



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 Higgins  
Complainant

Complaint No. 2011-54

v.

County of Hunterdon  
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 N.J.S.A. 47:1A-1 et seq. contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of limitations in OPRA bars the GRC’s adjudication of the Complainant’s Denial of Access Complaint in the instant matter.
2. Because the Custodian failed to forward the Complainant’s February 24, 2010 OPRA request to the proper Custodian, *i.e.* the Tax Administrator, and failed to provide any evidence that he directed the Complainant to submit his OPRA request directly to the Tax Administrator, the Custodian has violated N.J.S.A. 47:1A-5.h. *See* Kossup v. City of Newark Police Department, GRC Complaint No. 2006- 174 (February 2007) (holding that Lt. Caroline Clark violated OPRA by failing to forward the request or direct the requestor to the proper Custodian of record pursuant to N.J.S.A. 47:1A-5.h.)
3. Because the Custodian certified in the Statement of Information that the County does not maintain copies of the records responsive to the Complainant’s request, *i.e.* Mod IV tax roll records from the Division of Geographic Information Services, but rather such records are maintained with the County Board of Taxation, and Ms. Fatula certified that the County does not maintain any tax records and that the Board of Taxation maintains the records sought, and because there is no evidence in the record to refute the Custodian’s or Ms. Fatula’s certifications, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) and N.J.S.A. 47:1A-6.
4. The Custodian violated N.J.S.A. 47:1A-5.h. by failing to forward the Complainant’s OPRA request to the proper custodian of record or directing the Complainant to the

proper custodian. However, the Custodian and Ms. Fatula certified that the County Board of Taxation maintains the records responsive to the Complainant's OPRA request and that no records responsive to the Complainant's request exist at the County. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. 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 Custodian and Ms. Fatula certified that the County Board of Taxation maintains the records responsive to the Complainant's OPRA request and not the County. 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 Higgins<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-54**

v.

**County of Hunterdon<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** The most current 2010 Mod IV records also known as the tax roll from the Division of Geographic Information Services (“GIS”) of Hunterdon County (“County”).

**Request Made:** February 24, 2010

**Response Made:** March 5, 2010

**Custodian:** Robert L. Greene

**GRC Complaint Filed:** February 28, 2011<sup>3</sup>

**Background**

**February 24, 2010**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that the preferred medium for delivery is a compact disc (“CD”).

**March 5, 2010**

Custodian’s response to the OPRA request. The Custodian responds in writing via letter to the Complainant’s OPRA request on the sixth (6<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the requested records is denied because to provide such records in digital format would result in the release of citizen’s personal information which would violate their reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1.1. The Custodian also states that the requested records are also denied because said records include taxpayers’ personal identifying information. The Custodian further states that the taxpayers are required to furnish this information involuntarily and without consent.

**February 28, 2011**

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

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<sup>1</sup> Represented by Robert Blau, Esq., of Blau & Blau Attorneys at Law (Springfield, NJ).

<sup>2</sup> Represented by Michael A. DeSapio, Esq., of Gaetano M. DeSapio Attorney at Law (Frenchtown, NJ).

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

- Complainant's OPRA request dated February 24, 2010
- Letter from the Custodian to the Complainant dated March 5, 2010.

The Complainant states that the Custodian denied him access to these records on March 5, 2010 via letter stating that the requested records are exempt from disclosure. The Complainant further states that the County has a computer system at the County Clerk's office, so this data is maintained in electronic format.

The Complainant agrees to mediate this complaint.

**March 4, 2011**

Offer of Mediation sent to the Custodian.

**March 8, 2011**

The Custodian agrees to mediate this complaint.

**March 15, 2011**

Complaint is referred to mediation.

**June 23, 2011**

Complaint is referred back to the GRC for adjudication.

**June 23, 2011**

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

**June 30, 2011**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 24, 2010
- Letter from the Custodian to the Complainant dated March 5, 2010.

The Custodian certifies that he did not search for the requested records. The Custodian also certifies that no records were destroyed as such records must be permanently maintained in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that he received the Complainant's OPRA request on February 24, 2010. The Custodian also certifies that he denied the Complainant's OPRA request on March 5, 2010 via letter stating that the digital tax records maintained by GIS contains taxpayers' personal identifying information which they are required to furnish involuntarily and to disclose such data would violate a citizen's reasonable expectation of privacy. The Custodian further certifies that GIS maintains digital tax maps overlaid with personal identifying information on each parcel. The Custodian further certifies that GIS does not maintain the Mod IV tax roll records, rather the County Board of Taxation maintains these records.

The Custodian certifies that the County Board of Taxation, more specifically the Tax Administrator, is the custodian of the Mod IV records or tax roll records. The Custodian also certifies that the County Board of Taxation is a state agency pursuant to N.J.S.A. 54:3-1, et. seq. and is therefore subject to the provisions of OPRA. The Custodian argues that the Complainant should have filed his OPRA request with the County Board of Taxation and not to GIS. The Custodian certifies that he informed Complainant's Counsel that the requested records can be obtained from the Tax Administrator.<sup>4</sup> The Custodian requests that the Council dismiss the Complainant's Denial of Access Complaint, because the County is not the proper custodian of records.

Moreover, the Custodian requests the Council to dismiss the Complainant's Denial of Access Complaint, because it was not timely filed. The Custodian certifies that the Complainant was denied records on March 5, 2010 and did not challenge this denial until February 28, 2011, nearly one (1) year later. The Custodian argues that the New Jersey Supreme Court has held that OPRA actions to challenge custodian's denial of access to records are subject to a forty-five (45) day statute of limitations pursuant to Mason v. City of Hoboken, 196 N.J. 51 (2008). The Custodian also argues that while the Complainant has an option to file an action in Superior Court or the GRC pursuant to N.J.S.A. 47:1A-6, said action must be filed within forty-five (45) days.

#### **September 24, 2012**

E-mail from the GRC to the Custodian. The GRC states that in order to properly adjudicate the Complainant's Denial of Access Complaint, it is requesting a legal certification from the Custodian. The GRC states that the Custodian certified in the SOI that the digital tax records maintained by GIS contains taxpayers' personal identifying information which would violate a citizen's expectation of privacy. The GRC also states that the Custodian certified GIS does not maintain Mod IV tax roll records, rather these records are maintained with the County Board of Taxation. The GRC requests the Custodian to certify what type of tax records the County maintains and what is the difference between tax records maintained by the County and the Mod IV tax records maintained by the County Board of Taxation.

#### **September 25, 2012**

Telephone call from Custodian's Counsel to the GRC. Counsel states that since Tax Administrator Ms. Betty Fatula (Ms. Fatula) is the Custodian of Records for tax records, the certification would be best to come from her.

#### **September 26, 2012**

E-mail from Custodian's Counsel to the GRC attaching the requested legal certification from Ms. Fatula. Ms. Fatula certifies that the County Board of Taxation has access to the Mod IV tax records. Ms. Fatula certifies that the County is not the custodian for these records. Ms. Fatula also certifies that the Mod IV tax records include all parcel information, including name, address, block, lot, current assessment, property tax information, acreage and property class. Ms. Fatula further certifies that the County does not maintain any tax records. Lastly, Ms. Fatula certifies that given the fact that the County maintains no such records of taxation, the answer to the question as to the

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<sup>4</sup> The Custodian does not state when or in what format he informed Complainant's Counsel that the records responsive to the request could be obtained from the Tax Administrator.

difference between County tax records and the Board of Taxation records is that the County does not maintain any tax records.

### Analysis

#### **Is there a forty-five (45) day statute of limitations for filing a Denial of Access Complaint with the GRC?**

The Custodian asserted in the SOI that the Complainant did not timely file his Denial of Access Complaint. The Custodian stated that he denied the Complainant access to his OPRA request on March 5, 2010. The Custodian also stated that the Complainant did not challenge this denial until February 28, 2011, nearly one (1) year later. The Custodian argued that the New Jersey Supreme Court has held that OPRA actions to challenge custodian's denial of access to records are subject to a forty-five (45) day statute of limitations pursuant to Mason v. City of Hoboken, 196 N.J. 51 (2008). Lastly, the Custodian argued that the Complainant has an option to file in Superior Court or the GRC pursuant to N.J.S.A. 47:1A-6 but said action must be filed within forty-five (45) days.

In Mason v. City of Hoboken, 196 N.J. 51 (2008), the Supreme Court determined that the appropriate statute of limitations for filing a denial of access complaint *in Superior Court* was 45 days from the date of the Custodian's denial of access. The Court noted that this statute of limitations was consistent with the limitations period in actions in lieu of prerogative writs. *Id.* The Court noted that "the former Right to Know Law specifically directed that litigants headed to Superior Court should proceed via an action in lieu of prerogative writs. *N.J.S.A. 47:1A-4* (repealed 2002). That language does not appear in OPRA. *See N.J.S.A. 47:1A-6.*" *Id.*

The Court further noted that:

"The Legislature plainly stated that requestors denied access to public records may file an action in Superior Court or a complaint before the GRC. N.J.S.A. 47:1A-6. Those matters "shall proceed in a summary or expedited manner." *Ibid.* Beyond that, the Legislature specifically deferred to the Supreme Court to adopt court rules "necessary to effectuate the purposes of this act." N.J.S.A. 47:1A-12. The Legislature's action was consistent with our Constitution, which vests this Court with the authority to create procedural rules *for court practices*. *See* N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240, 255, 74 A.2d 406 (1950)." 196 N.J. 68 [Emphasis added].

The Court therefore held that:

"requestors who choose to file an action *in Superior Court* to challenge the decision of an OPRA custodian must do so within 45 days..." *Id.* at 70. (emphasis added.)

Thus, the holding of Mason is limited to Denial of Access Complaints filed in the Superior Court of New Jersey.

The New Jersey Legislature is empowered to delegate to an administrative agency the authority to promulgate rules and regulations interpreting and implementing a statute. An appellate court will defer to an agency's interpretation of a statute unless it is plainly unreasonable. The presumption of validity, however, is not without limits. If an agency's statutory interpretation is contrary to the statutory language, or if the agency's interpretation undermines the Legislature's intent, no deference is required. An appellate court's deference does not go so far as to permit an administrative agency under the guise of an administrative interpretation to give a statute any greater effect than is permitted by the statutory language. *See, Reilly v. AAA Mid-Atlantic Ins. Co. of New Jersey*, 194 N.J. 474 (2008).

The Open Public Records Act, N.J.S.A. 47:1A-1 et seq., contains no statute of limitations on Denial of Access Complaints filed with the GRC. The GRC is therefore without authority to impose a statute of limitations where one does not exist. Thus, no statute of limitations in OPRA bars the GRC's adjudication of the Complainant's denial of access complaint in the instant matter.

Because N.J.S.A. 47:1A-1 et seq. contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of limitations in OPRA bars the GRC's adjudication of the Complainant's Denial of Access Complaint in the instant matter.

### **Whether the Custodian should have directed the Complainant or forwarded the Complainant's OPRA request to the County Board of Taxation?**

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 provides that:

"[a]ny officer or *employee* of a *public agency* who receives a request for access to a government record *shall forward* the request to the *custodian of the record* or *direct the requestor* to the *custodian of the record.*" (Emphasis added.) N.J.S.A. 47:1A-5.h.

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 Custodian responded to the Complainant’s OPRA request, in writing on the sixth (6<sup>th</sup>) business day following receipt of such request. The Custodian denied the Complainant’s request advising that providing the records responsive in digital format would result in the release of a citizen’s personal information and would violate their reasonable expectation of privacy. In the Custodian’s SOI, the Custodian certified that the Division of GIS does not maintain the record responsive, rather the County Board of Taxation, more specifically the Tax Administrator, maintains these records. The Custodian argued that the Complainant should have filed his OPRA request with the County Board of Taxation and not to GIS. The Custodian also certified in the SOI that he informed Complainant’s Counsel that the requested records can be obtained from the Tax Administrator. Additionally, the Tax Administrator certified to this fact in a subsequent certification.

Although the Custodian certified in the SOI that he informed Complainant’s Counsel that the requested records can be obtained from the Tax Administrator, he initially denied the Complainant’s request because the release of such records would violate the citizen’s reasonable expectation of privacy. There is no evidence in the record that the Custodian informed the Complainant that he filed the instant request with the wrong public agency and, further, there is no evidence in the record that the Custodian forwarded the instant request to the appropriate custodian. The Complainant, therefore, had no way of knowing that the County was not the proper agency from which to the request the records he sought.

Therefore, because the Custodian failed to forward the Complainant’s February 24, 2010 OPRA request to the proper Custodian, *i.e.* the Tax Administrator, and failed to provide any evidence that he directed the Complainant to submit his OPRA request directly to the Tax Administrator, the Custodian has violated N.J.S.A. 47:1A-5.h. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006- 174 (February 2007) (holding that Lt. Caroline Clark violated OPRA by failing to forward the request or direct the requestor to the proper Custodian of record pursuant to N.J.S.A. 47:1A-5.h.)

### **Whether records responsive to the Complainant’s OPRA request exist?**



The Custodian certified in the SOI that that GIS does not maintain the Mod IV tax roll records responsive to the Complainant's OPRA request. The Custodian also certified in the SOI that the County Board of Taxation maintains these records responsive. The Custodian further certified in the SOI that the Tax Administrator is the custodian of the Mod 4 tax roll records. In a separate certification to the GRC dated September 27, 2012, Ms. Fatula certified that the County Board of Taxation has access to the Mod IV tax records and the County is not the custodian for those records. Ms. Fatula also certified that the County does not maintain any tax records. The Complainant has not disputed these certifications.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed. The complainant failed to submit any evidence to refute the custodian's certification. The GRC held that the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified in the Statement of Information that the County does not maintain copies of the records responsive to the Complainant's request, *i.e.* Mod IV tax roll records from the GIS, but rather such records are maintained with the County Board of Taxation, and Ms. Fatula certified that the County does not maintain any tax records and that the Board of Taxation maintains the records sought, and because there is no evidence in the record to refute the Custodian's or Ms. Fatula's certifications, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) and N.J.S.A. 47:1A-6.

**Whether the Custodian's failure to forward the Complainant's OPRA request or direct the Complainant to the proper custodian of records 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).

The Custodian violated N.J.S.A. 47:1A-5.h. by failing to forward the Complainant’s OPRA request to the proper custodian of record or directing the Complainant to the proper custodian. However, the Custodian and Ms. Fatula certified that the County Board of Taxation maintains the records responsive to the Complainant’s OPRA request and that no records responsive to the Complainant’s request exist at the County. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the Court held that attorney’s fees may be awarded when the

requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

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 Custodian certified in the SOI that GIS does not maintain these records. The Custodian also certified that the Complainant should direct his OPRA request to the County Board of Taxation, more specifically the Tax Administrator.

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 Custodian and Ms. Fatula certified that the County Board of Taxation maintains the records responsive to the Complainant’s OPRA request and not the County. 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 N.J.S.A. 47:1A-1 et seq. contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of limitations in OPRA bars the GRC’s adjudication of the Complainant’s Denial of Access Complaint in the instant matter.
2. Because the Custodian failed to forward the Complainant’s February 24, 2010 OPRA request to the proper Custodian, *i.e.* the Tax Administrator, and failed to provide any evidence that he directed the Complainant to submit his OPRA request directly to the Tax Administrator, the Custodian has violated N.J.S.A. 47:1A-5.h. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006- 174 (February 2007) (holding that Lt. Caroline Clark violated OPRA by failing to forward the request or direct the requestor to the proper Custodian of record pursuant to N.J.S.A. 47:1A-5.h.)
3. Because the Custodian certified in the Statement of Information that the County does not maintain copies of the records responsive to the Complainant’s request, *i.e.* Mod IV tax roll records from the Division of Geographic Information Services, but rather such records are maintained with the County Board of Taxation, and Ms. Fatula certified that the County does not maintain any tax records and that the Board of Taxation maintains the records sought, and because there is no evidence in the record to refute the Custodian’s or Ms. Fatula’s certifications, the Custodian has not unlawfully

denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) and N.J.S.A. 47:1A-6.

4. The Custodian violated N.J.S.A. 47:1A-5.h. by failing to forward the Complainant's OPRA request to the proper custodian of record or directing the Complainant to the proper custodian. However, the Custodian and Ms. Fatula certified that the County Board of Taxation maintains the records responsive to the Complainant's OPRA request and that no records responsive to the Complainant's request exist at the County. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
  
5. 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 Custodian and Ms. Fatula certified that the County Board of Taxation maintains the records responsive to the Complainant's OPRA request and not the County. 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>5</sup>

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<sup>5</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.