



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

FINAL DECISION

January 31, 2012 Government Records Council Meeting

Kenneth Vercammen  
Complainant

Complaint No. 2010-57

v.

New Jersey Department of Law & Public Safety,  
New Jersey State Police  
Custodian of Record

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

1. The Custodian’s failure to respond in writing to the Complainant’s February 17, 2010 and February 19, 2010 OPRA requests 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 dated October 31, 2007).
2. Although the Custodian denied access to the training materials sought in the Complainant’s February 17, 2010 and February 19, 2010 OPRA request Items No. 7 pursuant to N.J.A.C. 13:1E-3.2(a)1 PRN 2002-2227, July 1, 2002, which was later invalidated by the Court in Slaughter v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010), the New Jersey Department of Law & Public Safety proposed new OPRA rules on November 1, 2010 that contain the same exemption for training materials. Further, Executive Order 47 allowed New Jersey Department of Law & Public Safety’s proposed exemptions from public access to remain in full force and effect pending their adoption as final rules or until November 15, 2011. The proposed regulation was subsequently adopted as a new rule on December 5, 2011. Therefore, the Custodian lawfully denied access to the training materials responsive to the Complainant’s February 17, 2010 and February 19, 2010 OPRA request Items No. 7 pursuant to N.J.A.C. 13:1E-3.2(a)1, which exempts access to “Standard Operating Procedures and training materials.”
3. Because the Complainant’s February 17, 2010 and February 19, 2010 request Items No. 2 seek information rather than identifiable government records, the request items are invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey

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Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008), and Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). As such, the Custodian has not unlawfully denied access to the Complainant's two (2) request items. N.J.S.A. 47:1A-6.

4. Because the Complainant's February 17, 2010 and February 19, 2010 request Items No. 1 and Items No. 3 through No. 6 fail to specify identifiable government records, the request items are invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (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 of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008). As such, the Custodian has not unlawfully denied access to the Complainant's ten (10) request items. N.J.S.A. 47:1A-6.
5. The Custodian's failure to respond in writing within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, the Custodian lawfully denied access to the records responsive to the Complainant's February 17, 2010 and February 19, 2010 OPRA request Items No. 7 pursuant to N.J.A.C. 13:1E-3.2(a)1. Moreover, the Complainant's February 17, 2010 and February 19, 2010 request Items No. 1 through No. 6 are invalid under OPRA. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
6. 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), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian lawfully denied access to the Complainant's February 17, 2010 OPRA and February 19, 2010 OPRA request Items No. 7 pursuant to N.J.A.C. 13:1E-3.2(a)1 and the Complainant's February 17, 2010 and February 19, 2010 request Items No. 1 through No. 6 are invalid under OPRA. Further, the relief ultimately achieved did not have a basis in law. 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 31<sup>st</sup> Day of January, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: February 6, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Kenneth Vercammen<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-57**

v.

**New Jersey Department of Law & Public Safety,  
New Jersey State Police<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

February 17, 2010 OPRA request:

Copies of:

1. Training materials for the “test” usually given to individuals under suspicion of Driving While Intoxicated (“DWT”) including manuals, lesson plans, texts, tests and article reprints kept by the New Jersey State Police (“NJSP”), Troop C, Hamilton Barracks.
2. The website link for the specific National Highway Traffic Safety Administration (“NHTSA”) manual dealing with field sobriety relied on by the NJSP, Troop C, Hamilton Barracks.
3. Documents that set forth NJSP, Troop C, Hamilton Barracks, policy on accommodating persons with physical disabilities that are requested by the NJSP to perform a field sobriety test of walk and turn.
4. Documents that set forth NJSP, Troop C, Hamilton Barracks, policy on accommodating persons with physical disabilities that are requested by the NJSP to perform a field sobriety test of finger to nose.
5. Documents that set forth NJSP, Troop C, Hamilton Barracks, policy on accommodating persons with physical disabilities that are requested by the NJSP to perform a field sobriety test of one legged stand.
6. Documents that set forth procedures for officers in NJSP, Troop C, Hamilton Barracks, to achieve certification or recognition as a Drug Recognition Experts (“DRE”).
7. The most recent training manual for field sobriety testing by NJSP, Troop C, Hamilton Barracks.

February 19, 2010 OPRA request:

Copies of:

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

<sup>2</sup> Represented by DAG Mary Beth Wood, on behalf of the NJ Attorney General.

1. Training materials for DREs kept by NJSP.
2. The website link to the specific NHTSA manual relied on by NJSP for DREs.
3. Documents that set forth any formal connection between NJSP and the Internal Association of Chiefs of Police (“IACP”) for DREs.
4. Written communications from the IACP to NJSP regarding DREs between January 1, 2009 and January 1, 2010.
5. Documents setting forth the standards for an officer in NJSP to become a DRE.
6. Documents that set forth procedures for officers in NJSP to achieve certification or recognition as a DRE.
7. The most recent training manual for DREs.

**Request Made:** February 17, 2010<sup>3</sup> and February 19, 2010

**Response Made:** March 11, 2010

**Custodian:** Christopher Nunziato

**GRC Complaint Filed:** March 22, 2010<sup>4</sup>

### Background

#### **February 17, 2010**

Complainant’s first (1<sup>st</sup>) Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

#### **February 19, 2010**

Complainant’s second (2<sup>nd</sup>) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

#### **March 9, 2010**

Facsimile from the Complainant to the Custodian. The Complainant resubmits his two (2) OPRA requests.

#### **March 11, 2010**

Custodian’s response to the two (2) OPRA requests.<sup>5</sup>

#### Complainant’s February 17, 2010 OPRA request:

The Custodian responds in writing to the Complainant’s OPRA request on the seventeenth (17<sup>th</sup>) business day following receipt of such request. The Custodian states that the records sought fall under the training material exemption set forth at Executive Order No. 21 (McGreevey 2002)(“EO 21”) and *N.J.A.C. 13:1E-3.2*. The Custodian notes that he previously provided the Complainant with contact information for Sergeant First Class Craig Potter (“SFC Potter”), NJSP’s expert on DWI issues, and that SFC Potter has

<sup>3</sup> Although the Complainant asserts that he submitted this OPRA request to the NJSP on February 18, 2010, the evidence of record indicates that the Complainant actually submitted this OPRA request to the NJSP on February 17, 2010.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> The Custodian certified that he sent his response to the Complainant on March 11, 2010. Counsel further corroborated this date in the Statement of Information.

agreed to assist the Complainant. The Custodian states that to date, he has been advised that the Complainant did not contact SFC Potter. The Custodian states that as such, he is denying access to the Complainant's OPRA request and suggests that the Complainant follow up with SFC Potter regarding those records that can be provided to the Complainant.

Complainant's February 19, 2010 OPRA request:

The Custodian responds in writing to the Complainant's OPRA request on the fifteenth (15<sup>th</sup>) business day following receipt of such request. The Custodian states that the records sought fall under the training material exemption set forth at EO 21 and *N.J.A.C. 13:1E-3.2*. The Custodian notes that he previously provided the Complainant with contact information for SFC Potter, NJSP's expert on DRE issues, and that SFC Potter has agreed to assist the Complainant. The Custodian states that to date, he has been advised that the Complainant did not contact SFC Potter. The Custodian states that as such, he is denying access to the Complainant's OPRA request and suggests that the Complainant follow up with SFC Potter regarding those records that can be provided to the Complainant.

**March 22, 2010**

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

- Complainant's first (1<sup>st</sup>) OPRA request dated February 17, 2010.
- Complainant's second (2<sup>nd</sup>) OPRA request dated February 19, 2010.
- Letter from the Custodian to the Complainant (undated).
- Handwritten notes dated March 9, 2010.<sup>6</sup>

The Complainant states that he submitted two (2) OPRA requests to NJSP on February 17, 2010 and February 19, 2010 respectively. The Complainant states that he resubmitted both requests to NJSP on March 9, 2010 after receiving no written response.

The Complainant states that the Custodian responded in an undated letter advising the Complainant to contact SFC Potter of the Alcohol Drug Testing Unit regarding both OPRA requests. The Complainant states that the Custodian further requested that the Complainant advise when he had completed his interaction with SFC Potter so that the Custodian could consider the requests closed. The Complainant states that the Custodian also noted that the Complainant agreed to an extension of time<sup>7</sup> for the Custodian to respond to the Complainant's OPRA requests.

The Complainant notes that the Custodian verbally advised him on March 9, 2010 that the Complainant should contact SFC Potter regarding his two (2) OPRA requests. The Complainant argues that he did not receive a written response to the two (2) OPRA requests until March 19, 2010.

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<sup>6</sup> The Complainant submitted additional documents that are not relevant to the instant complaint.

<sup>7</sup> There is no evidence in the record to indicate that an extension of time was granted or on what date the extension of time expired.

The Complainant agrees to mediate this complaint.

**April 9, 2010**

Offer of Mediation sent to the Custodian.

**April 14, 2010**

Letter from the Complainant to the GRC. The Complainant states that he does not wish to mediate the instant complaint. The Complainant states that the Custodian has not provided access to any records.

**April 16, 2010**

The Custodian declines mediation.

**April 26, 2010**

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

**May 3, 2010**

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

**May 3, 2010**

E-mail from the GRC to the Custodian’s Counsel. The GRC grants Counsel an extension of time until May 10, 2010 to submit the requested SOI.

**May 10, 2010**

Custodian’s SOI attaching the Complainant’s first (1<sup>st</sup>) OPRA request dated February 17, 2010.

The Custodian certifies that regarding whether any records responsive were destroyed in accordance with the New Jersey Department of Archives and Records Management, the latest version of the training material regarding DWIs and field sobriety tests will remain in force until replaced with an updated version by NHTSA.

Complainant’s February 17, 2010 OPRA request

The Custodian certifies that he received the Complainant’s first (1<sup>st</sup>) OPRA request on February 17, 2010. The Custodian certifies that a search of the relevant database containing the requested information was conducted and the training materials regarding DWIs and field sobriety tests were identified. The Custodian certifies that it was determined that the requested records were not subject to disclosure under OPRA; however, the Custodian attempted to accommodate the Complainant through other means. The Custodian certifies that he provided the Complainant with SFC Potter’s contact information, who is an expert in regards to DWI and field sobriety testing. The Custodian certifies that SFC Potter advised that the Complainant never contacted him.

The Custodian certifies that he responded in writing to the Complainant’s OPRA request on March 11, 2010 denying access to the requested records pursuant to N.J.S.A. 47:1A-1 et seq. and *N.J.A.C. 13:1E-3.2(a)2*.

The Custodian's Counsel submits a letter brief in support of NJSP's position. Counsel argues that this complaint should be dismissed because the records requested are not government records subject to disclosure under OPRA. N.J.S.A. 47:1A-1 et seq.

Counsel states that the Complainant submitted an OPRA request to NJSP on February 17, 2010. Counsel states that NJSP received the Complainant's OPRA request on the same date. Counsel further states that the Custodian received an extension of time to respond and attempted to accommodate the Complainant.<sup>8</sup> Counsel states that the Custodian subsequently responded in writing on March 11, 2010 denying access to the requested records pursuant to *N.J.A.C. 13:1E-3.2*.

Counsel argues that the Custodian lawfully denied access to the requested records. Counsel states that OPRA provides that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions." N.J.S.A. 47: 1A-1. Counsel states that 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." N.J.S.A. 47:1A-1.1. Counsel states that OPRA further provides that:

“[t]he provisions of [OPRA], shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” N.J.S.A. 47:1A-9.a.

Counsel states that paragraph 4 of EO 21 provides in relevant part that:

“[i]n light of the fact that State departments and agencies have proposed rules exempting certain government records from public disclosure, and these regulations have been published for public comment, but cannot be adopted prior to the effective date of the Open Public Records Act, State agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order. Once those regulations have been adopted, they shall govern all government records requests filed thereafter.” *Id.*

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<sup>8</sup> As previously stated herein, there is no evidence in the record indicating that an extension was obtained or on what date the extension of time expired. Additionally, the Custodian submitted no evidence that he sought an extension in writing within the statutorily mandated time frame.



Counsel states that paragraph 6 of Executive Order No. 26 (McGreevey 2002) (“EO 26”) provides that “[t]he remaining provisions of [EO 21] are hereby continued to the extent that they are not inconsistent with this Executive Order.” *Id.*

Counsel states that the New Jersey Department of Law & Public Safety (“LPS”) proposed regulations specifically declaring that, among other items, training materials “... shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq.” *N.J.A.C. 13:1E-3.2(a)2*, PRN 2002-2227, July 1, 2002. Counsel argues that there has been no rescission or modification of EO 21 and EO 26, as such, the proposed regulations remain in effect. *See Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety*, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005).

Additionally, Counsel asserts that the NHTSA manual sought by the Complainant is maintained by NHTSA and not NJSP.

Counsel asserts that although the Custodian could not provide the requested records under OPRA, he attempted to accommodate the Complainant’s OPRA requests. Counsel argues that the Custodian contacted the Complainant, provided him with SFC Potter’s contact information and followed up with the Complainant. Counsel asserts that the Complainant chose not to contact the SFC Potter.

#### **April 4, 2011**

Letter from the Complainant’s Counsel to the GRC. Counsel states that the Custodian’s arguments have been rejected by the Appellate Division. Counsel states that in the SOI, NJSP relied on a 10 year-old proposed regulation that was never adopted as well as paragraph 6 of EO 21. Counsel states that in Slaughter v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010), the Court held that public agencies, including LPS, could not indefinitely rely on proposed regulations to deny access to police training materials. *Id.* at 555.<sup>9</sup> Counsel states that the Court delayed the effective date of its decision until November 5, 2010, which date has passed without the adoption of new regulations. Counsel states that the Custodian can no longer rely on *N.J.A.C. 13:1E-3.2(a)2* to deny access to the records sought by the Complainant.

Counsel requests that the GRC apply the Court’s decision in Slaughter to this complaint and order disclosure of the requested records.

#### **April 5, 2011**

Letter from the Custodian’s Counsel to the GRC. Counsel argues that Complainant Counsel’s reliance on Slaughter is misplaced. Counsel states that LPS promulgated regulations which are in the process of adoption and which are thus in effect

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<sup>9</sup> The GRC notes that the submission of the Custodian’s SOI predates the Court’s June 4, 2010 decision in Slaughter, *supra*. In said decision, the Court held that the executive order establishing that a government record that a State agency proposed to be exempt from disclosure in proposed regulations in accordance with the Administrative Procedure Act, was intended to be temporary only and therefore the exemption cited by the New Jersey Law & Public Safety, Division of Criminal Justice is no longer in effect. *Kenneth Vercammen v. New Jersey Department of Law & Public Safety, New Jersey State Police, 2010-57 – Findings and Recommendations of the Executive Director*

pursuant to Executive Order No. 47 (Christie 2010)(“E.O. No. 47”). Counsel contends that as such, the GRC should deny Complainant Counsel’s argument.

**April 5, 2011**

E-mail from the GRC to the Custodian. The GRC states that some information was not included as part of the SOI. The GRC states that both the Custodian and Custodian’s Counsel refer to an Item No. 8 provided as part of the SOI; however, the GRC has been unable to locate this item within the SOI. The GRC states that based on the references made to Item No. 8, it appears as though Item No. 8 comprised the Custodian’s written response to the Complainant’s OPRA requests.

The GRC requests that the Custodian provide the GRC with Item No. 8 or the Custodian’s written responses by April 7, 2011.

**April 5, 2011**

E-mail from the Custodian’s Counsel to the GRC attaching the following:

- Screen shot from NJSP’s OPRA tracking system regarding the Complainant’s February 17, 2010 OPRA request.
- Government Records Request Receipt dated March 12, 2010.
- Screen shot from NJSP’s OPRA tracking system regarding the Complainant’s February 19, 2010 OPRA request.
- Government Records Request Receipt dated March 12, 2010.

Counsel states that attached are two (2) screenshots from the OPRA electronic tracking system indicating that both of the Complainant’s OPRA requests were marked denied and closed on March 11, 2010. Counsel states that also attached are the two (2) Government Records Request receipts dated March 12, 2010, which were sent to the Complainant via regular mail per the Complainant’s delivery preference. Counsel requests that the GRC accept these documents as Item No. 8 of the SOI.

Additionally, Counsel asserts that based on her reading of the Complainant’s complaint, it appears that only the Complainant’s February 17, 2010 OPRA request, which was resubmitted on March 9, 2010, is at issue in this complaint.

**April 27, 2011**

E-mail from the GRC to the Complainant’s Counsel. The GRC states that pursuant to a telephone conversation on this day, the GRC is in need of clarification. The GRC states that the Complainant indicated in the Denial of Access Complaint that the only OPRA request at issue was the February 17, 2010 OPRA request (resubmitted on March 9, 2010). The GRC states that the Complainant also included a second (2<sup>nd</sup>) OPRA request dated February 19, 2010 as part of the complaint and included this request on the “Records Denied List” page.

The GRC states that NJSP’s SOI addressed only the Complainant’s February 17, 2010 OPRA request. The GRC requests that Counsel confirm whether the February 19, 2010 OPRA request is also at issue. The GRC states that if this OPRA request is part of

the complaint, the Custodian must amend the SOI to include any arguments relevant to the second (2<sup>nd</sup>) OPRA request. The GRC requests that Counsel submit the requested clarification by close of business on April 29, 2011.

**May 6, 2011**

E-mail from the GRC to the Complainant's Counsel. The GRC states that it requested additional clarification on April 27, 2011. The GRC states that Counsel's response was due by close of business on April 29, 2011 and that the GRC has not yet received said response.

The GRC states that if it does not receive a response from Counsel within three (3) business days, this complaint will proceed to adjudication based only on the information contained in the record.

**May 10, 2011**

Letter from the Complainant's Counsel to the GRC. Counsel states that the instant complaint concerns two (2) separate OPRA requests: W48823 submitted on February 17, 2010 and W48876 submitted on February 19, 2010. Counsel states that this complaint was filed based on NJSP's insufficient responses to both requests. Counsel notes that the Denial of Access Complaint lists the dates of the requests as February 17, 2010 and February 19, 2010.<sup>10</sup> Counsel further notes that both OPRA requests are identified in on the "Records Denied List" page.

Counsel acknowledges that the Custodian's SOI only addresses the Complainant's February 17, 2010 OPRA request. Counsel states that based on the foregoing, the Complainant agrees to allow NJSP to amend its SOI to address the Complainant's February 19, 2010 OPRA request.

**May 11, 2011**

E-mail from the GRC to the Custodian's Counsel. The GRC states that pursuant to the Complainant Counsel's letter dated May 10, 2011, the GRC requests that NJSP submit an amended SOI to address the Complainant's February 19, 2010 OPRA request. The GRC requests that Counsel submit the amended SOI by close of business on May 13, 2011.

**May 25, 2011**

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until June 3, 2011 to submit the requested amended SOI.

**May 25, 2011**

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until June 3, 2011 to submit the requested amended SOI.

**June 2, 2011**

Custodian's amended SOI attaching the following:

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<sup>10</sup> The Denial of Access Complaint actually identified the two (2) dates as February 17, 2010 and March 9, 2010. The GRC requested clarification based on the error contained on the complaint form.  
Kenneth Vercammen v. New Jersey Department of Law & Public Safety, New Jersey State Police, 2010-57 – Findings and Recommendations of the Executive Director 8

- Screen shot from NJSP's OPRA tracking system regarding the Complainant's February 17, 2010 OPRA request.
- Government Records Request Receipt dated March 12, 2010.
- Screen shot from NJSP's OPRA tracking system regarding the Complainant's February 19, 2010 OPRA request.
- Government Records Request Receipt dated March 12, 2010.

The Custodian's Counsel requests that the GRC accept this letter as an amendment to the Custodian's SOI.

February 19, 2010 OPRA request:

Counsel states that the Complainant submitted a second (2<sup>nd</sup>) OPRA request to NJSP on February 19, 2010. Counsel states that the Custodian responded in writing on March 11, 2010 denying access to this OPRA request for the same reasons the Custodian denied access to the Complainant's February 17, 2010 OPRA request.

Counsel contends that both of the Complainant's OPRA requests were denied pursuant to EO 21 and *N.J.A.C. 13:1E-3.2(a)2*. The Custodian's Counsel argues that after the Court's decision in Slaughter, LPS promulgated regulations which are in the process of adoption and are in effect pursuant to EO 47. Counsel states that as such, the Custodian properly denied access to the Complainant's two (2) OPRA requests.

Counsel further argues that the Complainant's two (2) OPRA requests are clearly improper because "OPRA ... is not intended as a research tool ... Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.' *N.J.S.A. 47:1A-1*." MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 *N.J. Super.* 534, 546 (App. Div. 2005).

Counsel argues that the Complainant was attempting to force NJSP to "identify and siphon useful information." Counsel asserts that the Complainant made it clear in both requests that he was seeking information in order to prepare articles. Counsel notes that the MAG Court held that inspection of records pursuant to OPRA "is subject to reasonable controls," and the courts and the GRC "have inherent power to prevent abuses." *Id.* Counsel argues that the Complainant's abuse of OPRA by attempting to use NJSP as his personal research tool was improper.

Counsel further argues that the Complainant's two (2) OPRA requests were overly broad because said requests failed to identify the specific government records sought. 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, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Counsel asserts that as an example, Item No. 2 of both requests seeks information rather than an identifiable government record.

Counsel argues that the Complainant's two (2) OPRA requests were properly denied pursuant to EO 47 and *N.J.A.C. 13:1E-3.2(a)2*. Moreover, Counsel argues that the Complainant's OPRA requests are invalid under OPRA.

### Analysis

#### **Whether the Custodian responded in a timely manner to the Complainant's two (2) OPRA requests?**

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

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

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.<sup>11</sup> 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 dated October 31, 2007).

The Complainant submitted his two (2) OPRA requests on February 17, 2010 and February 19, 2010. The Custodian responded in writing on March 11, 2010 denying access to both requests, on the seventh (7<sup>th</sup>) business day and fifteenth (15<sup>th</sup>) business day following receipt thereof, respectively.

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<sup>11</sup> 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.

OPRA requires that the Custodian respond in writing within seven (7) business days after receipt of the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time. The evidence of record indicates that no valid written response was provided by the Custodian to the Complainant until March 11, 2010. Moreover, the Custodian provided no evidence to indicate that he responded in writing requesting an extension of time until a date certain to respond. Thus, the Complainant's two (2) OPRA requests are "deemed" denied.

Therefore, the Custodian's failure to respond in writing to the Complainant's February 17, 2010 and February 19, 2010 OPRA requests 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, supra.

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA further provides that:

"[t]he provisions of [OPRA], *shall not abrogate any exemption of a public record or government record from public access* heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order." (Emphasis added.) N.J.S.A. 47:1A-9.a.

Paragraph 4 of EO 21 provides in relevant part that:

"[i]n light of the fact that State departments and agencies have proposed rules exempting certain government records from public disclosure, and these regulations have been published for public comment, but cannot be adopted prior to the effective date of the Open Public Records Act, State agencies are hereby directed to handle all government records requests in

a manner consistent with the rules as they have been proposed and published, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order. Once those regulations have been adopted, they shall govern all government records requests filed thereafter.” *Id.*

EO 26 provides that:

“[p]aragraphs 2 and 3 of [EO 21] are hereby rescinded ... The remaining provisions of [EO 21] are hereby continued to the extent that they are not inconsistent with this Executive Order.” *Id.*

EO 47 provides that:

“[t]he exemptions from public access that have been proposed by [LPS] ... shall be and shall remain in full force and effect pending their adoption as final rules pursuant to the provisions of the Administrative Procedure Act. Any provision of [EO 21] and [EO 26] that applies to any exemption initially proposed by an agency in the July 1, 2002 a New Jersey Register, is hereby rescinded. This Order shall take effect immediately and shall expire on November 15, 2011.”

*N.J.A.C. 13:1E-3.2(a)2*, PRN 2002-2227, July 1, 2002 provided that:

“[i]n addition to records designated as confidential pursuant to ... [OPRA] ... the following records shall not be considered government records subject to public access ... Standard Operating Procedures and training materials...” *Id.*

*N.J.A.C. 13:1E-3.2(a)1* provides that:

“[i]n addition to records designated as confidential pursuant to ... [OPRA] ... the following records shall not be considered government records subject to public access ... Standard Operating Procedures and training materials...” *Id.*

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.

Complainant's February 17, 2010 and February 19, 2010 OPRA requests, Items No. 7

The Complainant's February 17, 2010 OPRA request Item No. 7 sought "the most recent manual for field sobriety training by NJSP..." The Complainant's February 19, 2010 OPRA request Item No. 7 sought "the most recent training manual for DREs." The Custodian responded in writing on March 11, 2010 denying access to the requested records pursuant to EO 21 and *N.J.A.C. 13:1E-3.2*.

In the SOI, the Custodian's Counsel argued that EO 21 allowed for proposed OPRA regulations of State agencies to remain in effect prior to adoption. Counsel further stated that EO 26 provided that this provision remain in effect. Counsel argued that because no rescission or modification of EO 21 and EO 26 has occurred at that time, the proposed exemptions remain in effect pursuant to Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005).

On April 4, 2011, the Complainant's Counsel wrote to the GRC stating that pursuant to Slaughter v. Government Records Council, 413 *N.J. Super.* 544 (App. Div. 2010), NJSP could not indefinitely rely on proposed regulations to deny access to police training materials. Counsel stated that the Court delayed the effect of the ruling until November 5, 2010, which date has passed without NJSP passing any new regulations. Counsel requested that the GRC order disclosure of the requested training materials.

The Custodian's Counsel noted in the amended SOI that after the Court's decision in Slaughter, LPS promulgated regulations which were in the process of adoption and remained in effect pursuant to EO 47.

In Slaughter, the complainant appealed a final decision of the Council which upheld the Division of Criminal Justice's ("DCJ") asserted exemption of the requested record contained within their proposed regulations. The records sought were the "New Jersey State Police Forensic Laboratory's policies and procedures on blood test analysis, DNA comparisons ... and records concerning presumptive and confirmative testing." DCJ denied access to the requested records pursuant to *N.J.S.A. 47:1A-9.a.*, EO 21, EO 26, and *N.J.A.C. 13:1E-3.2(a)2*. The complainant contacted the GRC prior to filing a Denial of Access Complaint alleging that he could not find the cited regulation in the New Jersey Administrative Code because said section was reserved.

On appeal, the Court, tasked with deciding whether DCJ's proposed regulations remained in effect even after years of not being promulgated, discussed the impetus for DCJ's denial of access. Although the Court agreed with DCJ's contention that EO 26 directed State agencies to apply exemptions contained in proposed regulations to OPRA requests, the Court stated that the contention did not answer the issue raised by claimant: whether a State agency's proposed rules are still in effect nearly eight (8) years after the enactment of OPRA and the issuance of the enabling Executive Order. The Court held that although DCJ could have properly relied upon proposed rule *N.J.A.C. 13:1E-3.2(a)2* to deny the disclosure of records for the interim period established by EO 21 and EO 26,



that interim period had since expired and therefore, EO 21 and EO 26 were no longer in effect.

However, the Court also stated that:

“Nevertheless, we are reluctant to require immediate disclosure of those procedures, without affording [LPS] an opportunity to consider whether to now adopt the exemption that would have been provided by *N.J.A.C.* 13:1E-3.2(a)(2). We note that a Law Division judge issued an unpublished decision in 2005, which seemed to indicate that [EO 21] provided continuing authority to State agencies to deny access to government records they had proposed to exempt from disclosure by administrative rule published before issuance of [EO 21] but never adopted. In addition, the Council expressly held in a decision issued in 2006 that [EO 21] exempted from disclosure documents covered by another subsection of proposed *N.J.A.C.* 13:1E-3.2(a). [LPS] may have concluded, based on these decisions, that it could rely upon *N.J.A.C.* 13:1E-3.2(a)(2) to deny access to government records without adoption of this proposed exemption in accordance with the APA.” *Id.* at 555.

In so declaring, the Court recognized that at the time of the denial of access, it was reasonable for DCJ to rely upon its proposed rules prohibiting disclosure of the requested records; further, the Court implicitly recognized the important public policy underlying non-disclosure of certain records made, maintained, kept on file or received in the course of business by DCJ. The Court therefore delayed the effectiveness of its decision to November 5, 2010 to permit DCJ time to propose and adopt new regulations regarding the disclosure of government records and held that in the interim, DCJ could withhold disclosure of the records. *Id.* at 555-556.

After the Court’s decision in Slaughter, LPS, the Department of Corrections, the Department of Military and Veterans Affairs, the Department of Environmental Protection, and the Department of Community Affairs undertook the task of resubmitting proposed OPRA regulations for promulgation in accordance with the Administrative Procedures Act; however, it soon became apparent that the five (5) State agencies would be unable to meet the deadline set forth by the Slaughter Court. Therefore, Governor Chris Christie signed EO 47 on November 3, 2010, which provides that:

1. The exemptions from public access that have been proposed by the Departments of Law and Public Safety, Corrections, Military and Veterans Affairs, Environmental Protection, and Community Affairs, set forth in Appendix A attached hereto, shall be and shall remain in full force and effect pending their adoption as final rules pursuant to the provisions of the Administrative Procedure Act.
2. Any provision of [EO 21] and [EO 26] that applies to any exemption initially proposed by an agency in the July 1, 2002 a New Jersey Register, is hereby rescinded.
3. This Order shall take effect immediately and shall expire on November 15, 2011.” *Id.*

In the matter currently before the Council, the Custodian's response to the Complainant's OPRA request items and SOI argument relying on EO 21, EO 26 and *N.J.A.C. 13:1E-3.2*, PRN 2002-2227, July 1, 2002, preceded the Court's holding in Slaughter. Thus, the Custodian's response was consistent with case law at the time.

LPS subsequently proposed regulations at *N.J.A.C. 13:1E-3.2(a)1*, PRN 2010-269, November 1, 2010 exempting access to training materials held by LPS and all divisions and agencies therein under OPRA. EO 47 extended the promulgation deadline of LPS's proposed regulations until November 15, 2011. Henceforth, although the Court invalidated all proposed OPRA regulations including the one cited by the Custodian as of November 5, 2010, *N.J.A.C. 13:1E-3.2(a)1* continued to remain in effect through November 15, 2011 pursuant to EO 47. The proposed regulation was adopted as a new rule on December 5, 2011.

Therefore, although the Custodian denied access to the training materials sought in the Complainant's February 17, 2010 and February 19, 2010 OPRA requests, Items No. 7 pursuant to *N.J.A.C. 13:1E-3.2(a)1* PRN 2002-2227, July 1, 2002, which was later invalidated by the Court in Slaughter, *supra*, LPS proposed new OPRA rules on November 1, 2010 that contain the same exemption for training materials. Further, EO 47 allowed LPS's proposed exemptions from public access to remain in full force and effect pending their adoption as final rules or until November 15, 2011. The proposed regulation was subsequently adopted as a new rule on December 5, 2011. Therefore, the Custodian lawfully denied access to the training materials responsive to the Complainant's February 17, 2010 and February 19, 2010 OPRA requests Items No. 7 pursuant to *N.J.A.C. 13:1E-3.2(a)1*, which exempts access to "Standard Operating Procedures and training materials."

### **Whether request Items No. 1 through No. 6 of the Complainant's February 17, 2010 and February 19, 2010 requests are invalid under OPRA?**

#### Complainant's February 17, 2010 and February 19, 2010 OPRA request Items No. 2

The Complainant's February 17, 2010 and February 19, 2010 OPRA request Items No. 2 sought "the website link for the specific National Highway Traffic Safety Administration ("NHTSA") manual" dealing with "field sobriety tests" and "Drug Recognition Experts ("DRE")," relied upon by NJSP.

Settled case law requires that OPRA requests identify specific government records. 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.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>12</sup> 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.”<sup>13</sup>

Additionally, in New Jersey Builders Association v. New Jersey Council of 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...”

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008), the Council held that “[b]ecause the Complainant’s OPRA requests [No.] 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 Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009), the complainant’s request Items No. 5, through No. 8 sought:

- “5. The law that allows the temporary changing of Township codes by any Township representatives without the approval of Council and penalty if such action is against the law.
6. The person who authorized the North Edison Little League ball field light to be on at 11:00 pm and penalty if such authorization is against the law.
7. The law on making alterations to a leased township property, such as tree removal, fence installation, etc., without the approval of Council and penalty if such alterations are against the law.
8. The penalty for not enforcing state, federal or local laws which were being broken in the course making alterations to a leased township property.” *Id.*

The GRC deemed that the complainant’s request items constituted requests for information, holding that:

“because the Complainant’s OPRA request Items No. 5 through No. 8 seek information rather than a specifically identifiable government record, the request items are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div.

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<sup>12</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>13</sup> As stated in Bent, *supra*.

2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)...” *Id.* at pg. 6.

In the instant complaint, the Complainant’s two (2) request Items No. 2 seek a website link. As in Ohlson, *supra*, such request items seek information and are thus invalid under OPRA.

Therefore, because request Items No. 2 of the Complainant’s February 17, 2010 and February 19, 2010 requests seek information rather than identifiable government records, the request items are invalid under OPRA pursuant to MAG, *supra*, Bent, *supra*, New Jersey Builders, *supra*, Schuler, *supra*, and Ohlson, *supra*. As such, the Custodian has not unlawfully denied access to the Complainant’s two (2) request items. N.J.S.A. 47:1A-6.

Request Items No. 1 and No. 3 through No. 6 of the Complainant’s February 17, 2010 OPRA and February 19, 2010 requests

The Complainant’s February 17, 2010 request sought “training materials” for tests given to individuals under suspicion of DWI (request Item No. 1), “documents” regarding policies for accommodating disabled persons in field sobriety tests (request Items No. 3, No. 4 and No. 5) and procedures for achieving certification or recognition as a DRE (request Item No. 6). The Complainant’s February 19, 2010 OPRA request sought training materials for DRE’s kept by NJSP and “documents” setting forth a “formal connection between NJSP and Internal Association of Chiefs of Police (“IACP”) for DRE’s” (request Items No. 1 and No. 3). The Complainant’s request also sought “written communications” from IACP to NJSP regarding DRE’s for a one year period, “documents” setting forth the standards for an NJSP officer to become a DRE and “documents” that set forth the procedures for same to achieve certification or recognition as a DRE (request Items No. 4, No. 5 and No. 6).

As discussed above, the Court has determined that a valid OPRA request should identify specific government records and that OPRA is not intended to be used “*as a research tool litigants may use to force government officials to identify and siphon useful information.*” MAG, *supra*. Moreover, “a proper request under OPRA must identify with reasonable clarity those documents that are desired...” Bent, *supra*. *See also* NJ Builders, *supra*, and Schuler, *supra*.

The Complainant’s OPRA request items at issue herein seek a generic class of records (training materials, documents and written communications) in most cases over a nonspecific time frame. The only exception is the Complainant’s request for written communications, which contains a time period of one (1) year. Each request would force the Custodian to research all of the records in his possession to determine which records pertained to each of the Complainant’s request items. The Custodian is not obligated to make a decision as to those records that may be responsive to each request item; rather, MAG, *supra*, requires that the Custodian provide specifically identifiable government records.

Therefore, because request Items No. 1 and Items No. 3 through No. 6 of the Complainant's February 17, 2010 and February 19, 2010 requests fail to specify identifiable government records, the request items are invalid under OPRA pursuant to MAG, supra, Bent, supra, New Jersey Builders, supra, and Schuler, supra. As such, the Custodian has not unlawfully denied access to the Complainant's ten (10) request items. N.J.S.A. 47:1A-6.

**Whether the Custodian's "deemed" denial 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's failure to respond in writing within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i. However, the Custodian lawfully denied access to the records responsive to the Complainant's February 17, 2010 and February 19, 2010 OPRA request Items No. 7 pursuant to N.J.A.C. 13:1E-3.2(a)1. Moreover, the Complainant's February 17, 2010 and February 19, 2010 request Items No. 1 through No.

6 are invalid under OPRA. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

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

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

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

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

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

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

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that “[a] plaintiff is considered a prevailing party ‘when actual relief on the merits of [the]

claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); see also Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

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

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



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

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 determining whether the Complainant is a prevailing party, the GRC acknowledges that the Custodian's failure to respond in writing in a timely manner resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, the Custodian lawfully denied access to the Complainant's February 17, 2010 and February 19, 2010 OPRA request Items No. 7. Moreover, the GRC has determined that the Complainant's remaining request items for both requests were invalid under OPRA because they failed to identify with specificity the records sought. Based on the foregoing, this complaint did not bring about any change in the Custodian's conduct. Thus the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee.

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*, a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian lawfully denied access to the Complainant's February 17, 2010 and February 19, 2010 OPRA request Items No. 7 pursuant to *N.J.A.C. 13:1E-3.2(a)1* and the Complainant's February 17, 2010 and February 19, 2010 request Items No. 1 through No. 6 are invalid under OPRA.

Further, the relief ultimately achieved did not have a basis in law. 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's failure to respond in writing to the Complainant's February 17, 2010 and February 19, 2010 OPRA requests 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 dated October 31, 2007).
2. Although the Custodian denied access to the training materials sought in the Complainant's February 17, 2010 and February 19, 2010 OPRA request Items No. 7 pursuant to *N.J.A.C. 13:1E-3.2(a)1* PRN 2002-2227, July 1, 2002, which was later invalidated by the Court in Slaughter v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010), the New Jersey Department of Law & Public Safety proposed new OPRA rules on November 1, 2010 that contain the same exemption for training materials. Further, Executive Order 47 allowed New Jersey Department of Law & Public Safety's proposed exemptions from public access to remain in full force and effect pending their adoption as final rules or until November 15, 2011. The proposed regulation was subsequently adopted as a new rule on December 5, 2011. Therefore, the Custodian lawfully denied access to the training materials responsive to the Complainant's February 17, 2010 and February 19, 2010 OPRA request Items No. 7 pursuant to *N.J.A.C. 13:1E-3.2(a)1*, which exempts access to "Standard Operating Procedures and training materials."
3. Because the Complainant's February 17, 2010 and February 19, 2010 request Items No. 2 seek information rather than identifiable government records, the request items are invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (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 of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008), and Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). As such, the Custodian has not unlawfully denied access to the Complainant's two (2) request items. N.J.S.A. 47:1A-6.
4. Because the Complainant's February 17, 2010 and February 19, 2010 request Items No. 1 and Items No. 3 though No. 6 fail to specify identifiable government records, the request items are invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375

N.J. Super. 534, 546 (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 of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008). As such, the Custodian has not unlawfully denied access to the Complainant's ten (10) request items. N.J.S.A. 47:1A-6.

5. The Custodian's failure to respond in writing within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, the Custodian lawfully denied access to the records responsive to the Complainant's February 17, 2010 and February 19, 2010 OPRA request Items No. 7 pursuant to *N.J.A.C.* 13:1E-3.2(a)1. Moreover, the Complainant's February 17, 2010 and February 19, 2010 request Items No. 1 through No. 6 are invalid under OPRA. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
  
6. 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), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian lawfully denied access to the Complainant's February 17, 2010 OPRA and February 19, 2010 OPRA request Items No. 7 pursuant to *N.J.A.C.* 13:1E-3.2(a)1 and the Complainant's February 17, 2010 and February 19, 2010 request Items No. 1 through No. 6 are invalid under OPRA. Further, the relief ultimately achieved did not have a basis in law. 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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Executive Director

January 24, 2012