



**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**

**September 24, 2013 Government Records Council Meeting**

Larry S. Loigman, Esq.  
Complainant

Complaint No. 2011-197

v.

Ocean County Prosecutor's Office  
Custodian of Record

At the September 24, 2013 public meeting, the Government Records Council ("Council") considered the September 17, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that it dismisses the complaint in light of the Complainant's August 12, 2013 written request to the Office of Administrative Law to withdraw the case.

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 24th Day of September, 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: September 26, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 24, 2013 Council Meeting**

**Larry S. Loigman, Esq.**  
**(on behalf of E.C.)<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2011-197**

v.

**Ocean County Prosecutor's Office<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:** From January 1, 2010 through the present:

1. All reports, memoranda, correspondence, e-mails, press releases, statements, transcripts, complaints, pleadings, notes, photographs or other records relating to allegations of child abuse or neglect in which E.C. was the victim.
2. All reports, memoranda, correspondence, e-mails, press releases, statements, transcripts, complaints, pleadings, notes, photographs or other records relating to allegations that E.C. was a missing person or had disappeared or that E.C.'s whereabouts were unknown.
3. All reports, memoranda, correspondence, e-mails, press releases, statements, transcripts, complaints, pleadings, notes, photographs or other records relating to allegations that the Complainant had any involvement in any activity relating to E.C. or that the Complainant had violated a court order, request, directive, notice subpoena, summons or other process issued by court.

**Custodian of Record:** Peter A. Ryan, Esq.  
**Request Received by Custodian:** May 2, 2011  
**Response Made by Custodian:** May 13, 2011  
**GRC Complaint Received:** June 2, 2011

**Background**

March 22, 2013 Council Meeting:

At the March 22, 2013 public meeting, the Government Records Council ("Council") considered the March 15, 2013 Reconsideration Findings and Recommendations of the Executive Director and all related documentation submitted by

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<sup>1</sup> The Complainant is an attorney representing E.C. who was a minor at the time of this OPRA request and Denial of Access Complaint.

<sup>2</sup> Represented by Mary Jane Lidaaka, Esq., of Berry, Sahradnik, Kotzas and Benson, P.C. (Toms River, NJ).

the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Complainant has established in his request for reconsideration of the Council's December 18, 2012 Final Decision that GRC's decision was based on a palpably incorrect basis, said request for reconsideration is granted. Cummings v. Bahr, 295 N.J. Super., 374, 384 (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). Therefore, the Council amends its December 18, 2012 Final Decision to reflect that the Complainant's request was valid and not broad and unclear pursuant to MAG Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005) and N.J. Builders Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
2. Since there are issues of contested facts, specifically whether records identified by the Custodian in the Statement of Information are exempt from disclosure, this complaint should be referred to OAL for a determination of whether the Custodian unlawfully denied access to the requested records. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances. Further, OAL should determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6.

#### Procedural History:

On January 2, 2013, the Complainant requested that the Council reconsider its prior order dated December 18, 2012. N.J.A.C. 5:105-2.10. On March 22, 2013, the Council granted the Complainant's motion for reconsideration, and transmitted the complaint to the Office of Administrative Law ("OAL").

On August 12, 2013, the Complainant sent a letter OAL withdrawing the complaint because the Custodian produced the requested records.

#### Analysis

No analysis required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council dismiss the complaint in light of the Complainant's August 12, 2013 written request to the Office of Administrative Law to withdraw the case.

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

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

September 17, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

**INTERIM ORDER**

**May 28, 2013 Government Records Council Meeting**

Larry S. Loigman, Esq.  
Complainant

Complaint No. 2011-197

v.

Ocean County Prosecutor's Office  
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 voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that Custodian's Counsel has failed to establish in her request for reconsideration of the Council's March 22, 2013 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in referring this complaint to the Office of Administrative Law ("OAL"). Thus, Custodian's Counsel request for reconsideration is 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). As such, the Council's March 22, 2013 Interim Order is continued here, in that this complaint should be referred to OAL for a hearing to resolve said facts. OAL should also determine if the Custodian knowingly and willfully violated OPRA if found to have unlawfully denied access to the requested records and determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> 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: May 29, 2013**

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**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Larry S. Loigman, Esq.**  
**(on behalf of E.C.)<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2011-197**

**v.**

**Ocean County Prosecutor's Office<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** From January 1, 2010 through the present:

1. All reports, memoranda, correspondence, e-mails, press releases, statements, transcripts, complaints, pleadings, notes, photographs or other records relating to allegations of child abuse or neglect in which E.C. was the victim.
2. All reports, memoranda, correspondence, e-mails, press releases, statements, transcripts, complaints, pleadings, notes, photographs or other records relating to allegations that E.C. was a missing person or had disappeared or that E.C.'s whereabouts were unknown.
3. All reports, memoranda, correspondence, e-mails, press releases, statements, transcripts, complaints, pleadings, notes, photographs or other records relating to allegations that the Complainant had any involvement in any activity relating to E.C. or that the Complainant had violated a court order, request, directive, notice subpoena, summons or other process issued by court.

**Request Made:** May 2, 2011

**Response Made:** May 13, 2011

**GRC Complaint Filed:** June 2, 2011<sup>3</sup>

**Background**

At its March 22, 2013 public meeting, the Council considered the March 15, 2013 Reconsideration Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

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<sup>1</sup> The Complainant is an attorney representing E.C. who was a minor at the time of this OPRA request and Denial of Access Complaint.

<sup>2</sup> Peter A. Ryan, Esq., Custodian of Records. Represented by Mary Jane Lidaaka, Esq., of Berry, Sahradnik, Kotzas and Benson, P.C. (Toms River, NJ).

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

1. Because the Complainant has established in his request for reconsideration of the Council's December 18, 2012 Final Decision that GRC's decision was based on a palpably incorrect basis, said request for reconsideration is granted Cummings, supra; D'Atria, supra; 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). Therefore, the Council amends its December 18, 2012 Final Decision to reflect that the Complainant's request was valid and not broad and unclear pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
2. Since there are issues of contested facts, specifically whether records identified by the Custodian in the Statement of Information are exempt from disclosure, this complaint should be referred to OAL for a determination of whether the Custodian unlawfully denied access to the requested records. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances. Further, OAL should determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6.

The Council distributed its Interim Order to all parties on March 25, 2013.

#### Custodian's Request for Reconsideration

On March 26, 2013, the Custodian informs the GRC that he is on vacation and cannot respond to the Council's Interim Order. The Custodian requests that his response time to file reconsideration begin on April 2, 2013. The GRC informs the Custodian that the Custodian's ten (10) business day time frame to file for reconsideration will begin on April 2, 2013. On April 15, 2013, the Custodian's Counsel requests that the Council reconsider its March 22, 2013 Interim Decision based on mistake.

Counsel contends that a requestor is required to describe the requested record with particularity and not request information. Counsel argues that it is clear from a review of the Complainant's OPRA request that each itemized request is essentially a blanket request in broad, generic language that fails to identify with any particularity a specific government record. Counsel also argues that the Complainant's vague and blanket requests also encompass records that are exempt under OPRA. Counsel contends that the Complainant's request would require the Custodian to research its records for documents that may or may not fit the description. Counsel also states that in the Custodian's Statement of Information, the Custodian certified that the prosecutor's file contains more than 2,300 pages of records and would require a considerable amount of time to conduct such research.



Counsel asserts that the Complainant's reliance on Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012) is distinguishable from the instant complaint and the Council's reliance on Burke in reversing its prior decision is mistaken. Counsel argues that the OPRA request in Burke was extremely limited and narrow because it was limited to correspondence between the Governor's Office and the Port Authority with regard to E-ZPass benefits provided to Port Authority retirees. Counsel also argues that the OPRA request in the present complaint was not similarly limited, narrow or specific, but rather a blanket request which fails to identify a specific record. Lastly, Counsel argues that the Council's original decision finding that the requests are overly broad was correct.

Counsel also states that the Complainant's OPRA request in addition to being overly broad and vague, seeks records that are exempt under OPRA. Counsel argues that N.J.S.A. 47:1A-3(b) exempts criminal investigatory records from disclosure. Counsel also argues that the fact that an investigation is concluded does not remove the investigatory records from the OPRA exemption and the OPRA statute does not limit the records to active criminal investigations. *See* Woojin Hwang v. Bergen County Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013) and Solloway v. Bergen County Prosecutor's Office, GRC Complaint No. 2011-39 (January 2013). Counsel contends that the Complainant's request seeks criminal investigatory records which are exempt from disclosure under OPRA

Counsel asserts that the Complainant also seeks records that are exemption under N.J.S.A. 47:1A-1.1, by virtue of other statutory exemptions. Counsel argues that N.J.S.A. 2A:4A-60 prohibits releasing records pertaining to juveniles involved in a family crisis, as is the case here. Counsel also asserts that N.J.S.A. 9:6-8.10(a) requires agencies receiving reports from the Division of Youth and Family Services ("DYFS") to keep them confidential. Counsel argues that the Complainant seeks records relating to allegations of child neglect and abuse, which would fall under the N.J.S.A. 9:6-8.10(a) exemption. Counsel further argues that the broad, general nature of the Complainant's requests could also encompass Grand Jury records which are exempt from disclosure pursuant to N.J. Court Rule 3:6-1.

#### Complainant's Response to Custodian's Reconsideration

The Complainant states that his OPRA request is erroneously characterized as a vague and general blanket request. The Complainant also states that the Custodian has easily identified all of the records responsive to his request. The Complainant contends that to the extent that "the prosecutor's file contains more than 2,300 pages of records," it has already completed all of the work necessary to locate the responsive records. The Complainant asserts that his request was intended to encompass each of the alleged 2,300 responsive pages. The Complainant argues that the Custodian did not need to do any research or laborious search; rather, the Custodian only had to photocopy or otherwise make available each of such pages.

The Complainant rejects the Custodian's allegation that the records are exempt as criminal investigatory records. The Complainant states that the existence of a criminal investigation is disputed and must be reviewed by an Administrative Law Judge. The Complainant argues that there is no evidence to support that a criminal investigation was ever

undertaken. The Complainant asserts that no crime was committed, no one was charged with a crime and no victim was identified.

## Analysis

### Reconsideration

Pursuant to *N.J.A.C. 5:105-2.10*, 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. 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).

Here, on March 25, 2013, the Custodian requested that his time frame to file a request for reconsideration begin on April 2, 2013. On April 10, 2013, within the requested extension of time, Custodian’s Counsel filed the request for reconsideration of the Council’s Order dated March 22, 2013, relying on the previously mentioned arguments. As the moving party, the Counsel was required to establish either of the necessary criteria set forth above: namely 1) that the GRC’s decision is based upon a “palpably incorrect or irrational basis”; or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. Counsel failed to do so. Counsel has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint. *See D’Atria, supra*.

Further, Counsel’s request for reconsideration is more appropriately considered an objection to the Complainant’s request for reconsideration of the Council’s December 18, 2012 Final Decision, and should have been filed ten (10) business days after receipt of the

Complainant's request for reconsideration. Counsel was put on notice of the time to file any objections because along with its December 20, 2012 letter, the GRC provided Counsel with notice that parties must file any objections to a request for reconsideration within ten (10) business day following receipt thereof. Moreover, Counsel's request for reconsideration fails to make any new arguments; rather, it restates arguments made in the Statement of Information, along with a minor distinction of Burke, *supra*.

The Council notes that Burke, *supra*, is applicable to the instant complaint. In his initial response to the Complainant's OPRA request, the Custodian searched and identified a banker's box which contains the responsive records to the request. Further, in the Custodian's Statement of Information the Custodian identified 1,674 pages of Division of Youth and Family Services records, 425 pages of criminal investigatory records, and 234 pages of Grand Jury Records.

Therefore, Custodian's Counsel has failed to establish in her request for reconsideration of the Council's March 22, 2013 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in referring this complaint to the Office of Administrative Law ("OAL"). Thus, Custodian's Counsel request for reconsideration is denied. Cummings, *supra*; D'Atria, *supra*; Comcast, *supra*. As such, the Council's March 22, 2013 Interim Order is continued here, in that this complaint should be referred to OAL for a hearing to resolve said facts. OAL should also determine if the Custodian knowingly and willfully violated OPRA if found to have unlawfully denied access to the requested records and determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that Custodian's Counsel has failed to establish in her request for reconsideration of the Council's March 22, 2013 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in referring this complaint to the Office of Administrative Law ("OAL"). Thus, Custodian's Counsel request for reconsideration is 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). As such, the Council's March 22, 2013 Interim Order is continued here, in that this complaint should be referred to OAL for a hearing to resolve said facts. OAL should also determine if the Custodian knowingly and willfully violated OPRA if found to have unlawfully denied access to the requested records and determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee.

Prepared By: Harlynn A. Lack, Esq.  
Case Manager

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

May 21, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
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RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

March 22, 2013 Government Records Council Meeting

Larry S. Loigman, Esq.  
(on behalf of E.C.)

Complainant

v.

Ocean County Prosecutor's Office  
Custodian of Record

Complaint No. 2011-197

At the March 22, 2013 public meeting, the Government Records Council ("Council") considered the March 15, 2013 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Complainant has established in his request for reconsideration of the Council's December 18, 2012 Final Decision that GRC's decision was based on a palpably incorrect basis, said request for reconsideration is granted Cummings, supra; D'Atria, supra; 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). Therefore, the Council amends its December 18, 2012 Final Decision to reflect that the Complainant's request was valid and not broad and unclear pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
2. Since there are issues of contested facts, specifically whether records identified by the Custodian in the Statement of Information are exempt from disclosure, this complaint should be referred to OAL for a determination of whether the Custodian unlawfully denied access to the requested records. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances. Further, OAL should determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6.



Interim Order Rendered by the  
Government Records Council  
On The 22<sup>nd</sup> Day of March, 2013

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

Robin Berg Tabakin, Esq., Chair  
Government Records Council

**Decision Distribution Date: March 25, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**March 22, 2013 Council Meeting**

**Larry S. Loigman, Esq.**  
**(on behalf of E.C.)<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2011-197**

**v.**

**Ocean County Prosecutor's Office<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** From January 1, 2010 through the present:

1. All reports, memoranda, correspondence, e-mails, press releases, statements, transcripts, complaints, pleadings, notes, photographs or other records relating to allegations of child abuse or neglect in which E.C. was the victim.
2. All reports, memoranda, correspondence, e-mails, press releases, statements, transcripts, complaints, pleadings, notes, photographs or other records relating to allegations that E.C. was a missing person or had disappeared or that E.C.'s whereabouts were unknown.
3. All reports, memoranda, correspondence, e-mails, press releases, statements, transcripts, complaints, pleadings, notes, photographs or other records relating to allegations that the Complainant had any involvement in any activity relating to E.C. or that the Complainant had violated a court order, request, directive, notice subpoena, summons or other process issued by court.

**Request Made:** May 2, 2011

**Response Made:** May 13, 2011

**Custodian:** Peter A. Ryan, Esq.

**GRC Complaint Filed:** June 2, 2011<sup>3</sup>

**Background**

**December 18, 2012**

Government Records Council's ("Council") Final Decision. At its December 18, 2012 public meeting, the Council considered the October 23, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by

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<sup>1</sup> The Complainant is an attorney representing E.C. who was a minor at the time of this OPRA request and Denial of Access Complaint.

<sup>2</sup> Represented by Mary Jane Lidaaka, Esq., of Berry, Sahradnik, Kotzas and Benson, P.C. (Toms River, NJ).

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

the parties.<sup>4</sup> The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Complainant's request is overly broad and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
2. 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 a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. Specifically, the Complainant's request is invalid under OPRA because it is overly broad and would require the Custodian to perform research. 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*.

#### **December 20, 2012**

Council's Final Decision distributed to the parties.

#### **January 2, 2013**

Complainant's Motion for Reconsideration with no attachments.

The Complainant requests that the Council reconsider the December 18, 2012 Final Decision of his Denial of Access Complaint pursuant to N.J.A.C. 5:105-2.0. The Complainant asserts that a mistake requires the Council to reconsider this matter. The Complainant argues that the Council's decision relies heavily on MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) which is called into question by the Appellate Division's recent decision of Burke v. Brandes, No. A3051-11T3 (App. Div. December 7, 2012). The Complainant asserts that the Custodian identified records responsive to the request. The Complainant also asserts that the Ocean County Prosecutor's Office ("Prosecutor's Office") had specific files regarding the case, which the Custodian described in his Statement of Information ("SOI"). The Complainant argues that his OPRA request was not overly broad and the Custodian would not need to conduct research to fulfill the request.

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<sup>4</sup> This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.



## Analysis

### **Whether the Complainant has met the required standard for reconsideration of the Council's December 18, 2012 Final Decision?**

Pursuant to *N.J.A.C. 5:105-2.10*, 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. 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).

The Complainant argues that his OPRA request filed with the Prosecutor's Office was not broad and unclear. The Complaint also argues that the Custodian identified records responsive to the request in which the Custodian described said records in general terms. The Complainant further argues that the Council's decision relies heavily on *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 *N.J. Super.* 534 (App. Div. 2005) which is called into question by the Appellate Division's recent decision of *Burke v. Brandes*, No. A3051-11T3 (App. Div. December 7, 2012).

In *Burke, supra*, the plaintiff submitted an OPRA request to the Office of the Governor seeking “EZ pass benefits afforded to retirees of the Port Authority, including all...correspondence between the Office of the Governor...and the Port Authority...” The custodian denied the plaintiff's request as overly broad. However, the custodian also reviewed its files and provided the plaintiff with one record responsive and denied the other records responsive.

The Appellate Division held that the “[p]laintiff's request...was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information, namely, E-Z Pass benefits to Port Authority retirees.” The

Appellate Division also held that the request was limited to correspondence with another government entity.<sup>5</sup> The Appellate Division further held that “plaintiff’s request did not require the custodian to conduct research, or to collect, collate and analyze data.” The Appellate Division clearly stated that the custodian performed a search and was able to locate and identify records responsive, which contradicts the custodian’s assertion that the plaintiff’s request was overly broad.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. See Cummings, *supra*. The Complainant has met his burden of proving that the GRC’s decision was based on a “palpably incorrect basis” because the GRC failed to consider Appellate Division’s recent decision of Burke, *supra* because the said case was decided before the Council’s December 18, 2012 meeting.

Therefore, because the Complainant has established in his request for reconsideration of the Council’s December 18, 2012 Final Decision that GRC’s decision was based on a palpably incorrect basis, said request for reconsideration is granted Cummings, *supra*; D’Atria, *supra*; 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). Therefore, the Council amends its December 18, 2012 Final Decision to reflect that the Complainant’s request was valid and not broad and unclear pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

The Appellate Division of the New Jersey Superior Court has proffered ways in which the GRC may determine whether a Custodian’s claimed exemption applies to a record. In Hyman v. City of Jersey City, 2012 N.J. Super. Unpub. LEXIS 2032 (App. Div. 2012), the court held that:

“[t]he GRC functions in an adjudicative capacity and is statutorily charged, if it is able to do so, to ‘make a determination as to a record’s accessibility based upon the complaint and the custodian’s response thereto[.]’ N.J.S.A. 47:1A-7(e) (emphasis added). If the custodian’s response to the complaint does not justify the denial of access based upon the claimed privilege or exception, the GRC has a number of options available to it...It may conclude the proffered privilege does not apply and order the release of the document. Ibid. It may, through its Executive Director, require the custodian to submit, within prescribed time limits, additional information deemed necessary for the GRC to adjudicate the

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<sup>5</sup> The plaintiff asserted at oral argument before the Law Division that he was seeking written or electronic correspondence between the Governor’s Office and the Port Authority.  
Larry S. Loigman (on behalf of E.C.) v. Ocean County Prosecutor’s Office, 2011-197 – Supplemental Findings and Recommendations of the Executive Director 4

complaint. N.J.S.A. 47:1A-7(c)...Additionally, it may ‘conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the ‘Administrative Procedure Act,’ . . . insofar as they may be applicable and practicable.’ N.J.S.A. 47:1A-7(e).”

The Administrative Procedures Act provides that the Office of Administrative Law (“OAL”) “shall acquire jurisdiction over a matter only after it has been to be a contested case by an agency head and has been filed with the [OAL]...” *N.J.A.C. 1:1-3.2(a)*.

Therefore, since there are issues of contested facts, specifically whether records identified by the Custodian in the Statement of Information are exempt from disclosure, this complaint should be referred to OAL for a determination of whether the Custodian unlawfully denied access to the requested records. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances. Further, OAL should determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant has established in his request for reconsideration of the Council’s December 18, 2012 Final Decision that GRC’s decision was based on a palpably incorrect basis, said request for reconsideration is granted Cummings, supra; D’Atria, supra; 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). Therefore, the Council amends its December 18, 2012 Final Decision to reflect that the Complainant’s request was valid and not broad and unclear pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
2. Since there are issues of contested facts, specifically whether records identified by the Custodian in the Statement of Information are exempt from disclosure, this complaint should be referred to OAL for a determination of whether the Custodian unlawfully denied access to the requested records. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances. Further, OAL should determine whether the Complainant is a prevailing party

entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6.

Prepared By: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

March 15, 2013



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

December 18, 2012 Government Records Council Meeting

Larry Loigman, Esq.  
(on behalf of E.C.)  
Complainant

Complaint No. 2011-197

v.

Ocean County Prosecutor's Office  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council ("Council") considered the October 23, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Complainant's request is overly broad and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
2. 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 a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. Specifically, the Complainant's request is invalid under OPRA because it is overly broad and would require the Custodian to perform research. 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 18<sup>th</sup> Day of December, 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: December 20, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 18, 2012 Council Meeting**

**Larry S. Loigman, Esq.**  
**(on behalf of E.C.)<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2011-197**

v.

**Ocean County Prosecutor's Office<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** From January 1, 2010 through the present:

1. All reports, memoranda, correspondence, e-mails, press releases, statements, transcripts, complaints, pleadings, notes, photographs or other records relating to allegations of child abuse or neglect in which E.C. was the victim.
2. All reports, memoranda, correspondence, e-mails, press releases, statements, transcripts, complaints, pleadings, notes, photographs or other records relating to allegations that E.C. was a missing person or had disappeared or that E.C.'s whereabouts were unknown.
3. All reports, memoranda, correspondence, e-mails, press releases, statements, transcripts, complaints, pleadings, notes, photographs or other records relating to allegations that the Complainant had any involvement in any activity relating to E.C. or that the Complainant had violated a court order, request, directive, notice subpoena, summons or other process issued by court.

**Request Made:** May 2, 2011

**Response Made:** May 13, 2011

**Custodian:** Peter A. Ryan, Esq.

**GRC Complaint Filed:** June 2, 2011 <sup>3</sup>

**Background**

**May 2, 2011**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

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<sup>1</sup> The Complainant is an attorney representing E.C. who was a minor at the time of this OPRA request and Denial of Access Complaint.

<sup>2</sup> Represented by Mary Jane Lidaaka, Esq., of Berry, Sahradnik, Kotzas and Benson, P.C. (Toms River, NJ).

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

### **May 13, 2011**

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request.<sup>4</sup> The Custodian requests an extension of time until May 20, 2011 to fulfill the Complainant's OPRA request.

### **May 17, 2011**

Letter from the Custodian to the Complainant. The Custodian denies the Complainant access to the requested records. The Custodian states that the Complainant's request is overly broad and does not identify a specific government record. The Complainant also states that OPRA is not intended as a research tool, but rather as an avenue for citizens to obtain specific government records pursuant to MAG Entertainment, LLC v. Division of Alcohol Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). The Custodian further states that a proper request must identify with reasonable clarity those records which are desired and a party cannot satisfy this requirement by requesting all of an agency's documents. See Bent v. Twp of Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005). The Custodian states that the Complainant's request seeks all documents involving an investigation of a missing juvenile and the Complainant. The Custodian also states that the Complainant failed to provide a specific case number. The Custodian further states that he searched the Prosecutor's Office database and located an investigation file which appears to be responsive to the request. The Custodian additionally states that to his knowledge there are no other records responsive to the request.

The Custodian also states that the Complainant's request is denied for the following reasons:

1. The Complainant seeks criminal investigatory records which are exempt under OPRA. The Custodian also states that he has reviewed the case file and noted multiple police investigative reports and records which were obtained and/or created as part of the investigation into the disappearance of E.C.. The Custodian further states that these records were not required to be created by any statute and thus are considered criminal investigatory records.
2. The Complainant seeks juvenile records which are exempt pursuant to N.J.S.A. 2A:4A-60. The Complainant states that this statute prohibits the release of all social, medical, psychological, legal and other records of the court and probation division, and records of law enforcement agencies pertaining to a juvenile charged as a delinquent or found to be part of a juvenile-family crisis. The Custodian also states that all the records contained in this investigative file involve a missing minor child and allegation of physical and sexual abuse of said minor child by a family member. The Custodian further states that records contained in this file cannot be released without a court order because he is not the parent or guardian of E.C. The Custodian additionally states that according to court rulings in this matter, the Complainant is not the attorney for the minor child in the underlying matter.

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<sup>4</sup> The Custodian certifies in the SOI that he received the Complainant's OPRA request on May 4, 2011. Larry S. Loigman (on behalf of E.C.) v. Ocean County Prosecutor's Office, 2011-197 – Findings and Recommendations of the Executive Director



3. The Complainant seeks records from the Division of Youth and Family Services (“DYFS”) which are considered confidential pursuant to N.J.S.A. 9:6-8.10a(b). The Complainant states that this statute states that “any individual agency, board, court, grand jury, legislative committee, or other entity which receives from [DYFS] the records and reports referred to in subsection (a) shall keep such records and reports, or parts thereof, confidential and shall not disclose such records and reports and parts thereof except as authorized by law.” The Custodian states that the Prosecutor’s Office is an agency of the State of New Jersey and thus is subject to this statute. The Custodian also states that DYFS provided the Prosecutor’s Office with the contents of its file to aid in its investigation.
4. The Complainant’s request violates the privacy provision of OPRA pursuant to N.J.S.A. 47:1A-1.1, wherein a public agency has the responsibility to safeguard from public access to a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy. The Custodian also states that the Prosecutor’s Office has the responsibility to safeguard the minor child’s personal information but also the personal information of all parties involved in the ongoing investigation.
5. The Complainant seeks records part of an ongoing investigation pursuant to N.J.S.A. 47:1A-3. The Custodian also states that the underlying investigation has not been concluded. The Custodian further states that this investigation will continue despite the fact that the child is not eighteen (18) years old. The Custodian additionally states that the child was reported missing as a minor and releasing any record from this investigation file would go against the public interest since it would interfere with the Prosecutor’s Office ongoing investigation.
6. The Complainant seeks grand jury records which cannot be disclosed without an order from the Assignment Judge of the Ocean County Superior Court. The Custodian further states that the Complainant is seeking court records which are excluded from public access pursuant to N.J. Court Rule 1:38-3.

The Custodian states that the contents of the file are voluminous and fill up a banker’s box. The Custodian further states that he does not have the support staff to create such a list of records and conducting such an extended review would substantially disrupt the operations of the Prosecutor’s Office. However, the Custodian provides the Complainant with a breakdown of the types of records contained in the file. The Custodian states that there are 1,674 pages of DYFS investigative records, 425 pages of criminal investigatory records and 234 pages of Grand Jury records.

### **May 20, 2011**

Letter from the Complainant to the Custodian. The Complainant states that a considerable amount of information about the underlying case regarding the missing minor child has been released to the media on various occasions by Prosecutor Marlene Lynch Ford (“Prosecutor Ford”). The Complainant also states that the Custodian did not

provide any press releases. The Complainant further states that Prosecutor Ford's disclosure of information acts as a waiver and that any records upon which statements were based must be released. The Complainant additionally states that the Custodian can redact certain portions if there is a basis for doing so, but he cannot withhold an entire file after the Prosecutor's Office already provided details to the media.

The Complainant also states that there is no criminal investigation because no crime exists. The Complainant further states that it is the long standing practice of the Prosecutor's Office to refrain from any investigation of public official misconduct. Thus, the Complainant asserts that the Custodian's claim that the records are exempt from disclosure to protect an ongoing investigation is misleading, inaccurate and unsubstantiated.

The Complainant states that he also rejects the Custodian's claim that he is unable to provide an itemized list of the records which are held by the Prosecutor's Office and the reason why each record was withheld. The Complainant also states that compliance with OPRA is not contingent upon convenience of the Custodian. The Complainant further states that if the Custodian cannot compile the list, then he must enlist other persons to assist the Custodian. Lastly, the Complainant states that he will extend the time for the Custodian to adequately respond by May 31, 2011.

#### **May 27, 2011**

Letter from the Custodian to the Complainant. The Custodian states that he renews his denial of access to the Complainant's request for the reasons set forth in his letter dated May 17, 2011. The Custodian also states in the Complainant's letter dated May 20, 2011 the Complainant questioned the failure to provide a copy of a press release made by the Prosecutor's Office regarding the underlying investigation. The Custodian further states that he reviewed the file and it did not contain a press release. The Custodian additionally states that since the Complainant is now requesting a specific record, unlike the original request, he has provided a copy of the press release from Prosecutor Ford. The Custodian also states that he has researched the OPRA statute and did not find any "waiver" provision that would prohibit the Prosecutor's Office from denying the release of the requested records. The Custodian further states that the Complainant failed to provide any legal basis to support his conclusion.

The Custodian also states in the Complainant's letter, he is unaware of any statute or reported case which would support the Prosecutor's Office ongoing investigation into the disappearance of a minor child. The Custodian further states that Chapter 13 of the New Jersey Criminal Code, specifically, N.J.S.A. 2C:13-1 (kidnapping); N.J.S.A. 2C:13-2 (criminal restraint) and N.J.S.A. 2C:13-4 (interference with custody) are all indictable offenses. The Custodian further states that these are potential charges which may be filed depending on the outcome of the Prosecutor's Office investigation. The Custodian states that the purpose of an investigation is to determine the facts of a case and to determine which felonies, if any, have been committed. The Custodian also states that if the investigation does not support the filing of criminal charges then the case will be closed with no further action taken. The Custodian further states that the Prosecutor's Office investigation is still ongoing.

**June 2, 2011**

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

- Complainant’s OPRA request dated May 2, 2011
- Letter from the Custodian to the Complainant dated May 13, 2011
- Letter from the Custodian to the Complainant dated May 17, 2011
- Letter from the Complainant to the Custodian dated May 20, 2011
- Letter from the Custodian to the Complainant dated May 27, 2011.

The Complainant does not agree to mediate this complaint.<sup>5</sup>

**June 7, 2011**

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

**June 14, 2011**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated May 2, 2011
- Letter from the Custodian to the Complainant dated May 13, 2011
- Letter from the Custodian to the Complainant dated May 17, 2011
- Letter from the Custodian to the Complainant dated May 27, 2011.

The Custodian certifies that he received the Complainant’s OPRA request on May 4, 2011. The Custodian also certifies he responded to the Complainant’s request in writing on May 13, 2011 requesting an extension until May 20, 2011. The Custodian further certifies that he sent a letter to the Complainant on May 17, 2011 denying the OPRA request. The Custodian additionally certifies that the Complainant responded via letter on May 20, 2011 and specifically requested a copy of a press release. The Custodian certifies that he provided a copy of this press release on May 27, 2011. The Custodian also certifies that in a letter dated May 27, 2011 he renewed his original denial dated May 17, 2011.

The Custodian certifies that the investigative file he found in response to the Complainant’s OPRA request was filed in a standard banker’s box. The Custodian also certifies that the investigative file contained 2,333 pages of records. The Custodian further certifies that the Complainant’s original request sought a listing of each record responsive and the reason it was being denied. The Custodian additionally certifies that due to the volume of records contained in the investigation file, his response dated May 17, 2011 included a summary of the types of records contained in the file as well as the amount of pages in each category. The Custodian certifies that because of the volume of records, he was also not able to specifically identify each record in the SOI within the time allowed and was not able to check for duplication of records contained within the 2,333 pages of records.

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<sup>5</sup> The Complainant made no legal arguments or factual assertions in support of his Denial of Access Complaint.

The Custodian argues that based on his examination of the 2,333 records complying with the Complainant's request would require at least 31.25 hours of work just to review the records. The Custodian also argues that he cannot estimate the amount of hours would then be required to redact personal identifying information of victims and witnesses. The Custodian certifies that his hourly rate is \$45.91. The Custodian also certifies that the special service charge to perform 31.25 hours of work would be \$1,434.69.

The Custodian also included the following document index:

List of all records responsive to Complainant's OPRA request (include number of pages for each record)	List the Records Retention Requirement and Disposition Schedule for each record responsive to the Complainant's OPRA Request	List of all records provided to the Complainant in their <u>entirety</u> or <u>with redactions</u> (include the date such records were provided)	If records were disclosed, with redactions give a general nature description of the record.	If records were denied in their entirety, give a general nature description of the record.	List the legal explanation and statutory citation for the denial of access to records in their <u>entirety</u> or <u>with redactions</u> .
DYFS Investigative Records (1,674 pages)	Destroy ten (10) years after closed, final judgment or sentence served. Schedule C310000-003, Records Series 00018-0001	None	N/A	See letter from the Custodian to the Complainant dated May 17, 2011.	See letter from the Custodian to the Complainant dated May 17, 2011.
Criminal Investigatory Records (425 pages)	Destroy ten (10) years after closed, final judgment or sentence served. Schedule C310000-003, Records Series 00018-0001	None	N/A	See letter from the Custodian to the Complainant dated May 17, 2011.	See letter from the Custodian to the Complainant dated May 17, 2011.
Grand Jury Records (234 pages)	Destroy ten (10) years after closed,	None	N/A	See letter from the Custodian to	See letter from the Custodian to

	final judgment or sentence served. Schedule C310000-003, Records Series 00018-0001			the Complainant dated May 17, 2011.	the Complainant dated May 17, 2011.
Press Release	Destroy ten (10) years after closed, final judgment or sentence served. Schedule C310000-003, Records Series 00018-0001	None	N/A	See letter from the Custodian to the Complainant dated May 17, 2011.	See letter from the Custodian to the Complainant dated May 17, 2011.

**Analysis**

**Whether the Complainant’s request is valid under OPRA?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all

records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the instant complaint, the Complainant requested any and all records<sup>6</sup> relating to the following: 1) allegations of child abuse or neglect in which E.C. was the victim; 2) allegations that E.C. was a missing person or had disappeared or that E.C.’s whereabouts were unknown and 3) allegations that the Complainant had any involvement in any activity relating to E.C. or that the Complainant had violated a court order, request, directive, notice subpoena, summons or other process issued by court. This request is overly broad and would require the Custodian to conduct research in order to fulfill same. The Complainant’s request is therefore invalid under OPRA.

The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’* N.J.S.A. 47:1A-1.” (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). As the court noted in invalidating MAG’s request under OPRA:

“Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.” *Id.* at 549.

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.” (Emphasis added.) *Id.*

In addition, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>7</sup> the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA

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<sup>6</sup> The Complainant requests reports, memoranda, correspondence, e-mails, press releases, statements, transcripts, complaints, pleadings, notes, and photographs as well as “other records.”

<sup>7</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”<sup>8</sup>

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

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

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

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

In reviewing the complainant’s request, the Council found that “[b]ecause the Complainant’s OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).”

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<sup>8</sup> As stated in Bent, *supra*.

The Complainant's request sets forth a long list of records sought and includes the words "and other records," indicating that the list provided is not limited to those specific identifiable government records. The request does not identify who authored the records, the recipient of the records, or even a case number. The Complainant informed the Custodian via letter on May 17, 2011 that he located an investigation file which appears to be responsive to the Complainant's request. However, pursuant to Schuler, supra, the Complainant cannot request entire files. The Complainant's request would require the Custodian not only to search, but research, every document in the agency's possession regarding the three subjects set forth in the request. Thus, the Complainant's request is invalid under OPRA.

Therefore, because the Complainant's request is overly broad and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

**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.*

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 Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, supra, at



71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, *supra*, that 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 accepted the application of the catalyst theory within the context of OPRA, stating that:

“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 at 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 the instant complaint, as in Mason, the Complainant’s Denial of Access Complaint was not the catalyst for the release of the requested records, because the Complainant’s request is invalid under OPRA because it is overly broad and would require the Custodian to conduct research.

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 a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. Specifically, the Complainant's request is invalid under OPRA because it is overly broad and would require the Custodian to perform research. 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. Because the Complainant's request is overly broad and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
2. 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 a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. Specifically, the Complainant's request is invalid under OPRA because it is overly broad and would require the Custodian to perform research. 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*.

Prepared By: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

October 23, 2012<sup>9</sup>

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<sup>9</sup> This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.