



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Commissioner*

**FINAL DECISION**

**May 24, 2011 Government Records Council Meeting**

Martin O'Shea  
Complainant

Complaint No. 2007-207

v.

Township of Vernon (Sussex)  
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council ("Council") considered the May 17, 2011 Supplemental 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 this complaint should be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law via letter from his legal counsel dated April 25, 2011. Therefore, no further adjudication is required.

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 24<sup>th</sup> Day of May, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: June 2, 2011**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
May 24, 2011 Council Meeting**

**Martin O'Shea<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-207**

v.

**Township of Vernon (Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Any recording, whether audio tape, compact disc or other electronic medium, of the Township Council's May 14, 2007 public and executive session meetings.<sup>3</sup>

**Request Made:** August 24, 2007

**Response Made:** August 29, 2007

**Custodian:** Dennis G. Murray<sup>4</sup>

**GRC Complaint Filed:** September 1, 2007

**Background**

**April 30, 2008**

Government Records Council's ("Council") Interim Order. At its April 30, 2008 public meeting, the Council considered the April 23, 2008 Supplemental 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, found that:

1. Because the Custodian made the requested records available to the Complainant on compact disc for the actual cost of \$0.40 which does not include labor or other overhead expenses associated with making the copy and because the Custodian provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within the ordered five (5) business days, the Custodian has complied with the Council's March 28, 2008 Interim Order.
2. Although the original Custodian violated N.J.S.A. 47:1A-5.b. by not charging the actual cost of the requested audio recordings, because the original Custodian

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

<sup>2</sup> Represented by Michael D. Witt, Esq. of Chasan Leyner & Lamparello, PC (Secaucus, NJ).

<sup>3</sup> The Complainant requested additional records; however, said records are not the subject of this complaint.

<sup>4</sup> Patricia Lycosky was the Custodian at the time of the Complainant's request.

provided said records to the Complainant free of charge after the Complainant filed his Denial of Access Complaint, as well as because the current Custodian complied with the Council's March 26, 2008 Interim Order by making the requested records available to the Complainant for the actual cost of \$0.40, it is concluded that neither the original nor the current 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. However, the original Custodian's violation of N.J.S.A. 47:1A-5.b. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

3. Regarding fees for copies, the GRC is only concerned with whether a custodian is charging the appropriate fees pursuant to OPRA because custodians should be granting and denying access in accordance with the law. Thus, the fact that the Township of Vernon amended its ordinance, which sets forth the fees for copies, has no bearing on this complaint. Therefore, there is no evidence to support the Complainant's assertion that the Township Council knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Additionally, the knowing and willful penalty can only be assessed to an individual or individuals found to have knowingly and willfully violated OPRA, not an agency or entity pursuant to N.J.S.A. 47:1A-11.a. and Paff v. Borough of South Bound Brook, GRC Complaint No. 2006-158 (May 2007).
4. The action sought by the Complainant came about due to the Complainant's filing of a Denial of Access Complaint and as such, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Thus, this complaint should be referred to the Office of Administrative law for the determination of prevailing party attorney's fees.

**April 30, 2008**

Council's Interim Order distributed to the parties.

**May 23, 2008**

Complaint transmitted to the Office of Administrative Law ("OAL").

**April 25, 2011**

Letter from Complainant's Counsel to the Administrative Law Judge and the GRC. Counsel states that this matter has been resolved and the Complainant withdraws this complaint.

**Analysis**

No analysis required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law via letter from his legal counsel dated April 25, 2011. Therefore, no further adjudication is required.

Prepared By: Dara Lownie  
Communications Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

May 17, 2011



## State of New Jersey

### GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511  
Fax: 609-633-6337  
E-mail: [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us)  
Web Address:  
[www.nj.gov/grc](http://www.nj.gov/grc)

COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

### INTERIM ORDER

#### April 30, 2008 Government Records Council Meeting

Martin O'Shea  
Complainant

Complaint No. 2007-207

v.

Township of Vernon (Sussex)  
Custodian of Record

At the April 30, 2008 public meeting, the Government Records Council ("Council") considered the April 23, 2008 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimous to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian made the requested records available to the Complainant on compact disc for the actual cost of \$0.40 which does not include labor or other overhead expenses associated with making the copy and because the Custodian provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within the ordered five (5) business days, the Custodian has complied with the Council's March 28, 2008 Interim Order.
2. Although the original Custodian violated N.J.S.A. 47:1A-5.b. by not charging the actual cost of the requested audio recordings, because the original Custodian provided said records to the Complainant free of charge after the Complainant filed his Denial of Access Complaint, as well as because the current Custodian complied with the Council's March 26, 2008 Interim Order by making the requested records available to the Complainant for the actual cost of \$0.40, it is concluded that neither the original nor the current 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. However, the original Custodian's violation of N.J.S.A. 47:1A-5.b. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Regarding fees for copies, the GRC is only concerned with whether a custodian is charging the appropriate fees pursuant to OPRA because custodians should be granting and denying access in accordance with the law. Thus, the fact that the



Township of Vernon amended its ordinance, which sets forth the fees for copies, has no bearing on this complaint. Therefore, there is no evidence to support the Complainant's assertion that the Township Council knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Additionally, the knowing and willful penalty can only be assessed to an individual or individuals found to have knowingly and willfully violated OPRA, not an agency or entity pursuant to N.J.S.A. 47:1A-11.a. and Paff v. Borough of South Bound Brook, GRC Complaint No. 2006-158 (May 2007).

4. The action sought by the Complainant came about due to the Complainant's filing of a Denial of Access Complaint and as such, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Thus, this complaint should be referred to the Office of Administrative law for the determination of prevailing party attorney's fees.

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of April, 2008

Robin Berg Tabakin, Chairman  
Government Records Council

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

David Fleisher, Vice Chairman & Secretary  
Government Records Council

**Decision Distribution Date: April 30, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 30, 2008 Council Meeting**

**Martin O'Shea<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-207**

v.

**Township of Vernon (Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Any recording, whether audio tape, compact disc or other electronic medium, of the Township Council's May 14, 2007 public and executive session meetings.<sup>3</sup>

**Request Made:** August 24, 2007

**Response Made:** August 29, 2007

**Custodian:** Dennis G. Murray<sup>4</sup>

**GRC Complaint Filed:** September 1, 2007

**Background**

**March 26, 2008**

Government Records Council's ("Council") Interim Order. At its March 26, 2008 public meeting, the Council considered the March 19, 2008 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, found that:

1. Pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J.Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962) and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the actual cost of duplicating the requested records. As such, the Custodian's charge of \$35.00 for an audio recording of the requested meeting minutes is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must provide the requested records to the Complainant and charge the actual cost of the audiotape and shall not include the cost of labor or other overhead expenses associated with making the copy.

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

<sup>2</sup> Represented by Michael D. Witt, Esq. of Chasan Leyner & Lamparello, PC (Secaucus, NJ).

<sup>3</sup> The Complainant requested additional records; however, said records are not the subject of this complaint.

<sup>4</sup> Patricia Lycosky was the Custodian at the time of the Complainant's request.

2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
3. Because the GRC's primary responsibility is to adjudicate denial of access complaints, the GRC can invalidate a custodian's copy charge if said charge is found to be in violation of OPRA and the requestor files a denial of access complaint regarding the specific copy fee. However, pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority to generally invalidate a Township's ordinance which sets forth the fees for copying government records.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 pending the Custodian's compliance with the Council's Interim Order.

**March 27, 2008**

Council's Interim Order distributed to the parties.

**March 31, 2008**

Letter from Custodian's Counsel to Complainant's Counsel. The Custodian's Counsel states that, pursuant to the GRC's Interim Order, the Township will provide the Complainant with a compact disc of the records requested at the cost of \$0.40. Counsel states that the Complainant may either pick up the disc from the Clerk's office, or the Custodian will provide the disc via United States Mail for an additional postage charge of \$0.58. Counsel also notes that the Complainant was provided with the same records free of charge on or about September 14, 2007. Additionally, Counsel asks that the Complainant's Counsel advise as to how the Complainant wishes to receive the requested records.

**April 1, 2008**

Custodian's certification in response to the Council's Interim Order. The Custodian certifies that he is the Acting Municipal Clerk and is familiar with the facts of this complaint. The Custodian certifies that via letter dated March 31, 2008, the Municipal Attorney advised the Complainant's Counsel that a compact disc containing the requested records was ready to either be picked up or mailed to the Complainant. The Custodian certifies that the Municipal Attorney advised the Complainant's Counsel that the actual cost of the compact disc is \$0.40. The Custodian certifies that this cost does not include labor or other overhead expenses associated with making the copy. The Custodian also certifies that the Municipal Attorney informed the Complainant's Counsel the cost for postage, should the Complainant wish to have the disc sent via mail.



Additionally, the Custodian certifies that the Municipal Attorney asked the Complainant's Counsel to advise as to how the Complainant wishes to receive the requested compact disc. Further, the Custodian certifies that Municipal Attorney notified the Complainant's Counsel that the requested records had been previously provided to the Complainant on September 14, 2007 free of charge.

#### **April 16, 2008**

Letter from Complainant's Counsel to GRC. In light of the Custodian's certification, Counsel asks that the GRC proceed to a determination of whether the Complainant is a prevailing party in this matter.

### **Analysis**

#### **Whether the Custodian complied with the Council's March 28, 2008 Interim Order?**

The Custodian certified on April 1, 2008 that the Municipal Attorney made the requested records available to the Complainant on compact disc for the actual cost of \$0.40 via letter dated March 31, 2008. The Custodian certifies that this cost does not include labor or other overhead expenses associated with making the copy.

Therefore, because the Custodian made the requested records available to the Complainant on compact disc for the actual cost of \$0.40 which does not include labor or other overhead expenses associated with making the copy and because the Custodian provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within the ordered five (5) business days, the Custodian has complied with the Council's March 28, 2008 Interim Order.

#### **Whether the Custodian's delay in access to the requested records rises 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.

In this complaint, the original Custodian responded to the Complainant's request on the third (3<sup>rd</sup>) business day after receiving said request and informed the Complainant that she would provide the requested records on a compact disc for \$35.00. Via letter dated September 14, 2007 (after the Complainant filed this Denial of Access Complaint), the original Custodian provided the Complainant with a compact disc of the requested records free of charge. Additionally, in response to the Council's March 26, 2008 Interim Order, the current Custodian certified that the Municipal Attorney made the requested records available to the Complainant, via letter dated March 31, 2008, on a compact disc for the actual cost of \$0.40.

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 at 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 (App. Div. 1996) at 107).

Therefore, although the original Custodian violated N.J.S.A. 47:1A-5.b. by not charging the actual cost of the requested audio recordings, because the original Custodian provided said records to the Complainant free of charge after the Complainant filed his Denial of Access Complaint, as well as because the current Custodian complied with the Council's March 26, 2008 Interim Order by making the requested records available to the Complainant for the actual cost of \$0.40, it is concluded that neither the original nor the current Custodians' actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the original Custodian's violation of N.J.S.A. 47:1A-5.b. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Additionally, the Complainant asks the Council to find that the Township Council knowingly and willfully violated OPRA. The Complainant's Counsel states that according to the Township's website ([www.vernontwp.com](http://www.vernontwp.com)), the Township proposed Ordinance No. 07-44 which reduces the fees the Township charges for copies of audiotapes, videotapes and photographs to the actual cost of material and supplies. Counsel states that said ordinance also proposes the copying fees enumerated in OPRA for photocopies. Counsel questions whether the Township knowingly and willfully violated OPRA because the Township failed to inform the GRC of the proposed copy fee changes.

Regarding fees for copies, the GRC is only concerned with whether a custodian is charging the appropriate fees pursuant to OPRA because custodians should be granting and denying access in accordance with the law. Thus, the fact that the Township of

Vernon amended its ordinance, which sets forth the fees for copies, has no bearing on this complaint. As such, there is no evidence to support the Complainant's assertion that the Township Council knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Further, OPRA's provision which sets forth the assessment of a civil penalty for a knowing and willful violation of OPRA specifically provides that said penalty can be assessed to a public official, officer, employee or custodian. N.J.S.A. 47:1A-11.a. Thus, the knowing and willful penalty can only be assessed to an individual or individuals found to have knowingly and willfully violated OPRA, not an agency or entity. *See Paff v. Borough of South Bound Brook*, GRC Complaint No. 2006-158 (May 2007). Therefore, the Complainant's request that the Township be held to have knowingly and willfully violated OPRA is invalid.

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

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.

In the complaint currently before the Council, by filing a Denial of Access Complaint, the Complainant requested that the Council declare that the Custodian violated OPRA by charging \$35.00 for records provided on compact disc. The Complainant also requested that the Council order the Custodian to charge the actual cost of producing copies of government records. The Council, at its March 26, 2008 public meeting, held that, "...the Custodian's charge of \$35.00 for an audio recording of the requested meeting minutes is unreasonable and in violation of N.J.S.A. 47:1A-5.b." Additionally, the Council ordered the Custodian to "...provide the requested records to the Complainant and charge the actual cost of the audiotape..." In response to the Council's March 26, 2008 Interim Order, the Municipal Attorney made the requested records available to the Complainant, via letter dated March 31, 2008, for the actual cost of the compact disc. Additionally, the original Custodian provided the Complainant with the requested records free of charge after the Complainant filed a Denial of Access Complaint.

Therefore, the action sought by the Complainant came about due to the Complainant's filing of a Denial of Access Complaint and as such, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of prevailing party attorney's fees.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian made the requested records available to the Complainant on compact disc for the actual cost of \$0.40 which does not include labor or other overhead expenses associated with making the copy and because the Custodian provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within the ordered five (5) business days, the Custodian has complied with the Council's March 28, 2008 Interim Order.
2. Although the original Custodian violated N.J.S.A. 47:1A-5.b. by not charging the actual cost of the requested audio recordings, because the original Custodian provided said records to the Complainant free of charge after the Complainant filed his Denial of Access Complaint, as well as because the current Custodian complied with the Council's March 26, 2008 Interim Order by making the requested records available to the Complainant for the actual cost of \$0.40, it is concluded that neither the original nor the current 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. However, the original Custodian's violation of N.J.S.A. 47:1A-5.b. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

3. Regarding fees for copies, the GRC is only concerned with whether a custodian is charging the appropriate fees pursuant to OPRA because custodians should be granting and denying access in accordance with the law. Thus, the fact that the Township of Vernon amended its ordinance, which sets forth the fees for copies, has no bearing on this complaint. Therefore, there is no evidence to support the Complainant's assertion that the Township Council knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Additionally, the knowing and willful penalty can only be assessed to an individual or individuals found to have knowingly and willfully violated OPRA, not an agency or entity pursuant to N.J.S.A. 47:1A-11.a. and Paff v. Borough of South Bound Brook, GRC Complaint No. 2006-158 (May 2007).
4. The action sought by the Complainant came about due to the Complainant's filing of a Denial of Access Complaint and as such, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Thus, this complaint should be referred to the Office of Administrative Law for the determination of prevailing party attorney's fees.

Prepared By:

Dara Lownie  
Senior Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

April 23, 2008



## State of New Jersey

### GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511  
Fax: 609-633-6337  
E-mail: [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us)  
Web Address:  
[www.nj.gov/grc](http://www.nj.gov/grc)

COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

### INTERIM ORDER

#### March 26, 2008 Government Records Council Meeting

Martin O'Shea  
Complainant

Complaint No. 2007-207

v.

Township of Vernon (Sussex)  
Custodian of Record

At the March 26, 2008 public meeting, the Government Records Council ("Council") considered the March 19, 2008 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. Pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J.Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962) and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the actual cost of duplicating the requested records. As such, the Custodian's charge of \$35.00 for an audio recording of the requested meeting minutes is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must provide the requested records to the Complainant and charge the actual cost of the audiotape and shall not include the cost of labor or other overhead expenses associated with making the copy.
2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
3. Because the GRC's primary responsibility is to adjudicate denial of access complaints, the GRC can invalidate a custodian's copy charge if said charge is found to be in violation of OPRA and the requestor files a denial of access complaint regarding the specific copy fee. However, pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority to generally invalidate a Township's ordinance which sets forth the fees for copying government records.



4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Custodian is a prevailing party pursuant to N.J.S.A. 47:1A-6 pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of March, 2008

Robin Berg Tabakin, Vice Chairman  
Government Records Council

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

Janice Kovach  
Government Records Council

**Decision Distribution Date: March 27, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 26, 2008 Council Meeting**

**Martin O'Shea<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-207**

v.

**Township of Vernon (Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Any recording, whether audio tape, compact disc or other electronic medium, of the Township Council's May 14, 2007 public and executive session meetings.<sup>3</sup>

**Request Made:** August 24, 2007

**Response Made:** August 29, 2007

**Custodian:** Patricia Lycosky

**GRC Complaint Filed:** September 1, 2007

**Background**

**August 24, 2007**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**August 29, 2007**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3<sup>rd</sup>) business day following receipt of such request. The Custodian states that the cost for a copy of the meeting disc is \$35.00. The Custodian asks that the Complainant indicate if he wishes for the Custodian to proceed with making a copy of the requested audio recording.

**August 31, 2007**

E-mail from Custodian to Complainant. The Custodian states that she is waiting for the Complainant's response as to whether the Custodian should proceed to copying the requested records.

**September 1, 2007**

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

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

<sup>2</sup> Represented by Joseph J. Ragno, Jr., Esq., of Struble Ragno (Riverdale, NJ).

<sup>3</sup> The Complainant requested additional records; however, said records are not the subject of this complaint.  
Martin O'Shea v. Township of Vernon (Sussex), 2007-207 – Findings and Recommendations of the Executive Director



- Complainant's OPRA request dated August 24, 2007
- Custodian's response to the Complainant's OPRA request dated August 29, 2007

The Complainant states that the Custodian charged \$35.00 for an audio recording of the Township Council's meeting minutes. The Complainant contends that the Custodian is not charging the actual cost of the requested audio recording. The Complainant states that the Township passed an ordinance which sets the fees for copies of sound recordings at \$35.00 for the first ninety (90) minutes and \$25.00 for each additional ninety (90) minutes or part thereof. *See* Chapter 250, Article II § 250.9(E). The Complainant also states that said chapter of the Township's code contains additional fees that appear to violate OPRA. The Complainant states that Section 250-11(A) of Chapter 250, Article II contains the following fees that appear to be in excess of the actual costs:

1. copies of audiotapes: \$10.00 (blank tape supplied by requestor)
2. copies of videotapes: \$50.00 (blank videotape supplied by requestor)
3. copies of subpoenaed materials: \$0.75 per page
4. copies of photographs: \$10.00

The Complainant states that pursuant to N.J.S.A. 47:1A-5.b., a municipality may not charge more than the actual cost of duplicating the records requested. The Complainant asserts that actual cost does not include overhead, cost of reproduction equipment, postage, delivery confirmation, or labor. The Complainant states that pursuant to Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26, 31 (1962) and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271, 280 (App. Div. 2005), labor is not included in calculating actual costs under OPRA.

Additionally, the Complainant requests the following relief from the Council:

1. A declaration that the Custodian violated OPRA by charging \$35.00 for a copy of a CD-ROM.
2. A declaration that the Township Council violated OPRA by passing and maintaining an ordinance which sets forth the fees for copies of government records in excess of the actual cost of copying the records.
3. An order compelling the Custodian to charge fees for copies of government records that is not in excess of the actual cost of copying said records.
4. Prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6.
5. An order fining the Custodian for knowingly and willfully violating OPRA.
6. An order fining the Township Council for knowingly and willfully violating OPRA.

**September 10, 2007**

Offer of Mediation sent to both parties.

**September 11, 2007**

Custodian Counsel's signed Agreement to Mediate.

**September 12, 2007**

The Complainant declines mediation of this complaint.

**September 13, 2007**

Request for the Statement of Information sent to the Custodian.

**September 14, 2007**

Letter from Custodian to Complainant's Counsel. The Custodian provides a copy of the Township Council's public meeting dated May 14, 2007 on a CD-ROM and states that the executive portion of said meeting does not exist on audio tape because the executive session was not recorded.

**September 19, 2007**

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated August 24, 2007
- Custodian's response to the Complainant's request dated August 29, 2007
- E-mail from Custodian to Complainant dated August 31, 2007
- Letter from Custodian to Complainant's Counsel dated September 14, 2007

The Custodian certifies receiving the Complainant's OPRA request on August 24, 2007. The Custodian certifies that she provided a written response to the Complainant on August 29, 2007 advising the Complainant of the cost of the requested records. The Custodian also certifies that she e-mailed the Complainant on August 30, 2007<sup>4</sup> after not receiving a response from the Complainant.

Additionally, the Custodian certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM"), the requested recording must be retained for eighty (80) days or until the meeting minutes are approved, whichever is longer.

Further, the Custodian asserts that she did not unlawfully deny the Complainant access to the requested records. The Custodian certifies that as per the Complainant's request, the Custodian notified the Complainant of the copy cost but received no response from the Complainant. The Custodian contends that if the Complainant had objected to the copy cost, the matter would have been referred to legal counsel and if Counsel determined that the cost was incorrect, the Custodian would have charged the appropriate amount. The Custodian also certifies that she provided the Complainant's Counsel with the recording of the Township Council's public meeting dated May 14, 2007 on September 14, 2007. The Custodian certifies that a recording of the Township Council's executive session dated May 14, 2007 does not exist.

**September 20, 2007**

Complainant Counsel's response to the Custodian's SOI. Complainant's Counsel asserts that the Custodian's SOI misses the point of the Complainant's Denial of Access

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<sup>4</sup> Actual date of said e-mail is August 31, 2007.

Complaint. Counsel states that this complaint is not about whether the Custodian provided the requested records; this complaint is about the fees the Township charges by statute for copies of audiotapes, videotapes, CD-ROMs, subpoenaed documents and photographs. Counsel asks the GRC to proceed to a determination of the Township's actual cost for the records listed above.

### **September 20, 2007**

Letter from Custodian's Counsel to Complainant's Counsel. Custodian's Counsel asserts that the Township has responded to the charges notwithstanding Complainant Counsel's allegations to the contrary. Custodian's Counsel states that the Township is amenable to resolving this complaint and as such the Township provided the requested records to Complainant's Counsel free of charge. Custodian's Counsel states that the Township is reviewing its ordinance and will make adjustments if necessary.

### **December 5, 2007**

Letter from Complainant's Counsel to GRC. Complainant's Counsel states that according to the Township's website ([www.vernontwp.com](http://www.vernontwp.com)), the Township proposed Ordinance No. 07-44 which reduces the fees the Township charges for copies of audiotapes, videotapes and photographs to the actual cost of material and supplies. Counsel states that said ordinance also proposes the copying fees enumerated in OPRA for photocopies.

Counsel contends that the Township has admitted that its prior charges were illegal by preparing to reduce its charges for making copies of the above listed records. Counsel asserts that the issue of the Township's fees is not moot because the Township can repeal its ordinance at any time.

Additionally, Counsel questions whether the Township knowingly and willfully violated OPRA because the Township failed to inform the GRC of the proposed copy fee changes. Counsel contends that the GRC should find that the Township violated OPRA by charging flat fees for records rather than the actual cost and also determine whether the Township's violations were knowing and willful.

### **December 6, 2007**

E-mail from Custodian's Counsel to GRC. Custodian's Counsel asserts that the Township's action of amending its ordinance is not an admission of any kind. Counsel reiterates that the Township provided the requested records to the Complainant's Counsel free of charge. Counsel also states that, contrary to Complainant Counsel's assertion that the Township failed to inform the GRC of the changes in copy fees, the Township did advise the GRC that it was reviewing its ordinance and would make revisions if necessary in the Township's letter to Complainant's Counsel dated September 20, 2007 which was copied to the GRC.

## **Analysis**

**Whether the Custodian violated OPRA by charging the copy costs enumerated in the Township’s ordinance rather than the actual cost of duplicating the requested records?**

OPRA sets forth the amount to be charged for a government record in printed form. Specifically, OPRA states:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the *actual cost* of duplicating the record.

Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following:

- First page to tenth page, \$0.75 per page;
- Eleventh page to twentieth page, \$0.50 per page;
- All pages over twenty, \$0.25 per page.

*The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section.* If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.” (Emphasis added). N.J.S.A. 47:1A-5.b.

Whenever a records custodian asserts that fulfilling an OPRA records request requires an “extraordinary” expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5.c. In this regard, OPRA provides:

“Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*” (Emphasis added.) N.J.S.A. 47:1A-5.c.

OPRA also states that:

“[a] custodian shall permit access to a government record and *provide a copy thereof in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium...” (Emphasis added.) N.J.S.A. 47:1A-5.d.

The Complainant contends that the Custodian’s charge of \$35.00 for an audio recording of the Township Council’s meeting minutes dated May 14, 2007 violates OPRA because said charge is in excess of the actual cost of duplicating the records. The Complainant states that the Township passed an ordinance which sets the fees for copies of sound recordings at \$35.00 for the first ninety (90) minutes and \$25.00 for each additional ninety (90) minutes or part thereof. *See* Chapter 250, Article II § 250.9(E).

While OPRA provides that paper copies of government records may be obtained upon payment of the actual cost of duplication not to exceed the enumerated rates of \$0.75/0.50/0.25 per page (N.J.S.A. 47:1A-5.b.), the Act does not provide explicit copy rates for any other medium. N.J.S.A. 47:1A-5.b. goes on to state that the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy. However, OPRA does provide that whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter cannot be reproduced by ordinary document copying equipment in ordinary business size, the public agency may charge in addition to the *actual cost* of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copies. N.J.S.A. 47:1A-5.c. Additionally, OPRA provides that when a request for a record in a medium not routinely used by an agency, not routinely developed or maintained by an agency, or requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the *actual cost of duplication*, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both. N.J.S.A. 47:1A-5.d.

Thus, it appears that the Legislature included the central theme throughout OPRA that duplication cost should equal actual cost and when actual cost cannot be applied, the duplication cost should be reasonable. *See Spaulding v. County of Passaic*, GRC Complaint No. 2004-199 (September 2006).

In Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Township of Edison charged \$55.00 for a computer diskette containing Township Council meeting minutes. The plaintiff asserted that the fee was excessive and not related to the actual cost of duplicating the record. The defendant argued that the plaintiff’s assertion is moot because the fee was never imposed and the requested records were available on the Township’s website free of charge. The court held that “...the appeal is not moot, and the \$55 fee established by the Township of Edison for duplicating

the minutes of the Township Council meeting onto a computer diskette is unreasonable and unsanctioned by explicit provisions of OPRA.” The court stated that:

“[i]n adopting OPRA, the Legislature made clear 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] as amended and supplemented, shall be construed in favor of the public’s right of access.’ *N.J.S.A. 47:1A-1*. The imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication. *N.J.S.A. 47:1A-5b*.”

The court also stated that “...although plaintiffs have obtained access to the actual records requested, the legal question remains viable, because it is clearly capable of repetition. See *New Jersey Div. of Youth & Family Servs. v. J.B.*, 120 *N.J.* 112, 118-19, 576 *A.2d* 261 (1990).” Further, the court stated that “...the fee imposed by the Township of Edison creates an unreasonable burden upon plaintiff’s right of access and is not rationally related to the actual cost of reproducing the records.”

Additionally, in *Moore v. Board of Chosen Freeholders of Mercer County*, 39 *N.J.* 26 (1962), the court addressed the issue of the cost of providing copies of requested records to a requestor. The plaintiffs argued that if custodians could set a per page copy fee, arguably custodians could set a rate that would deter the public from requesting records. The court stated that “[w]here the public right to know would thus be impaired the public official should calculate his charge on the basis of actual costs. Ordinarily there should be no charge for labor.” *Id.* at 31.

Further, in *Dugan v. Camden County Clerk’s Office*, 376 *N.J. Super.* 271 (App. Div. 2005), the court cited *Moore*, *supra*, by stating that “[w]hen copies of public records are purchased under the common law right of access doctrine, the public officer may charge only the actual cost of copying, which ordinarily should not include a charge for labor... Thus, the fees allowable under the common law doctrine are consistent with those allowable under OPRA.” 376 *N.J. Super.* At 279.

In this complaint, the Complainant requested an audio recording of meeting minutes. The Complainant’s request does not require an extraordinary expenditure of time and effort pursuant to *N.J.S.A. 47:1A-5.c.* nor does said request require a substantial amount of manipulation or programming of information technology pursuant to *N.J.S.A. 47:1A-5.d.*

Therefore, pursuant to *N.J.S.A. 47:1A-5.b.*, *Spaulding*, *supra*, *Libertarian Party of Central New Jersey*, *supra*, *Moore*, *supra*, and *Dugan*, *supra*, the Custodian must charge the actual cost of duplicating the requested records. As such, the Custodian’s charge of \$35.00 for an audio recording of the requested meeting minutes is unreasonable and in violation of *N.J.S.A. 47:1A-5.b.* The Custodian must provide the requested records to the

Complainant and charge the actual cost of the audiotape and shall not include the cost of labor or other overhead expenses associated with making the copy.

**Whether the Government Records Council has the authority to declare that the Township's ordinance which sets forth the fees for copying government records violates OPRA?**

OPRA states that:

“The Government Records Council shall:

- establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
- make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and
- operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied...”  
N.J.S.A. 47:1A-7.b.

N.J.S.A. 47:1A-7.b. delineates the powers of the GRC. The GRC administers OPRA and adjudicates denial of access complaints. In this complaint, the Complainant

states that the Township's code contains additional fees that appear to violate OPRA. The Complainant states that Section 250-11(A) of Chapter 250, Article II contains the following fees that appear to be in excess of the actual costs:

5. copies of audiotapes: \$10.00 (blank tape supplied by requestor)
6. copies of videotapes: \$50.00 (blank videotape supplied by requestor)
7. copies of subpoenaed materials: \$0.75 per page
8. copies of photographs: \$10.00

Because the GRC's primary responsibility is to adjudicate denial of access complaints, the GRC can invalidate a custodian's copy charge if said charge is found to be in violation of OPRA and the requestor files a denial of access complaint regarding the specific copy fee. However, pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority to generally invalidate a Township's ordinance which sets forth the fees for copying government records.

**Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

The Council defers analysis of whether the Custodian is a prevailing party pursuant to N.J.S.A. 47:1A-6 pending the Custodian's compliance with the Council's Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J.Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962) and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the actual cost of duplicating the requested records. As such, the Custodian's charge of \$35.00 for an audio recording of the requested meeting minutes is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must provide the requested records to the Complainant and charge the actual cost of the audiotape and shall not include the cost of labor or other overhead expenses associated with making the copy.
2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order and simultaneously**



**provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

3. Because the GRC's primary responsibility is to adjudicate denial of access complaints, the GRC can invalidate a custodian's copy charge if said charge is found to be in violation of OPRA and the requestor files a denial of access complaint regarding the specific copy fee. However, pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority to generally invalidate a Township's ordinance which sets forth the fees for copying government records.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Custodian is a prevailing party pursuant to N.J.S.A. 47:1A-6 pending the Custodian's compliance with the Council's Interim Order.

Prepared By:

Dara Lownie  
Senior Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

March 19, 2008