



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 No.: 2011-119

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 this complaint be dismissed. The Complainant (via Counsel) withdrew his complaint in a letter to the Honorable Robert W. Bingham, Administrative Law Judge, dated April 9, 2014, because this matter 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 29<sup>th</sup> 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. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-119**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of the following highlighted records as referenced in an attached invoice dated March 3, 2011 from Cooper & Cooper:

1. January 26, 2011 entry – “... e-mail from [the Complainant’s Counsel] ...”
2. January 28, 2011 entry – “... e-mail from [the Complainant’s Counsel] regarding adjournment of Case Management Conf.”
3. January 28, 2011 entry – “... e-mail from R. McGowan regarding PILOT Agreement.”
4. January 31, 2011 entry – “... FIA correspondence ...”
5. February 1, 2011 entry – “... e-mail from Bob Heugle regarding FIA’s position and materials they will provide.”
6. February 2, 2011 entry – “... scheduling notice for 3/18/11 before Judge Kumpf in Somerville at 2:00 p.m.”
7. February 4, 2011 entry – “... decisions from DCA regarding anonymous complaints for various officials ...”
8. February 4, 2011 entry – “... e-mail from [the Custodian] regarding GRC advisory.”
9. February 8, 2011 entry – “... correspondence from A. Crus, Esq. regarding drafting of sign ordinance.”
10. February 8, 2011 entry – “... correspondence from [the Custodian’s Counsel] regarding pending litigation.”
11. February 8, 2011 entry – “... correspondence from Judge Ciccone, A.J.S.C. regarding Paff v. South Bound Brook.”
12. February 13, 2011 entry – “... correspondence from Barry Sirota, Esq. regarding Developer’s Agreement.”
13. February 14, 2011 entry – “... correspondence from Barry Sirota, Esq.”
14. February 14, 2011 entry – “... e-mail from M. Calafati concerning Staats project.”
15. February 24, 2011 entry – “... materials from Bob McGowan concerning escrow held by Borough on Town & Country Project.”
16. February 28, 2011 entry – “... correspondence from Barry Sirota, Esq. regarding Escrow Account.”

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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 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 represented the Borough.

17. February 28, 2011 entry – “... preliminary investigation reports from DCA ...”
18. February 28, 2011 entry – “... materials from Randy Bahr and [the Custodian].”
19. March 1, 2011 entry – “... draft response ... to DCA...”
20. March 2, 2011 entry – “... materials from Councilperson Michele Duh regarding Nepotism Policy ...”

**Custodian of Record:** Donald E. Kazar

**Request Received by Custodian:** March 18, 2011

**Response Made by Custodian:** March 28, 2011

**GRC Complaint Received:** April 13, 2011

### Background

#### August 28, 2012 Council Meeting:

At its August 28, 2012 public meeting, the Council considered the August 21, 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. The Custodian timely complied with the Council’s July 31, 2012 Interim Order by providing the Complainant access to the requested record via e-mail and providing certified confirmation to the GRC within the extended time frame to comply.
2. Although the Custodian unlawfully denied access to the scheduling notice responsive to the Complainant’s OPRA request Item No. 6, the remainder of the Complainant’s request is invalid under OPRA pursuant to MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010) *and* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). Moreover, the Custodian timely complied with the Council’s July 31, 2012 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the

Custodian provided the Complainant with the responsive scheduling notice in accordance with the Council's July 31, 2012 Interim Order. 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 30, 2012, the Council distributed its Interim Order to all parties. On April 22, 2013, the complaint was 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 this complaint because same was settled.

#### Analysis

No analysis required.

#### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed. The Complainant (via Counsel) withdrew his complaint in a letter to the Honorable Robert W. Bingham, Administrative Law Judge, dated April 9, 2014, because this matter 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

August 28, 2012 Government Records Council Meeting

Robert A. Verry  
Complainant

Complaint No. 2011-119

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 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. The Custodian timely complied with the Council’s July 31, 2012 Interim Order by providing the Complainant access to the requested record via e-mail and providing certified confirmation to the GRC within the extended time frame to comply.
2. Although the Custodian unlawfully denied access to the scheduling notice responsive to the Complainant’s OPRA request Item No. 6, the remainder of the Complainant’s request is 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 on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010) *and* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). Moreover, the Custodian timely complied with the Council’s July 31, 2012 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a



Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the Complainant with the responsive scheduling notice in accordance with the Council's July 31, 2012 Interim Order. 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 28<sup>th</sup> Day of August, 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 30, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-119**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of the following highlighted records as referenced in an attached invoice dated March 3, 2011 from Cooper & Cooper:

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

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16. February 28, 2011 entry – “... correspondence from Barry Sirota, Esq. regarding Escrow Account.”
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19. March 1, 2011 entry – “... draft response ... to DCA...”
20. March 2, 2011 entry – “... materials from Councilperson Michele Duh regarding Nepotism Policy ...”

**Request Made:** March 18, 2011

**Response Made:** March 28, 2011

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** April 13, 2011<sup>3</sup>

### Background

#### **July 31, 2012**

Government Records Council’s (“Council”) Interim Order. At its July 31, 2012 public meeting, the Council considered the July 24, 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 request items Nos. 1, 2, 3, 5, 8 and 14 are invalid under OPRA because they fail to identify specific dates or ranges of dates for the responsive e-mails and because the request items require research beyond the scope of a custodian’s duties pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 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 on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010).
2. Because the Complainant’s request items Nos. 4, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19 and 20 fail to identify with reasonable clarity the specific government records sought, these 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 on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012).

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



3. The Custodian has unlawfully denied access to the requested “scheduling notice” pursuant to N.J.S.A. 47:1A-6 and must disclose same to the Complainant.
4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup>**
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

**August 3, 2012**

Council’s Interim Order (“Order”) distributed to the parties.

**August 10, 2012**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until August 17, 2012 to submit certified compliance of the Council’s Interim Order to the Executive Director.

**August 10, 2012**

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until August 17, 2012 to submit certified compliance of the Council’s Interim Order to the Executive Director.

**August 17, 2012**

Custodian’s response to the Council’s Interim Order attaching the responsive scheduling notice. The Custodian certifies that the Council has ordered him to provide to the Complainant a copy of the scheduling notice responsive to Item No. 6 of the Complainant’s OPRA request. The Custodian certifies that he has enclosed the scheduling notice and is in compliance of the Council’s July 31, 2012 Order.<sup>6</sup>

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<sup>4</sup> "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."

<sup>5</sup> 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.

<sup>6</sup> The Complainant and Complainant’s Counsel were copied on the e-mail attaching the Custodian’s certification and copy of the scheduling notice.

## Analysis

### **Whether the Custodian complied with the Council's July 31, 2012 Interim Order?**

At its July 31, 2012 meeting, the Council ordered the Custodian to:

**"... disclose [the responsive scheduling notice] to the Complainant. The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director."** (Footnotes omitted.)

The Council disseminated its Interim Order to the parties on August 3, 2012. Thus, the Custodian's response was due by close of business on August 10, 2012.

On August 10, 2012, the Custodian requested an extension of time until August 17, 2012 to comply with the Council's Order: the GRC granted said extension. Thereafter on August 17, 2012, the Custodian provided certified confirmation of compliance to the Executive Director that he forwarded the responsive scheduling notice to the Complainant and Complainant's Counsel via e-mail on August 17, 2012.

Therefore, the Custodian timely complied with the Council's July 31, 2012 Interim Order by providing the Complainant access to the requested record via e-mail and providing certified confirmation to the GRC within the extended time frame to comply.

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

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully denied access to the scheduling notice responsive to the Complainant's OPRA request Item No. 6, the remainder of the Complainant's request is 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 on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010) *and* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). Moreover, the Custodian timely complied with the Council's July 31, 2012 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 (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), *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 filed this complaint on April 13, 2011 contending that his OPRA request was not overly broad or unclear because said request sought "e-mail," "correspondence," "scheduling notice," "decisions," "materials," "preliminary investigation reports" and "responses" which are expressly referenced in the Cooper &

Cooper March 3, 2011 invoice and are clearly identifiable government records. The Council determined that all request items but the Complainant's OPRA request Item No. 6 were overly broad and thus invalid under OPRA. The Council further ordered the Custodian in its July 31, 2012 Order to provide to the Complainant the scheduling notice responsive to the Complainant's OPRA request Item No. 6. The Custodian submitted certified confirmation of compliance on August 17, 2012 certifying that he provided the responsive notice to the Complainant and Complainant's Counsel on August 17, 2012. Therefore, the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Pursuant to Teeters, *supra*, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the Complainant with the responsive scheduling notice in accordance with the Council's July 31, 2012 Interim Order. 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. The Custodian timely complied with the Council's July 31, 2012 Interim Order by providing the Complainant access to the requested record via e-mail and providing certified confirmation to the GRC within the extended time frame to comply.
2. Although the Custodian unlawfully denied access to the scheduling notice responsive to the Complainant's OPRA request Item No. 6, the remainder of the Complainant's request is 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 on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Elcavage v. West Milford Township (Passaic),

GRC Complaint No. 2009-07 (April 8, 2010) *and Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). Moreover, the Custodian timely complied with the Council's July 31, 2012 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the Complainant with the responsive scheduling notice in accordance with the Council's July 31, 2012 Interim Order. 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

August 21, 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  
Commissioner

INTERIM ORDER

July 31, 2012 Government Records Council Meeting

Robert A. Verry  
Complainant

Complaint No. 2011-119

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 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 request items Nos. 1, 2, 3, 5, 8 and 14 are invalid under OPRA because they fail to identify specific dates or ranges of dates for the responsive e-mails and because the request items require research beyond the scope of a custodian’s duties pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 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 on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010).
2. Because the Complainant’s request items Nos. 4, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19 and 20 fail to identify with reasonable clarity the specific government records sought, these 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 on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012).
3. The Custodian has unlawfully denied access to the requested “scheduling notice” pursuant to N.J.S.A. 47:1A-6 and must disclose same to the Complainant.
4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions,**

**including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

5. 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.
6. 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 31<sup>st</sup> 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**

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<sup>1</sup> "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."

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-119**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of the following highlighted records as referenced in an attached invoice dated March 3, 2011 from Cooper & Cooper:

1. January 26, 2011 entry – “... e-mail from [the Complainant’s Counsel] ...”
2. January 28, 2011 entry – “... e-mail from [the Complainant’s Counsel] regarding adjournment of Case Management Conf.”
3. January 28, 2011 entry – “... e-mail from R. McGowan regarding PILOT Agreement.”
4. January 31, 2011 entry – “... FIA correspondence ...”
5. February 1, 2011 entry – “... e-mail from Bob Heugle regarding FIA’s position and materials they will provide.”
6. February 2, 2011 entry – “... scheduling notice for 3/18/11 before Judge Kumpf in Somerville at 2:00 p.m.”
7. February 4, 2011 entry – “... decisions from DCA regarding anonymous complaints for various officials ...”
8. February 4, 2011 entry – “... e-mail from [the Custodian] regarding GRC advisory.”
9. February 8, 2011 entry – “... correspondence from A. Crus, Esq. regarding drafting of sign ordinance.”
10. February 8, 2011 entry – “... correspondence from [the Custodian’s Counsel] regarding pending litigation.”
11. February 8, 2011 entry – “... correspondence from Judge Ciccone, A.J.S.C. regarding Paff v. South Bound Brook.”
12. February 13, 2011 entry – “... correspondence from Barry Sirota, Esq. regarding Developer’s Agreement.”
13. February 14, 2011 entry – “... correspondence from Barry Sirota, Esq.”
14. February 14, 2011 entry – “... e-mail from M. Calafati concerning Staats project.”
15. February 24, 2011 entry – “... materials from Bob McGowan concerning escrow held by Borough on Town & Country Project.”

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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 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 represented the Borough. Robert A. Verry v. Borough of South Bound Brook (Somerset), 2011-119 – Findings and Recommendations of the Executive Director

16. February 28, 2011 entry – “... correspondence from Barry Sirota, Esq. regarding Escrow Account.”
17. February 28, 2011 entry – “... preliminary investigation reports from DCA ...”
18. February 28, 2011 entry – “... materials from Randy Bahr and [the Custodian].”
19. March 1, 2011 entry – “... draft response ... to DCA...”
20. March 2, 2011 entry – “... materials from Councilperson Michele Duh regarding Nepotism Policy ...”

**Request Made:** March 18, 2011

**Response Made:** March 28, 2011

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** April 13, 2011<sup>3</sup>

### Background

#### **March 18, 2011**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that the preferred method of delivery is either e-mail or facsimile.

#### **March 28, 2011**

Custodian’s response to the OPRA request. On behalf of the Custodian, previous Counsel responds in writing via e-mail to the Complainant’s OPRA request on the fifth (5<sup>th</sup>) business day following receipt of such request.<sup>4</sup> Counsel states that a valid OPRA request seeks specific, identifiable government records and does not ask questions or seek information and does not require a custodian to conduct research or create a new record.

Counsel states that the Complainant’s OPRA request seeks information or asks questions and does not identify a specific government record. Counsel states that as such, the Complainant’s OPRA request is invalid under OPRA pursuant to New Jersey Builders Assoc. v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and therefore denied.

#### **April 13, 2011**

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

- Complainant’s OPRA request dated March 18, 2011 attaching an invoice from Cooper & Cooper dated March 3, 2011.
- E-mail from previous Counsel to the Complainant dated March 28, 2011.

The Complainant states that he submitted an OPRA request to the Borough of South Bound Brook (“Borough”) on March 18, 2011. The Complainant states that he attached to the request a copy of the relevant invoice dated March 3, 2011 from Cooper

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

<sup>4</sup> The Custodian certifies in the SOI that he received the Complainant’s OPRA request on March 21, 2011. Robert A. Verry v. Borough of South Bound Brook (Somerset), 2011-119 – Findings and Recommendations of the Executive Director

& Cooper highlighting the exact records sought, thus providing the Custodian an easy reference guide to identify the precise records responsive.

The Complainant states that previous Counsel responded in writing on March 28, 2011 denying access to the Complainant's OPRA request stating that said request was invalid. The Complainant notes that Counsel confirmed that he received the highlighted invoice. The Complainant states that "e-mail," "correspondence," "scheduling notice," "decisions," "materials," "preliminary investigation reports" and "responses" are expressly referenced in the invoice and are clearly identifiable government records.

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.

**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.

**June 9, 2011**

Custodian's SOI with the following attachments:

- Complainant's Denial of Access Complaint 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 Records Management Services because said records must be retained permanently. The Custodian notes, however, that the Borough did not physically possess any of the responsive records.<sup>5</sup>

The Custodian certifies that he received the Complainant's OPRA request on March 21, 2011. The Custodian certifies that the OPRA request sought "e-mails, correspondence, scheduling notices, decisions, materials, preliminary investigation reports and responses..." with no specific dates and broad terms of content.

The Custodian certifies that previous Counsel responded in writing via e-mail on March 28, 2011 denying access to the Complainant's OPRA request stating that said request is invalid.

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<sup>5</sup> 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), 2011-119 – Findings and Recommendations of the Executive Director 3

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 request.

### Analysis

#### **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 ... The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

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

The Complainant's OPRA request at issue herein sought "e-mail," "correspondence," "scheduling notice," "decisions," "materials," "preliminary investigation reports" and "responses" as highlighted on an invoice dated March 3, 2011 from Cooper & Cooper. Previous Counsel responded denying access to all of the Complainant's OPRA request items as invalid; thus, the GRC must determine whether said request items 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),<sup>6</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>7</sup>

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).

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

<sup>7</sup> As stated in Bent, *supra*.

*Research is not among the custodian's responsibilities.”* (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

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).”

The Complainant’s request items Nos. 1, 2, 3, 5, 8 and 14 sought “e-mail.” With the exception of request Item No. 1, the requests for e-mails contained a sender and the content or subject matter. However, each request item did not contain a date or time frame other than the date of the entry on the invoice. These entry dates are not necessarily the dates of the e-mails sought. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (May 2012)(The custodian provided five (5) records to



the GRC for an *in camera* review and certified that the actual dates of the records differed from the billing date contained on the invoice that the complainant used to request same).

The GRC 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.*

Here, the Complainant’s request items include the sender and content or subject matter; however, the items do not contain a specific date or range of dates thus allowing the Custodian to accurately identify each responsive record without performing research.

Thus, the Complainant’s request items Nos. 1, 2, 3, 5, 8 and 14 are invalid under OPRA because they fail to identify specific dates or ranges of dates for the responsive e-mails and because the request items require research beyond the scope of a custodian’s duties pursuant to MAG, *supra*; Bent, *supra*; New Jersey Builders, *supra*; Schuler, *supra*. See also Elcavage, *supra*.

A review of the records the Complainant sought shows that request items Nos. 4, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19 and 20 referred to “correspondence,” “materials,” “a draft response,” “preliminary investigation reports” and “decisions.” Although decided on after the filing of this complaint, the Council’s decision in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012) provides instruction in this matter.

Specifically, in Verry, the complainant there also requested records identified as “correspondence” from an invoice. The custodian’s counsel responded in a timely manner on behalf of the custodian denying access to five (5) of the seven (7) responsive records pursuant to N.J.S.A. 47:1A-1.1. In the SOI, the custodian identified those five (5) records and argued that same were exempt from disclosure. Because the complainant’s OPRA request sought correspondence, the Council briefly addressed whether the request was valid. The Council held that:

“... while the Complainant’s *OPRA request on its face is overly broad and unclear due to the absence of a specific type of government record (i.e., letter, memo, e-mail, etc.)*, the OPRA request was sufficiently clear for the Custodian and/or Counsel to identify the responsive records within the statutorily mandated time frame.” (*Emphasis added.*) *Id.* at page 8.

In reaching this conclusion, the Council reasoned that:

“...the term ‘correspondence’ is a general record that includes letters, memos, e-mails, etc., and could have required the Custodian to perform ‘an open-ended search’ of the Borough’s files because ‘the Complainant failed to identify with reasonable clarity the records [sought].’ See

Oberwanowicz, Branchburg Township Board of Education (Somerset),  
GRC Complaint No. 2008-113 (June 2009).

However, the Council determined that because the Custodian was able to identify the records sought and never asserted that the request was invalid, he could not subsequently argue that the request was invalid. *See Gannett v. County of Middlesex*, 379 N.J. Super. 205 (App. Div. 2005). The GRC further noted that it decided on this issue similarly in Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Final Decision dated March 29, 2011) and Darata v. Monmouth County Board of Chosen Freeholders, GRC Complaint No. 2009-312 (Interim order dated February 24, 2011).

This complaint differs from Verry in that previous Counsel herein responded to the Complainant's OPRA request stating that same was invalid. Additionally, the Custodian reasserted this argument in the SOI. The Council's holding in Verry is instructive here because the Complainant's 13 request items seek generic types of government records that could include any number of records and would force the Custodian to search all of his files to identify "correspondence," "materials," "responses," "preliminary investigation reports" and "decisions" that may be responsive to each request item. Moreover, these request items are largely devoid of a specific date or time period within which the records were created.

Thus, because the Complainant's request items Nos. 4, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19 and 20 fail to identify with reasonable clarity the specific government records sought, these request items are invalid under OPRA pursuant to MAG; Bent; NJ Builders; Schuler. *See Verry, supra*.

The GRC further notes that request items No. 17 and No. 19, by their very nature, appear to be inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material. In fact, the Council has consistently determined that draft documents are exempt from disclosure under OPRA as advisory, consultative and deliberative ("ACD") material. *See Ciesla (on behalf of The Valley Hospital) v. New Jersey Department of Health & Senior Services, Division of Health Care Quality and Oversight*, GRC Complaint No. 2010-38 (Final Decision dated May 24, 2011).

Regarding request Item No. 6, the Complainant sought a "scheduling notice for 3/18/11." This request item specifically identifies the record sought and a date by which the Custodian would be able to easily identify the responsive record.

Thus, the Custodian has unlawfully denied access to the requested "scheduling notice" pursuant to N.J.S.A. 47:1A-6 and must disclose same to the Complainant.

**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 request items Nos. 1, 2, 3, 5, 8 and 14 are invalid under OPRA because they fail to identify specific dates or ranges of dates for the responsive e-mails and because the request items require research beyond the scope of a custodian’s duties pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 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 on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010).
2. Because the Complainant’s request items Nos. 4, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19 and 20 fail to identify with reasonable clarity the specific government records sought, these 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 on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012).
3. The Custodian has unlawfully denied access to the requested “scheduling notice” pursuant to N.J.S.A. 47:1A-6 and must disclose same to the Complainant.
4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified**

**confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>8</sup> to the Executive Director.<sup>9</sup>**

5. 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.
6. 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: Karyn Gordon, Esq.  
Acting Executive Director

July 24, 2012

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<sup>8</sup> "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."

<sup>9</sup> Satisfactory compliance requires that the Custodian deliver the record(s) 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.