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Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**July 26, 2016 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2015-59

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the July 26, 2016 public meeting, the Government Records Council (“Council”) considered the June 21, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian timely responded to the Complainant’s OPRA request in writing by requesting an extension until February 26, 2015, the Custodian’s failure to respond timely in writing within the extended deadline results in a “deemed” denial of access. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian bore his burden of proof that he lawfully denied access to the Complainant’s February 4, 2015 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Complainant sought all e-mails containing a disclaimer: a generic disclaimer does not sufficiently narrow the scope of the subject or content of records sought. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); NJ Builders Ass’n v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-97, *et seq.* (Interim Order dated April 26, 2016).
3. Although the Custodian’s failure to respond in the extended time frame resulted in a “deemed” denial of access, the Custodian lawfully denied access to the Complainant’s OPRA request because it failed to identify a specific “subject or content.” N.J.S.A. 47:1A-6. 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, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. 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. Teeters v.



DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the GRC determined that the Custodian lawfully denied access to the Complainant's OPRA request because it failed to include a specific "subject or content." Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

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 26<sup>th</sup> Day of July, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: July 29, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 26, 2016 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-59**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of all e-mails to/from the Custodian from September 23, 2014, to February 4, 2015, containing a “disclaimer” informing the recipient that “[e]mail received by or sent to [Borough of South Bound Brook (“Borough”)] officials is subject to the Open Public Records Act” and further advising recipients that they should “[c]onsider alternate avenues of communication” if they “have concerns about the contents of your email being read by someone other than the person(s) [they] are contacting” (including any variation of this disclaimer).

**Custodian of Record:** Donald E. Kazar

**Request Received by Custodian:** February 9, 2015

**Response Made by Custodian:** February 18, 2015

**GRC Complaint Received:** March 9, 2015

**Background<sup>3</sup>**

**Request and Response:**

On February 4, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Complainant noted that he recently noticed that certain words may have been removed from the disclaimer, which he believed the Custodian purposely did in order to knowingly and willfully deny a request where the content did not match the exact disclaimer language.

On February 7, 2015, a Saturday, the Complainant asked the Custodian to confirm receipt of the OPRA request because he received undeliverable notices in several other e-mails.

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

On February 18, 2015, the sixth (6<sup>th</sup>) business day after receipt of the OPRA request,<sup>4</sup> the Custodian responded in writing seeking additional time until February 26, 2015, to respond to the Complainant's OPRA request. On March 2, 2015, two (2) business days after the last day of the extension, the Custodian responded in writing, denying the Complainant's OPRA request because it failed to specify a recipient and the content or subject of the requested e-mails. Elcavage v. West Milford Twp., GRC Complaint No. 2009-07 (April 2010); MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005).

#### Denial of Access Complaint:

On March 9, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian failed to respond timely to his OPRA request. The Complainant acknowledged that he resent his request to the Custodian on February 7, 2015, based on an error with his initial e-mail; however, the Custodian confirmed receipt of the OPRA request on February 9, 2015. The Complainant asserted that the last day for the Custodian to respond was February 17, 2015, and that he did not respond to the Custodian's request for an extension of time because same was a day late.

The Complainant also disputed the Custodian's denial of access, arguing that his request conformed to the criteria set forth in Elcavage, GRC 2009-07. Specifically, the Complainant asserted that he included the sender (the Custodian), range of dates (September 23, 2014, to February 4, 2015), and content (containing the disclaimer about OPRA). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-108 (April 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-114, *et seq.* (Interim Order dated July, 31, 2012). The Complainant contended that the Custodian's denial was intentional and in bad faith, given the fact that the GRC previously determined that he unlawfully denied access to similar requests.

Further, the Complainant argued that, notwithstanding the troubling nature of the disclaimer,<sup>5</sup> the Custodian was obligated to search his e-mails for all responsive records. Burke v. Ryan, 2013 N.J. Super. Unpub LEXIS 2331 (September 17, 2013)(*citing* Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007)). The Complainant argued that the request does not require research: the disclaimer is or is not contained within responsive e-mails for the identified time frame. Further, the Complainant argued that the Custodian is in the best position to determine whether he included the disclaimer in his e-mails.

The Complainant stated that given the Custodian's twenty-five (25) years of service, attendance at various OPRA trainings, numerous guidance from the GRC, and dozens of Denial of Access Complaints, it is assumed that the Custodian is well-versed in OPRA. The Complainant contended that the facts here prove beyond a doubt that the Custodian knowingly and willfully denied access to the responsive records. N.J.S.A. 47:1A-11.

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<sup>4</sup> President's Day, a federal holiday, was observed on February 16, 2015.

<sup>5</sup> The Complainant asserted that the disclaimer hindered the spirit of OPRA. The Complainant also noted that the GRC has yet to address this issue.

The Complainant thus requested that the GRC: 1) determine that the Custodian's responses resulted in a "deemed" denial; 2) order disclosure of all responsive records; 3) determine that the Custodian knowingly and willfully violated OPRA, thereby warranting an assessment of the civil penalty; 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees; and 5) order any further relief deemed appropriate.

### Statement of Information:

On April 9, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian argued that he lawfully denied access to the Complainant's OPRA request because same did not conform with Elcavage, GRC 2009-07. Specifically, the Custodian argued that, although the Complainant included a broad range of dates, the request failed to identify a specific recipient and a particular subject matter. The Custodian thus requested that the GRC dismiss the complaint based on precedential GRC case law.<sup>6</sup>

### Analysis

#### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>7</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Additionally, OPRA provides that:

If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.

N.J.S.A. 47:1A-5(i).

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<sup>6</sup> The Custodian provided minimal information regarding his handling of the complaint. He certified that that he received the OPRA request on February 18, 2015. That contradicts the Complainant's Denial of Access Complaint, which states that the Custodian acknowledged receipt of the request on February 9, 2015. Further, the Custodian referred back to his response as part of the Complainant's Denial of Access Complaint; however, the response did not contain a date.

<sup>7</sup> A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5<sup>th</sup>) business day after receipt of the complainant's March 19, 2007 OPRA request, seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The [c]ustodian properly requested an extension of time to provide the requested records to the [c]omplainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the [c]ustodian failed to provide the [c]omplainant access to the requested records by the extension date anticipated by the [c]ustodian, the [c]ustodian violated N.J.S.A. 47:1A-5(i), resulting in a “deemed” denial of access to the records.

Id.

As a threshold issue, the Complainant contended that the Custodian initially did not timely respond to his OPRA request. However, the Custodian certified in the SOI that he received the OPRA request on February 9, 2015, and responded on February 18, 2015, the sixth (6<sup>th</sup>) business day after receipt of the request, taking into account that the Borough was closed on President's Day. For this reason, the Custodian's initial response was timely.

However, although the evidence of record indicates that the Custodian timely responded to the Complainant's OPRA request by seeking an extension until February 26, 2015, to respond, he did not actually respond until March 2, 2015. In accordance with N.J.S.A. 47:1A-5(i), the request was “deemed” denied at that time.

Therefore, although the Custodian timely responded to the Complainant's OPRA request in writing by requesting an extension until February 26, 2015, the Custodian's failure to respond timely in writing within the extended deadline results in a “deemed” denial of access. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124.

### **Unlawful Denial of Access**

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 New Jersey Appellate Division has held that:

While 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, 375 N.J. Super. at 546 (emphasis added).

The Court reasoned that:

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 (emphasis added).

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.” Id. at 549 (emphasis added). Bent, 381 N.J. Super. at 37;<sup>8</sup> NJ Builders Ass’n v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In Elcavage, GRC 2009-07, the GRC established criteria deemed necessary under OPRA to request an email communication. The Council determined that to be valid, such requests must contain: (1) the content and/or subject of the email, (2) the specific date or range of dates during which the email(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. *See also Sandoval v. NJ State Parole Bd.*, GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. *See Armenti v. Robbinsville Bd. of Educ. (Mercer)*, GRC Complaint No. 2009-154 (Interim Order May 24, 2011).

Additionally, the Court has found a request for “EZ Pass benefits afforded to retirees of the Port Authority, including all . . . correspondence between the Office of the Governor . . . and the Port Authority . . .” to be valid under OPRA because it “was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information . . . [and] was limited to particularized identifiable government records, namely, correspondence with another government entity, rather than information generally.” Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012).

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<sup>8</sup> Affirming Bent v. Stafford Police Dep’t, GRC No. 2004-78 (October 2004).

In Doss v. Borough of Paramus (Bergen), GRC Complaint No. 2014-149 (Interim Order dated January 30, 2015), one of the subject OPRA requests comprised sixteen (16) individual items seeking e-mails and correspondence between specifically identified persons over a defined time period for a number of keywords. The Council held that said request was invalid, reasoning that:

Even though the Complainant's request items included the requisite criteria set forth in Elcavage, the inclusion of eighty (80) applicable search terms is contrary to the Appellate Division's holding in Burke. Whereas the request at issue in Burke identified a particular subject (EZ Pass benefits for retirees), the Complainant's request items here identify numerous terms, most very generic and others a little more specific (from "approvals" and "loans" to "297 Palisades Avenue"). In order to fulfill this type of request, the Custodian would not be limited to just electronically searching e-mails by the search terms provided but would also have to research all Borough files for a period greater than fourteen (14) months in an effort to locate all correspondence responsive to the request. Given all the search words for each of the sixteen (16) request items this would be a daunting task, and one not required under the law because ". . . OPRA does not countenance open-ended searches of an agency's files." MAG, at 549.

Id. at 4.

In Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated September 24, 2013), the GRC provided that:

[A] valid OPRA request requires a search, not research. An OPRA request is thus only valid if the subject of the request can be readily identifiable based on the request. Whether a subject can be readily identifiable will need to be made on a case-by-case basis.

Id. at 5.

Most recently, the GRC addressed the series of requests where the complainant utilized individual keywords. In Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-97, *et seq.* (Interim Order dated April 26, 2016), the complainant submitted several requests conforming to the Elcavage, criteria; however, the "content and/or subject" comprised of several individual keywords. The keywords included proper names and individual generic keywords. In reviewing the facts, the Council looked to Elcavage, Burke, and Doss to determine this novel issue, holding that:

[T]he Complainant's OPRA requests No. 1 and 2 are valid because the identification of an individual as the subject or content of correspondence is reasonably specific enough for a custodian to locate responsive records. . . . However, the Complainant's OPRA requests No. 3 through 8 are invalid because they fail to include a narrowly construed "subject or content." Elcavage, GRC 2009-07; Doss, GRC 2014-149. Specifically, the Complainant included a single



generic keyword in each request that does not sufficiently narrow the scope of the subject or content of records sought.

Id. at 8-9.

In reaching this conclusion, the Council reasoned that proper names as “subject or content” could not be construed interchangeably. Further, the Council reasoned that “a custodian would easily be able to ascertain” whether located correspondence referred to the identified individuals. However, the Council was not persuaded that generic keywords without any context met the “subject or content requirement. The Council noted that generic keywords are akin to “. . . the type of overly broad request that the MAG and NJ Builder Courts determined to be invalid.” Id. at 8. Further, the Council was not convinced that the complainant’s requests contained enough context to conform to the “limited subject matter” requirement borne out in Burke, 429 N.J. Super. at 178.

In the instant matter, the Complainant contended that his OPRA request conformed to the Elcavage criteria, that same was valid, and that the Custodian unlawfully denied access to the responsive records. Conversely, the Custodian alleged in the SOI that the Complainant’s OPRA request lacked an identifiable recipient and subject matter; thus, the request failed to conform to the criteria required for a valid request for e-mail communications.

A review of the subject OPRA request reveals that same sought e-mails to or from the Custodian for a specific time period (September 23, 2014, through February 4, 2015) regarding an identifiable subject (inclusive of the disclaimer language). Thus, in form alone, the requests appear to contain all relevant criteria necessary for a valid request seeking correspondence under OPRA. Elcavage, GRC 2009-07; Armenti, GRC 2009-154.

However, the threshold issue is whether the Complainant’s request for all e-mails including a disclaimer sufficiently identifies the “subject or content” of the e-mails sought. The Council’s decision in Verry, GRC 2015-97, *et seq.*, although adjudicated during the pendency of this complaint, is instructive here. The disclaimer appears in all e-mails the Custodian sent to the Complainant and/or GRC in this complaint. Moreover, by its very nature, a disclaimer within an e-mail is typically generic. The disclaimer alone is not synonymous to a “subject or content” as contemplated in Burke; rather, such a request would constitute a fishing expedition as contemplated in MAG. More specifically, the request would require the Custodian to disclose a broad cross section of e-mails regarding various different topics simply because of the inclusion of a generic disclaimer. Based on the foregoing, the GRC is satisfied that the Complainant’s request did not include a “limited subject matter” and was therefore invalid.

Accordingly, the Custodian bore his burden of proof that he lawfully denied access to the Complainant’s February 4, 2015 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Complainant sought all e-mails containing a disclaimer: a generic disclaimer does not sufficiently narrow the scope of the subject or content of records sought. MAG, 375 N.J. Super. at 546; NJ Builders, 390 N.J. Super. at 180; Burke, 429 N.J. Super. at 177. *See also* Verry, GRC 2015-97, *et seq.*

## **Knowing & Willful**

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 “[i]f 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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian’s failure to respond in the extended time frame resulted in a “deemed” denial of access, the Custodian lawfully denied access to the Complainant’s OPRA request because it failed to identify a specific “subject or content.” N.J.S.A. 47:1A-6. 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, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

## **Prevailing Party 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 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, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties,” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

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

Mason at 73-76 (2008).

The Court in Mason, further held that:

[R]equestors 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).

Id. at 76.

In this matter, the Complainant requested that the GRC order the Custodian to disclose the responsive records. However, the GRC has not granted the requested relief. Specifically, the GRC has determined that the Custodian lawfully denied access to the Complainant’s OPRA request because it did not include a specific “subject or content.” Accordingly, the Complainant could not have prevailed in this complaint and is not entitled to an award of reasonable attorney’s fees.

Accordingly, 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. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the GRC determined that the Custodian lawfully denied access to the Complainant’s OPRA request because it failed to include a specific “subject or content.” Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian timely responded to the Complainant’s OPRA request in writing by requesting an extension until February 26, 2015, the Custodian’s failure to respond timely in writing within the extended deadline results in a “deemed” denial of access. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian bore his burden of proof that he lawfully denied access to the Complainant’s February 4, 2015 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Complainant sought all e-mails containing a disclaimer: a generic disclaimer does not sufficiently narrow the scope of the subject or content of records sought. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); NJ Builders Ass’n v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-97, *et seq.* (Interim Order dated April 26, 2016).

3. Although the Custodian's failure to respond in the extended time frame resulted in a "deemed" denial of access, the Custodian lawfully denied access to the Complainant's OPRA request because it failed to identify a specific "subject or content." N.J.S.A. 47:1A-6. 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, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. 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. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the GRC determined that the Custodian lawfully denied access to the Complainant's OPRA request because it failed to include a specific "subject or content." Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

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June 21, 2016<sup>9</sup>

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<sup>9</sup> This complaint was prepared for adjudication at the Council's June 28, 2016 meeting, but could not be adjudicated due to lack of quorum.