



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

April 29, 2014 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint Nos.: 2011-114, 2011-115, 2011-116, 2011-117, 2011-118

v.

Borough of South Bound Brook
(Somerset)
Custodian of Record

At the April 29, 2014 public meeting, the Government Records Council (“Council”) considered the April 22, 2014 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 these complaints be dismissed. The Complainant (via Counsel) withdrew his complaints in a letter to the Honorable Robert W. Bingham, Administrative Law Judge, dated April 9, 2014, because the matters were settled. 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 29th Day of April, 2014

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: May 2, 2014



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 29, 2014 Council Meeting**

**Robert A. Verry¹
Complainant**

**GRC Complaint Nos. 2011-114, 2011-115,
2011-116, 2011-117
and 2011-118²**

v.

**Borough of South Bound Brook (Somerset)³
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. E-mails sent and/or received by the Custodian, Mr. Joseph Danielsen (“Mr. Danielsen”) and Network Blade, Inc., from January 1, 2007 to December 31, 2007, with the content or subject computer, computer services, system maintenance and/or network maintenance.⁴
2. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2008 to December 31, 2008 with the content or subject computer, computer services, system maintenance and/or network maintenance.⁵
3. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2009 to December 31, 2009 with the content or subject computer, computer services, system maintenance and/or network maintenance.⁶
4. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2010 to December 31, 2010 with the content or subject computer, computer services, system maintenance and/or network maintenance.⁷
5. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2011 to March 20, 2011 with the content or subject computer, computer services, system maintenance and/or network maintenance.⁸

Custodian of Record: Donald E. Kazar

Request Received by Custodian: March 20, 2011

Response Made by Custodian: March 28, 2011

GRC Complaint Received: April 13, 2011

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

² Due to the commonality of the parties and the issues herein, the GRC has consolidated these complaints for adjudication.

³ Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previous counsel was William T. Cooper III, Esq. (Somerville, NJ), who advised the GRC on May 6, 2011 that he no longer represents the Borough.

⁴ This OPRA request is the subject of GRC Complaint No. 2011-118.

⁵ This OPRA request is the subject of GRC Complaint No. 2011-117.

⁶ This OPRA request is the subject of GRC Complaint No. 2011-116.

⁷ This OPRA request is the subject of GRC Complaint No. 2011-115.

⁸ This OPRA request is the subject of GRC Complaint No. 2011-114.

Background

July 31, 2012 Council Meeting:

At its July 31, 2012 public meeting, the Council considered the July 24, 2012 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. Although the Custodian provided to the GRC his first (1st) certification on June 6, 2012, the GRC requested additional clarification regarding whether the Custodian complied with the Council's May 29, 2012 Interim Order because the Custodian's first (1st) certification was unclear as to whether he provided the responsive records to the Complainant per the Council's Order. Further, because the Custodian did not provide his second (2nd) certification clarifying that he provided the records on June 5, 2012 until after the last day to comply with the Order, the Custodian did not fully comply with said Order.
2. Although the Custodian failed to bear his burden of proving a lawful denial of access to the Complainant's five (5) OPRA requests pursuant to N.J.S.A. 47:1A-6, because said requests were valid pursuant to Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010) and the Custodian further failed to fully comply with the Council's May 29, 2012 Interim Order, the Custodian did provide access to the responsive records on June 5, 2012 and further certified that no records responsive to the first (1st) and second (2nd) OPRA requests existed. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's May 29, 2012 Interim Order, the Complainant has achieved "the desired result because the complaint[s] brought about a change (voluntary or otherwise) in the custodian's conduct." Id. at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of these five (5) Denial of Access Complaints and the relief ultimately achieved. Specifically, the Custodian provided access to e-mails responsive to the Complainant's third (3rd), fourth (4th) and fifth (5th) OPRA requests while certifying that no records responsive to the Complainant's first (1st) and second (2nd) OPRA requests existed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, and Mason. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ

Dep't of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Twp. of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Procedural History:

On August 3, 2012, the Council distributed its Interim Order to all parties. On April 22, 2013, the complaints were transmitted to the Office of Administrative Law.

On April 9, 2014, the Complainant's Counsel sent a letter to the Honorable Robert W. Bingham, Administrative Law Judge, withdrawing these complaints because same were settled.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that these complaints be dismissed. The Complainant (via Counsel) withdrew his complaints in a letter to the Honorable Robert W. Bingham, Administrative Law Judge, dated April 9, 2014, because the matters were settled. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

April 22, 2014



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

July 31, 2012 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint Nos. 2011-114, 2011-115,
2011-116, 2011-117 & 2011-118

v.

Borough of South Bound
Brook (Somerset)
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 2012 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. Although the Custodian provided to the GRC his first (1st) certification on June 6, 2012, the GRC requested additional clarification regarding whether the Custodian complied with the Council’s May 29, 2012 Interim Order because the Custodian’s first (1st) certification was unclear as to whether he provided the responsive records to the Complainant per the Council’s Order. Further, because the Custodian did not provide his second (2nd) certification clarifying that he provided the records on June 5, 2012 until after the last day to comply with the Order, the Custodian did not fully comply with said Order.
2. Although the Custodian failed to bear his burden of proving a lawful denial of access to the Complainant’s five (5) OPRA requests pursuant to N.J.S.A. 47:1A-6, because said requests were valid pursuant to Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010) and the Custodian further failed to fully comply with the Council’s May 29, 2012 Interim Order, the Custodian did provide access to the responsive records on June 5, 2012 and further certified that no records responsive to the first (1st) and second (2nd) OPRA requests existed. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's May 29, 2012 Interim Order, the Complainant has achieved "the desired result because the complaint[s] brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of these five (5) Denial of Access Complaints and the relief ultimately achieved. Specifically, the Custodian provided access to e-mails responsive to the Complainant's third (3rd), fourth (4th) and fifth (5th) OPRA requests while certifying that no records responsive to the Complainant's first (1st) and second (2nd) OPRA requests existed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 31st Day of July, 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: August 3, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry¹
Complainant**

**GRC Complaint No. 2011-114, 2011-115,
2011-116, 2011-117
& 2011-118²**

v.

**Borough of South Bound Brook (Somerset)³
Custodian of Records**

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4. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2010 to December 31, 2010 with the content or subject computer, computer services, system maintenance and/or network maintenance.⁷
5. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2011 to March 20, 2011 with the content or subject computer, computer services, system maintenance and/or network maintenance.⁸

Requests Made: March 20, 2011

Responses Made: March 28, 2011

Custodian: Donald E. Kazar

GRC Complaints Filed: April 13, 2011⁹

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

² Due to the commonality of the parties and the issues herein, the GRC has consolidated these complaints for adjudication.

³ Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previous counsel was William T. Cooper III, Esq. (Somerville, NJ), who advised the GRC on May 6, 2011 that he no longer represents the Borough.

⁴ This OPRA request is the subject of GRC Complaint No. 2011-118.

⁵ This OPRA request is the subject of GRC Complaint No. 2011-117.

⁶ This OPRA request is the subject of GRC Complaint No. 2011-116.

⁷ This OPRA request is the subject of GRC Complaint No. 2011-115.

⁸ This OPRA request is the subject of GRC Complaint No. 2011-114.

⁹ The GRC received the Denial of Access Complaint on said date.

Background

May 29, 2012

Government Records Council's ("Council") Interim Order. At its May 29, 2012 public meeting, the Council considered the May 22, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted, by a majority vote, to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Complainant's five (5) OPRA requests are valid OPRA requests for e-mails pursuant to Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). The Custodian's search for the responsive e-mails does not require research, but rather requires the Custodian to conduct a search of his e-mail account based on requisite information provided in order to locate the responsive records. *See* Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). Additionally, the Custodian failed to bear his burden of proving that his denial of access to said OPRA requests was lawful under OPRA. N.J.S.A. 47:1A-6. Thus, the Custodian must provide the Complainant access to the records responsive to each OPRA request. If records for a particular OPRA request do not exist, the Custodian shall certify to this fact.
2. **The Custodian shall comply with Item No. 1 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, if necessary, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁰ to the Executive Director.¹¹**
3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

May 30, 2012

Council's Interim Order distributed to the parties.

¹⁰ "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."

¹¹ 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.

June 5, 2012

E-mail from the Custodian's Counsel to the GRC. Counsel states that attached is the Custodian's certified confirmation of compliance. Counsel states that the Custodian sent the responsive records via mail on this date.

June 6, 2012

E-mail from the GRC to the Custodian's Counsel. The GRC states that it is in receipt of Counsel's June 5, 2012 e-mail; however, the e-mail had no attachment. The GRC requests that Counsel resend the Custodian's certification.

June 6, 2012

Custodian's response to the Council's Interim Order. The Custodian certifies that he received the Council's Interim Order on May 30, 2012. The Custodian certifies that said Order required him to search for and provide the e-mails responsive to the Complainant's five (5) OPRA requests. The Custodian certifies that he conducted a search for the e-mails and will be mailing same to the Complainant. The Custodian certifies that he must mail the records because of their voluminous nature.

The Custodian further certifies that no e-mails responsive to the Complainant's first (1st) and second (2nd) OPRA requests exist.

June 6, 2012

E-mail from the GRC to the Custodian's Counsel. The GRC states that it reviewed the Complainant's legal certification and found that it is unclear as to whether the Custodian actually sent the requested records to the Complainant. The GRC thus requests that the Custodian resubmit his certified confirmation of compliance to answer the following questions:

1. On what date did the Custodian send the responsive records to the Complainant?
2. How many records responsive existed and were provided?
3. Why the Custodian could not send the responsive records to the Complainant via his preferred method of delivery (either facsimile or e-mail)?

The GRC requests that the Custodian provide the requested certification, with any supporting documents by close of business on June 8, 2012.

June 6, 2012

E-mail from the Complainant to the GRC. The Complainant notes that he would still prefer to receive the records via his preferred method of delivery, which is facsimile or e-mail.

June 6, 2012

E-mail from the Custodian to the GRC. The Custodian states that he found 320 pages of e-mails responsive to the Complainant's OPRA requests. The Custodian states that he can only fax 20 pages at a time and that the e-mails are stored in different places on his computer; therefore, it would take hours to provide the records via the Complainant's preferred methods of delivery. The Custodian states that he mailed the

records on June 5, 2012 and was informed by the Postmaster that the Complainant regularly checks his PO Box.

The Complainant asserts that he did not know there was a requirement to provide the records via the Complainant's preferred method of delivery when complying with an Order of the Council. The Custodian further expresses concern that he will not be able to confirm whether the Complainant received all records if he faxed them. The Custodian states that he will be able to confirm the Complainant received the records because he sent them via certified mail.

June 7, 2012

Custodian's second (2nd) legal certification attaching a certified mail receipt dated June 6, 2012.

The Custodian certifies that he located 309¹² pages of records responsive and sent same to the Complainant via certified mail on June 5, 2012. The Custodian certifies that the Complainant received the records on June 6, 2012. The Custodian certifies that providing the records via facsimile would have taken hours because he can only send 20 pages at a time.

The Custodian further certifies that no e-mails responsive to the Complainant's first (1st) and second (2nd) OPRA requests exist.

Analysis

Whether the Custodian complied with the Council's May 29, 2012 Interim Order?

The Council's May 29, 2012 Interim Order required the Custodian to search his computer to locate the e-mails responsive to the Complainant's five (5) OPRA requests and provide same "... **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 Council further required the Custodian to certify if any records to a particular OPRA request do not exist.

On June 6, 2012, the last day to comply with the Council's Order, the Custodian submitted certified confirmation of compliance that he "... conducted a search for the e-mails and *will be mailing* same to the Complainant." (Emphasis added.). The Custodian further certified that no records responsive to the Complainant's first (1st) and second (2nd) OPRA requests exist. Based on the vagueness of the Custodian certification, the GRC requested from the Custodian a second (2nd) certification answering the following:

1. On what date did the Custodian send the responsive records to the Complainant?
2. How many records responsive existed and were provided?
3. Why the Custodian could not sent the responsive records to the Complainant via his preferred method of delivery (either facsimile or e-mail)?

¹² The number of pages that the Custodian certifies that he provided to the Complainant is 11 pages less than he originally indicated in his June 6, 2012 e-mail to the GRC.

The Custodian submitted same on June 7, 2012 certifying that he located a voluminous number of pages responsive to the request that would take hours to provide to the Complainant via the preferred method of delivery. The Custodian further certified that he sent the records to the Complainant on June 5, 2012 and received the certified mail receipt dated June 6, 2012, which proves the Complainant received the records. The Custodian finally again certified that no records responsive to the Complainant's first (1st) and second (2nd) OPRA requests exist.

Therefore, although the Custodian provided to the GRC his first (1st) certification on June 6, 2012, the GRC requested additional clarification regarding whether the Custodian complied with the Council's May 29, 2012 Interim Order because the Custodian's first (1st) certification was unclear as to whether he provided the responsive records to the Complainant per the Council's Order. Further, because the Custodian did not provide his second (2nd) certification clarifying that he provided the records on June 5, 2012 until after the last day to comply with the Order, the Custodian did not fully comply with said Order.

Finally, there is conflicting evidence in the record as to the manner in which the Custodian provided the records to the Complainant. The Complainant's original OPRA request identified the preferred method of delivery as via facsimile or e-mail. The Custodian, however, provided the responsive records to the Complainant via certified mail.¹³ Nevertheless, the GRC declines to order the Custodian to again provide the records via the Complainant's preferred method of delivery because the certified mail receipt serves as confirmation that the Complainant received the responsive records on June 6, 2012.

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

OPRA states that:

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

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

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

¹³ The GRC notes that its Interim Order did not specifically require that the Custodian provide the responsive records via the preferred method of delivery.
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2011-114, 2011-115, 2011-116, 2011-117 & 2011-118 – 5
Supplemental Findings and Recommendations of the Executive Director

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)).

Although the Custodian failed to bear his burden of proving a lawful denial of access to the Complainant's five (5) OPRA requests pursuant to N.J.S.A. 47:1A-6 because said requests were valid pursuant to Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010) and the Custodian further failed to fully comply with the Council's May 29, 2012 Interim Order, the Custodian did provide access to the responsive records on June 5, 2012 and further certified that no records responsive to the first (1st) and second (2nd) OPRA requests existed. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were 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 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), *cert. 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)."

The Complainant here did not specifically request that the GRC determine whether he is a prevailing party entitled to reasonable attorney's fees. However, based on the Court's specific language in Mason, *supra*, a complainant need not request that the Council determine whether he/she is a prevailing party entitled to reasonable attorney's fees because N.J.S.A. 47:1A-6 is not permissive; rather, it is mandatory. The Council must, therefore, determine whether the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

The Complainant filed these complaints arguing that his five (5) OPRA requests were not broad and unclear pursuant to Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010)(citing Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (March 2010)) because they contained a specific date range, content and/or subject, sender and recipient.

In its May 29, 2012 Interim Order, the Council determined that the Complainant's five (5) OPRA requests were valid and consistent with its holding in Elcavage, supra. Thus, the Council ordered the Custodian to provide all records responsive to the Complainant's five (5) OPRA requests or to certify if records responsive to a particular OPRA request do not exist. The Custodian provided two (2) legal certifications on June 6, 2012 and June 7, 2012 certifying that he sent to the Complainant the e-mails responsive to the Complainant's third (3rd), fourth (4th) and fifth (5th) OPRA requests via certified mail and further certifying that no records for the Complainant's first (1st) and second (2nd) OPRA requests exist. Thus, the Complainant is a prevailing party because the filing of these complaints brought about a change in the Custodian's conduct.

Pursuant to Teeters, supra, and the Council's May 29, 2012 Interim Order, the Complainant has achieved "the desired result because the complaint[s] brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, supra, a factual causal nexus exists between the Complainant's filing of these five (5) Denial of Access Complaints and the relief ultimately achieved. Specifically, the Custodian provided access to e-mails responsive to the Complainant's third (3rd), fourth (4th) and fifth (5th) OPRA requests while certifying that no records responsive to the Complainant's first (1st) and second (2nd) OPRA requests existed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian provided to the GRC his first (1st) certification on June 6, 2012, the GRC requested additional clarification regarding whether the Custodian complied with the Council's May 29, 2012 Interim Order because the Custodian's first (1st) certification was unclear as to whether he provided the responsive records to the Complainant per the Council's Order.

Further, because the Custodian did not provide his second (2nd) certification clarifying that he provided the records on June 5, 2012 until after the last day to comply with the Order, the Custodian did not fully comply with said Order.

2. Although the Custodian failed to bear his burden of proving a lawful denial of access to the Complainant's five (5) OPRA requests pursuant to N.J.S.A. 47:1A-6, because said requests were valid pursuant to Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010) and the Custodian further failed to fully comply with the Council's May 29, 2012 Interim Order, the Custodian did provide access to the responsive records on June 5, 2012 and further certified that no records responsive to the first (1st) and second (2nd) OPRA requests existed. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's May 29, 2012 Interim Order, the Complainant has achieved "the desired result because the complaint[s] brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of these five (5) Denial of Access Complaints and the relief ultimately achieved. Specifically, the Custodian provided access to e-mails responsive to the Complainant's third (3rd), fourth (4th) and fifth (5th) OPRA requests while certifying that no records responsive to the Complainant's first (1st) and second (2nd) OPRA requests existed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

May 29, 2012 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint Nos. 2011-114, 2011-115, 2011116,
2011-117, 2011-118

v.

Borough of South Bound Brook
(Somerset)
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council ("Council") considered the May 22, 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 Complainant's five (5) OPRA requests are valid OPRA requests for e-mails pursuant to Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). The Custodian's search for the responsive e-mails does not require research, but rather requires the Custodian to conduct a search of his e-mail account based on requisite information provided in order to locate the responsive records. *See Donato v. Township of Union*, GRC Complaint No. 2005-182 (February 2007). Additionally, the Custodian failed to bear his burden of proving that his denial of access to said OPRA requests was lawful under OPRA. N.J.S.A. 47:1A-6. Thus, the Custodian must provide the Complainant access to the records responsive to each OPRA request. If records for a particular OPRA request do not exist, the Custodian shall certify to this fact.
2. **The Custodian shall comply with Item No. 1 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, if necessary, 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.

3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of May, 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: May 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 29, 2012 Council Meeting**

**Robert A. Verry¹
Complainant**

**GRC Complaint No. 2011-114, 2011-115,
2011-116, 2011-117
& 2011-118²**

v.

**Borough of South Bound Brook (Somerset)³
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. E-mails sent and/or received by the Custodian, Mr. Joseph Danielsen (“Mr. Danielsen”) and Network Blade, Inc., from January 1, 2007 to December 31, 2007, with the content or subject computer, computer services, system maintenance and/or network maintenance.⁴
2. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2008 to December 31, 2008 with the content or subject computer, computer services, system maintenance and/or network maintenance.⁵
3. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2009 to December 31, 2009 with the content or subject computer, computer services, system maintenance and/or network maintenance.⁶
4. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2010 to December 31, 2010 with the content or subject computer, computer services, system maintenance and/or network maintenance.⁷
5. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2011 to March 20, 2011 with the content or subject computer, computer services, system maintenance and/or network maintenance.⁸

Requests Made: March 20, 2011

Responses Made: March 28, 2011

Custodian: Donald E. Kazar

GRC Complaints Filed: April 13, 2011⁹

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

² Due to the commonality of the parties and the issues herein, the GRC has consolidated these complaints for adjudication.

³ Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previous counsel was William T. Cooper III, Esq. (Somerville, NJ), who advised the GRC on May 6, 2011 that he no longer represents the Borough.

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

⁵ This OPRA request is the subject of GRC Complaint No. 2011-118.

⁶ This OPRA request is the subject of GRC Complaint No. 2011-117.

⁷ This OPRA request is the subject of GRC Complaint No. 2011-116.

⁸ This OPRA request is the subject of GRC Complaint No. 2011-115.

⁹ This OPRA request is the subject of GRC Complaint No. 2011-114.

⁹ The GRC received the Denial of Access Complaint on said date.

Background

March 20, 2011¹⁰

Complainant's five (5) Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to the complaints listed above on five (5) official OPRA request forms. The Complainant indicates that the preferred method of delivery is either via facsimile or electronically.

The Complainant further notes that he is aware that the Borough of South Bound Brook ("Borough") uses Microsoft Outlook® and that the Custodian can easily conduct a search for the responsive e-mails.

March 28, 2011

Custodian's response to OPRA request No. 4. On behalf of the Custodian, previous Counsel responds in writing via e-mail to the Complainant's OPRA request No. 4 on the fifth (5th) business day following receipt of such request.¹¹ Counsel states that 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-1.1." MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). Counsel states that 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." *Id.* at 549.

Counsel states that in determining that MAG'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.*

¹⁰ March 20, 2011 was a Sunday.

¹¹ The Custodian certifies in the Statement of Information that he received the Complainant's OPRA request on March 21, 2011.

Counsel further states that in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), the Superior Court references MAG in holding that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” Counsel states that the Court further held that “[a]s 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.”

Counsel states that 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...” Counsel states that the Court also quoted N.J.S.A. 47:1A-5.g: “[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.” Counsel states that 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...”

Counsel states that in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the Council held that “[b]ecause the Complainant’s OPRA requests [Items 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] and [Bent].”

Counsel states that in accordance with this case law, the Complainant’s OPRA request No. 4 is denied. Counsel states that the request asks the Custodian to perform a “search” of all e-mails. Counsel states that the content or subject of the responsive e-mails, the date ranges and the identity of the sender and/or recipient are overly broad and do not identify the specific records sought by the Complainant.

March 30, 2011¹²

E-mail from the Custodian to the Complainant. The Custodian states that previous Counsel’s March 28, 2011 e-mail should be construed as the Borough’s response for all five (5) of the Complainant’s OPRA requests.

April 13, 2011

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

- Complainant’s five (5) OPRA requests dated March 20, 2011.
- Five (5) e-mails from previous Counsel to the Complainant dated March 28, 2011.

The Complainant states that he submitted five (5) OPRA requests to the Custodian on March 21, 2011. The Complainant states that he noted in his OPRA

¹² The GRC received this e-mail as part of the Custodian’s May 8, 2012 legal certification.

requests that he knows the Borough uses Microsoft Outlook® and that the Custodian could easily conduct a search for the responsive e-mails.

The Complainant states that previous Counsel responded in writing via e-mail on March 28, 2011 denying access to the Complainant's OPRA requests and stating that same were overly broad.

The Complainant states that in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124, the Council held that "... an OPRA request for an e-mail or e-mails shall therefore focus upon the following four (4) characteristics: (1) Content and/or subject (2) Specific date or range of dates (3) Sender and (4) Recipient." *Id.* (citing Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (March 2010)). The Complainant argues that his OPRA requests were not overly broad because they contained a specific date range, content and/or subject, sender and recipient.

The Complainant does not agree to mediate this complaint.

May 26, 2011

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

June 1, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until June 10, 2011 to submit the SOI's.

June 2, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until June 10, 2011 to submit the SOI's.

June 9, 2011

Custodian's SOI with the following attachments:

- Complainant's five (5) Denial of Access Complaints dated April 13, 2011.
- Letter from the GRC to the Custodian dated May 26, 2011.

The Custodian certifies that no records responsive to the Complainant's five (5) OPRA requests were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management because said records must be retained permanently. The Custodian further notes that as the GRC is aware from past complaints, some records responsive may not exist because the Borough's server was permanently damaged at some point in 2009.¹³

The Custodian certifies that he received the Complainant's five (5) OPRA requests on March 21, 2011. The Custodian certifies that four (4) of the five (5) requests

¹³ The Custodian did not certify to the search undertaken to locate the records responsive as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2011-114, 2011-115, 2011-116, 2011-117 & 2011-118 – 4
Findings and Recommendations of the Executive Director

sought e-mails over a one (1) year time period and the last sought e-mails for a three (3) month time period. The Custodian certifies that the Complainant included a very broad set of four (4) subject/content terms and speculated as to Mr. Danielsen's e-mail address.

The Custodian certifies that previous Counsel responded to the Complainant's OPRA requests on March 28, 2011 stating that said requests were overly broad.

The Custodian argues that he provided no records to the Complainant based on the advice of previous Counsel. The Custodian further argues that the Borough properly denied access to the Complainant's OPRA requests. The Custodian argues that based on the Complainant's own admission in his OPRA requests, the Custodian would be required to "search" all mail items to locate the responsive records.

August 1, 2011

Complainant's legal certification with the following attachments:

- Complainant's OPRA request dated February 18, 2011.
- E-mail from previous Counsel to the Complainant February 22, 2011.

The Complainant certifies that the attached evidence proves that previous Counsel was willing to disclose e-mails in response to an OPRA request in which the Complainant sought thirteen (13) months' worth of e-mails regarding OPRA between the Custodian, previous Counsel and current Counsel.

The Complainant contends that Custodian now argues in the SOI that a request for twelve (12) months of e-mails constitutes an invalid OPRA request. The Complainant further contends that previous Counsel was prepared to disclose all e-mails with no e-mail address present, yet the Custodian defends previous Counsel's denial because of the addition of a "possible" e-mail address.

The Complainant finally certifies that the Custodian was required to "search all mail items" in response to the February 18, 2011 OPRA request and should still be able to do the same regarding the OPRA requests at issue herein. The Complainant contends that now the Custodian uses that same phrase to argue that the OPRA requests are invalid.

April 27, 2012

Letter from the GRC to the Custodian. The GRC states that its regulations provide that "[t]he Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint." *N.J.A.C. 5:105-2.4(1)*. The GRC states that it has reviewed the parties' submissions and has determined that additional information is required.

The GRC states that the Complainant submitted the five (5) subject OPRA requests on March 20, 2011 seeking the following:

1. E-mails sent and/or received by the Custodian, [Mr. Danielsen] and Network Blade, Inc., from January 1, 2007 to December 31, 2007, with the content or subject computer, computer services, system maintenance and/or network maintenance.
2. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2008 to December 31, 2008 with the content or subject computer, computer services, system maintenance and/or network maintenance.
3. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2009 to December 31, 2009 with the content or subject computer, computer services, system maintenance and/or network maintenance.
4. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2010 to December 31, 2010 with the content or subject computer, computer services, system maintenance and/or network maintenance.
5. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2011 to March 20, 2011 with the content or subject computer, computer services, system maintenance and/or network maintenance.

The GRC states that the Complainant included as part of each Denial of Access Complaint a response from previous Counsel; however, each complaint contains the same response regarding the Complainant's fourth (4th) OPRA request.

The GRC thus requests a legal certification, pursuant to N.J. Court Rule 1:4-4, in response to the following question: Whether previous Counsel responded individually to each OPRA request at issue herein? If so, please provide said responses.

The GRC requests that the Custodian provide the requested legal certification by close of business on May 2, 2012. The GRC notes that submissions received after this deadline date may not be considered by the Council for adjudication.

May 8, 2012

Custodian's legal certification attaching the following:

- E-mail from previous Counsel to the Complainant dated March 28, 2011.
- E-mail from the Custodian to the Complainant dated March 30, 2011.

The Custodian certifies that previous Counsel responded to the Complainant's five (5) OPRA requests on March 28, 2011; however, Counsel only identified one (1) of the five (5) OPRA requests in said response. The Custodian certifies that in order to clarify Counsel's response, he e-mailed the Complainant on March 30, 2011 advising that the response applied to all five (5) OPRA requests.

The Custodian certifies that although previous Counsel did not respond to each OPRA request individually in light of the obvious redundancy, he clarified said response shortly thereafter. The Custodian further certifies that the Complainant received both e-mails within the statutorily mandated seven (7) business days.

Analysis

Whether the Complainant's five (5) OPRA requests are invalid 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.

Each of the Complainant's five (5) OPRA requests at issue herein sought "e-mails" for a one (1) year period with the exception of one (1) OPRA request, which sought e-mails for approximately three (3) months. The Complainant's OPRA requests further included the following search terms: "computer, computer services, system maintenance and/or network maintenance." Finally, the Complainant's OPRA requests identified the Custodian, Mr. Danielsen and Network Blade, Inc. as the recipients and/or senders.

Previous Counsel responded denying access to the Complainant's OPRA requests as invalid; thus, the GRC must determine whether said requests are invalid under OPRA.

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). As the Court noted in invalidating MAG's request under OPRA:

"Most 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.* 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.*

In addition, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹⁴ 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."¹⁵

Moreover, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the Court enumerated the responsibilities of a custodian and a requestor as follows:

"OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). *Research is not among the custodian's responsibilities.*" (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

¹⁴ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁵ As stated in Bent, *supra*.

Moreover, 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..." Accordingly, the test under MAG then, is whether a requested record is a *specifically identifiable* government record.

Under such rationale, the GRC has repeatedly found that blanket requests are not valid OPRA requests. In the matter of Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the relevant part of the Complainant's request sought:

- Item No. 2: "From the Borough Engineer's files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 3: From the Borough Engineer's files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
- Item No. 4: From the Borough Attorney's files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 5: From the Borough Attorney's files: all documents related to the development or modification to North Street, to the south and east of Wilson St."

In reviewing the complainant's request, the Council found that "[b]ecause the Complainant's OPRA requests [Items 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)."

However, the GRC has established criteria deemed necessary to specifically identify an e-mail communication in Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). In Elcavage, the Council determined that "[i]n accordance with MAG, *supra*, and its progeny, in order to specifically identify an e-mail the OPRA request must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) identification of the sender and/or the recipient thereof." *Id.*

The Complainant's five (5) OPRA requests at issue herein sought the following:

1. E-mails sent and/or received by the Custodian, [Mr. Danielsen] and Network Blade, Inc., from January 1, 2007 to December 31, 2007, with the content or subject computer, computer services, system maintenance and/or network maintenance.
2. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2008 to December 31, 2008 with the content or subject computer, computer services, system maintenance and/or network maintenance.
3. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2009 to December 31, 2009 with the content or subject computer, computer services, system maintenance and/or network maintenance.
4. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2010 to December 31, 2010 with the content or subject computer, computer services, system maintenance and/or network maintenance.
5. E-mails sent and/or received by the Custodian, Mr. Danielsen and Network Blade, Inc., from January 1, 2011 to March 20, 2011 with the content or subject computer, computer services, system maintenance and/or network maintenance.

A review of the Complainant's OPRA requests show that said requests conform to the tenets of a request for e-mail communications set forth in Elcavage. Specifically, the requests seek e-mails over a specific range of dates and include the content or subject terms "computer, computer services, system maintenance and/or network maintenance." Further, the Complainant identified three parties as the senders/receivers: the Custodian, Mr. Danielsen and Network Blade, LLC.

Additionally, the Custodian argued in the SOI that the Complainant's OPRA requests would require him to "search" all e-mail items to locate the responsive records. In Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG, *supra*, a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

"[p]ursuant to [MAG], the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as 'to go or look through carefully in order to find something missing or lost.' The word *research*, on the other hand, means 'a close and careful study to find new facts or information.'" (Footnotes omitted.) *Id.*

Thus, the Custodian herein is obligated to search for identifiable government records pursuant to Donato, which is exactly what he argues in the SOI that the OPRA requests would force him to do. The Complainant's five (5) OPRA requests supply the requisite information required under Elcavage and require the Custodian to perform a search for e-mails responsive to said requests based on this information.

Therefore, the Complainant's five (5) OPRA requests are valid OPRA requests for e-mails pursuant to Elcavage, *supra*. The Custodian's search for the responsive e-mails does not require research, but rather requires the Custodian to conduct a search of his e-mail account based on the requisite information provided in order to locate the responsive records. *See Donato*. Additionally, the Custodian failed to bear his burden of proving that his denial of access to said OPRA requests was lawful under OPRA. N.J.S.A. 47:1A-6. Thus, the Custodian must provide the Complainant access to the records responsive to each OPRA request. If records for a particular OPRA request do not exist, the Custodian shall certify to this fact.

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

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

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant's five (5) OPRA requests are valid OPRA requests for e-mails pursuant to Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). The Custodian's search for the responsive e-mails does not require research, but rather requires the Custodian to conduct a search of his e-mail account based on requisite information provided in order to locate the responsive records. *See Donato v. Township of Union*, GRC Complaint No. 2005-182 (February 2007). Additionally, the Custodian failed to bear his burden of proving that his denial of access to said OPRA requests was lawful under OPRA. N.J.S.A. 47:1A-6. Thus, the Custodian must provide the Complainant access to the records responsive to each OPRA request. If records for a particular OPRA request do not exist, the Custodian shall certify to this fact.
2. **The Custodian shall comply with Item No. 1 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, if necessary, and simultaneously**

provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁶ to the Executive Director.¹⁷

3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 22, 2012

¹⁶ "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."

¹⁷ 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.