



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 31, 2012 Government Records Council Meeting

Elizabeth Cross
Complainant

Complaint No. 2011-98

v.

Township of Wall (Monmouth)
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 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 certified in the Statement of Information and subsequently on May 2, 2012 that the Township never received any bids for healthcare, dental or vision coverage for the February 2011 renewal. Moreover, the Custodian certified that the Township only solicited quotes for healthcare. Further, the Complainant failed to submit any evidence to refute the Custodian’s certification. Thus, the Custodian did not unlawfully deny access to the bids pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
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. Specifically, the GRC determined that the evidence of record supported that no “bids” responsive to the Complainant’s OPRA request existed. 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 31st Day of July, 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 7, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

**Elizabeth Cross¹
Complainant**

GRC Complaint No. 2011-98

v.

**Township of Wall (Monmouth)²
Custodian of Records**

Records Relevant to Complaint: Copies of all insurance bids received for healthcare, dental and vision coverage for the February 2011 renewal.

Request Made: February 3, 2011

Response Made: February 4, 2011

Custodian: Lorraine Kubacz

GRC Complaint Filed: March 24, 2011³

Background

February 3, 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.

February 4, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via response receipt to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian provides access to health insurance quotes (3 pages).

March 24, 2011

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

- Complainant's OPRA request dated February 3, 2011.
- Wall Township ("Township") "Public Records Request Response" receipt dated February 4, 2011.
- Records provided to the Complainant (3 pages).

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by Sheri K. Siegelbaum, Esq., of Scarinci, Hollenbeck (Lyndhurst, NJ).

³ The GRC received the Denial of Access Complaint on said date.

The Complainant's Counsel states that the Township failed to provide the Complainant with the records responsive to her OPRA request.

Counsel states that the Complainant submitted an OPRA request to the Township on February 3, 2011 seeking all insurance bids received for health, dental and vision coverage for the February 2011 renewal. Counsel states that the Custodian responded on February 4, 2011 providing the Complainant with three (3) pages of bid summaries.

Counsel states that OPRA mandates that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] shall be construed in favor of the public's right of access." Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006)(citing N.J.S.A. 47:1A-1). Further, Counsel states that "[t]he purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004). Counsel states that in any action under OPRA, the burden of proof rests with the public agency. N.J.S.A. 47:1A-6.

Counsel states that a custodian of record must bear the burden of proof in any proceeding under OPRA. N.J.S.A. 47:1A-6 and Paff v. Township of Lawnside (Camden), GRC Complaint No. 2009-155 (October 2010). Counsel contends that there is no doubt that the records requested by the Complainant are government records as defined under OPRA. N.J.S.A. 47:1A-1.1.

Counsel contends that here, the Custodian provided summaries of bids instead of the actual bids. Counsel contends that the Custodian's failure to provide the responsive bids constitutes a "deemed" denial of access. N.J.S.A. 47:1A-5.i. Counsel thus requests the following:

1. A determination ordering the Custodian to provide the Complainant with copies of the requested bids.
2. A determination that the Complainant is a prevailing party entitled to reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

April 15, 2011

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

April 25, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 3, 2011.
- Township "Public Records Request Response" receipt dated February 4, 2011.
- Records provided to the Complainant (3 pages).

The Custodian certifies that her search for the requested records included herself and the Business Administrator searching the Township's files for all responsive records.

The Custodian also certifies that whether any records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services is not applicable to this complaint.

The Custodian certifies that she received the Complainant's OPRA request on February 3, 2011. The Custodian certifies that she responded in writing to the Complainant on February 4, 2011 providing copies of quotes for healthcare coverage.

The Custodian further certifies that the Township received no quotes or bids for dental or vision coverage in connection with the February 2011 renewal.

May 16, 2011

Letter from the Complainant's Counsel to the GRC attaching the following:

- Complainant's OPRA request dated February 3, 2011.
- Township "Public Records Request Response" receipt dated February 4, 2011.
- Records provided to the Complainant (3 pages).
- Additional records (21 pages).

Counsel states that the Complainant believes that certain additional records exist that are responsive to her OPRA request. Counsel notes that the Complainant relied on the fact that the third (3rd) page of the records provided contained the footer "Page 1 of 3. 11/10/2010 10:10 am." Counsel contends that the Custodian did not provide the remaining pages.

Counsel states that during a meeting on May 6, 2011 between the Complainant, Township Administrator and others, the Complainant demanded to see the entire file regarding health care insurance bids. Counsel states that the Township Administrator obtained the file, which contained an additional 100 pages of the requested health insurance bids. Counsel notes that almost all of the additional pages contain the exact same footer of "11/10/2010 10:10 am." Counsel states that the Township Administrator made copies of the additional pages and gave them to the Complainant.

Counsel requests that, in light of this new information, the GRC order the Custodian to amend the SOI to reflect these new facts to include a more specific explanation as to the search conducted and whether any additional records exist. Counsel further requests that the GRC order the Custodian to amend the SOI to state why these new pages, which are clearly part of the entire document, were omitted in the Township's original response on February 4, 2011.

May 18, 2011

Letter from the Custodian's Counsel to the GRC. Counsel states that she is in receipt of Complainant Counsel's letter dated May 16, 2011 and disputes that the Township withheld additional records. Counsel states that the Complainant's February 3,

2011 OPRA request sought “insurance bids.” Counsel states that the Custodian provided same. Counsel asserts that the additional records were actually backup information provided to the Township regarding the bids to include the description of the benefits provided, statistics used to calculate medical benefits, and so on.

Counsel further argues that in an effort to satisfy the Complainant, the Township Administrator voluntarily provided these additional records. Counsel argues that these records were not part of the Complainant’s original OPRA request but were provided to the Complainant as part of a verbal request at the May 6, 2011 Township Council meeting.⁴

Counsel states that if necessary, the Township Administrator can submit a legal certification. Counsel contends that this complaint should be dismissed as moot.

April 27, 2012

E-mail from the GRC to the Custodian. The GRC states that its regulations provide that “[t]he Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint.” *N.J.A.C. 5:105-2.4(1)*. The GRC states that it has reviewed the parties’ submissions and has determined that additional information is required.

The GRC states that the Custodian’s Counsel submitted a letter to the GRC on May 18, 2011 in response to Complainant’s Counsel’s May 16, 2011 submission. The GRC states that these two submissions together have raised several questions. The GRC thus requests a legal certification, pursuant to N.J. Court Rule 1:4-4, in response to the following questions:

1. The Complainant sought a bid; however, the Custodian provided a quote:
 - a. What is the difference in meaning between the two?
 - b. Does the Township use “bid” and “quote” interchangeably?
2. Regarding the additional documents at issue, which contain the same footnote as the last of the three (3) pages of records initially provided to the Complainant:
 - a. Are the additional documents backup documents or part of the actual bid submitted by United Healthcare?
 - b. If so, why would these documents not be considered part of the bid and thus not responsive to a request for just the bid?
 - c. Regarding the first two (2) pages initially provided to the Complainant, were these pages received prior to receipt of the last page and additional documentation?
3. Whether the 21 pages provided were the only pages in the file that were “part and parcel” of the total bid and the other pages were not?
4. Whether the Township Administrator provided all 100 pages or just the pages attached to Complainant Counsel’s May 16, 2011 submission?

⁴ Counsel notes that the records are the subject of litigation.
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The GRC requests that the Custodian provide the requested legal certification by close of business on May 2, 2012. The GRC notes that submissions received after this deadline date may not be considered by the Council for adjudication.

May 2, 2012

Custodian's legal certification. The Custodian certifies that following is her response to the GRC's request for additional information:

1. What is the difference between a "bid" and a "quote":

The Custodian certifies that when bids are sought, formal bid specifications are prepared and a Notice to Bidders is advertised in the newspaper and on the Township's website. The Custodian certifies that formal sealed bids are received at a specific time and place as advertised. The Custodian certifies that quotes, on the other hand, are informal responses to requests for proposals. The Custodian certifies that no formal sealed bids were received in this instance.

2. Does the Township use "bid" and "quote" interchangeably:

The Custodian certifies that the Township does not use the terms interchangeably. The Custodian certifies that the Complainant met with the Township Administrator and a Committee member and that the Township Administrator advised the Complainant that no formal bids were received and that the Township only solicited quotes, which he provided to the Complainant.

3. Are the additional documents backup documents or part of the actual bid submitted by United Healthcare:

The Custodian certifies that no formal bids were received from United Healthcare. The Custodian certifies that the Township Administrator provided the responsive quotes to the Complainant and further advised that the additional records were "colorful brochures, company information, etc., provided by the company."

4. If so, why would these documents not be considered part of the bid and thus no responsive to a request for just the bid:

The Custodian reiterates that the Township did not receive any formal bid, which is what the Complainant's OPRA request sought. The Custodian certifies that the Township Administrator advised the Complainant of this fact and provided the Complainant with quotes.

5. Regarding the first two (2) pages initially provided to the Complainant, were these pages received prior to receipt of the last page and additional documentation:

The Custodian certifies that the Township Administrator has advised that all documents were received at the same time; however, not all were responsive to

the Complainant's OPRA request. The Custodian reiterates that the quotes received were provided to the Complainant.

6. Whether the 21 pages provided were the only pages in the file that were “part and parcel” of the total bid and the other pages were not:

The Custodian certifies that the additional pages were colorful brochures, company information, etc., provided by the company and not responsive to the OPRA request.

7. Whether the Township Administrator provided all 100 pages or just the pages attached to the May 16, 2011 submission:

The Custodian certifies that the Township Administrator provided all records in response to the Complainant's OPRA request.

Analysis

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 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's OPRA request at issue herein sought "all insurance bids received for healthcare, dental and vision coverage for the February 2011 renewal. The Custodian responded to said request on the first (1st) business day after receipt of same providing the Complainant with a 3 page quote for health insurance. The Complainant's Counsel subsequently filed this complaint arguing that the Township failed to provide the Complainant with all responsive records. Counsel argued that the Custodian provided summaries of bids instead of actual bids.

In the SOI, the Custodian certified that she provided "quotes" for healthcare coverage and that the Township never received quotes or bids in connection with the February 2011 renewal. In a letter to the GRC on May 16, 2011, the Complainant's Counsel stated that the Complainant filed this complaint because she believed additional records existed: this belief was verified when on May 6, 2011 she reviewed the entire healthcare insurance file and found that 100 additional pages of bids existed.

The Custodian's Counsel responded on May 18, 2011 rebutting Complainant Counsel's assertions. Counsel asserted that the Complainant was provided with all responsive records and that the additional material was not responsive to her OPRA request. Upon review of the evidence of record, the GRC determined that it had several additional questions. Thus, on April 27, 2012, the GRC requested that the Custodian submit a legal certification answering these questions. The Custodian submitted her legal certification on May 2, 2012 certifying that the Township never received any bids; rather, the Township received only quotes for healthcare coverage.

Thus, the crux of this complaint is whether any "bids" responsive to the Complainant's OPRA request exist. The Custodian certified in the SOI that the Township did not receive any bids or quotes for dental and vision coverage.

Further, in attempting to determine this issue as it relates to the healthcare "quotes" that the Custodian provided to the Complainant on February 4, 2011, the GRC asked the Custodian to differentiate between the term "bid" and "quote." The Custodian certified that the Township did not use the terms interchangeably and that the Township only received quotes for healthcare coverage. Thus, the evidence of record indicates that no "bids" responsive to the Complainant's OPRA request exist.

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 certified in the SOI that no records responsive to the complainant's request existed. The complainant submitted no evidence to refute the custodian's certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified in the SOI and subsequently on May 2, 2012 that the Township never received any bids for healthcare, dental or vision coverage for the February 2011 renewal. Moreover, the Custodian certified that the Township only solicited quotes for healthcare. Further, the Complainant failed to submit any evidence to

refute the Custodian's certification. Thus, the Custodian did not unlawfully deny access to the bids pursuant to Pusterhofer.

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 filed this complaint arguing that the Township failed to provide records responsive to the Complainant's OPRA request. Counsel requested that the GRC order the Custodian to disclose to the Complainant the responsive bids and further determine that the Complainant was a prevailing party entitled to reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

The GRC, after receiving additional information regarding whether the Township ever received bids, determined that the evidence of record supported the conclusion that no responsive records existed. Thus, the GRC determined that the Custodian did not unlawfully deny access to the bids sought because no such bids existed. Thus, the Complainant is not a prevailing party entitled to reasonable attorney's fees.

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. Specifically, the GRC determined that the evidence of record supported that no "bids" responsive to the Complainant's OPRA request existed. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian certified in the Statement of Information and subsequently on May 2, 2012 that the Township never received any bids for healthcare, dental or vision coverage for the February 2011 renewal. Moreover, the Custodian certified that the Township only solicited quotes for healthcare. Further, the Complainant failed to submit any evidence to refute the Custodian's certification. Thus, the Custodian did not unlawfully deny access to the bids

pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

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. Specifically, the GRC determined that the evidence of record supported that no "bids" responsive to the Complainant's OPRA request existed. 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: Frank F. Caruso
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