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

July 23, 2013 Government Records Council Meeting

Robert A. Verry
Complainant
v.
Borough of South Bound Brook (Somerset)
Custodian of Record

Complaint No. 2011-171

At the July 23, 2013 public meeting, the Government Records Council ("Council") considered the June 18, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Complainant has failed to establish in his request for reconsideration of the Council's September 25, 2012 Final Decision that: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to do so. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 23rd Day of July, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 26, 2013

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting

Robert A. Verry[1] **GRC Complaint No. 2011-171**
Complainant

v.

Borough of South Bound Brook (Somerset)[2]
Custodian of Records

Records Relevant to Complaint: Copies of financial disclosure statements ("FDS") for 2011.

Request Made: May 1, 2011
Response Made: May 10, 2011
Custodian: Donald E. Kazar
GRC Complaint Filed: May 16, 2011[3]

Background

September 25, 2012 Council Meeting:

At its September 25, 2012 public meeting, the Council considered the September 18, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian made a good faith effort to provide all records on May 13, 2011, his response was insufficient pursuant to N.J.S.A. 47:1A-5(g) because all responsive records failed to transmit successfully. However, pursuant to Wolosky v. Township of Rockaway (Morris), GRC Complaint No. 2010-242 (February 2012), the Custodian did not unlawfully deny access to the responsive FDS forms. N.J.S.A. 47:1A-6.

2. Although the Custodian violated N.J.S.A. 47:1A-5(g) by insufficiently responding to the Complainant's OPRA request because of a transmittal error, the Custodian did not unlawfully deny the Complainant access to the responsive records. N.J.S.A. 47:1A-6. 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

[1] Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).
[2] Represented by Francesco Taddeo, Esq. (Somerville, NJ).
[3] The GRC received the Denial of Access Complaint on said date.

deliberate. Therefore, it is concluded that the Custodian's insufficient response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of these Denial of Access Complaints and the relief ultimately achieved. Specifically, the Custodian attempted to provide the responsive records on May 13, 2011 and was not aware that some pages did not transmit until receiving the Complainant's OPRA request: he rectified the issue on May 17, 2011 by resending the responsive records via facsimile. Further, the Complainant failed to engage in the cooperative balance contemplated by the Supreme Court in Mason, *supra*. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Procedural History:

On September 27, 2012, the Council sent its Final Decision to all parties.

Complainant's Reconsideration:

On October 12, 2012, the Complainant filed a request for reconsideration requesting that the Council reconsider its September 25, 2012 Final Decision based on a mistake.

The Custodian's Counsel submits a letter stating that the standard for requesting reconsideration is stringent. *N.J.A.C.* 5:105-2.10, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)(quoting D'Atria v. D'Atria, 242 N.J. Super. at 401) *and* White v. William Patterson University, GRC Complaint No. 2008-216 (August 2009). Counsel contends that pursuant to the Complainant's attached legal certification[4] that there is no substantial, credible evidence supporting that the Custodian faxed the responsive FDS statements to the Complainant. Counsel asserts that the Custodian never actually says what records were faxed to the Complainant: this information was either lost to time, poor memory, poor record keeping or some combination thereof. Counsel contends that absent a certified statement describing the records transmitted by the Custodian, the GRC should have held in the Complainant's favor.

The Complainant contends that the Council arbitrarily and capriciously determined that the Custodian did not unlawfully deny access to the responsive records for the sole purpose of absolving the Complainant of any wrongdoing and placing the burden on the Complainant to impinge on his right to file denial of access complaints. The Complainant contends that the GRC could only have reached this conclusion by relying solely on the Custodian's unsubstantiated, inconsistent and uncertified statements. The Complainant contends that the evidence proves that on May 13, 2011, the Custodian only faxed 37 of 48 responsive pages; therefore, the Custodian

[4] The GRC notes that a party can only legally certify to facts and not legal arguments.

denied access to 11 pages of records. The Complainant contends that his position has always been that the Custodian never had any intention of providing more than 37 pages of records: there was and still is no evidence to prove that he is wrong. The Complainant contends that without the filing of this complaint, he would have never known that more than a possible 41 pages of records existed (37 pages provided in addition to the 4 pages the Complainant identified in the Denial of Access Complaint). The Complainant asserts that the Custodian sending 37 pages on two (2) occasions reinforces the Complainant's position that the Custodian had no intention of providing all 48 pages of records. The Complainant contends that given a chance to provide additional documentary evidence that he sent 48 pages, the Custodian failed to present same and was still found to have not unlawfully denied access to any records. The Complainant contends that this complaint exposed the true purpose of the Custodian's actions, which was to avoid providing all responsive records as required under OPRA. The Complainant further asserts that the one (1) page discrepancy further adds to the erroneousness of the conclusion that the Custodian acted in good faith.

The Complainant contends that it cannot be disputed that the GRC was aware of a discrepancy in the number of pages sent to the Complainant. The Complainant notes that the GRC was aware of an apparent discrepancy in the number of pages sent because it noted as much in the analysis. The Complainant contends that regardless of the GRC's acknowledgement of a one (1) page discrepancy, it never questioned the Custodian to clear the discrepancy or ordered disclosure of the 48th page. The Complainant contends that what is more confusing is that the GRC identifies that 48 pages were transmitted successfully,[5] but takes no issue with the Custodian's conflicting certified statement that 47 total pages of FDS forms were available for disclosure. The Complainant contends he is still not in receipt of one (1) page of records that the Custodian stated were responsive in his initial May 17, 2011 e-mail.

The Complainant further asserts that although the GRC, on August 29, 2012, requested a legal certification as to whether the Custodian provided or attempted to provide the responsive records on May 13, 2011, the Custodian never responded.[6] The Complainant contends that absent the Custodian's response, the GRC provided a defense that never existed. The Complainant contends that the Custodian only certified that he released the records on May 17, 2011, or two (2) days after the filing of this complaint. The Complainant thus argues that this complaint did bring about a change in the Custodian's conduct.

The Complainant disputes the Council's determination that the Custodian's response was insufficient because of a transmission error but that he did not unlawfully deny access to any records. The Complainant argues that the Council looked to the Custodian's September 4, 2012 certification; however, there is absolutely no statement in that certification identifying FDS forms as the records the Custodian attempted to send. The Complainant further argues that there is no evidence in the fax journal to support a transmittal error aside from the four (4) failed fax

[5] The GRC notes that the September 25, 2012 Final Decision does not acknowledge that 48 pages were successfully transmitted.

[6] The GRC notes that the Custodian responded to the GRC's request for additional information on September 4, 2012. This response is reflected in the background of the Council's Final Decision. The GRC further notes that the Complainant was aware that the Custodian responded because he submitted a letter on September 12, 2012, disputing the Custodian's legal certification.

attempts.[7] The Complainant contends that there is no evidence supporting that these failed attempts were connected to the subject OPRA request or that the Custodian was attempting to send 48 pages of records. The Complainant contends that the evidence of record does support that the Custodian sent the records between 5:37 pm and 6:12 pm and not 3:04pm and 3:44 pm.[8] The Complainant further contends that the Custodian never argued that these attempts were directly related to this OPRA request: the GRC created and imputed this defense and made its decision accordingly. The Complainant contends that by doing so, the GRC unfairly prejudiced any chance of adjudication favorable to the Complainant. The Complainant argues that the evidence and facts to not support the Council's conclusion; therefore, the Council should reverse its decision.

The Complainant also contends that the Council erred by concluding that the Complainant was not a prevailing party entitled to an award of reasonable attorney's fees. The Complainant contends that more importantly, the Council misapplied Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). The Complainant contends that in Mason, defendant advised plaintiff that records would be available "… within two weeks …" while here the Custodian never indicated that additional records would be provided prior to May 13, 2011 (the expiration of the extended time frame to respond). The Complainant contends that it was not until after the filing of this complaint that the Complainant received additional records clearly indicating a change in the Custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

The Complainant further contends that the Council misapplied Mason, *supra*, because his request was not "problematic"[9] nor did the Custodian or Custodian's Counsel argue same. Wolosky v. Township of Rockaway (Morris), GRC Complaint No. 2010-242 (February 2012)(*citing* Wolosky v. Township of Stillwater (Sussex), GRC Complaint No. 2009-22 (September 2011)). The Complainant argues that if his OPRA request was problematic, the Custodian is still required to respond in writing stating as such in order to give the Complainant the opportunity to clarify his request or work towards a compromise. The Complainant contends that not only does the Council's Decision contradict the Court's holdings in Mason and Wolosky, but it also refutes the Council's own adopted principle in Wolosky. The Complainant contends that this holding signifies that the Council has taken a position that even for non-problematic requests, a requestor is now required to contact a custodian every time the requestor receives records to ensure that all records provided were received. The Complainant contends that no provision in OPRA contains such a requirement.

[7] The fax journal provided to the GRC on September 4, 2012, shows a communication error and two (2) "document jammed" entries all to the Complainant's number in a span of 40 minutes.

[8] The Complainant notes that "minutes" after the last supposed failed attempt, the Custodian successfully sent the Complainant two (2) faxes in response to separate OPRA requests. The Complainant attached these records.

[9] The Complainant provides a definition of "problematic" from Merriam Webster's website. *See* http://www.merriam-webster.com/dictionary/problematic.

Analysis

Reconsideration

Parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. *N.J.A.C.* 5:105-2.10. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C.* 5:105-2.10(a) – (e).

Applicable case law holds that:

> "[a] party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, *supra*, 242 N.J. Super. at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' *Ibid.*" In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's September 25, 2012 Final Decision on October 12, 2012, ten (10) business days from the issuance of the Council's Order.

The Council should reject the portion of the Complainant's reconsideration arguing that the Custodian did not unlawfully deny access to the responsive records. The Council supported its conclusion by comparing the facts of this complaint to those in Wolosky v. Township of Rockaway (Morris), GRC Complaint No. 2010-242 (February 2012). The Complainant's dissatisfaction with the Council's decision based on prior case law does not meet the standard for reconsideration of the Council's decision.

The Council should also reject the portion of the Complainant's reconsideration concerning prevailing party attorney's fees. First, the Council correctly applied Mason, *supra*. The Council looked to the Court's discussion of "… aggressive litigation tactics …" *Id.* at 78-79. More specifically, the Council noted that "[t]he Court expressed fears that judging cases by more objective merits would tarnish the statute's intent." *Id.* The Council weighed the facts of this

complaint based on this premise and held that its conclusion was reasonable based on the Custodian's attempts to provide the responsive records prior to the filing of this complaint.

Furthermore, the Council's decision is consistent with the Administrative Law Judge's ("ALJ") decision in Wolosky, *supra*. The issue in Wolosky was hardly problematic, yet the ALJ believed that the complainant ignored an important element of Mason: compromise. Similarly, the facts of this complaint indicate that the Complainant clearly knew prior to filing the complaint that certain pages were missing and chose to file the complaint instead of attempting to contact the Custodian to remedy the situation. This action was very similar to the complainant's actions contemplated by the ALJ in Wolosky (holding that in denying prevailing party attorney's fees, the complainant chose to file a complaint instead of first objecting to the proposed copying cost for a CD. *Id.*)

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: 1) that the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See* Cummings, *supra*. The Complainant failed to do so. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See* D'Atria, *supra*. Thus, the Complainant's request for reconsideration should be denied. Cummings, *supra*; D'Atria, *supra*; Comcast, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council's September 25, 2012 Final Decision that: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to do so. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso
Senior Case Manager

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

June 18, 2013[10]

[10] This complaint was prepared and scheduled for adjudication at the Council's June 25, 2013 meeting; however, this complaint was not adjudicated due to lack of quorum.

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FINAL DECISION

September 25, 2012 Government Records Council Meeting

Robert A. Verry
Complainant
v.
Borough of South Bound Brook (Somerset)
Custodian of Record

Complaint No. 2011-171

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

1. Although the Custodian made a good faith effort to provide all records on May 13, 2011, his response was insufficient pursuant to N.J.S.A. 47:1A-5.g. because all responsive records failed to transmit successfully. However, pursuant to Wolosky v. Township of Rockaway (Morris), GRC Complaint No. 2010-242 (February 2012), the Custodian did not unlawfully deny access to the responsive FDS forms. N.J.S.A. 47:1A-6.

2. Although the Custodian violated N.J.S.A. 47:1A-5.g. by insufficiently responding to the Complainant's OPRA request because of a transmittal error, the Custodian did not unlawfully deny the Complainant access to the responsive records. N.J.S.A. 47:1A-6. 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 insufficient response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of these Denial of Access Complaints and the relief ultimately achieved. Specifically, the Custodian attempted to provide the responsive records on May 13, 2011 and was not aware that some pages did not transmit until receiving the Complainant's OPRA request: he rectified the issue on May 17, 2011 by resending the responsive records via facsimile. Further, the Complainant failed to engage in the cooperative balance contemplated by the Supreme Court in Mason, *supra*. Therefore, the Complainant is

not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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

Final Decision Rendered by the
Government Records Council
On The 25th Day of September, 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: September 27, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

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

Robert A. Verry[1] **GRC Complaint No. 2011-171**
Complainant

v.

Borough of South Bound Brook (Somerset)[2]
Custodian of Records

Records Relevant to Complaint: Copies of financial disclosure statements ("FDS") for 2011.

Request Made: May 1, 2011
Response Made: May 10, 2011
Custodian: Donald E. Kazar
GRC Complaint Filed: May 16, 2011[3]

Background

May 1, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA attaching "Local Finance Notice 2011-11" dated March 4, 2011. The Complainant indicates that the preferred method of delivery is e-mail or facsimile only if the record is not available electronically.

May 10, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the sixth (6^{th}) business day following receipt of such request.[4] The Custodian requests an extension of time until May 13, 2011 to respond to the Complainant's OPRA request.

May 10, 2011

E-mail from the Complainant to the Custodian. The Complainant states that he will grant an extension of time until May 13, 2011 for the sole purpose of disclosing the responsive records.

[1] Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).
[2] Represented by Francesco Taddeo, Esq. (Somerville, NJ).
[3] The GRC received the Denial of Access Complaint on said date.
[4] The Custodian certifies in the Statement of Information that he received the Complainant's OPRA request on May 2, 2011.

May 13, 2011

Facsimile from the Custodian to the Complainant. The Custodian faxes 37 pages of records to the Complainant.

May 16, 2011

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

- Complainant's OPRA request dated May 1, 2011 attaching "Local Finance Notice 2011-11" dated March 4, 2011.
- E-mail from the Custodian to the Complainant dated May 10, 2011.
- E-mail from the Complainant to the Custodian dated May 10, 2011.
- FDS forms (37 pages).

The Complainant states that he submitted an OPRA request to the Borough of South Bound Brook ("Borough") on May 1, 2011. The Complainant states that the Custodian responded in writing on May 10, 2011 requesting an extension of time until May 13, 2011 to respond to the Complainant's OPRA request. The Complainant states that he granted this extension for the sole purpose of the Custodian disclosing the responsive records. The Complainant states that on May 13, 2011, the Custodian faxed him 37 pages. The Complainant states that a half-hour later, the Custodian again faxed 37 pages of records to him.

The Complainant contends that FDS forms are no less than two (2) pages in length. The Complainant asserts that the Custodian thus failed to provide a second (2^{nd}) page for the following individuals:

- Mr. Randy Bahr
- Ms. Carol Rice
- Mr. Tamas Ormosi
- The Custodian

The Complainant contends that regardless of the two (2) faxes he received on May 13, 2011, the Custodian knowingly and willfully failed to provide these additional pages. The Complainant asserts that until the GRC holds the Custodian accountable for his continuous disregard for OPRA, the Custodian will not change his practices to comply with the law. The Complainant thus requests the following:

1. A determination ordering the Custodian to disclose the responsive record.
2. A determination that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees. N.J.S.A. 47:1A-6.
3. A determination that the Custodian knowingly and willfully violated OPRA and is subject to a civil penalty. N.J.S.A. 47:1A-11.

The Complainant does not agree to mediate this complaint.

May 16, 2011

E-mail from the Custodian to the Complainant. The Custodian states that it is obvious that some of the pages did not transmit. The Custodian states that the Complainant could have contacted him if he believed pages were missing. The Custodian states that it was not his intention to deny access to any records as is clear from the fact that he sent the first (1st) page for the FDS forms missing a second (2nd) page. The Custodian states that he will forward the missing pages.[5]

May 17, 2011

E-mail from the Custodian to the Complainant. The Custodian states that he reviewed his fax journal for May 13, 2011 that indicated that his machine sent 48 pages of records to the Complainant. The Custodian states that he sent all FDS forms to the Complainant and requests that the Complainant check his fax machine or computer to see if he can locate the missing nine (9) pages. The Custodian states that he will also refax the records and requests that the Complainant advise as to the number of pages he receives.

May 17, 2011

E-mail from the Complainant to the Custodian. The Complainant states that he received only 37 pages in each fax and attached all 74 pages to the Denial of Access Complaint. The Complainant thus states that the Custodian failed to provide him with all responsive records.

May 17, 2011

E-mail from the Custodian to the Complainant. The Custodian states that the Complainant should have just received 47 pages of FDS forms filed with the Borough. The Custodian states that this transmission should satisfy the Complainant's OPRA request.

The Custodian reiterates that his fax journal indicates there was a discrepancy in the number of pages transmitted on May 13, 2011. The Custodian states that it was not his intention to withhold access to any records. The Custodian further states that he had no way of knowing that the Complainant did not receive all of the responsive records because the Complainant did not contact him prior to filing the instant complaint.

May 17, 2011

E-mail from the Complainant to the Custodian. The Complainant reiterates the assertions made in the Denial of Access Complaint that he believes the Custodian knowingly and willfully violated OPRA and continues to do so based on his continuous disregard for the law.

July 11, 2011

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

[5] The Custodian further notes that he will also provide the records again in response to a new OPRA request for same.

July 15, 2011

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until July 25, 2011 to submit the SOI.

July 18, 2011

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until July 25, 2011 to submit the SOI.

July 19, 2011

E-mail from the Custodian to the GRC. The Custodian requests an additional two (2) day extension of time to submit the SOI.

July 20, 2011

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until July 27, 2011 to submit the SOI and advises that no further extensions will be granted.

July 27, 2011[6]

Custodian's SOI with no attachments:

The Custodian certifies that he received the Complainant's OPRA request on May 2, 2011. The Custodian certifies that he responded on May 10, 2011 requesting an extension of time until May 13, 2011 to respond to the Complainant's OPRA request. The Custodian certifies that he sent the responsive records to the Complainant via facsimile on May 13, 2011.

The Custodian certifies that the Complainant filed this complaint alleging that the Custodian failed to provide page 2 of the FDS forms for four (4) individuals. The Custodian notes that had the Complainant contacted the Custodian regarding the absence of the four (4) missing pages, the issue would have been handled without necessitating the filing of a complaint. The Custodian certifies that omission of the pages was an obvious error that the Complainant did not give the Custodian a chance to correct.

The Custodian requests that the GRC review whether the Borough is capable of seeking fees from the Complainant for misleading or omitting information and submitting frivolous complaints.

August 29, 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(l). The GRC states that it has

[6] The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

reviewed the parties' submissions and has determined that additional information is required.

The GRC states that in an e-mail to the Complainant dated May 17, 2011, the Custodian indicates that his fax journal showed that he transmitted 48 pages of FDS forms to the Complainant on May 13, 2011. The GRC further states that in a second (2nd) e-mail that day, the Custodian advises the Complainant that the Complainant should have received a 47-page facsimile satisfying the OPRA request at issue herein. The GRC states that the Custodian did not attach copies of these documents to the Statement of Information.

The GRC thus requests responses to the following questions:

1. Whether the Custodian provided or attempted to provide all responsive records on May 13, 2011? Please provide all supporting documentation that exists.
2. Whether the Custodian provided or attempted to provide again all responsive records on May 17, 2011? Please provide all supporting documentation that exists.

The GRC requests that the Custodian provide the requested legal certification by close of business on September 4, 2012. The GRC further advises that submissions received after this deadline date may not be considered by the Council for adjudication.

September 4, 2012

Custodian's legal certification attaching a fax journal dated May 17, 2011. The Custodian certifies that the fax journal indicates that he attempted to send the responsive FDS forms four (4) times on May 13, 2011. The Custodian certifies that the fax journal indicates that the Custodian resent 47 pages of FDS forms to the Complainant on May 17, 2011. The Custodian certifies that the 47 pages of FDS forms represent all pages responsive to the Complainant's OPRA request.

September 12, 2012

Letter from the Complainant to the GRC.[7] The Complainant states that he submits this letter in response to the Custodian's September 4, 2012 certification. The Complainant states that the Custodian requested an extension of time until May 13, 2011 to respond to the Complainant's OPRA request. The Complainant states that pursuant to the fax journal submitted as part of the Custodian's certification, the Custodian attempted to send four (4) unidentified transmissions on May 13, 2011. The Complainant notes that the Custodian never provided any supporting documentation showing that he was indeed faxing the alleged records.

The Complainant states that the fax journal shows that the four (4) transmissions were attempted, but failed to complete for various reasons. The Complainant notes that the fourth (4th) transmission resulted in "pressed the stop button." The Complainant

[7] The Complainant identifies this submission as a certification; however, said letter does not contain the following requisite language: "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."

contends that the Custodian was clearly conscious that the last attempt failed because he pressed the stop button. The Complainant contends that the Custodian never provided any evidence in either the SOI or certification that the responsive records were disclosed.[8] The Complainant contends that he filed his Denial of Access Complaint on May 15, 2011 because the Custodian never disclosed and never planned on disclosing the responsive records.

The Complainant contends that the facts supported by the fax journal should be the only evidence the Council uses to render a decision and that the Custodian's actions following the Denial of Access Complaint "… *should play no part to the [C]ouncil's conclusion*." (Emphasis in original). The Complainant asserts that had the Custodian properly provided access to the responsive records, this complaint would have been unnecessary. The Complainant contends that the Custodian's clear, conscious denial of access warranted this complaint, which in turned forced the Custodian to disclose the responsive records on May 17, 2011.

The Complainant further asserts that the Custodian manipulated the GRC by contending that only four (4) pages of records were missing even though the evidence of record proves otherwise.[9] The Complainant asserts that although the Custodian claimed the his failure to provide the responsive records was an error, he still asked the Council to review the possibility of seeking fees and costs from the Complainant.

The Complainant thus contends that the Custodian's request for an extension of time and conscious interruption of the fourth (4th) fax on May 13, 2011 unquestionably proves that the Custodian knowingly and willfully violated OPRA. The Complainant requests the following:

1. A determination that the Custodian violated OPRA by failing to provide the responsive records to the Complainant within seven (7) business days.
2. A determination ordering the Custodian to disclose the responsive records.
3. A determination that the Custodian knowingly and willfully violated OPRA warranting an imposition of civil penalties. N.J.S.A. 47:1A-11.
4. A determination that the Complainant is a prevailing party subject to an award of reasonable attorney's fees.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

[8] The GRC notes that the Custodian certified in the SOI and subsequent certification that he disclosed, or at least attempted to disclose said records. This certification is supported by the Complainant's own Denial of Access Complaint, which contains two (2) sets of FDS forms received by the Complainant via facsimile on May 13, 2011.

[9] The GRC notes that the Complainant only identified four (4) pages of missing records in the Denial of Access Complaint.

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

Additionally, OPRA defines a government record as:

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

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

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

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

The Complainant filed this complaint arguing that the Custodian failed to provide him with four (4) pages of the responsive FDS forms. The Complainant contended that the Custodian knowingly and willfully failed to provide said pages and sought attorney's fees.

The Custodian e-mailed the Complainant upon receipt of this complaint on May 16, 2011 stating that the Complainant could have contacted the Custodian if he believed pages were missing. The Custodian e-mailed the Complainant on May 17, 2011 advising that his fax journal indicated that 48 pages were transmitted to the Complainant and that he will resend the records. The Complainant responded advising that he only received 37 pages and that the Custodian failed to provide him with all responsive records. The Custodian responded noting that he just sent the responsive FDS forms to the Complainant again and further that he did not know the Complainant did not receive all records until the filing of this complaint.

The Custodian certified in the SOI that the omission of four (4) pages was obviously an error that the Complainant never gave the Custodian a chance to rectify. In support of this argument, the Custodian submitted to the GRC on September 4, 2012 a fax journal showing that he made not one (1) but four (4) attempts to provide the responsive records to the Complainant on May 13, 2011. Additionally, the fax journal indicates that on May 17, 2011 the Custodian resent the responsive records to the Complainant upon being notified that some of the FDS form pages did not transmit.

The Complainant subsequently submitted a letter arguing that the fax journal proved that the Custodian consciously stopped the last transmission on May 13, 2011. The Complainant further argued that the Custodian provided no evidence in either the SOI or certification that the records he attempted to send were the responsive records. The Complainant also argued that the GRC should only rely on the facts of May 13, 2011 and nothing else after the filing of this complaint.

Thus, the crux of this complaint is whether the Custodian unlawfully denied access to the pages of FDS forms that failed to transmit via facsimile to the Complainant on May 13, 2011.

Regarding the Custodian's submission of the fax journal, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-86 (Final Decision dated June 28, 2011), the Council determined that the fax journal provided by the custodian did not raise to the level of competent credible evidence that the responsive records were properly provided. Specifically, the Custodian "could not accurately certify what the Complainant received because the facsimile journal the Custodian provided to the GRC on July 29, 2010 showed two (2) document jams and three (3) other faxes of varying page lengths." *Id.* at pg. 8. The complainant in that complaint submitted a legal certification arguing that he never received any records. The Council thus determined that the Custodian failed to bear his burden of proving a lawful denial of access:

> "… because the fax journal provided by the Custodian does not raise to the level of competent, probative evidence that the records were successfully transmitted to the Complainant and because the Complainant twice certified that he never received the records in response to his April 15, 2010 OPRA request." *Id.* at pg. 8-9.

The fax journal submitted by the Custodian in this complaint shows four (4) separate transmissions on May 13, 2011 that resulted in a "communication error 44," "document jammed," document jammed," and "pressed the stop key." In each instance, the journal shows that either one (1) page or no pages were transmitted to the Complainant. However, contrary to the complainant's certifications in Verry, *supra*, that he received no records and contrary to the Complainant's September 12, 2012 submission, the Complainant here twice received 37 pages of records within a half-hour. Thus, the evidence departs from Verry, *supra*, and supports that the Custodian attempted to provide the records; however, errors in each transmission resulted in incomplete records sent.

The facts of this complaint are more closely related to those in Wolosky v. Township of Rockaway (Morris), GRC Complaint No. 2010-242 (February 2012). In Wolosky, the complainant sought the first 50 OPRA requests submitted to the custodian, who provided access to records via e-mail in a timely manner. The complainant subsequently filed a complaint arguing that he was provided with a resolution and not the responsive OPRA requests. The custodian certified in the SOI that she committed an inadvertent error that she rectified immediately upon receipt of the complaint. The Council determined that:

> "… although the Custodian's response to the Complainant's OPRA request is insufficient because she failed to grant access to the records specifically requested by the Complainant pursuant to N.J.S.A. 47:1A-5.g., Bart v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), and Riley v. City of West Orange, GRC Complaint No. 2008-27 (April 2009), the Custodian's denial of access to the requested first fifty (50) OPRA requests made to the Custodian from January 1, 2010 until August 25, 2010 was not unlawful under OPRA. N.J.S.A. 47:1A-6." *Id*. at pg. 4.

In reaching this conclusion, the Council reasoned that "… the Custodian reasonably believed that she was granting access to the requested records when she responded to the OPRA request … the Custodian did not assert that the requested records were exempt from disclosure under OPRA." The Council further noted that the complainant failed to submit any evidence to refute the custodian's SOI certification.

The facts of this complaint depart slightly from Wolosky, *supra*, in that instead of proving the wrong records, the Custodian attempted to fax the actual responsive records four (4) times on May 13, 2011. However, the evidence is clear that certain pages did not transmit. As was the case in Wolosky, *supra*, the evidence of record supports that the Custodian reasonably believed he had provided access to all records because he stated as much in several e-mails to the Complainant on May 16, 2011 and May 17, 2011 upon receipt of this complaint. Additionally, the Custodian never claimed any of the records were exempt under OPRA. Instead, as did the custodian in Wolosky, *supra*, the Custodian immediately rectified the error on May 17, 2011 by resending the records via facsimile. The fax journal affirmatively supports this transmission by showing 47 pages transmitted to the Complainant on May 17, 2011. There is thus no evidence in the record supporting a conclusion that the Custodian unlawfully denied access to any of the responsive FDS forms.

Thus, although the Custodian made a good faith effort to provide all records on May 13, 2011, his response was insufficient pursuant to N.J.S.A. 47:1A-5.g. because all responsive records failed to transmit successfully. However, pursuant to Wolosky, *supra*, the Custodian did not unlawfully deny access to the responsive FDS forms. N.J.S.A. 47:1A-6.

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

OPRA states that:

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

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

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

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

Although the Custodian violated N.J.S.A. 47:1A-5.g. by insufficiently responding to the Complainant's OPRA request because of a transmittal error, the Custodian did not unlawfully deny the Complainant access to the responsive records. N.J.S.A. 47:1A-6. 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 insufficient response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

> "[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:
>
> - institute a proceeding to challenge the custodian's decision by filing an action in Superior Court…; or
> - in lieu of filing an action in Superior Court, file a complaint with the Government Records Council…
>
> A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

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

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

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

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

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

> "New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).
>
> Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); see also Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id*. at 422.
>
> This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to

> find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id*. at 153.
>
> After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id*. at 426-27.
>
> The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id*. at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon ... " *Id*. at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.
>
> OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed $ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the $ 500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight (8) business days later, or one day beyond the statutory limit. *Id*. at 79.As a result, the Court shifted the burden to Hoboken to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind the City's voluntary

disclosure. *Id.* Because Hoboken's February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id*. at 80.

The Court held that the shifting of this burden to a custodian only occurs when offending the agency has failed to respond *at all* to a request within the seven (7) business days prescribed in OPRA. Mason, 196 N.J. at 76. The Court determined that the catalyst theory's requirement of the establishment of a causal nexus maintains the "cooperative balance OPRA strives to attain," as it constitutes a subjective test that can be conducted on a case-by-case basis to ensure that attorney's fees are awarded when they are appropriate. *Id.* at 78. The Court noted that "[t]he statute (OPRA) is designed both to promote prompt access to government records and to encourage requestors and agencies to work together toward that end by accommodating one another." *Id*. The Court expressed fears that judging cases by more objective merits would tarnish the statute's intent. *Id.*

Specifically, the Court reasoned that:

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

Here, the Complainant filed this complaint arguing that the Custodian knowingly and willfully withheld access to certain pages of the responsive FDS forms. Upon receipt of the complaint, the Custodian e-mailed the Complainant on May 16, 2011 stating that he was unaware that some pages did not transmit and that the Complainant should have contacted him had he believed certain pages were missing. The Custodian further advised that he would send the missing pages and did so on May 17, 2011.

There is no evidence in the record to indicate that the Complainant's only recourse was to file a complaint with the GRC. In fact, as noted by the Custodian in his May 16, 2011 e-mail, the Complainant could have contacted the Custodian if he believed some FDS form pages were missing. However, the Complainant chose to file this complaint instead. The Council finds the Complainant's conduct to be the very embodiment of the overly litigious activity feared by the New Jersey Supreme Court in Mason, *supra*. A finding that the Complainant's filing of these Denial of Access Complaints qualifies as the legitimate causal nexus for the release of the requested records would fly in the face of the "cooperative balance" that Mason sought to protect.

Moreover, the New Jersey Office of Administrative Law ("OAL") and the GRC have held that good faith efforts of communication between custodians and complainants are paramount and are essential to promoting the spirit of OPRA. In Wolosky v. Township of Stillwater (Sussex), GRC Complaint No. 2009-22 (September 2011), the Council adopted Administrative Law Judge ("ALJ") Jeff S. Masin's Initial Decision wherein he cited Mason for the proposition that custodians and complainants must work together and compromise to resolve problematic requests and held that the absence of such collaboration is a crucial factor in determining the actual catalyst of the relief achieved. *Id*. *See also* Wolosky v. Township of Rockaway (Morris), GRC Complaint No. 2010-242 (February 2012).

In Wolosky, GRC Complaint No. 2009-22, the complainant submitted a request for items, including an audio CD, on December 2, 2008. In response, the complainant was advised of the $5.00 fee for the disk. On December 9, 2008, he e-mailed Ms. Kathy Wunder ("Ms. Wunder"), Clerk Typist, requesting a reason for the $5.00 charge. On December 10, 2008 the Township faxed the ordinance containing the charge to the complainant, who subsequently informed the custodian that "I would not like it to be mailed and I will not be picking it up." In the Initial Decision, ALJ Masin observed that the custodian noted that it was not unusual for someone to make an OPRA request and then decide not to pick up the requested materials, and that given the complainant's response, the custodian thought that the request was "done." ALJ Masin further observed that the evidence indicated that the complainant never responded to the custodian or any other official that the cost for the CD was too high or illegal. ALJ Masin found that the complainant filed his Denial of Access Complaint on January 6, 2009. ALJ Masin further found that Stillwater Township's Council met on January 20, 2009 and again on February 3, 2009, and determined that only actual cost could be charged for CDs pursuant to OPRA. ALJ Masin also found that on February 5, 2009, the GRC transmitted a request for an SOI to the custodian; the custodian testified that she received a copy of the Denial of Access Complaint on or about February 11, 2009. Finally, ALJ Masin found that a new fee ordinance was introduced on March 3, 2009 and adopted on March 17, 2009.

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

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

The facts of the instant complaint fall squarely within the ALJ's holding in Wolosky, *supra*. The Complainant did not contact the Custodian and give him the opportunity to rectify the error prior to the filing of the complaint. Instead, the Complainant chose to file this complaint and continued to pursue same even after the Custodian resent the responsive records. Thus, the evidence of record supports the conclusion that this complaint was not the causal nexus for the relief achieved.

Further, there is no evidence that the Custodian affirmatively attempted to deny the Complainant access to the responsive records. In fact, the Custodian immediately rectified the situation upon being apprised that the Complainant had not received some of the FDS form pages. Moreover, there is no evidence indicating that the Complainant attempted to settle this matter once the Custodian contacted him on May 16, 2011 stating that he believed an error in transmitting the records via facsimile had occurred. Instead, the Complainant pursued this complaint and even went so far as to submit a new OPRA request for the same records within days of filing this complaint.[10] The Council observes that this complaint may have been avoided had the Complainant engaged in the cooperative balance contemplated by the Supreme Court in Mason.

Therefore, pursuant to Teeters, *supra*, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason, *supra*, no factual causal nexus exists between the Complainant's filing of these Denial of Access Complaints and the relief ultimately achieved. Specifically, the Custodian attempted to provide the responsive records on May 13, 2011 and was not aware that some pages did not transmit until receiving the Complainant's OPRA request: he rectified the issue on May 17, 2011 by resending the responsive records via facsimile. Further, the Complainant failed to engage in the cooperative balance contemplated by the Supreme Court in Mason, *supra*. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian made a good faith effort to provide all records on May 13, 2011, his response was insufficient pursuant to N.J.S.A. 47:1A-5.g. because all responsive records failed to transmit successfully. However, pursuant to Wolosky v. Township of Rockaway (Morris), GRC Complaint No. 2010-242 (February 2012), the Custodian did not unlawfully deny access to the responsive FDS forms. N.J.S.A. 47:1A-6.

2. Although the Custodian violated N.J.S.A. 47:1A-5.g. by insufficiently responding to the Complainant's OPRA request because of a transmittal error, the Custodian did not unlawfully deny the Complainant access to the responsive records. N.J.S.A. 47:1A-6. Additionally, the evidence of record

[10] *See* F.N. No. 5.

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 insufficient response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of these Denial of Access Complaints and the relief ultimately achieved. Specifically, the Custodian attempted to provide the responsive records on May 13, 2011 and was not aware that some pages did not transmit until receiving the Complainant's OPRA request: he rectified the issue on May 17, 2011 by resending the responsive records via facsimile. Further, the Complainant failed to engage in the cooperative balance contemplated by the Supreme Court in Mason, *supra*. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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Acting Executive Director

September 18, 2012