



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

May 28, 2013 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2011-158 and 2011-193

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 *Reconsideration* 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, and has failed to show that the Council acted arbitrarily, capriciously or unreasonably. 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 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 28th Day of May, 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: June 4, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Robert A. Verry¹
Complainant

GRC Complaint No. 2011-158 & 2011-193

v.

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

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

1. "... e-mail from R. McGowan regarding PILOT Agreement."

Request Made: April 19, 2011 and May 7, 2011

Response Made: April 28, 2011

Custodian: Donald E. Kazar

GRC Complaint Filed: May 9, 2011 and May 31, 2011³

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 voted unanimously to adopt, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not timely respond to the Complainant's first (1st) OPRA request. As such, although the Custodian timely responded to the Complainant's first (1st) OPRA request in writing requesting an extension of time until May 6, 2011 to respond to said request, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).

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 these Denial of Access Complaints on said dates.

2. Although the Custodian responded to the Complainant's second (2nd) OPRA request in writing in a timely manner, his response to said request was insufficient pursuant to N.J.S.A. 47:1A-5(g) and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006), because the Custodian's response that the Complainant was provided with the e-mail on May 6, 2011 failed to contain a lawful basis for denying access to said OPRA request.
3. Although the Custodian's failure to respond in writing to the Complainant's first (1st) OPRA request within the extended time frame results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(i), the Custodian's response to the Complainant's second (2nd) OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5(g) and the Custodian failed to bear his burden of proving a lawful denial of access to the responsive e-mail, the Custodian attached the responsive record to the Statement of Information for GRC Complaint No. 2011-193 and thus the GRC declined to order disclosure of same. 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.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of these Denial of Access Complaints and the relief ultimately achieved. Specifically, the Custodian intended to provide access to the responsive record prior to the filing of both Denial of Access Complaints and further certified in both Statements of Information that he did just that. 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 distributed its Final Decision to all parties.

Complainant's Reconsideration:

On October 19, 2012,⁴ the Complainant requests that the Council reconsider its Final Decision based on a mistake.⁵

⁴ The GRC granted the Complainant Counsel's request for an extension of time until October 19, 2012, to submit a request for reconsideration; thus, this filing is timely.

⁵ The Complainant characterizes his submission as a legal certification; however, the GRC notes that a party can only legally certify to facts and not legal arguments.

The Complainant first notes that the Council's decision references a "resignation letter" instead of the e-mail at issue in these two (2) complaints. *Id.* at 9. The Complainant contends that, at the very least, the Council should re-examine its decision to ensure that the facts of these complaints were not crossed with the facts of other complaints filed by the Custodian.⁶

The Complainant contends that the Council exceeded its authority by combining these two complaints and thus unfairly prejudicing any chance of a favorable adjudication. The Complainant contends that the First Amendment of the Constitution "... prohibits the making of any law ... prohibiting [the Complainant's right] to petition for a governmental redress of grievances." *Id.* The Complainant contends that OPRA gives the Council the ability to adjudicate *a complaint* "... according to law, on the proofs heretofore presented, and such other proofs as may be adduced." United States v. Irwin, 127 U.S. 125, 126 (1888). The Complainant contends that the term "complaint" under OPRA is always singular and never plural.⁷ N.J.S.A. 47:1A-7. The Complainant further argues that OPRA requires the Council to adjudicate complaints independently by using the word "shall," which is an imperative command not open to discretion. The Complainant contends that had the Legislature wanted the Council to use discretion in consolidating complaints, it would have pluralized the term in N.J.S.A. 47:1A-7. The Complainant further argues that the Council has already established a principle of processing complaints independently. Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006)(holding that "... the fact that the records were previously provided to the Complainant on several occasions" was not a lawful basis to deny similar OPRA requests.). The Complainant asserts that the GRC thus established that a custodian must handle each request individually and independently regardless of whether the request is identical. The Complainant argues that the Council's referral to his two (2) OPRA requests as the first (1st) and second (2nd) OPRA requests clearly contradicts the principle established in Caggiano, *supra*. The Complainant notes that he has not found any case that applies this principle to denial of access complaints.

The Complainant asserts that combining complaints will hinder the fair adjudication of each because no two (2) complaints have the same exact fact pattern. The Complainant contends that combining complaints will always be advantageous to the custodian and not the requestor because the requestor submits individual complaints based upon facts and circumstances of that event. The Complainant contends that the Council has adjudicated at least five (5) complaints filed by anonymous requestors. The Complainant contends that if an anonymous requestor files two (2) complaints for the same records against the same custodian on the same day, the Council would likely adjudicate each complaint individually even if it was rumored that the anonymous requestor was the same person. The Complainant contends that treating a named complainant's complaints differently from anonymous complaints is deliberately disadvantageous and unequivocally prejudicial.

The Complainant argues that the Council erred by consolidating these complaints only to absolve the Custodian of his legal obligations and shift the burden to the Complainant. The Complainant contends that the GRC erroneously held that "the Complainant's actions give the

⁶ The reference to a "resignation letter" was an error. The remainder of the Council's Final Decision is based on these complaints.

⁷ The Complainant points to several instance where N.J.S.A. 47:1A-7 refers to "a complaint" or "the complaint."

appearance that he attempted to use the GRC's complaint process as leverage on the Custodian to produce a different result in response to the Complainant's second (2nd) OPRA request for the same record." *Id.* at 8. The Complainant contends that this argument is specious at best and that the Council easily could have contacted the Complainant to clarify his actions. The Complainant contends that although OPRA does not require a requestor to provide a reason for seeking records (*citing* Sebastian v. Borough of Ramsey (Bergen), GRC Complaint No. 2010-42 (March 2012), the Council used the Complainant's silence against him by asserting, accepting and applying a reason. The Complainant contends that the Council acted arbitrarily and deprived the Complainant off his rights afforded for in Sebastian, *supra*.

The Complainant asserts that notwithstanding the forgoing, his first complaint dealt with the first (1st) request and was detached from the second (2nd) request. The Complainant notes that although he recognizes and accepts the Council's proceedings in an "expedited manner," the Council's process can take months. The Complainant contends that the Council cannot set a precedence that handcuffs a requestor from submitting requests for identical records because it would impede the public right of access afforded for under OPRA. The Complainant contends that the Custodian's failure to disclose the record until 81 days after the filing of GRC Complaint No. 2011-158 and the Council's dismissal of a "deemed denial" are perfect examples as to why identical records requests are an essential and should never be discouraged or held against the requestor. The Complainant contends that had the Custodian met his obligation under OPRA, there would have been no need to submit a second OPRA request. The Complainant contends that so long as the Council continues to combine complaints with similar parties and identical requests, it will invite custodians to ignore their obligations.

The Complainant contends that the Council further erred by determining 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 the part of Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), which shifts the burden to a custodian when "... *an agency fails to respond at all within that time frame*, but voluntarily discloses records after a requestor files suit ..." (Emphasis added.) *Id.* at 51. The Complainant contends that unlike Mason, *supra*, where records were provided after the suit was filed, the Custodian herein refused to disclose the responsive record.

The Complainant contends that the Council misapplied Mason, *supra*, because his request was not "problematic"⁸ 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

⁸ The Complainant provides a definition of "problematic" from Merriam Webster's website. *See* <http://www.merriam-webster.com/dictionary/problematic>.

records provided were received. The Complainant contends that no provision in OPRA contains such a requirement. The Complainant further argues that the Council's new position provides custodians with no incentive to disclose responsive records within the statutorily-mandated time frame.

The Complainant next contends that the GRC erred by concluding that the Custodian's May 7, 2011 e-mail constituted a response to the Complainant's May 7, 2011 OPRA request. The Complainant contends that the Custodian's May 7, 2011 e-mail was in response to GRC Complaint No. 2011-158 as indicated in the subject line: "RE: New GRC Complaints – E-mails and etc." The Complainant asserts that had the Custodian intended to reply, the e-mail he would have replied to would have the subject line "OPRA Requests: ... E-mails, etc." The Complainant contends that's that he included this e-mail to prove that the Custodian refused to respond to his second OPRA request; however, the Council misapplied this evidence against the Complainant and in favor of the Custodian. The Complainant asserts that the Council's conclusion that the Custodian responded is in error and should be reconsidered.

The Complainant next contends that the Council failed to take into account the Custodian's familiarity with OPRA as well as various other complaints filed against him. The Complainant states that the Council previously noted that "... in light of his own knowledge of OPRA ... [t]he custodian's lack of initiative ... [was] an additional factor to be considered by the Council." Blanchard v. Rahway Board of Education, GRC Complaint No. 2003-57 (October 2003). The Complainant further states that the Council warned the public agency that it "...should carefully review its OPRA procedures to ensure timely, accurate responses, and are herewith warned that future violations will be considered in light of this case." *Id.* The Complainant contends that the Custodian herein is no stranger to OPRA and is currently defending his actions in several complaints, some of which have been referred to the Office of Administrative Law. The Complainant contends that he and the Custodian's Counsel are well aware of their legal obligations under OPRA and cannot claim ignorance of same. The Complainant contends that notwithstanding the precedence set in Blanchard, *supra*, the Council issued no such warning here and instead continuously absolved the Custodian of any wrongdoing.

Custodian's Objections:

On November 12, 2012, the Custodian's Counsel submitted objections to the Complainant's request for reconsideration.⁹ Counsel asserts that the record at issue is an undated e-mail that the Custodian provided to the Complainant via facsimile on May 6, 2011, e-mailed the Complainant to confirm this fact, and again e-mailed the Complainant on May 7, 2011, advising that the record was provided. Counsel asserts that it is clear that the timing of the second (2nd) OPRA request caused an insufficient response.

Counsel argues that a cursory review of the Complainant's reconsideration indicates that there is no legal basis for same because the Complainant is merely dissatisfied with the Council's Decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990) and Cummings v. Bahr,

⁹ The GRC granted the Custodian Counsel's request for an extension of time until November 12, 2012 to submit a request for reconsideration because of Hurricane Sandy; thus, this filing is timely.

295 N.J. Super. 374, 384 (App. Div. 1996). Counsel further argues that the Complainant's reconsideration, like the original complaints, is a clear example of the highly harassing and frivolous nature of the Complainant's continued OPRA requests and Denial of Access Complaints. Counsel asserts that the Complainant continually files complaints instead of working with the Custodian. Counsel notes that the Complainant invoked the spirit of OPRA; however, the Complainant continues to operate in manner contrary to the spirit by filing submitting overly broad OPRA requests, placing unfounded conditions on requests for extensions, file complaints instead of working with the Custodian and again asking for the same records on the same day he files a complaint. Counsel contends that the Complainant's reconsideration evidences his animus towards the Custodian and Borough with whom he has legally engaged continuously through OPRA.

Counsel asserts that the Council's Decision is appropriate based on the evidence of record. Counsel further implores the Council to review the possibility of seeking fees from the Complainant for his harassing conduct.¹⁰

Additional Submissions:

On November 19, 2012, the Complainant submitted a response to Custodian Counsel's objections. The Complainant contends that had the Council determined that the subject complaints were frivolous, they would have dismissed same prior to seeking Statements of Information. N.J.S.A. 47:1A-7. The Complainant contends that Counsel falsely asserts that the Complainant has animosity towards the Custodian and the Borough. The Complainant asserts that these assertions explain why the Custodian has treated the Complainant differently and among other things, should be ignored as baseless.

The Complainant further contends that Counsel did not refute the arguments set forth in the request for reconsideration. The Complainant contemplates that either Counsel felt addressing same was unnecessary or that the Council would hold in a manner most favorable to the Custodian.

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:

¹⁰ The GRC notes that the fee-shifting provision under OPRA only applies to complainants with representation and does not allow for custodians to recoup legal fees. N.J.S.A. 47:1A-6.

“[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).

On October 19, 2012, the Complainant filed the request for reconsideration of the Council’s September 25, 2012 Final Decision, the last business day of the extended time frame to provide same.¹¹

The Council should reject the portion of the Complainant’s reconsideration concerning consolidation of complaints. Contrary to the Complainant’s assertions, the Council has a longstanding policy of consolidating complaints based on the commonality of parties and issues. *See Janeczko v. NJ Dept. of Law & public Safety, Div. of Criminal Justice*, GRC Complaint Nos. 2002-79 & 2002-80 (June 2004); Gettler v. Township of Wantage (Sussex), GRC Complaint Nos. 2009-73 & 2009-74 (Interim Order dated January 31, 2012); Kohn v. Township of Livingston (Essex), GRC Complaint Nos. 2009-203 & 2009-211 (March 2013). Furthermore, several of the Complainant’s previous complaints were combined and the Complainant has never before challenged the Council’s consolidation of same.¹²

Moreover, the Complainant’s argument that consolidating these complaints goes against the Council’s Decision in Caggiano, supra, is erroneous. The Council’s holding in Caggiano does not apply to the Council’s processing of complaints; rather, the Council’s holding addresses a custodian’s response to multiple OPRA requests for the same records. Further, the Council would have no grounds to combine “anonymous” complaints even if against the same public agency because, by definition, the Council would not know the identity of the complainant and

¹¹ The GRC notes the Custodian’s Counsel submitted objections. Counsel argues, among other things, that the Complainant’s reconsideration does meet the appropriate standards for reconsideration. Additionally, the Complainant submitted a reply arguing that Counsel’s objections do not address his request for reconsideration point by point.

¹² *See Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint Nos. 2008-70 & 2008-71 (February 2009); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2009-204 & 2009-205 (August 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2010-105 & 2010-106 (January 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2011-114 et. seq. (July 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2011-128 et. seq. (August 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2011-159 & 2011-195 (September 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2011-161 et. seq. (September 2012).

thus could not determine if there was a commonality of both parties. Also contrary to the Complainant's argument, the Council's process of consolidation of complaints is not predicated on producing an outcome that would be advantageous to either party. The Council proves this fact in the multiple consolidations containing a mixture of different decisions. The Council's consolidation of these complaints for adjudication by the Council was sound and in line with the Council's previous practices.

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 holds that its conclusion was reasonable based on the timing of the OPRA requests, the Custodian's May 7, 2011 e-mail advising that he sent the record to the Complainant, and the Complainant's continued pursuit of both complaints notwithstanding the Custodian's e-mail.

The Council also properly applied Wolosky, *supra*, in a manner consistent with the Office of Administrative Law. The issue in Wolosky was hardly problematic, yet the Office of Administrative Law still believed that the complainant ignored an important element of Mason: compromise. Similarly, the facts of these two (2) complaints is that the Custodian expressed in his May 7, 2011 e-mail that on May 6, 2011, he provided the responsive record to the Complainant; however, the Complainant continued to pursue both complaints instead of striking a compromise with the Custodian.

Finally, the Council has routinely determined that a complainant is not a prevailing party based on a "technical violation of OPRA." See Petrycki, Jr., Esq. v. Township of Hamilton (Atlantic), GRC Complaint No. 2009-159 (May 2010); Wolosky v. Sparta Board of Education (Sussex), GRC Complaint No. 2010-189 (July 2011). Finding a technical violation of OPRA does not change a custodian's conduct. The technical violation identifies that the custodian has violated the law in some way; however, the technical violation cannot be changed because it already occurred.

The Council should reject the portion of the Complainant's reconsideration concerning the May 7, 2011 e-mail. On page 2 of the Denial of Access Complaint for GRC Complaint No. 2011-193, which asks if the Complainant received a reply to include the date, the Complainant checked "yes" and identified May 7, 2011 as the date of the Custodian's response. The Council logically concluded that the attached May 7, 2011 e-mail was the response to which the Complainant referred. Thus, the Council did not misapply this evidence because it relied on the Complainant's own filing.

The Council should reject the portion of the Complainant's reconsideration concerning the "Matrix." At the outset of OPRA, the GRC created a list known as the "Matrix." to track custodians that violated OPRA multiple times in order to assess the civil penalty. However, the Council unanimously voted to discontinue the "Matrix" at its November 10, 2005 meeting because:

“... the statutory language of the OPRA allows for penalties based on a Custodian's knowing and willful violation of the OPRA ‘under the totality of the circumstances’ for a particular complaint, not multiple complaints. Based on that fact, it was determined that the time matrix could not be used given the statutory language or requirements for assessing penalties for knowing and willful violations ...” Paff v. Cumberland County Sheriff’s Office, GRC Complaint No. 2005-159 (January 2006)(citing Renna v. County of Union, GRC Complaint No. 2005-89 (October 2005)).

Thus, because the “Matrix” was discontinued in November 2005, the Council did not err by failing to list the Custodian thereon.

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, and has failed to show that the Council acted arbitrarily, capriciously or unreasonably. 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 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

May 21, 2013



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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. The Custodian did not timely respond to the Complainant’s first (1st) OPRA request. As such, although the Custodian timely responded to the Complainant’s first (1st) OPRA request in writing requesting an extension of time until May 6, 2011 to respond to said request, the Custodian’s failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. Although the Custodian responded to the Complainant’s second (2nd) OPRA request in writing in a timely manner, his response to said request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006), because the Custodian’s response that the Complainant was provided with the e-mail on May 6, 2011 failed to contain a lawful basis for denying access to said OPRA request.
3. Although the Custodian’s failure to respond in writing to the Complainant’s first (1st) OPRA request within the extended time frame results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response to the Complainant’s second (2nd) OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and the Custodian failed to bear his burden of proving a lawful denial of access to the responsive e-mail, the Custodian attached the responsive record to the Statement of Information for GRC Complaint No. 2011-193 and thus the GRC declined to order disclosure of same. 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.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of these Denial of Access Complaints and the relief ultimately achieved. Specifically, the Custodian intended to provide access to the responsive record prior to the filing of both Denial of Access Complaints and further certified in both Statements of Information that he did just that. 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. Verry¹
Complainant**

GRC Complaint No. 2011-158 & 2011-193

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

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

1. "... e-mail from R. McGowan regarding PILOT Agreement."

Request Made: April 19, 2011 and May 7, 2011

Response Made: April 28, 2011

Custodian: Donald E. Kazar

GRC Complaint Filed: May 9, 2011 and May 31, 2011³

Background

April 19, 2011

Complainant's first (1st) 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.

April 28, 2011

Custodian's response to the first (1st) OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request.⁴ The Custodian requests an extension of time until May 6, 2011 to respond because Cooper & Cooper may maintain the responsive record.

April 28, 2011

E-mail from the Complainant to the Custodian. The Complainant states that he will grant the Custodian an extension of time until May 6, 2011 for the sole purpose of disclosing the responsive record.

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 these Denial of Access Complaints on said dates.

⁴ The Custodian certifies in the Statement of Information that he received the Complainant's OPRA request on April 21, 2011.

May 7, 2011

Complainant's second (2nd) 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.

May 7, 2011

E-mail from the Custodian to the Complainant. The Custodian states that he faxed the responsive e-mail to the Complainant on May 6, 2011.⁵

May 9, 2011

Denial of Access Complaint for GRC Complaint No. 2011-158 filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated April 19, 2011.
- Letter from the Custodian to the Complainant dated April 28, 2011.
- E-mail from the Complainant to the Custodian dated April 28, 2011.

The Complainant states that he submitted an OPRA request to the Borough of South Bound Brook ("Borough") on April 19, 2011. The Complainant states that the Custodian responded in writing on April 28, 2011 requesting an extension of time until May 6, 2011 to respond to the Complainant's OPRA request. The Complainant states that he granted the Custodian an extension of time on April 28, 2011.

The Complainant asserts that the Custodian knowingly and willfully failed to disclose the responsive record. 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 31, 2011

Denial of Access Complaint for GRC Complaint No. 2011-193 filed with the GRC with the following attachments:

- Complainant's OPRA request dated May 7, 2011.
- E-mail from the Custodian to the Complainant dated May 7, 2011.

The Complainant states that he submitted an OPRA request to the Borough on May 7, 2011. The Complainant states that the Custodian responded via e-mail on May 7,

⁵ The Custodian received a copy of the Denial of Access Complaint via e-mail on May 7, 2011, a Saturday. Robert A. Verry v. Borough of South Bound Brook (Somerset), 2011-158 & 2011-193 – Findings and Recommendations of the Executive Director 2

2011 stating that he already faxed the Complainant the responsive e-mail on May 6, 2011.

The Complainant contends that he never received the responsive e-mail and further did not receive any faxes from the Borough on May 6, 2011. The Complainant states that his records indicate that the Borough faxed him eight (8) pages on May 3, 2011 and then nothing further until May 13, 2011. The Complainant thus contends that the Custodian never provided the responsive record.

The Complainant asserts that the Custodian knowingly and willfully failed to disclose the responsive record. 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.

June 29, 2011

Request for the Statement of Information ("SOI") for GRC Complaint No. 2011-158 sent to the Custodian.

June 29, 2011

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until July 15, 2011 to submit the SOI for GRC Complaint No. 2011-158. The Custodian states that this extension is necessary because of the upcoming holiday and the Custodian will be out of the office for part of the following week.

June 29, 2011

E-mail from the GRC to the Custodian. The GRC states that it will routinely grant one (1) extension of five (5) business days to submit an SOI; however, based on the circumstances, the GRC grants the Custodian an extension of time until July 15, 2011 to submit the SOI.

July 11, 2011

Request for the SOI for GRC Complaint No. 2011-193 sent to the Custodian.

July 14, 2011⁶

Custodian's SOI for GRC Complaint No. 2011-158 with the following attachments:

- E-mail from the Custodian to the Complainant dated May 7, 2011.
- Letter from the GRC to the Custodian dated June 29, 2011.

The Custodian certifies that he received the Complainant's OPRA request on April 21, 2011. The Custodian certifies that he responded in writing on April 28, 2011 requesting an extension of time until May 6, 2011 to respond to the Complainant's OPRA request. The Custodian certifies that on May 6, 2011, he faxed the responsive e-mail to the Complainant.

The Custodian contends that this complaint should be dismissed because the Complainant failed to acknowledge that he received the responsive e-mail on May 6, 2011. The Custodian notes that he confirmed this fact in an e-mail to the Complainant on May 7, 2011.

The Custodian further disputes the Complainant's attempt to place terms on the Custodian's request for an extension of time. The Custodian notes the GRC's Handbook for Records Custodians (Fifth Edition – January 2011) specifically states that “[i]t is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or *requesting an extension of time within the statutorily mandated seven (7) business days*, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.” (Emphasis added.) *Id.* at pg. 16.

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.

The Custodian's Counsel submits a letter brief in support of the Borough's position in the instant complaint. Counsel contends that this matter should be dismissed as a frivolous and harassing action against the Custodian. Counsel contends that this complaint, taken in tandem with multiple other complaints simultaneously filed before the GRC clearly indicate that the intent of the Complainant is not to promote transparency, but to harass and overburden the Custodian with meaningless complaints. Counsel disputes the Complainant's comments regarding the Custodian as an attempt to taint the GRC process. Counsel contends that *in toto*, these factors evidence the Complainant's clear, malicious intent in filing this complaint.

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 New Jersey Department of State, Division of Archives and Records Management as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

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 for GRC Complaint No. 2011-193.

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 for GRC Complaint No. 2011-193.

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, 2011⁷

Custodian's SOI for GRC Complaint No. 2011-193 with the following attachments:

- E-mail from the Custodian to "R. McGowan" dated January 28, 2011.
- Complainant's first (1st) OPRA request dated April 19, 2011 with the Custodian's note thereon.

The Custodian contends this complaint is the same as GRC Complaint No. 2011-158 and should be dismissed. The Custodian certifies that he already provided the responsive record to the Complainant on May 6, 2011 in response to the Complainant's first (1st) OPRA request. The Custodian certifies that he noted that the request was completed as of May 7, 2011 on the OPRA request form. The Custodian further certifies that his e-mail to the Complainant dated May 7, 2011 confirming that he faxed the record was included as part of the Denial of Access Complaint.

The Custodian contends that this complaint should be dismissed because the Complainant failed to state that he received the responsive record. The Custodian asserts that the Complainant was disingenuous with the GRC. 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.

⁷ 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).
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Analysis

Whether the Custodian timely responded to the Complainant's first (1st) OPRA request?

OPRA provides that:

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

Further, OPRA provides that:

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

In Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007, OPRA request, seeking an extension of time until April 20, 2007 to fulfill the complainant's OPRA request. However, the custodian responded on April 20, 2007, stating that he would provide the requested records later in the week, and the evidence of record showed that the custodian provided no records until May 31, 2007. The Council held that:

“[t]he Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. ... however ... [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial of access to the records.” *Id.*

The Complainant filed GRC Complaint No. 2011-158 stating that the Custodian requested an extension of time but never provided the record within that time frame. Upon receipt of said complaint, the Custodian e-mailed the Complainant stating that he

sent the responsive record to the Complainant via facsimile on May 6, 2011. The Custodian subsequently certified to this fact in the SOI. However, the Custodian provided no supporting documentation rising to the level of competent, credible evidence establishing by a preponderance of the evidence that the Custodian faxed the requested record to the Complainant on May 6, 2011, as would a cover sheet or letter, transmission confirmation page or even a facsimile journal. Thus, the Custodian failed to provide competent, credible evidence in either the SOI or certification to support his response to the Complainant's first (1st) OPRA request.

Whenever a denial of access complaint is filed, a custodian is required to bear his burden of proving a lawful denial of access to any records. N.J.S.A. 47:1A-6. As previously stated, a custodian's failure to respond in within the extended time frame results in a "deemed" denial of access N.J.S.A. 47:1A-5.i. Here, the Custodian has failed to provide adequate evidence of his timely response within the extended time frame and has thus failed to bear the burden of proving he responded in a timely manner.

Therefore, the Custodian did not timely respond to the Complainant's first (1st) OPRA request. As such, although the Custodian timely responded to the Complainant's first (1st) OPRA request in writing requesting an extension of time until May 6, 2011 to respond to said request, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn, supra. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).

Whether the Custodian sufficiently responded to the Complainant's second (2nd) OPRA request?

The Complainant filed GRC Complaint No. 2011-193 arguing that although the Custodian responded in writing on the same day of receipt of the Complainant's second (2nd) OPRA request stating that he previously provided the e-mail at issue herein on May 6, 2011, the Complainant contends that the Custodian never provided him with the responsive e-mail. The GRC notes that the Complainant submitted his second (2nd) OPRA request and GRC Complaint No. 2011-158 for the same record on the same day: May 7, 2011.⁸

As previously stated, a custodian is required to respond in writing to an OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. Moreover, in Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006), the complainant filed numerous OPRA requests for the same records in each request. The custodian responded to the complainant stating that the records were previously provided to the complainant in 2002 and 2003 on repeated occasions. The Council held that "the fact that the records were previously provided to the Complainant on several occasions is not a lawful basis to deny access to the records requests."

⁸ The GRC did not receive the Complainant's Denial of Access Complaint for GRC Complaint No. 2011-158 until May 9, 2011.
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Therefore, although the Custodian responded to the Complainant's second (2nd) OPRA request in writing in a timely manner, his response to said request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Caggiano, because the Custodian's response that the Complainant was provided with the e-mail on May 6, 2011 failed to contain a lawful basis for denying access to said OPRA request.

The GRC notes that in Caggiano, *supra*, the Council held that "OPRA does not limit the number of times a requestor may ask for the same record even when the record was previously provided." Notwithstanding the Council's long standing position on the issue, the facts of these complaints depart from this position. Specifically, the Complainant submitted a second (2nd) OPRA request for the same e-mail on the same day that he filed a complaint for the first (1st) OPRA request. Thus, the Complainant's actions give the appearance that he attempted to use the GRC's complaint process as leverage on the Custodian to produce a different result in response to the Complainant's second (2nd) OPRA request for the same record. Additionally, notwithstanding the Custodian's failure to provide adequate evidence that he provided the responsive record on May 6, 2011, the timing of the Complainant's second (2nd) OPRA request and GRC Complaint No. 2011-158 essentially caused the Custodian's insufficient response.

Whether the Custodian unlawfully denied access to the requested e-mail?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

The record at issue herein is an e-mail that the Complainant contends he never received from the Custodian in response to the two (2) OPRA requests⁹. As previously stated, the evidence of record is insufficient to indicate whether the Custodian ever provided the responsive e-mail to the Complainant. Specifically, the Custodian offered no supporting documentation that he provided said record via facsimile to the Complainant on May 6, 2011. However, the Custodian later attached the responsive record to the SOI relevant to GRC Complaint No. 2011-193 that was sent to all parties via e-mail on July 27, 2011.

It is clear from the evidence of record that the responsive e-mail is a government record pursuant to OPRA. N.J.S.A. 47:1A-1.1. Additionally, there is no evidence in the record to indicate that any exemption applies to said e-mail. Accordingly, the Custodian was required to disclose same in response to the Complainant's two (2) OPRA requests; however, he failed to adequately bear his burden of proving that he sent the responsive record to the Complainant via facsimile on May 6, 2011 or at any time after the Complainant submitted his second (2nd) OPRA request. Thus, the Custodian unlawfully denied access to same.

Therefore, the Custodian unlawfully denied access to the responsive resignation letter. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the responsive e-mail because same was attached to the SOI for GRC Complaint No. 2011-193 which was sent to all parties via e-mail on July 27, 2011.

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

⁹ The GRC notes that these two (2) OPRA requests were identical to an OPRA request item at issue in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (July 2012). In that complaint, the custodian's counsel denied access to the complainant's OPRA request, to include the request item for the record also at issue herein, advising that same was invalid. The Council determined that the request item was “...invalid under OPRA because they fail to identify specific dates or ranges of dates for the responsive [e-mail] ...” *Id.* at pg. 7. However, the GRC declines to apply the same analysis here because the Custodian was able to identify the responsive record and did provide same as part of the SOI relevant to GRC Complaint No. 2011-193.

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 (Felder 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’s failure to respond in writing to the Complainant’s first (1st) OPRA request within the extended time frame results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response to the Complainant’s second (2nd) OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and the Custodian failed to bear his burden of proving a lawful denial of access to the responsive e-mail, the Custodian attached the responsive record to the SOI for GRC Complaint No. 2011-193 and thus the GRC declined to order disclosure of same. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.*

at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

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

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (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 simultaneously submitted GRC Complaint No. 2011-158 to the GRC and the OPRA request relevant to GRC Complaint No. 2011-193 to the Custodian on May 7, 2011, the first (1st) day after the expiration the Custodian's extended time frame to respond. The Custodian immediately e-mailed the Complainant stating that he provided the record via facsimile on May 6, 2011 and subsequently certified to such fact in the SOI relevant to GRC Complaint No. 2011-158. The Complainant, instead of working with the Custodian to resolve the issue, submitted GRC Complaint No. 2011-193 on May 31, 2011 again contending that he never received the responsive record. The Complainant acknowledged in the second (2nd) Denial of Access Complaint that the Custodian advised that he provided the responsive record on May 6, 2011; however, the Complainant continued to pursue both complaints arguing that he never received the record.

Absent any evidence supporting the Custodian's SOI certifications, 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, 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 ___.

A review of the facts of these two (2) complaints indicates that the Custodian not only intended, at the very least, to provide the responsive record to the Complainant, but that he believed he had done so even before the filing of either complaint. Notwithstanding the Custodian's failure to provide supporting documentary evidence that he in fact provided the Complainant access to the responsive e-mail via facsimile on May 6, 2011, it is apparent that these two (2) complaints were 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 record. Moreover, there is no evidence indicating that the Complainant attempted to cooperate with the Custodian once the Custodian contacted him on May 7, 2011 stating that he provided the record via facsimile on May 6, 2011. Instead, the Complainant pursued GRC Complaint No. 2011-158 and filed and pursued a second (2nd) OPRA request on the same day even in light of the Custodian's assertion that he provided the responsive e-mail via facsimile on May 6, 2011. The Complainant then filed GRC Complaint No. 2011-193 for the second (2nd) OPRA request less than one (1) month after simultaneously filing GRC Complaint No. 2011-158 and the second (2nd) OPRA request. The Council observes that both complaints may have been avoided had the Complainant engaged in the cooperative balance contemplated by the Supreme Court in Mason, *supra*.

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 intended to provide access to the responsive record prior to the filing of both Denial of Access Complaints and further certified in both SOIs that he did just that. 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. The Custodian did not timely respond to the Complainant's first (1st) OPRA request. As such, although the Custodian timely responded to the Complainant's first (1st) OPRA request in writing requesting an extension of time until May 6, 2011 to respond to said request, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).

2. Although the Custodian responded to the Complainant's second (2nd) OPRA request in writing in a timely manner, his response to said request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006), because the Custodian's response that the Complainant was provided with the e-mail on May 6, 2011 failed to contain a lawful basis for denying access to said OPRA request.

3. Although the Custodian's failure to respond in writing to the Complainant's first (1st) OPRA request within the extended time frame results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response to the Complainant's second (2nd) OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and the Custodian failed to bear his burden of proving a lawful denial of access to the responsive e-mail, the Custodian attached the responsive record to the Statement of Information for GRC Complaint No. 2011-193 and thus the GRC declined to order disclosure of same. 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.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of these Denial of Access Complaints and the relief ultimately achieved. Specifically, the Custodian intended to provide access to the responsive record prior to the filing of both Denial of Access Complaints and further certified in both Statements of Information that he did just that. 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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