State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 25, 2012 Government Records Council Meeting

Thomas H. Foregger
Complainant
v.
Township of Berkeley Heights (Union)
Custodian of Record

Complaint No. 2012-02

At the September 25, 2012 public meeting, the Government Records Council ("Council") considered the September 18, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Complainant's request is overly broad and fails to identify the specific government record sought, the Complainant's request is not valid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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 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. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra.*

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

Final Decision Rendered by the
Government Records Council
On The 25th Day of September, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: October 1, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
September 25, 2012 Council Meeting

Thomas H. Foregger[1] **GRC Complaint No. 2012-02**
Complainant

v.

Township of Berkley Heights (Union)[2]
Custodian of Records

Records Relevant to Complaint: 2010 Forensic Audit

Request Made: November 30, 2011
Response Made: December 7, 2011
Custodian: Ana Minkoff, Acting Clerk
GRC Complaint Filed: January 9, 2012[3]

Background

November 30, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the record relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that he prefers to personally pick up the record.

December 7, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that access to the requested record is denied because the record is exempt from access pursuant to N.J.S.A. 47:1A-1.1. as information generated on behalf of the Township of Berkeley Heights ("Township") in connection with a grievance filed against an employee.

January 9, 2012

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

- Township of Berkeley Heights v. Tedesco petition dated May 23, 2011 ("petition")[4]

[1] Represented by Walter M. Luers, Esq., Law Offices of Walter M. Luers, LLC (Clinton, NJ).
[2] Represented by Joseph V. Sordillo, Esq., of McElroy, Deutch, Mulvaney & Carpenter, LLP (Morristown, NJ).
[3] The GRC received the Denial of Access Complaint on said date.

- Complainant's OPRA request dated November 30, 2011
- Custodian's response to the OPRA request dated December 7, 2011

The Complainant's Counsel states that the Complainant submitted his OPRA request dated November 30, 2011 to the Custodian. Counsel further states that the Custodian responded to the Complainant on December 7, 2011 by denying the Complainant access to the requested record which the Complainant states the Custodian told him was prepared in connection with a grievance filed by or against a public employee. Counsel argues that a "grievance" within the meaning of OPRA means a complaint filed in the context of a collective bargaining agreement. The Complainant cites to Farneski v. Hunterdon County Prosecutor's Office, GRC Complaint No. 2010-20 (October 2011) and Asbury Park Press v. County of Monmouth, 406 N.J. Super. 1, 8-9 (App. Div. 2010) in support of his argument. Counsel further argues that in the instant complaint the action filed by the Township was not a grievance filed against a public employee pursuant to a labor agreement, but rather an action filed against a part-time employee to revoke her certification. Counsel refers to the petition, which he attached to the complaint as Exhibit 3.

The Complainant's Counsel asks the Council to order the Custodian to disclose the requested record and determine that the Complainant is the prevailing party and entitled to reasonable attorney fees.

The Complainant does not agree to mediate this complaint.

January 10, 2012

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

January 13, 2012[5]

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated November 30, 2011
- Custodian's response to the OPRA request dated December 7, 2011

The Custodian certifies that her search for the requested records involved reviewing the Township's records and consulting with Counsel.

The Custodian certifies that she received the Complainant's OPRA request on November 30, 2011. The Custodian further certifies that she responded to the Complainant's request on December 7, 2011.

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[4] This is a petition in an administrative matter before the New Jersey Department of Community Affairs, Local Government Services and is captioned: "Township of Berkeley Heights v. Tracy Tedesco – Township's Petition for Permanent Removal from Position, Revocation of Chief Financial Officer Certificate and Request for Emergent Relief."

[5] The Custodian did not certify whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

The Custodian certifies that the Complainant's OPRA request was overly broad, nonspecific, and unidentifiable pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), and Petrelli v. Branchburg Board of Education, GRC Complaint No. 2010-13 (March 2011). The Custodian further certifies that "…[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.' N.J.S.A. 47:1A-1." MAG at 546.

The Custodian certifies that, although the request was not specific, she "deciphered the record being requested." The Custodian certifies, however, that the record responsive to the Complainant's request was determined to be exempt from disclosure because it contained information generated on behalf of the Township in connection with a grievance filed against an employee pursuant to N.J.S.A. 47:1A-1.1.[6] The Custodian certifies that the Complainant relied upon the GRC's decision in Farneski v. Hunterdon County Prosecutor's Office, GRC Complaint No. 2010-20 (October 2011) to argue that the record should be disclosed because it is not subject to the grievance exemption. The Custodian further certifies that Farneski can be distinguished on its facts and is not applicable to the instant complaint, because unlike Farneski, in the instant complaint there was a grievance filed by the Township against an individual for which the requested record was prepared.

January 24, 2012

The Complainant's response to the Custodian's SOI. The Complainant's Counsel asserts that the record which formed the basis of the Complainant's Denial of Access Complaint is a forensic audit prepared by McEnerney, Brady & Company LLC ("MBC Report"). Counsel states that the date on which the report was prepared and finalized is not clear.

Counsel states that in the Custodian's SOI the Custodian certified that the record responsive to the OPRA request is a 2009 Forensic Audit Report; however, according to paragraph 13 of the petition, the MBC Report was given to the Township on April 29, 2011. As such, the Complainant questions whether the Custodian has denied access to the 2009 Forensic Audit Report, the 2010 Forensic Audit Report, or the MBC Report. The Complainant requests that the GRC obtain a clarification of the Custodian's determination of the record responsive to the request.

Counsel states that there is no evidence to indicate that the Custodian was confused about what record the Complainant sought. Counsel states that the Custodian's response to the effect that the audit is confidential reveals that the Custodian knew that

[6] In the document index, attached to her SOI as Item No. 9, the Custodian lists under the list of all records responsive to Complainant's OPRA request a "2009 Forensic Audit Report."

the Complainant wanted a copy of the MBC Report. Counsel states that the cases cited by the Custodian in support of the Custodian's argument that the Complainant's request was overly broad are not applicable to the instant complaint. Counsel cites MAG Entertainment v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) as addressing an "over broad and impenetrable request" unlike the Complainant's "entirely valid" request. Counsel contends the OPRA request was specific.

Counsel states that there was no evidence that the MBC Report was created in connection with the Township's petition. The Complainant's Counsel contends that the MBC Report was commissioned and received by the Township before May 23, 2011, which was when the petition was filed.[7] Counsel argues that because the MBC Report predated the petition, it could not have been created in connection with the petition.

January 31, 2012

Letter from the Custodian's Counsel to the GRC. Counsel states that there was a typographical error in the SOI. Counsel states that all references to the 2009 Forensic Audit Report should have read 2010 Forensic Audit Report because this was the record as requested by the Complainant.

Analysis

Here, there is no dispute between the parties that the Custodian received the Complainant's OPRA request on November 30, 2011, and responded to the request in writing on December 7, 2011.

The Custodian certified that she denied the Complainant access to the record that she determined was responsive to the request because she certified that it was exempt from disclosure because it contained information generated on behalf of the Township in connection with a grievance filed against an employee pursuant to N.J.S.A. 47:1A-1.1. However, it was unnecessary for the Custodian to respond to the request because the Complainant's request was not a valid OPRA request. The request was overly broad and failed to name a specific identifiable government record. As such, it required the Custodian to conduct research to locate the record responsive to the request.

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

[7] The petition is dated by the preparer on May 23, 2011. There is no date stamp on the copy of the petition provided by the Complainant to the GRC, so it is unknown whether the petition was filed on that date as well.

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

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

In addition, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),[8] the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."[9]

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

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

Further, the court cited MAG by stating that "…when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA…" The court also quoted N.J.S.A. 47:1A-5.g in that "'[i]f a

[8] Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).
[9] As stated in Bent, *supra*.

request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.'" The court further stated that "…the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to…generate new records…" Accordingly, the test under MAG then, is whether a requested record is a ***specifically identifiable*** government record.

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

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

In the instant complaint, the Complainant argued that MAG, *supra*, and its progeny are not applicable to the instant complaint because those cases address an overly broad and impenetrable request. The Complainant contends that his OPRA request was specific and that there was no evidence to indicate that the Custodian was confused about which record the Complainant sought. The Complainant further asserts that the Custodian's response to the effect that the audit was confidential revealed that the Custodian knew that the Complainant wanted a copy of the MBC Report.

However, the overly broad nature of a request is not subjectively determined by a custodian's interpretation or treatment of a request, but rather in the form of the request itself. Here, the Custodian was not obligated to try to, as she put it, "decipher" the Complainant's request. The Complainant's request should have been sufficiently specific such that the Custodian needed only to search for and retrieve the record responsive to the request. The Township's OPRA request form asks a requestor to "be as specific as possible in describing the records being requested." The Complainant in describing the requested record merely wrote "2010 Forensic Audit." The Complainant made no effort to attempt to specifically identify the record sought. The Complainant made no reference to a date or date range within which the record was prepared, who may have prepared it, or why it was prepared. Any such information would have more specifically identified the requested record. Moreover, the Complainant, at the time he made his request, knew

or should have known who prepared the record and why it was prepared. In fact, in his Denial of Access Complaint the Complainant attached a copy of the petition which references the record which formed the basis of the complaint; to wit, a forensic audit prepared by McEnerney, Brady & Company LLC. The petition is dated May 23, 2011, which is fully six (6) months prior to the date on which the Complainant filed his OPRA request. It is therefore clear from the evidence of record that the Complainant would have been able to more specifically identify the record in his OPRA request, but for whatever reason he chose not to do so.

Accordingly, because the Complainant's request is overly broad and fails to identify the specific government record sought, the Complainant's request is not valid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Because the Complainant's request in not valid, it is unnecessary for the GRC to analyze whether the requested record would be exempt from access pursuant to N.J.S.A. 47:1A-1.1. as information generated on behalf of the Township in connection with a grievance filed against an employee.

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

OPRA provides that:

> "[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:
>
> - institute a proceeding to challenge the custodian's decision by filing an action in Superior Court…; or
> - in lieu of filing an action in Superior Court, file a complaint with the Government Records Council…
>
> A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

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

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to

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

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

As the New Jersey Supreme Court noted in Mason, Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied,* 174 N.J. 193 (2002). "But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes." 196 N.J. at 73 (citations omitted).

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

> "New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied,* New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at

the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

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

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005) (NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

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

> The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon . . . ." *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.
>
> OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed $ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the $500 cap on fees and permit a reasonable, and quite likely higher, fee award.[10] Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight business days later, or one day beyond the statutory limit. *Id.* at 79.As a result, the Court shifted the burden to Hoboken to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind the City's voluntary disclosure. *Id.* Because Hoboken's February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

[10] The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

In the instant matter, as in Mason, the Complainant's Denial of Access Complaint was not the catalyst for the release of the requested records, because the Complainant's request is invalid under OPRA as it fails to specify identifiable government records, pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Therefore, pursuant to Teeters, *supra*, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct. Additionally, pursuant to Mason, *supra*, no factual 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. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra.*

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant's request is overly broad and fails to identify the specific government record sought, the Complainant's request is not valid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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 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. 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: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

September 18, 2012