



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

February 26, 2013 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2012-47

v.

Township of Vernon (Sussex)
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the February 19, 2013 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 portion of the Complainant’s OPRA request seeking the page of the petition showing signatures of the Committee is invalid because the Custodian would be required to ascertain the members of the Committee in order to identify their signatures in a 358-page petition: the Custodian is not required to perform this type of research. *See Donato v. Township of Union*, GRC Complaint No. 2005-182 (February 2007).
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian unlawfully denied access to the responsive random page and further failed to bear her burden of proving that the responsive petition page was not public records until after same was certified. However, the GRC declines to order disclosure of this page as the Custodian provided same to the Complainant on March 13, 2012.
3. The Custodian failed to bear her burden of proving a lawful denial of access to the responsive random page of the petition; however, the GRC declines to order disclosure of same because the Custodian disclosed the page on March 13, 2012. 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 did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has 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 Custodian



expressed her intention to disclose the records in her initial response and did so within the terms expressed in said response. 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 26th Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 27, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2012-47

v.

**Township of Vernon (Sussex)²
Custodian of Records**

Records Relevant to Complaint: Copy of two (2) pages from the petition papers submitted to the Custodian on February 14, 2012: one (1) where the Committee of Petitioners (“Committee”) signed the petition and any other petition page.

Request Made: February 15, 2012

Response Made: February 15, 2012

Custodian: Susan S. Nelson

GRC Complaint Filed: March 5, 2012³

Background

February 15, 2012

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA. The Complainant indicates that the preferred method of delivery is via e-mail. The Complainant further requests the records in .pdf files and that the Custodian label each file according to topic.

February 15, 2012

Custodian’s response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant’s OPRA request on the same business day as receipt of such request. The Custodian states that she cannot disclose the records until after the petition has been certified. The Custodian states that she will forward the records in accordance with the Complainant’s OPRA request thereafter.

February 15, 2012

E-mail from the Complainant to the Custodian. The Complainant states that once the petition is received, it is a public record. The Complainant states that OPRA requires a custodian to grant access to records within seven (7) business days. The Complainant states that one of a municipal clerk’s duties is to certify petition pages within 20 days of receiving same to verify that the petition is valid.

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

² Represented by Kevin D. Kelly, Esq., of Kelly & Ward, LLC (Newton, NJ).

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

The Complainant states that he is not seeking a copy of the certified petition or a copy of the Custodian's certification results. The Complainant states that the Custodian should disclose the responsive pages within seven (7) business days. The Complainant further advises that the Custodian should seek advice from the Custodian's Counsel.

February 17, 2012

E-mail from the Custodian's Counsel to the Complainant. Counsel states that the Complainant's OPRA request has been forwarded to him for a response. Counsel states that the Complainant's February 15, 2012 e-mail is confusing as to what records the Complainant is seeking. Counsel further states that N.J.S.A. 40:69A-189 establishes the 20-day certification period for petitions.⁴

February 17, 2012

E-mail from the Complainant to the Custodian's Counsel. The Complainant states that he is requesting two (2) pages of the petition as identified in his OPRA request.

February 28, 2012

E-mail from the Complainant to the Custodian. The Complainant states that the seventh (7th) business day to disclose the responsive records was February 27, 2012. The Complainant states that he has not received the responsive records and expects that the Custodian will provide same before close of business.

February 28, 2012

E-mail from the Custodian to the Complainant. The Custodian states that she believed that the Custodian's Counsel contacted the Complainant regarding his OPRA request. The Custodian states that the time frame to respond is stayed until Counsel advises the Custodian of the appropriate next step.

February 28, 2012

E-mail from the Complainant to the Custodian. The Complainant states that the Custodian's Counsel contacted the Complainant and he responded, copying the Custodian. The Complainant states that he expected the Custodian to provide the responsive records within seven (7) business days and will file a complaint regardless of Counsel's advice. The Complainant notes that the time frame is not stayed while the Custodian waits for legal advice.

February 29, 2012

E-mail from the Custodian's Counsel to the Complainant. Counsel states that he has returned from vacation and received the Complainant's February 17, 2012 e-mail. Counsel states that this e-mail has not clarified which two (2) of more than 100 pages of the petition the Complainant is seeking. Counsel asks the Complainant to identify those exact two (2) pages.

Moreover, Counsel states that no petition pages will be disclosed until after the Custodian completes her review and certifies the petition as required by applicable statutes. Counsel states that because of the complex legal issues herein, Counsel will be making all future responses on behalf of the Township.

⁴ Counsel notes that he is going away on vacation but did not provide a date on which he would return.
Jesse Wolosky v. Township of Vernon (Sussex), 2012-47 – Findings and Recommendations of the Executive Director

March 5, 2012

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

- Complainant’s OPRA request dated February 15, 2012.
- E-mail from the Custodian to the Complainant dated February 15, 2012.
- E-mail from the Complainant to the Custodian dated February 15, 2012.
- E-mail from the Custodian’s Counsel to the Complainant dated February 17, 2012.
- E-mail from the Complainant to the Custodian’s Counsel dated February 17, 2012.
- E-mail from the Complainant to the Custodian dated February 28, 2012.
- E-mail from the Custodian to the Complainant dated February 28, 2012.
- E-mail from the Complainant to the Custodian dated February 28, 2012.
- E-mail from the Custodian’s Counsel to the Complainant dated February 29, 2012.

The Complainant’s Counsel submits a letter brief in support of the Complainant’s position. 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 the 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 states that custodians must respond to OPRA requests within seven (7) business days either granting or denying access to responsive records. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Counsel states that a failure to provide records within that time frame result in a “deemed” denial of access. N.J.S.A. 47:1A-5.i. Counsel contends that here, the Custodian failed to provide the Complainant with the responsive petition pages. Counsel contends that whether the petition was certified is meaningless because said certification relates to whether the Custodian, in her opinion, believes that the petition complied with relevant law. Counsel contends that certification of the petition does not impact whether same became a government record once received on February 14, 2012. Counsel asserts that with this reasoning, zoning and variance applications

would similarly be exempt until they were approved by a zoning board. Counsel asserts that henceforth the responsive petition pages should be provided to the Complainant.

Counsel requests the following:

1. A determination ordering the Custodian to provide the responsive pages to the Complainant.
2. A determination as to whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.
3. 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.

March 5, 2012

Memorandum from the Custodian to Mayor and Council. The Custodian states that pursuant to N.J.S.A. 40A:9-165, the "Petition to Oppose and Repeal Township of Vernon Ordinance No. 12-01" has been signed by a sufficient number of qualified voters.

March 8, 2012

E-mail from the Complainant to the Custodian. The Complainant states that he is still waiting for the Custodian to provide the responsive petition pages. The Complainant states that he is aware that the Custodian certified the petition on March 5, 2012. The Complainant further states that the Custodian noted on February 15, 2012 that she would provide the responsive pages once the petition was certified.

March 9, 2012

E-mail from the Custodian's Counsel to the Complainant's Counsel. Counsel states that he is in receipt of the Complainant's Denial of Access Complaint. Counsel states that the petition is a public record to which the Complainant may immediately have access. Counsel states that he understands the petition is 358 pages and the Complainant is seeking two (2) of those pages. Counsel requests clarification as to the exact two (2) pages the Complainant is seeking.

March 13, 2012

E-mail from the Custodian to the Complainant (with attachment). The Custodian states that attached are the pages responsive to the Complainant's OPRA request. The Custodian notes that she picked these two (2) pages at random.

March 23, 2012

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

April 9, 2012

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on March 23, 2012 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

April 12, 2012

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 15, 2012.
- E-mail from the Custodian to the Complainant dated February 15, 2012.
- E-mail from the Complainant to the Custodian dated February 15, 2012.
- E-mail from the Custodian's Counsel to the Complainant dated February 17, 2012.
- E-mail from the Complainant to the Custodian's Counsel dated February 17, 2012.
- E-mail from the Complainant to the Custodian dated February 28, 2012.
- E-mail from the Custodian to the Complainant dated February 28, 2012.
- E-mail from the Complainant to the Custodian dated February 28, 2012.
- E-mail from the Custodian's Counsel to the Complainant dated February 29, 2012.
- Memorandum from the Custodian to Mayor and Council dated March 5, 2012.
- E-mail from the Complainant to the Custodian dated March 8, 2012.
- E-mail from the Custodian's Counsel to the Complainant's Counsel dated March 9, 2012.
- E-mail from the Custodian to the Complainant dated March 13, 2012 (with attachment).

The Custodian certifies that her search is not applicable to the instant complaint. 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.

The Custodian recapitulates the facts of the instant complaint. The Custodian certifies that the Complainant's OPRA request sought two (2) pages from the 358-page petition. The Custodian certifies that she responded on February 15, 2012 stating that she would provide the responsive records after she certified the petition. The Custodian certifies that the Complainant disputed the Custodian's response.

The Custodian certifies that thereafter, she and the Custodian's Counsel sought clarification of the exact two (2) pages sought on multiple occasions. The Custodian certifies that she certified the petition to the Mayor and Council on March 5, 2012 at which time the Custodian's Counsel determined that the petition was subject to disclosure. The Custodian certifies that Counsel contacted the Complainant's Counsel on March 9, 2012 in order to get additional clarification as to the exact pages the Complainant sought. The Custodian certifies that while awaiting Complainant Counsel's response, she provided two (2) pages that she picked at random to the Complainant on March 13, 2012 via e-mail.

Analysis

Whether the Custodian unlawfully denied access to the requested petition pages?

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 Counsel filed the instant complaint arguing that the Custodian unlawfully denied access to the responsive records because the Custodian’s certification process does not impact the fact that the petition was a government record once the Township received same on February 14, 2012. In the SOI, the Custodian certifies that she responded on February 15, 2012 stating that she would provide the responsive records after she certified the petition. The Custodian also certified that the Custodian’s Counsel sought clarification of the Complainant’s OPRA request multiple times and that she disclosed two (2) random pages of the petition on March 13, 2012 after she certified same.

Regarding the issue of clarification and whether same was warranted, the Complainant’s OPRA request sought two (2) pages from a non-descript petition submitted to the Township on February 14, 2012. The Complainant noted that one (1) of the pages must be from “... where the [Committee] signed ...” The Complainant did not include a specific page number for this page. The Complainant noted that the second (2nd) page could be a random page in the petition.

The Custodian's Counsel sought clarification of the Complainant's OPRA request on February 17, 2012. The Complainant responded on the same day stating that he sought the records that were identified in his OPRA request. The Complainant subsequently e-mailed the Custodian on February 28, 2012 noting that the seven (7) business day time frame has expired and that the responsive records should have been provided. The Custodian responded on the same day stating that she believed Counsel contacted the Complainant and that the time to respond was stayed until Counsel advised the Custodian. The Complainant responded on the same day disputing that the time to respond was stayed until Counsel rendered advice to the Complainant. Counsel subsequently requested clarification on February 29, 2012 and again on March 9, 2012; however, the Complainant did not provide any clarification. The Custodian thus disclosed to the Complainant two (2) random pages on March 13, 2012 without clarification.

Thus, the Custodian was able to at least identify the petition from which the Complainant was seeking pages. However, the Complainant also sought one of the pages under a specific condition: that the page included a Committee signature. This portion of the request contained a specific detail that would have required the Custodian to meet certain conditions in order to provide the correct page. Specifically, the Custodian would have needed personal knowledge of who some of the members of that particular committee were and she would have had to review each individual page in order to determine whether these members' signatures appeared on a given page. Such a process is conducting research: a custodian is not required to conduct research under OPRA. *See Donato v. Township of Union*, GRC Complaint No. 2005-182 (February 2007)(citing MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005)).

Therefore, the portion of the Complainant's OPRA request seeking the page of the petition showing signatures of the Committee is invalid because the Custodian would be required to ascertain the members of the Committee in order to identify their signatures in a 358-page petition: the Custodian is not required to perform this type of research. *See Donato, supra*.

The Council notes that in Gannett v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), the Court held that although Gannett's request was improper and Middlesex County could have refused to produce any records responsive but instead Middlesex County provided Gannett with most of the records responsive to the request. Gannett brought action against County of Middlesex seeking disclosure of the remainder of the records responsive. The Court held that "[s]uch a voluntary disclosure of most of the documents sought by Gannett and refusal to release the remaining documents solely on confidentiality grounds constituted a waiver of whatever right the County may have had to deny Gannett's entire OPRA request on the ground that it was improper." *Id.* at 213. This complaint is distinguishable from Gannett in that the Custodian's Counsel here sought clarification on three (3) occasions instead of identifying two (2) pages and granting access to same without attempting to clarify the request.

The GRC must next determine whether the Custodian unlawfully denied access to the random petition page requested. Whenever a denial of access complaint is filed, a

custodian is required to bear his or her burden of proving a lawful denial of access to any records. N.J.S.A. 47:1A-6.

The Complainant herein contended that the Custodian unlawfully denied access to the responsive random page under the assertion that she needed to certify the petition before disclosing the pages. The Custodian and Counsel cited to two (2) provisions that required this certification process: N.J.S.A. 40:69A-189 and N.J.S.A. 40A:9-165. The petition at issue is little more than a list of names and signatures for which the Custodian must verify that all are valid. Further, a list of names in a petition does not logically equate to the type of information that would be deemed to be "... inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1.

OPRA provides that "...any limitations on the right of access ... shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1. Here, the GRC has reviewed both statutes and found no grant of confidentiality exempting access to a petition to rescind a salary ordinance pending a municipal clerk's certification. Additionally, the Custodian has failed to present any arguments supporting that her denial of access was lawful. Thus, the Custodian did not bear her burden of proving a lawful denial of access to the responsive random page.

Therefore, pursuant to N.J.S.A. 47:1A-6, the Custodian unlawfully denied access to the responsive random page and further failed to bear her burden of proving that the responsive petition page was not public records until after same was certified. However, the GRC declines to order disclosure of this page as the Custodian provided same to the Complainant on March 13, 2012.

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

OPRA states that:

"[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11(a).

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian

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

The Custodian failed to bear her burden of proving a lawful denial of access to the responsive random page of the petition; however, the GRC declines to order disclosure of same because the Custodian disclosed the page on March 13, 2012. 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 did 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 (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.

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. Klagholtz, 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 this complaint, the Custodian initially responded to the Complainant stating that she would provide responsive petition pages after the 20-day verification period expired. The GRC notes that the Complainant acknowledged that the Custodian promised to provide the records upon completion of the verification process in an e-mail to the Custodian on March 8, 2012. The Complainant filed this complaint on March 5, 2012 arguing that he was unlawfully denied access to the responsive records. The Custodian

completed her verification on the same day and subsequently provided two (2) of the petition pages to the Complainant on March 13, 2012.

In determining whether the Complainant herein is a prevailing party, the evidence is clear that the Custodian expressed her intention to disclose the responsive pages and did so within the terms expressed in her initial response. Thus, although the Custodian disclosed records to the Complainant after the filing of this complaint, the complaint could not have brought about a change in the Custodian's conduct because she clearly indicated that she would disclose the records at the conclusion of the verification process. Thus, the Complainant is not a prevailing party entitled to an award of 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 Custodian expressed her intention to disclose the records in her initial response and did so within the terms expressed in said response. 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 portion of the Complainant's OPRA request seeking the page of the petition showing signatures of the Committee is invalid because the Custodian would be required to ascertain the members of the Committee in order to identify their signatures in a 358-page petition: the Custodian is not required to perform this type of research. *See Donato v. Township of Union*, GRC Complaint No. 2005-182 (February 2007).
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian unlawfully denied access to the responsive random page and further failed to bear her burden of proving that the responsive petition page was not public records until after same was certified. However, the GRC declines to order disclosure of this page as the Custodian provided same to the Complainant on March 13, 2012.
3. The Custodian failed to bear her burden of proving a lawful denial of access to the responsive random page of the petition; however, the GRC declines to order disclosure of same because the Custodian disclosed the page on March 13, 2012. 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 did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has 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 Custodian expressed her intention to disclose the records in her initial response and did so within the terms expressed in said response. 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*.

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Acting Executive Director

February 19, 2013