or was overbroad.” *Id.* at 177. *See also Gannett v. County of Middlesex*, 379 N.J. Super. 205 (App. Div. 2005)(holding that “[s]uch a voluntary disclosure of most of the documents sought ... constituted a waiver of whatever right the County may have had to deny Gannett's entire OPRA request on the ground that it was improper.” *Id.* at 213).

Here, the Complainant's OPRA request sought attorneys' bills regarding “... a civil suit filed by ... [O]fficer Nance against the City.” The evidence of record indicates that the Custodian sought an extension of time to respond, commissioned the City Law Department to undertake a search for responsive records that the Custodian certified in the Statement of Information

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

spanned a 20-year period. The evidence of record further indicates that the Custodian disclosed records dated 2008 to the present. The evidence also indicates that the Custodian advised the Complainant that the City was still searching for responsive dated prior to 2008. However, there is no evidence in the record supporting that the Custodian subsequently responded providing additional records or advising the Complainant that further records existed.

As in Burke, supra, the Complainant's OPRA request here sought a specific type of record (attorneys' bills) regarding a specific subject (civil suit against the City filed by Officer Nance). The GRC recognizes that although the request is devoid of a time frame, the identification of the civil suit involving a specific person is sufficient to narrow the time frame from the commencement of litigation to its conclusion, if applicable. The Custodian further cited to the case by name and docket number (Nance v. City of Newark, Docket No. 97-CV-6184) in the Statement of Information. Additionally, the Custodian performed a search, located records, provided them to the Complainant and acknowledged that he would continue to search for records prior to 2008. The Custodian's actions here "belied any assertion that the request was ... overbroad." See Burke, supra.

Therefore, the Council should reverse its April 25, 2012 Final Decision at conclusion No. 2 to hold that the Complainant's OPRA request is valid because the request contained enough identifiers to allow the Custodian to search for and identify responsive records. Burke, supra. Thus, the Custodian must disclose all responsive records with the exception of those previously provided. If no further records exist, the Custodian must certify to this fact.

Additionally, since the Council has reversed conclusion No. 2, the Council should abandon its April 25, 2012 Final Decision as to conclusion Nos. 3 and 4 regarding the knowing and willful violation of OPRA and award of prevailing party attorney's fees.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Council reconsiders its April 25, 2012 Final Decision to determine whether the Complainant's OPRA request was invalid based on the Court's holding in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012).

2. The Council reverses its April 25, 2012 Final Decision at conclusion No. 2 to hold that the Complainant's OPRA request is valid under OPRA because the request contained enough identifiers to allow the Custodian to search for and identify responsive records. Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). Thus, the Custodian must disclose all responsive records with the exception of those previously provided. If no further records exist, the Custodian must certify to this fact.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁷ to the Executive Director.⁸**
4. Since the Council has reversed conclusion No. 2, the Council should abandon its April 25, 2012 Final Decision as to conclusion Nos. 3 and 4 regarding the knowing and willful violation of OPRA and award of prevailing party attorney's fees.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

May 21, 2013

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

April 25, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-274

v.

City of Newark (Essex)
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant’s request for the itemized attorney billing information pursuant to Herron v. Township of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).
2. Because the Complainant’s request fails to identify a specific government record and would require the Custodian to conduct research, such request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant’s OPRA request. However, the Complainant’s OPRA request fails to specifically identify a government record and would require the Custodian to conduct research to locate a responsive record. Additionally, the evidence of record does not indicate that the former 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 did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has 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 nexus exists between the Complainant’s filing of a Denial of



Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. 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 25th Day of April, 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: April 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-274

v.

**City of Newark (Essex)²
Custodian of Records**

Records Relevant to Complaint: Itemized attorney billings for all attorneys and firms that worked on a matter relevant to a civil suit filed by former City of Newark's ("City") police officer Darren Nance against the City.³

Request Made: July 15, 2010

Response Made: July 20, 2010

Custodian: Robert P. Marasco

GRC Complaint Filed: October 21, 2010⁴

Background

July 15, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint in a facsimile referencing OPRA.

July 20, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via facsimile to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that the Complainant's OPRA request has been forwarded to the appropriate departments for response. The Custodian also requests an extension of time until September 1, 2010 because the Complainant is requesting numerous records from multiple agencies.

July 22, 2010

Facsimile from the Complainant to the Custodian. The Complainant states that he is in receipt of the Custodian's response dated July 20, 2010. The Complainant also states that he does not agree to an extension of more than one (1) month to complete his OPRA request. The Complainant further states that he will accept a one (1) week

¹ Represented by Jeanne LoCicero, Esq., of the American Civil Liberties Union of New Jersey ("ACLU-NJ"). (Mr. Bobby Conner, Esq., of the ACLU-NJ represented the Complainant until December 15, 2011.)

² Represented by Danielle P. Torok, Esq. (Newark, NJ).

³ The Complainant references a Newark Star Ledger newspaper article which states in part, "Bianchi said extensive discovery and changes in the city's legal department between the James and Booker administrations kept the trial out of a courtroom until June 9, 2010. The trial lasted two weeks."

⁴ The GRC received the Denial of Access Complaint on said date.

extension for the Custodian to fulfill the request. The Complainant states that the most recent material should be readily accessible. The Complainant states that he understands that the attorney billings for the onset of civil litigation might be archived. The Complainant requests that the Custodian notify him in writing as to the anticipated date of the records' availability and to discuss delivery. The Complainant also requests that all communications be via e-mail or facsimile.

October 21, 2010

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

- Complainant's OPRA request dated July 15, 2010
- Facsimile from the Custodian to the Complainant dated July 20, 2010
- Facsimile from the Complainant to the Custodian dated July 22, 2010.

The Complainant states that he filed his OPRA request on July 15, 2010. The Complainant also states that the Custodian responded to such request on July 20, 2010 stating that the records would be ready by September 1, 2010. Lastly, the Complainant states that as of the date of his Denial of Access Complaint, the Custodian has not provided him with any records responsive to his request.

The Complainant does not agree to mediate this complaint.

October 27, 2010

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

November 10, 2010

Letter from the GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on October 27, 2010 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

November 16, 2010

E-mail from the Complainant's Counsel to the GRC. Counsel states that the City has had four (4) months to provide the requested attorney invoices to the Complainant but has simply failed to do so. Counsel argues that pursuant to N.J.S.A. 47:1A-5.e. custodians must provide immediate access to bills and vouchers. Counsel also argues that invoices are inherently the type of government records that should be kept on file so they are readily available to the public when requested. Counsel further argues that the City is delaying and ignoring such requests for invoices.

Counsel argues that because of the City's blatant disregard for the law, by not providing the records within the statutory-imposed time frame nor within its own extended deadline, the GRC should impose sanctions pursuant to N.J.S.A. 47:1A-11. Counsel also argues that this is an appropriate case in which to impose sanctions as there is no doubt that there was a knowing and willful violation.

November 18, 2010

E-mail from the GRC to the Custodian. The GRC confirms a telephone conversation with the Custodian's assistant, Joyce Lanier ("Ms. Lanier") in which Ms. Lanier stated that the Custodian did not receive the GRC's e-mail dated October 27, 2010 regarding the request for the SOI. The GRC states that the SOI must be completed within five (5) business days.⁵

November 22, 2010

E-mail from Ms. Lanier to the GRC. Ms. Lanier states that due to layoffs, holidays and scheduled vacations, the Custodian will not be able to complete the requested SOI until December 1, 2010. Ms. Lanier requests an extension of time until December 1, 2010 to complete the SOI.

November 22, 2010

E-mail from the GRC to Ms. Lanier. The GRC grants the extension of time to complete the SOI until December 1, 2010.

December 1, 2010

Custodian's SOI with no attachments.

The Custodian certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007), itemized billing requisitions have a six (6) year retention requirement and litigation files must be kept for twenty (20) years upon conclusion.

The Custodian certifies that he received the Complainant's OPRA request on July 15, 2010 and forwarded such request to the Finance and Law Departments for a response. The Custodian also certifies that the Law Department advised the Custodian that the records responsive cover a period of twenty (20) years. The Custodian further certifies that the Law Department also advised the Custodian that it would take a significant amount of time to locate these records because some records have been archived. The Custodian certifies that the Law Department advised that it was a labor intensive process to locate billing sheets for the Nance matter and further review was needed to redact any attorney-client privileged information.

The Custodian certifies that the Law Department advised the Custodian that the records would require further review because the Complainant sought copies of all attorney billings. The Custodian also certifies that he advised the Complainant that additional time was needed. The Custodian further certifies that the Complainant agreed to an extension of time until September 1, 2010.⁶ The Custodian certifies that the Law Department conducted a search for the records responsive but it was unable to locate any records responsive by the September 1, 2010 deadline. The Custodian certifies that the Law Department advised that it would require additional time to process the request and

⁵ The GRC did not receive a "read receipt" from the Custodian to the GRC's initial e-mail dated October 27, 2010.

⁶ The evidence of record indicates that in the Complainant's facsimile dated July 22, 2010, he did not agree to the extension of time.

asked that an extension be obtained from the Complainant. The Custodian certifies that he requested additional time to work on the request but the Complainant was unwilling to grant any further extensions.⁷ The Custodian also certifies that the Complainant filed a Denial of Access Complaint on November 3, 2010.⁸ The Custodian further certifies that the Law Department has advised that it will be able to provide copies of the records responsive from 2008 through the present by December 3, 2010. Lastly, the Custodian certifies that the Law Department is still continuing to search for the records responsive that pre-date 2008. The Custodian argues that the itemized billings for all attorneys and firms that worked on the Nance matter are attorney-client privileged confidential communications and do not qualify as government records pursuant to N.J.S.A. 47:1A-1.1..

December 3, 2010

E-mail from the Custodian to the Complainant. The Custodian confirms a telephone conversation advising that the Office of the City Clerk will be providing the Complainant with outside counsel billing invoices from 2008 through 2010 which are responsive to the request. The Custodian states that the Law Department is still trying to locate the billing records for years prior to 2008.

December 17, 2010

E-mail from Complainant's Counsel to the GRC. Counsel responds to the Custodian's SOI dated December 1, 2010. Counsel argues that sanctions should be imposed on the City for its willful withholding of records. Counsel also argues that the City has had months to provide the requested attorney invoices to the Complainant. Counsel further argues that the City requested an extension of time to provide the requested invoices, failed to meet the Complainant's request for a shorter extension of time, then failed to meet its own requested extension date and then simply ignored the Complainant's OPRA request. Counsel argues that only after the Complainant filed a Denial of Access Complaint and sought legal advice did the City provide a portion of the records requested. Counsel argues that the Complainant is still awaiting the remaining records responsive.

Counsel states that the City asserts that after receiving the Complainant's OPRA request, it requested and the Complainant agreed to an extension of time until September 1, 2010. Counsel also states that after the City conducted a search of its records, it was unable to locate any responsive invoices by September 1, 2010 and upon advising the Complainant of this fact, the Complainant was unable to grant any further extensions of time. Counsel argues that the City has not submitted any correspondence or other documentation confirming this purported timeline.

Counsel states that pursuant to N.J.S.A. 47:1A-11, "a public official who knowingly and willfully violates OPRA and has unreasonably denied access under the totality of the circumstances shall be subject to a civil penalty of \$1,000 for the first (1st) violation, \$2,500 for the second (2nd), and \$5,000 for the third (3rd) violation." Counsel argues that the City of Newark violated both the letter and the spirit of the law by failing

⁷ The Custodian does not provide any correspondence relevant to this certification.

⁸ The evidence of record indicates that the GRC received the Complainant's Denial of Access Complaint on October 22, 2010.

to provide the requested government records within 1) the statutorily mandated time frame, 2) the Complainant's allowance for additional time, or 3) its own designated extended time frame. Counsel also argues that the City knowingly and willfully violated OPRA because: 1) the City chose its own time frame by which to provide the responsive records and 2) failed to meet that commitment and chose instead to ignore the request altogether. Counsel requests that the GRC impose sanctions of \$2,500 on the City because it violated OPRA at least twice.

Counsel argues that because it took the American Civil Liberty Union of NJ's ("ACLU-NJ") representations and filings to get the City to finally turn over the records responsive to the Complainant, the Complainant is entitled to attorney's fees pursuant to Mason v. City of Hoboken, 196 N.J. 51 (2008). Counsel also argues that the City avoided its obligations under OPRA until after the ACLU-NJ filed its submissions with the GRC. Counsel further argues that the City even avoided its responsibility in response to the GRC until the ACLU-NJ began representing the Complainant. Counsel further argues that but for the ACLU-NJ's direct involvement, the City would not have disclosed the requested records to the Complainant. Lastly, Counsel argues that the Complainant is entitled to have the City pay the fees incurred by the ACLU-NJ to represent him and to file its submissions before the GRC.

February 6, 2012

E-mail from the GRC to the Custodian. The GRC states that the Custodian certified in his SOI that "the Law Department advised the Clerk's office that it would require additional time to process the request and asked that an extension of time be obtained from the requestor." The GRC also states that the Custodian certified in his SOI that "the OPRA designee requested additional time to work on the request and the requestor was unwilling to grant any further extensions." The GRC further states that the Custodian did not include any correspondence in his SOI in which the OPRA designee requested an additional extension of time and in which the Complainant denied said extension. The GRC requests the Custodian to provide a copy of this correspondence to the GRC within five (5) business days.

February 8, 2012

E-mail from Ms. Lanier to the GRC. Ms. Lanier includes a facsimile from the Custodian to the Complainant dated July 20, 2010. Ms. Lanier also includes a facsimile from the Complainant to the Custodian dated July 22, 2010.⁹

Analysis

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

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

⁹ Ms. Lanier's submissions do not include the correspondence requested by the GRC, but instead include correspondence already submitted to the GRC by the Complainant.

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.

Also, 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.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁰ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The invoices requested in the instant complaint are specifically classified 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 Council held that the “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 should immediately respond to the request for those records, granting or denying access, requesting additional time to respond or requesting clarification of the request.

The evidence of record indicates that the Complainant requested itemized attorney billings for all attorneys and firms that worked on a matter relevant to a civil suit filed by

¹⁰ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

former City police officer Darren Nance against the City. Such records fall under the immediate access provision of N.J.S.A. 47:1A-5.e. The evidence of record also indicates that the Custodian responded on the third (3rd) business day following receipt of such request. Therefore, although the Custodian's response was within the seven (7) business days pursuant to N.J.S.A. 47:1A-5.i., said response was not timely because the Custodian had an obligation to respond *immediately* to the Complainant's OPRA request for immediate access records.

Therefore, the Custodian violated N.J.S.A. 47:1A-5.e by failing to immediately respond to the Complainant's request for the itemized attorney billing information pursuant to Herron v. Township of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).

Whether the Complainant's request for "itemized attorney billings for all attorneys and firms that worked on a matter relevant to a civil suit filed by former City police officer Darren Nance against the City" is valid under OPRA?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials*

to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.' N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

In determining that MAG Entertainment's request for "all documents or records" from the Division of Alcoholic Beverage Control pertaining to selective enforcement was invalid under OPRA, the Appellate Division noted that:

"[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹¹ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."¹²

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests

¹¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹² As stated in Bent, *supra*.

2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).”

In the instant complaint, the Complainant requested “itemized attorney billings for all attorneys and firms that worked on a matter relevant to a civil suit filed by former City police officer Darren Nance against the City.” The Complainant’s request fails to specifically identify a government record. Furthermore, the Complainant’s request fails to provide a date range, case name or docket number to aid the Custodian in identifying an attorney bill responsive. Thus, the Custodian would have to research every itemized attorney billing to identify which records are responsive to the Complainant’s request. OPRA does not require custodians to perform research to locate records responsive to the Complainant’s request. See MAG, *supra*.

Therefore, because the Complainant’s request fails to identify a specific government record and would require the Custodian to conduct research, such request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Whether the Custodian’s untimely response rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian

“knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant’s OPRA request. However, the Complainant’s OPRA request fails to specifically identify a government record and would require the Custodian to conduct research to locate a responsive record. Additionally, the evidence of record does not indicate that the former 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 did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

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

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and

Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

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

As the New Jersey Supreme Court noted in Mason, Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing Teeters*, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

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

“New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term “prevailing party” within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved;” in other words, plaintiff’s

efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

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

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDP), 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.¹³ Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" Singer v. State, 95 N.J. 487, 495, cert denied (1984)."

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

In the instant matter, as in Mason, the Complainant's Denial of Access Complaint was not the catalyst for the release of the requested records, because the Complainant's request is invalid under OPRA as it fails to specify identifiable government records, fails to provide for a date range, case name or docket number to aid the Custodian in

¹³ 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.

identifying an attorney bill responsive and requires the Custodian to perform research beyond the scope of a custodian's duties, pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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 nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's request for the itemized attorney billing information pursuant to Herron v. Township of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).
2. Because the Complainant's request fails to identify a specific government record and would require the Custodian to conduct research, such request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request. However, the Complainant's OPRA request fails to specifically identify a government record and would require the Custodian to conduct research to locate a responsive record. Additionally, the evidence of record does not indicate that the former 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 did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has 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 nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. 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*.

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