



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

March 25, 2014 Government Records Council Meeting

Jeff Carter
Complainant

Complaint Nos. 2011-217 and 2011-218

v.

Franklin Fire District No. 2 (Somerset)
Custodian of Record

At the March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 18, 2014 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 these complaints be dismissed. The Complainant (via Counsel) withdrew his complaints in a letter to the Honorable John Schuster, Administrative Law Judge, dated February 7, 2014, because the matters were settled. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 25th Day of March, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: March 27, 2014



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 25, 2014 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-217 & 2011-218

v.

**Franklin Fire District No. 2 (Somerset)²
Custodian of Records**

Records Relevant to Complaint:

- Copies of all resolutions from January 1, 2010 to December 31, 2010.³
- Copies of all resolutions from January 1, 2011 to April 22, 2011.⁴

Custodian of Record: William Kleiber

Request Received by Custodian: April 22, 2011

Response Made by Custodian: None⁵

GRC Complaint Received: June 17, 2011

Background

August 28, 2012 Council Meeting:

At its August 28, 2012 public meeting, the Council considered the August 21, 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, found that:

1. The Custodian did not timely respond to the Complainant's OPRA request. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No.

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ). Counsel entered his appearance to the GRC via e-mail on June 16, 2011.

² Represented by Eric M. Perkins, Esq. (Skillman, NJ).

³ This request is the subject of GRC Complaint No. 2011-218.

⁴ This request is the subject of GRC Complaint No. 2011-217.

⁵ The Complainant identified May 3, 2011 as the response date in the Denial of Access Complaint while the Custodian certified that he responded on April 26, 2011. Neither of these dates was substantiated by the evidence of record.

2007-11 (Interim Order October 31, 2007). Moreover, the evidence indicates that the Custodian's search for the responsive records was inadequate. *See Schneble v. New Jersey Department of Environmental Protection*, GRC Complaint No. 2007-220 (April 2008).

2. Because the Franklin Fire District No. 2 maintained responsive resolutions but failed to perform an adequate search to locate same, and because a proper search during the preparation of the Statements of Information yielded the responsive records, the Custodian has unlawfully denied access to same. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the resolutions because the Custodian certified that the responsive resolutions were sent to the Complainant and because same were attached to the Statements of Information.
3. Although the Custodian's failure to respond in writing within the statutorily mandated seven (7) business days resulted in a "deemed" denial of access, the Custodian's search for the responsive resolutions was insufficient and the Custodian unlawfully denied access to same, the evidence of record indicates that the Complainant received same by way of the Statements of Information. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's insufficient response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Id. at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian failed to provide the responsive resolutions until after the filing of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters and Mason. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Procedural History:

On August 30, 2012, the Council distributed its Interim Order to all parties. On April 23, 2013, the complaint was transmitted to the Office of Administrative Law (“OAL”).

On February 7, 2014, the Complainant’s Counsel sent a letter to the Honorable John Schuster, Administrative Law Judge, withdrawing these complaints because same were settled.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that these complaints be dismissed. The Complainant (via Counsel) withdrew his complaints in a letter to the Honorable John Schuster, Administrative Law Judge, dated February 7, 2014, because the matters were settled. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

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

March 18, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

August 28, 2012 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-217 & 2011-218

v.

Franklin Fire District No. 2 (Somerset)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 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. The Custodian did not timely respond to the Complainant’s OPRA request. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra. Moreover, the evidence indicates that the Custodian’s search for the responsive records was inadequate. *See* Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008).
2. Because the Franklin Fire District No. 2 maintained responsive resolutions but failed to perform an adequate search to locate same, and because a proper search during the preparation of the Statements of Information yielded the responsive records, the Custodian has unlawfully denied access to same. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the resolutions because the Custodian certified that the responsive resolutions were sent to the Complainant and because same were attached to the Statements of Information.
3. Although the Custodian’s failure to respond in writing within the statutorily mandated seven (7) business days resulted in a “deemed” denial of access, the Custodian’s search for the responsive resolutions was insufficient and the Custodian unlawfully denied access to same, the evidence of record indicates that the Complainant received same by way of the Statements of Information. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s insufficient response does not rise to the level of a knowing and



willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian failed to provide the responsive resolutions until after the filing of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees. Based on the New Jersey Supreme Court’s decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council’s decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of “unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]” this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 28th Day of August, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: August 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-217 & 2011-218

v.

**Franklin Fire District No. 2 (Somerset)²
Custodian of Records**

Records Relevant to Complaint:

1. Copies of all resolutions from January 1, 2010 to December 31, 2010.³
2. Copies of all resolutions from January 1, 2011 to April 22, 2011.⁴

Request Made: April 22, 2011

Response Made: None.⁵

Custodian: William Kleiber

GRC Complaint Filed: June 17, 2011⁶

Background

April 22, 2011

Complainant's two (2) Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above in two (2) letters referencing OPRA. The Complainant indicates that the preferred method of delivery is e-mail, or facsimile only if the record is not available electronically. The Complainant further requests that the Custodian confirm receipt of these OPRA requests via e-mail.

June 17, 2011

Denial of Access Complaints filed with the Government Records Council ("GRC") attaching the Complainant's two (2) OPRA requests dated April 22, 2011.

The Complainant states that he submitted two (2) OPRA requests to the Custodian via e-mail and facsimile on April 22, 2011. The Complainant states that as of June 16, 2011, the Custodian has failed to respond to either request.

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ). Counsel entered his appearance to the GRC via e-mail on June 16, 2011.

² Represented by Eric M. Perkins, Esq. (Skillman, NJ).

³ This request is the subject of GRC Complaint No. 2011-218.

⁴ This request is the subject of GRC Complaint No. 2011-217.

⁵ The Complainant identifies May 3, 2011 as the response date in the Denial of Access Complaint while the Custodian certifies that he responded on April 26, 2011. Neither of these dates can be substantiated by the evidence of record.

⁶ The GRC received the Denial of Access Complaint on said date.

The Complainant states that the OPRA requests at issue are two (2) of several submitted to the Custodian in which he failed to respond. The Complainant further states that he subsequently filed complaints for those requests to which the Custodian failed to respond. The Complainant asserts that all of these complaints viewed in their totality establish a pattern indicating that the Custodian is knowingly and willfully violating OPRA.

The Complainant requests the following:

1. A determination that the Custodian violated OPRA by failing to respond to the Complainant's OPRA requests within the statutorily mandated time frame.
2. A determination ordering the Custodian to immediately disclose all responsive records.
3. A determination finding that the Custodian knowingly and willfully violated OPRA.

The Complainant does not agree to mediate this complaint.

July 18, 2011

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

July 22, 2011

E-mail from Ms. Sandi Accardi ("Ms. Accardi"), Franklin Fire District ("FFD") Secretary, to the GRC. Ms. Accardi requests an extension of time until August 5, 2011 to submit the SOIs.

July 22, 2011

E-mail from the GRC to Ms. Accardi. The GRC grants Ms. Accardi an extension of time until August 5, 2011 to submit the SOIs.

August 8, 2011

Custodian's SOIs with the following attachments:

- Complainant's two (2) OPRA requests dated April 22, 2011.
- Complainant's two (2) Denial of Access Complaints dated June 17, 2011.
- Letter from the GRC to the Custodian dated July 18, 2011.
- 21 resolutions responsive to the Complainant's OPRA request relevant to GRC Complaint No. 2011-217.
- 13 resolutions responsive to the Complainant's OPRA request relevant to GRC Complaint No. 2011-218.

The Custodian certifies that FFD staff maintains monthly meeting minutes of all meetings. The Custodian certifies that the minutes contain all resolutions adopted by the FFD. The Custodian certifies that his search for the requested records included FFD staff reviewing records and providing the requested material.

The Custodian also certifies that no records responsive to the 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.

The Custodian certifies that he received the Complainant's OPRA requests on April 22, 2011. The Custodian certifies that he responded on April 26, 2011⁷ providing access to all minutes for 2010 and 2011 to the date of the OPRA request, which contain the FFD's actions including resolutions. The Custodian certifies that most actions were recorded in the minutes only; thus, the FFD did not provide resolutions as same do not exist.

The Custodian certifies that during the FFD's preparation of the SOI, the Custodian's Counsel located 13 resolutions for 2010 and 21 resolutions for 2011 that existed and immediately forwarded same to the Complainant. The Custodian certifies that in each instance, the resolution was titled the same as the resolutions incorporated into the minutes.

Analysis

Whether the Custodian timely responded to the Complainant's 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* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A.

⁷ The Custodian provided no proof of his April 26, 2011 response as part of the SOI.
Jeff Carter v. Franklin Fire District No. 2 (Somerset), 2011-217 & 2011-218 – Findings and Recommendations of the Executive Director

47:1A-5.g.⁸ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant complaint, the Custodian and Complainant each provided two (2) different dates that the Custodian responded: April 26, 2011 and May 3, 2011 respectively. However, there is no evidence in the record to substantiate that the Custodian responded in writing on either date.

Additionally, the Custodian certified in the SOI that he provided access to meeting minutes because the resolutions were memorialized therein and no resolutions were thought to exist. However, the Custodian next certified that in preparing the SOI, the Custodian's Counsel located 34 resolutions responsive to the Complainant's two (2) OPRA requests. Thus, it is clear that the Custodian failed to adequately search and provide the actual records responsive. *See* Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008).

Therefore, the Custodian did not timely respond to the Complainant's OPRA request. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra. Moreover, the evidence indicates that the Custodian's search for the responsive records was inadequate. *See* Schneble.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or*

⁸ It 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.

kept on file ... or that has been received in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

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

The Complainant submitted two (2) OPRA requests on April 22, 2011 seeking resolutions for 2010 and 2011 from January 1, 2011 to the date of the OPRA request. The Complainant subsequently filed these complaints after not receiving the responsive records.

In the SOIs, the Custodian certified that he provided the Complainant with minutes memorializing resolutions passed by the FFD because the FFD recorded most actions in the minutes. The Custodian further certified that during the preparation of the SOIs, the Custodian’s Counsel located 34 responsive resolutions and immediately provided same to the Complainant. Additionally, these resolutions were attached to the SOIs.

It is clear from the evidence of record that the responsive resolutions are government records 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 resolutions. Accordingly, the Custodian was required to disclose same in response to the Complainant’s OPRA requests; however, he failed to perform an adequate search to locate same. Thus, the Custodian unlawfully denied access to same.

Thus, because the FFD maintained responsive resolutions but failed to perform an adequate search to locate same, and because a proper search during the preparation of the SOIs yielded the responsive records, the Custodian has unlawfully denied access to same. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the resolutions because the Custodian certified that the responsive resolutions were sent to the Complainant and because same were attached to the SOIs.

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

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied

access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

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

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

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

Although the Custodian’s failure to respond in writing within the statutorily mandated seven (7) business days resulted in a “deemed” denial of access, the Custodian’s search for the responsive resolutions was insufficient and the Custodian unlawfully denied access to same, the evidence of record indicates that the Complainant received same by way of the SOIs. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s insufficient response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

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

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

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

As the New Jersey Supreme Court noted in Mason, Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001)(applying Buckhannon to the federal Individuals with Disabilities

Education Act), *cert. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

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

“New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); *see also* Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J.

137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon ... " *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

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

The Complainant filed the instant complaints seeking access to the resolutions responsive to his two (2) April 22, 2011 OPRA requests. Subsequent to the filing of these complaints, the GRC requested that the Custodian submit two (2) SOIs. In the SOIs, the Custodian certified that during the preparation of same, the Custodian's Counsel located 34 resolutions and sent them to the Complainant. Further, these resolutions were attached to the SOI submitted to the GRC. Therefore, because the Custodian provided the responsive records to the Complainant following the filing of this complaint, the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Pursuant to Teeters, *supra*, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian failed to provide the responsive resolutions until after the filing of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not timely respond to the Complainant's OPRA request. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, *supra*. Moreover, the evidence indicates that the Custodian's search for the

responsive records was inadequate. See Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008).

2. Because the Franklin Fire District No. 2 maintained responsive resolutions but failed to perform an adequate search to locate same, and because a proper search during the preparation of the Statements of Information yielded the responsive records, the Custodian has unlawfully denied access to same. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the resolutions because the Custodian certified that the responsive resolutions were sent to the Complainant and because same were attached to the Statements of Information.
3. Although the Custodian's failure to respond in writing within the statutorily mandated seven (7) business days resulted in a "deemed" denial of access, the Custodian's search for the responsive resolutions was insufficient and the Custodian unlawfully denied access to same, the evidence of record indicates that the Complainant received same by way of the Statements of Information. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's insufficient response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian failed to provide the responsive resolutions until after the filing of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012