



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

November 29, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2008-219

v.

Township of Sparta (Sussex)
Custodian of Record

At the November 29, 2011 public meeting, the Government Records Council (“Council”) considered the November 22, 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:

1. As the prevailing party in this matter, the Complainant is entitled to an award of attorney’s fees consisting of a lodestar of \$5,085.
2. Because the facts of this case do not rise to a level of “unusual circumstances ... justify[ing] an upward adjustment of the lodestar” of a 20 percent fee enhancement on 17.3 of the hours expended on the case, or \$778.50, under New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 156 – 158 (2005), *i.e.*, this matter was not one of significant public importance; this case involved a routine request for copies of executive session minutes and memoranda written by the Township manager to the Township Council. This is not an issue of first impression before the Council; the issue of access to executive session minutes and memoranda is an area of settled law and one which the Council has decided on numerous occasions. Thus, the risk of failure was not high. The records themselves, executive session minutes and memoranda written by the Township manager, do not relate to an issue of significant public importance and the reasons asserted by the Custodian for the redactions made are areas of well-settled law which the Council has ruled upon many times. Moreover, the Council determined that only three (3) of the 71 challenged redactions were unlawful. Although the Administrative Law Judge found that the risk of non-payment for legal services rendered by Complainant’s Counsel was high and that Counsel achieved a high degree of success in this matter, these factors alone do not rise to a level of “unusual circumstances ... justify[ing] an upward adjustment of the lodestar” under New Jerseyans to support an award of a 20 percent fee enhancement on 17.3 of the hours expended on the case, or \$778.50. Thus, the Council hereby modifies the ALJ’s Initial Decision dated September 13, 2011 to deny any enhancement of the lodestar on Complainant Counsel’s claim for a reasonable prevailing party attorney fee. under N.J.S.A. 47:1A-6. As such, only the



requested prevailing party attorney fee of \$5,085 (\$225 x 22.6 hours) is awarded to Complainant's Counsel.

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 29th Day of November 29, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 29, 2011 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-219

v.

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

Records Relevant to Complaint:

OPRA Request Dated July 9, 2008:

1. The meeting minutes in electronic format from each of the closed/executive sessions held by the Township Council during 2008, including but not limited to the Council's meetings on January 8, 2008; January 22, 2008; January 24, 2008; February 7, 2008; February 12, 2008; February 26, 2008; March 11, 2008; March 25, 2008; April 8, 2008; April 22, 2008; May 15, 2008; May 27, 2008; June 12, 2008; and June 26, 2008.
2. Each "Friday Memo" in electronic format from Henry Underhill (Township Manager) to the Township Council from January 1, 2007 to June 30, 2008.

OPRA Request dated July 31, 2008: Each "Friday Memo" in electronic format from Henry Underhill (Township Manager) to the Township Council from January 1, 2007 to December 31, 2007.

Requests Made: July 9, 2008, July 31, 2008 and August 1, 2008

Responses Made: July 21, 2008 and August 6, 2008

Custodian: Mary Coe³

GRC Complaint Filed: October 2, 2008⁴

Background

August 24, 2010

Government Records Council's ("Council") Interim Order. At its August 24, 2010 public meeting, the Council considered the August 17, 2010 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 Represented by Walter Luers, Esq., of Law Offices of Walter M. Luers (Oxford, NJ).

² Represented by Richard Stein, Esq., of Laddey Clark & Ryan (Sparta, NJ).

³ Miriam Tower was the Custodian at the time of the Complainant's OPRA requests and Denial of Access Complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

1. The current Custodian complied with the provisions of the Council's May 27, 2010 Interim Order by providing the records unlawfully denied by the original Custodian to the Complainant and the GRC with certified confirmation of same within five (5) business days of receiving the Council's Order.
2. Although the original Custodian provided insufficient responses to the Complainant's July 9, 2008 and July 31, 2008 requests pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. thus resulting in deemed denials and the current Custodian did not comply with the Council's September 30, 2009 Interim Order by failing to provide the Council with all records requested for the *in camera* examination within five (5) business days of receiving the Council's Order, the current Custodian did provide the records unlawfully denied by the original Custodian to the Complainant and the GRC with certified confirmation of same within five (5) business days of receiving the Council's May 27, 2010 Interim Order. The evidence of record does not support the notion that either Custodians' actions were intentional or deliberate. Therefore, it is concluded that the neither the original nor 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's May 27, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved since records originally denied were provided to the Complainant after the filing of the Denial of Access Complaint and the Council's May 27, 2010 Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, 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, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

August 27, 2010

Council's Interim Order distributed to the parties.

September 22, 2010

Complaint transmitted to the Office of Administrative Law.

September 9, 2011

Administrative Law Judge (“ALJ”) Leslie Z. Celentano’s Initial Decision.⁵ The ALJ **FINDS** that the complainant, as a prevailing party, is entitled to the full amount of the requested prevailing party attorney’s fees in addition to a 25% fee enhancement. Specifically, the ALJ states that:

“In [this matter], concerning the reversed redactions from minutes and memos, petitioner is entitled to the full lodestar amount because the expenditure of counsel’s time on the entire litigation was reasonable in relation to the actual relief obtained. Both the amount of time expended on the matter and the attorney’s hourly rate are fair and reasonable. Moreover, requiring an award of attorney’s fees to be commensurate with the degree of success in OPRA matters would have a chilling effect on ensuring the public’s right to access government records. Furthermore, a fee enhancement of 20 percent is warranted based upon the high risk of non-payment incurred.

...

As to GRC 10340-10—reversed redactions from minutes and memos, pursuant to N.J.S.A. 47:1A-6 petitioner is entitled to an award of attorney’s fees in the amount of \$5,863.50, consisting of a lodestar of \$5,085.00 and a 25 [percent] fee enhancement of \$778.50 on 17.3 of the 22.6 hours expended prior to the GRC’s [August 24, 2010], decision regarding prevailing-party status.”

Analysis

Whether the GRC should adopt, modify or reject the ALJ’s Initial Decision dated September 9, 2011?

The GRC referred this matter to the Office of Administrative Law to determine the amount of the reasonable attorney’s fee to which the Complainant, as a prevailing party, was entitled pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

The ALJ subsequently held that:

“In [this matter], concerning the reversed redactions from minutes and memos, petitioner is entitled to the full lodestar amount because the expenditure of counsel’s time on the entire litigation was reasonable in relation to the actual relief obtained. Both the amount of time expended on the matter and the attorney’s hourly rate are fair and reasonable. Moreover, requiring an award of attorney’s fees to be commensurate with the degree of success in OPRA matters would have a chilling effect on

⁵ The OAL combined this complaint with GRC Complaint No. 2008-277 because of the commonality of parties and the issue of prevailing party fees. GRC Complaint No. 2008-277 is being adjudicated concurrently but separately with the matter herein.

ensuring the public's right to access government records. Furthermore, a fee enhancement of 20 percent is warranted based upon the high risk of non-payment incurred.

...

As to [this matter]—reversed redactions from minutes and memos, pursuant to N.J.S.A. 47:1A-6 petitioner is entitled to an award of attorney's fees in the amount of \$5,863.50, consisting of a lodestar of \$5,085.00 and a 25 [percent] fee enhancement of \$778.50 on 17.3 of the 22.6 hours expended prior to the GRC's [August 24, 2010], decision regarding prevailing-party status."

The ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties.

"The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div.), *certif. denied* 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Board of Education of the Township of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." Cavalieri v. Board of Trustees of Public Employees Retirement System, 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." *Id.* at 443. Additionally, the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hospital v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

Here, the ALJ fairly summarized the facts and the law, explaining how he weighed the proofs before him and explaining why he credited, or discredited, certain testimony. The ALJ's conclusions are clearly aligned and consistent with those credibility determinations.

Therefore, the Council should accept the ALJ's determination that as the prevailing party in this matter, the Complainant is entitled to an award of attorney's fees consisting of a lodestar of \$5,085.00.

Whether the Administrative Law Judge’s award of a 20 percent fee enhancement on 17.3 of the hours expended on the case is consistent with the law?

N.J.S.A. 52:14B-10 (c) states in pertinent part that:

“All hearings of a State agency required to be conducted as a contested case under this act or any other law shall be conducted by an administrative law judge assigned by the Director and Chief Administrative Law Judge of the Office of Administrative Law.... A recommended report and decision which contains recommended findings of fact and conclusions of law and which shall be based upon sufficient, competent, and credible evidence shall be filed, not later than 45 days after the hearing is concluded, with the agency.... The head of the agency, upon a review of the record submitted by the administrative law judge, shall adopt, reject or modify the recommended report and decision no later than 45 days after receipt of such recommendations. In reviewing the decision of an administrative law judge, the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. ... *In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record....*” (Emphasis added).

In the matter before the Council, the ALJ noted that petitioner’s attorney sought a total award of \$6,058.13 in attorney’s fees, representing 22.6 hours at the hourly rate of \$225, plus a 25 percent fee enhancement (\$973.13) on 17.3 of those hours prior to the GRC’s July 27, 2010 decision. The ALJ noted that:

“[i]n this matter, there was a high risk of failure, as well as a high risk of non-payment. However, although the matter may be of higher public importance ... as it involved claims of exemption from disclosure, the nature of the documents released was not highly substantive. Moreover, there was no high level of success. Therefore, a 20 percent fee enhancement of the lodestar on petitioner’s claim is reasonable.” Initial Decision, pg. 14.

The Supreme Court of New Jersey in New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 156 – 158 (2005), found that:

“[I]ike all fee-shifting statutes, the OPRA neither prohibits enhancements, nor does the Act require them. Because enhancements are not preordained, trial courts should not enhance fee awards as a matter of course. Every case will depend upon its facts. Ordinarily, the facts of an OPRA case will not warrant enhancement of the lodestar because the economic risk in securing access to a particular government record will be minimal. For

example, in a "garden variety" OPRA matter, if a person's request for a traffic or tax record is denied, resulting in an action that forces the custodian to promptly produce the record, enhancement will likely be inappropriate.... *However, unusual circumstances occasionally may justify an upward adjustment of the lodestar.*" (Emphasis added). *Id.*, 185 N.J. 137, 157 (2005).

The New Jersey Supreme Court also noted that the factors to be considered when deciding whether to award a contingency fee enhancement should begin with the determination of the lodestar as determined in Rendine v. Pantzer, 141 N.J. 292, 337-345 (1995), except "that enhancements are not a matter of right in OPRA cases." *Id.* at 158. Moreover, in Rendine, the Supreme Court of New Jersey found that contingency enhancements in fee-shifting cases "ordinarily should range between five and fifty percent of the lodestar fee, with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar." Rendine, 141 N.J. at 343.

In New Jerseyans, the Supreme Court determined that the facts of the case supported an award of a fee enhancement. Specifically, the Court noted that:

"the attorney did not receive a fee from his client; the risk of failure was high because the DOC asserted a blanket claim of privilege; and the documents sought related to an issue of sign[ificant] public importance, capital punishment by lethal injection. Further, as both the trial court and the Appellate Division have acknowledged, the attorney achieved an excellent result in this case of first impression, and, we add, he did so with exemplary competence and commitment. Although those factors are illustrative only, we conclude that, under the totality of the circumstances, this is an unusual OPRA matter that warrants enhancement." *Id.*, 185 N.J. 137, 157-158 (2005).

The facts of the instant matter are not consistent with the facts of New Jerseyans and therefore do not support an award of a fee enhancement. The evidence of record indicates that the petitioner filed a Denial of Access Complaint alleging an unlawful denial of access to 1) copies of the Township Council's 2008 executive session minutes and 2) copies of "Friday memos," which are memoranda written by the Township manager to the Township Council, from January 1, 2007 to June 30, 2008.

The Council held that the Township's response to the request was insufficient because the Custodian did not provide all requested records to the Complainant and did not provide the lawful basis for 71 redactions made to the records. The Council therefore conducted an *in camera* review of the redacted records. Pursuant to the *in camera* review, the Council determined that the original Custodian improperly redacted three items⁶ and

⁶ In its Interim Order dated May 27, 2010, the Council determined that:

- 2a) The original Custodian unlawfully redacted the February 7, 2008 executive session minutes for the section heading "Cemex" since this redaction is not appropriate because it is a statement of the Township's settlement in Tax Court which is not exempt from disclosure as it is a public record of the Court. Therefore, the current Custodian must disclose this sentence to the Complainant.

ordered the Custodian to release portions of two (2) Friday memos and one set of minutes to petitioner; the Council determined that the Custodian bore her burden of proof that the remaining redactions were authorized by law. The Council determined that the petitioner was a prevailing party entitled to an award of a reasonable attorney fee pursuant to N.J.S.A. 47:1A-6 because the complaint brought about a change in the custodian's conduct and there was a "causal nexus" between the complaint and the relief ultimately achieved that had a basis in law.

A review of the facts of this case leads to the conclusion that the facts herein do not rise to a level of "unusual circumstances ... justify[ing] an upward adjustment of the lodestar" as contemplated by the New Jersey Supreme Court in New Jerseyans. This matter was not one of significant public importance; this case involved a routine request for copies of executive session minutes and memoranda written by the Township manager to the Township Council. This is not an issue of first impression before the Council; the issue of access to executive session minutes and memoranda is an area of settled law and one which the Council has decided on numerous occasions. Thus, the risk of failure was not high. The records themselves, executive session minutes and memoranda written by the Township manager, do not relate to an issue of significant public importance and the reasons asserted by the Custodian for the redactions made are also areas of well-settled law which the Council has ruled upon many times. Moreover, the Council determined that only three (3) of the 71 challenged redactions were unlawful. Although the ALJ found that the risk of non-payment for legal services rendered by Complainant's Counsel was high and that Counsel achieved a high degree of success in this matter, these factors alone do not rise to a level of "unusual circumstances ... justify[ing] an upward adjustment of the lodestar" under New Jerseyans to support an award of a 20 percent fee enhancement on 17.3 of the hours expended on the case, or \$778.50.

Therefore, the ALJ's award of a 20 percent fee enhancement on 17.3 of the hours expended on the case is not consistent with the law because the facts of this case do not rise to a level of "unusual circumstances ... justify[ing] an upward adjustment of the lodestar" of a 20 percent fee enhancement on 17.3 of the hours expended on the case, or \$778.50, under New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 156 – 158 (2005), *i.e.*, this matter was not one of significant public importance; this case involved a routine request for copies of executive session minutes and memoranda written by the Township manager to the Township Council. This is not an issue of first impression before the Council; the issue of access to executive session minutes and memoranda is an area of settled law and one which the Council has decided on numerous occasions. Thus, the risk of failure was not high. The records themselves, executive session minutes and memoranda written by the Township manager, do not relate to an issue of significant public importance and the

2b) The original Custodian unlawfully redacted the March 9, 2007 Friday Memo, paragraph 7 because only the last sentence is exempt as advisory, consultative or deliberative material as it contains a recommendation, and is part of the deliberative process pursuant to N.J.S.A. 47:1A-1.1. Therefore, the current Custodian must disclose the balance of this redaction to the Complainant.

2c) The original Custodian unlawfully redacted the April 11, 2008 Friday Memo, paragraph 3 because the first (1st) sentence of that paragraph is not exempt from disclosure as personnel information under OPRA. Therefore, the Custodian must disclose this sentence.

reasons asserted by the Custodian for the redactions made are areas of well-settled law which the Council has ruled upon many times. Moreover, the Council determined that only three (3) of the 71 challenged redactions were unlawful. Although the ALJ found that the risk of non-payment for legal services rendered by Complainant's Counsel was high and that Counsel achieved a high degree of success in this matter, these factors alone do not rise to a level of "unusual circumstances ... justify[ing] an upward adjustment of the lodestar" under New Jerseyans to support an award of a 20 percent fee enhancement on 17.3 of the hours expended on the case, or \$778.50. Thus, the Council hereby modifies the ALJ's Initial Decision dated September 13, 2011 to deny any enhancement of the lodestar on Complainant Counsel's claim for a reasonable prevailing party attorney fee. under N.J.S.A. 47:1A-6. As such, only the requested prevailing party attorney fee of \$5,085 (\$225 x 22.6 hours) is awarded to Complainant's Counsel.

Conclusions and Recommendations

The Executive Director respectfully recommends the the Council find that Administrative Law Judge Leslie Z. Celentano's decision dated September 9, 2011 is adopted in part and modified in part, as follows:

1. As the prevailing party in this matter, the Complainant is entitled to an award of attorney's fees consisting of a lodestar of \$5,085.
2. Because the facts of this case do not rise to a level of "unusual circumstances ... justify[ing] an upward adjustment of the lodestar" of a 20 percent fee enhancement on 17.3 of the hours expended on the case, or \$778.50, under New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 156 – 158 (2005), *i.e.*, this matter was not one of significant public importance; this case involved a routine request for copies of executive session minutes and memoranda written by the Township manager to the Township Council. This is not an issue of first impression before the Council; the issue of access to executive session minutes and memoranda is an area of settled law and one which the Council has decided on numerous occasions. Thus, the risk of failure was not high. The records themselves, executive session minutes and memoranda written by the Township manager, do not relate to an issue of significant public importance and the reasons asserted by the Custodian for the redactions made are areas of well-settled law which the Council has ruled upon many times. Moreover, the Council determined that only three (3) of the 71 challenged redactions were unlawful. Although the Administrative Law Judge found that the risk of non-payment for legal services rendered by Complainant's Counsel was high and that Counsel achieved a high degree of success in this matter, these factors alone do not rise to a level of "unusual circumstances ... justify[ing] an upward adjustment of the lodestar" under New Jerseyans to support an award of a 20 percent fee enhancement on 17.3 of the hours expended on the case, or \$778.50. Thus, the Council hereby modifies the ALJ's Initial Decision dated September 13, 2011 to deny any enhancement of the lodestar on Complainant Counsel's claim for a reasonable prevailing party attorney fee. under N.J.S.A.

47:1A-6. As such, only the requested prevailing party attorney fee of \$5,085 (\$225 x 22.6 hours) is awarded to Complainant's Counsel.

Approved By: Catherine Starghill, Esq.
Executive Director

November 22, 2011



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

INTERIM ORDER

August 24, 2010 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2008-219

v.

Township of Sparta (Sussex)
Custodian of Record

At the August 24, 2010 public meeting, the Government Records Council (“Council”) considered the August 17, 2010 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:

1. The current Custodian complied with the provisions of the Council’s May 27, 2010 Interim Order by providing the records unlawfully denied by the original Custodian to the Complainant and the GRC with certified confirmation of same within five (5) business days of receiving the Council’s Order.
2. Although the original Custodian provided insufficient responses to the Complainant’s July 9, 2008 and July 31, 2008 requests pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. thus resulting in deemed denials and the current Custodian did not comply with the Council’s September 30, 2009 Interim Order by failing to provide the Council with all records requested for the *in camera* examination within five (5) business days of receiving the Council’s Order, the current Custodian did provide the records unlawfully denied by the original Custodian to the Complainant and the GRC with certified confirmation of same within five (5) business days of receiving the Council’s May 27, 2010 Interim Order. The evidence of record does not support the notion that either Custodians’ actions were intentional or deliberate. Therefore, it is concluded that the neither the original nor 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council’s May 27, 2010 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or



otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved since records originally denied were provided to the Complainant after the filing of the Denial of Access Complaint and the Council's May 27, 2010 Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, 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, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 24th Day of August, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Stacy Spera, Secretary
Government Records Council

Decision Distribution Date: August 27, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 24, 2010 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-219

v.

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

Records Relevant to Complaint:

OPRA Request Dated July 9, 2008:

1. The meeting minutes in electronic format from each of the closed/executive sessions held by the Township Council during 2008, including but not limited to the Council's meetings on January 8, 2008; January 22, 2008; January 24, 2008; February 7, 2008; February 12, 2008; February 26, 2008; March 11, 2008; March 25, 2008; April 8, 2008; April 22, 2008; May 15, 2008; May 27, 2008; June 12, 2008; and June 26, 2008.
2. Each "Friday Memo" in electronic format from Henry Underhill (Township Manager) to the Township Council from January 1, 2007 to June 30, 2008.

OPRA Request dated July 31, 2008: Each "Friday Memo" in electronic format from Henry Underhill (Township Manager) to the Township Council from January 1, 2007 to December 31, 2007.

Requests Made: July 9, 2008, July 31, 2008 and August 1, 2008

Responses Made: July 21, 2008 and August 6, 2008

Custodian: Mary Coe³

GRC Complaint Filed: October 2, 2008⁴

Background

May 27, 2010

Government Records Council's ("Council") Interim Order. At its May 27, 2010 public meeting, the Council considered the May 20, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ).

² Represented by Richard Stein of Laddey, Clark & Ryan law firm (Sparta, NJ).

³ Miriam Tower was the Custodian at the time of the Complainant's OPRA requests and Denial of Access Complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The current Custodian did not comply with the Council's September 30, 2009 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order within five (5) business days of receiving the Council's Order.
2. On the basis of the Council's determination in this matter, the current Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.
 - a. **The original Custodian unlawfully redacted the February 7, 2008 executive session minutes for the section heading "Cemex" since this redaction is not appropriate because it is a statement of the Township's settlement in Tax Court which is not exempt from disclosure as it is a public record of the Court.** Therefore, the current Custodian must disclose this sentence to the Complainant.
 - b. **The original Custodian unlawfully redacted the March 9, 2007 Friday Memo, paragraph 7 because only the last sentence is exempt as advisory, consultative or deliberative material as it contains a recommendation, and is part of the deliberative process pursuant to N.J.S.A. 47:1A-1.1.** Therefore, the current Custodian must disclose the balance of this redaction to the Complainant.
 - c. **The original Custodian unlawfully redacted the April 11, 2008 Friday Memo, paragraph 3 because the first (1st) sentence of that paragraph is not exempt from disclosure as personnel information under OPRA.** Therefore, the Custodian must disclose this sentence.

The original Custodian, however, did lawfully redact information from the remaining records and carried her burden of proof pursuant to N.J.S.A. 47:1A-6 relating to those records.

Record or Redaction Number	Record Name/Date	Description of Redaction by Section Heading (for Executive Session Minutes) and Paragraph Number (for Friday Memos)	Custodian's Explanation/ Citation for Redactions (referencing <u>N.J.S.A.</u>)	Findings of the <i>In Camera</i> Examination ⁵
1.	Executive Session Minutes dated January 8, 2008	LMCC-Land Sale Monto/Karaski v. Township of Sparta Limecrest Developer and Tax Appeal Litigation	10:4-12(b)7 10:4-12(b)7 10:4-12(b)7	<p>- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding contract negotiations pursuant to <u>N.J.S.A.</u> 10:4-12(b)7 and <u>N.J.S.A.</u> 47:1A-1.1.</p> <p>- This redaction is exempt as attorney-client privileged advice regarding pending litigation pursuant to <u>N.J.S.A.</u> 10:4-12(b)7 and <u>N.J.S.A.</u> 47:1A-1.1.</p> <p>- This redaction is exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A.</u> 10:4-12(b)7 and <u>N.J.S.A.</u> 47:1A-1.1. Last redaction is exempt as ACD because it is a recommendation of the Mayor to the Council.</p>

⁵ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

2.	Executive Session Minutes dated January 17, 2008	Limecrest Quarry, LLC v. Township of Sparta	10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
3.	Executive Session Minutes dated February 7, 2008	Lake Mohawk Country Club – Old DPW Building Cemex	10:4-12(b)7 10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> - This redaction is not appropriate because it is a statement of the Township’s settlement in Tax Court which is not exempt from disclosure since it is a public record of the Court. The Custodian must disclose this sentence.
4.	Executive Session Minutes dated March 4, 2008	Limecrest Quarry Limecrest LLC Tax Appeal	10:4-12(b)7 10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> . - These redactions are exempt as attorney-client privileged advice regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
5.	Executive Session Minutes dated March 25, 2008	Limecrest Quarry Tax Appeal LMCC Purchase of DPW Property on Newton Sparta Road	10:4-12(b)7 10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> . - This redaction is exempt as ACD as it contains opinion and recommendation, and is part of the deliberative

		Letter to Editor – Councilman Murphy	10:4-12(b)7	process pursuant to <u>N.J.S.A. 47:1A-1.1</u> . - These redactions are exempt as attorney-client privileged advice and strategy discussion regarding anticipated litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
6.	Executive Session Minutes dated April 8, 2008	Limecrest Quarry	10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
		Shared Services – Ogdensburg	10:4-12(b)7	- This redaction is exempt as ACD as it contains opinion and recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
		LMCC/DPW Grounds	10:4-12(b)7	- This redaction is exempt as ACD as it contains opinion and recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
7.	Executive Session Minutes dated April 22, 2008	Personnel – Maull	10:4-12(b)7	- This redaction is exempt as attorney-client privileged advice regarding anticipated litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
		Limecrest Quarry	10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
8.	Executive Session	Limecrest Litigation	10:4-12(b)7	- These redactions are exempt as attorney-client

	Minutes dated May 15, 2008	Contract Negotiations	10:4-12(b)7	<p>privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A.</u> 10:4-12(b)7 and <u>N.J.S.A.</u> 47:1A-1.1 .</p> <p>- This redaction is exempt as ACD as it contains recommendations, and is part of the deliberative process pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p>
9.	Executive Session Minutes dated June 12, 2008	Wolosky v. Sparta Township/Clerk	10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A.</u> 10:4-12(b)7 and <u>N.J.S.A.</u> 47:1A-1.1.
		Limecrest Quarry	10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A.</u> 10:4-12(b)7 and <u>N.J.S.A.</u> 47:1A-1.1.
10.	Friday Memo dated January 4, 2007	1	47:1A-10 (Personnel) and -1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A.</u> 47:1A-1.1.
		2	47:1A-1.1 (ACD)	This redaction is exempt as ACD as it contains an opinion, and is part of the deliberative process pursuant to <u>N.J.S.A.</u> 47:1A-1.1.
11.	Friday Memo dated January 12, 2007	6	47:1A-1.1 (ACD)	This redaction is exempt as ACD as it contains an opinion/recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A.</u> 47:1A-1.1.

12.	Friday Memo dated March 2, 2007	9	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
13.	Friday Memo dated March 9, 2007 (Budget Update)	4	47:1A-1.1 (ACD)	This redaction is exempt as ACD as it contains recommendations, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
		7	47:1A-1.1 (ACD)	Only the last sentence is exempt as ACD as it contains a recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1.</u> The Custodian must disclose the balance of this redaction.
		8	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
		10	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
14.	Friday Memo dated March 16, 2007	3	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
15.	Friday Memo dated April 13, 2007	2	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and

				recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
16.	Friday Memo dated February 1, 2008	3	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
17.	Friday Memo dated March 14, 2008	4	47:1A-1.1 (ACD)	This redaction is exempt as ACD as they contain a recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
		6	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
18.	Friday Memo dated April 4, 2008	3	47:1A-10 (Personnel)	These redactions are exempt as personnel discussion pursuant to <u>N.J.S.A. 47:1A-10</u> .
		5	47:1A-1.1 (ACD)	This redaction is exempt as ACD as it contains an opinion, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
19.	Friday Memo dated April 11, 2008	3	47:1A-10 (Personnel)	The first (1st) sentence of this redaction is unlawfully because it is not exempt from disclosure under OPRA. The Custodian must disclose this sentence. The remainder of this redaction is exempt as information concerning individuals regarding medical, psychiatric or psychological history,

				diagnosis, treatment or evaluation pursuant to paragraph 4.b.1., Executive Order #26 (McGreevey) (August 13, 2002).
20.	Friday Memo dated April 25, 2008	2	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
21.	Friday Memo dated May 2, 2008	8	47:1A-1.1 (ACD)	This redaction is exempt as ACD as it contains an opinion, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
22.	Friday Memo dated May 9, 2008	7	47:1A-1.1 (ACD)	This redaction is exempt as ACD as is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
23.	Friday Memo dated May 23, 2008	13	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
24.	Friday Memo dated June 27, 2008	1 5	47:1A-10 (Personnel) 47:1A-1.1 (ACD)	This redaction is exempt as personnel discussion pursuant to <u>N.J.S.A. 47:1A-10</u> . This redaction is exempt as ACD as it contains a recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

June 1, 2010

Council's Interim Order distributed to the parties.

June 2, 2010

Custodian's response to the Council's Interim Order. The current Custodian stated that her certification and copies of the February 7, 2008 executive session minutes

and the Friday Memos dated March 9, 2007 and April 11, 2008 are attached. The Custodian's response was sent to the GRC and the Complainant's attorney.

Analysis

Whether the Custodian complied with the Council's May 27, 2010 Interim Order?

At its May 27, 2010 public meeting, the Council determined that the original Custodian unlawfully redacted the following records and ordered disclosure of the same:

- February 7, 2008 executive session minutes for the section heading "Cemex" since this redaction is not appropriate because it is a statement of the Township's settlement in Tax Court which is not exempt from disclosure as it is a public record of the Court;
- March 9, 2007 Friday Memo, paragraph 7 because only the last sentence is exempt as advisory, consultative or deliberative material as it contains a recommendation, and is part of the deliberative process pursuant to N.J.S.A. 47:1A-1.1;
- April 11, 2008 Friday Memo, paragraph 3 because the first (1st) sentence of that paragraph is not exempt from disclosure as personnel information under OPRA;

The Council ordered the Custodian to comply with the Interim Order within five (5) business days from receipt of the Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005)⁶ to the Executive Director. Such compliance was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on June 8, 2010.

The current Custodian provided the Complainant and the GRC with a legal certification and copies of the unlawfully redacted records on June 2 2010. Therefore, the current Custodian timely complied with the Council's May 27, 2010 Interim Order.

Whether the original Custodian's unlawful denial of 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.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

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

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

Although the original Custodian provided insufficient responses to the Complainant’s July 9, 2008 and July 31, 2008 requests pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., thus resulting in “deemed” denials of said requests, and although the current Custodian did not comply with the Council’s September 30, 2009 Interim Order by failing to provide the Council with all records requested for the *in camera* examination within five (5) business days of receiving the Council’s Order, the current Custodian did provide the records unlawfully denied by the original Custodian to the Complainant and the GRC with certified confirmation of same within five (5) business days of receiving the Council’s May 27, 2010 Interim Order. The evidence of record does not support the notion that either custodians’ actions were intentional or deliberate. Therefore, it is concluded that neither the original and 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.

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

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or

- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

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

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

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

As the New Jersey Supreme Court noted in Mason, Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, supra, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79

(App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

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

“New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

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

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J.

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

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

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon" *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.⁷ Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

⁷ The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

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

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

In this complaint, the original Custodian provided insufficient responses to the Complainant’s July 9, 2008 and July 31, 2008 requests pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. thus resulting in “deemed” denials of said requests and the current Custodian did not comply with the Council’s September 30, 2009 Interim Order by failing to provide the Council with all records requested for the *in camera* examination within five (5) business days of receiving the Council’s Order, however the current Custodian did provide the records unlawfully denied by the original Custodian to the Complainant and the GRC with certified confirmation of same within five (5) business days of receiving the Council’s May 27, 2010 Interim Order. Thus, the Complainant achieved the desired result because the complaint brought about a change in the Custodian’s conduct because records originally denied were provided to the Complainant.

Pursuant to Teeters, *supra*, and the Council’s May 27, 2010 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved since records originally denied were provided to the Complainant after the filing of the Denial of Access Complaint and the Council’s May 27, 2010 Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, 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, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the provisions of the Council’s May 27, 2010 Interim Order by providing the records unlawfully denied by the

original Custodian to the Complainant and the GRC with certified confirmation of same within five (5) business days of receiving the Council's Order.

2. Although the original Custodian provided insufficient responses to the Complainant's July 9, 2008 and July 31, 2008 requests pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. thus resulting in deemed denials and the current Custodian did not comply with the Council's September 30, 2009 Interim Order by failing to provide the Council with all records requested for the *in camera* examination within five (5) business days of receiving the Council's Order, the current Custodian did provide the records unlawfully denied by the original Custodian to the Complainant and the GRC with certified confirmation of same within five (5) business days of receiving the Council's May 27, 2010 Interim Order. The evidence of record does not support the notion that either Custodians' actions were intentional or deliberate. Therefore, it is concluded that the neither the original nor 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's May 27, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved since records originally denied were provided to the Complainant after the filing of the Denial of Access Complaint and the Council's May 27, 2010 Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, 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, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared and
Approved By: Catherine Starghill, Esq.
Executive Director

August 17, 2010



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
Acting Commissioner

INTERIM ORDER

May 27, 2010 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2008-219

v.

Township of Sparta (Sussex)
Custodian of Record

At the May 27, 2010 public meeting, the Government Records Council (“Council”) considered the May 20, 2010 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian did not comply with the Council’s September 30, 2009 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order within five (5) business days of receiving the Council’s Order.
2. On the basis of the Council’s determination in this matter, the current Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.
 - a. The original Custodian unlawfully redacted the February 7, 2008 executive session minutes for the section heading “Cemex” since this redaction is not appropriate because it is a statement of the Township’s settlement in Tax Court which is not exempt from disclosure as it is a public record of the Court. **Therefore, the current Custodian must disclose this sentence to the Complainant.**
 - b. The original Custodian unlawfully redacted the March 9, 2007 Friday Memo, paragraph 7 because only the last sentence is exempt as advisory, consultative or deliberative material as it contains a recommendation, and is part of the deliberative process pursuant to N.J.S.A. 47:1A-1.1.



Therefore, the current Custodian must disclose the balance of this redaction to the Complainant.

- c. The original Custodian unlawfully redacted the April 11, 2008 Friday Memo, paragraph 3 because the first (1st) sentence of that paragraph is not exempt from disclosure as personnel information under OPRA. **Therefore, the Custodian must disclose this sentence.**

The original Custodian, however, did lawfully redact information from the remaining records and carried her burden of proof pursuant to N.J.S.A. 47:1A-6 relating to those records.

Record or Redaction Number	Record Name/Date	Description of Redaction by Section Heading (for Executive Session Minutes) and Paragraph Number (for Friday Memos)	Custodian's Explanation/ Citation for Redactions (referencing <u>N.J.S.A.</u>)	Findings of the <i>In Camera</i> Examination¹
1.	Executive Session Minutes dated January 8, 2008	LMCC-Land Sale Monto/Karaski v. Township of Sparta	10:4-12(b)7 10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding contract negotiations pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> . - This redaction is exempt as attorney-client privileged advice regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .

¹ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

		Limecrest Developer and Tax Appeal Litigation	10:4-12(b)7	- This redaction is exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> . Last redaction is exempt as ACD because it is a recommendation of the Mayor to the Council.
2.	Executive Session Minutes dated January 17, 2008	Limecrest Quarry, LLC v. Township of Sparta	10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
3.	Executive Session Minutes dated February 7, 2008	Lake Mohawk Country Club – Old DPW Building Cemex	10:4-12(b)7 10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> - This redaction is not appropriate because it is a statement of the Township's settlement in Tax Court which is not exempt from disclosure since it is a public record of the Court. The Custodian must disclose this sentence.
4.	Executive Session Minutes dated March 4, 2008	Limecrest Quarry Limecrest LLC Tax Appeal	10:4-12(b)7 10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> . - These redactions are exempt as attorney-client privileged advice regarding

				pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
5.	Executive Session Minutes dated March 25, 2008	Limecrest Quarry Tax Appeal LMCC Purchase of DPW Property on Newton Sparta Road Letter to Editor – Councilman Murphy	10:4-12(b)7 10:4-12(b)7 10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> . - This redaction is exempt as ACD as it contains opinion and recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> . - These redactions are exempt as attorney-client privileged advice and strategy discussion regarding anticipated litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
6.	Executive Session Minutes dated April 8, 2008	Limecrest Quarry Shared Services – Ogdensburg LMCC/DPW Grounds	10:4-12(b)7 10:4-12(b)7 10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> . - This redaction is exempt as ACD as it contains opinion and recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> . - This redaction is exempt as ACD as it contains opinion and recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

7.	Executive Session Minutes dated April 22, 2008	Personnel – Maull Limecrest Quarry	10:4-12(b)7 10:4-12(b)7	- This redaction is exempt as attorney-client privileged advice regarding anticipated litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> . - These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
8.	Executive Session Minutes dated May 15, 2008	Limecrest Litigation Contract Negotiations	10:4-12(b)7 10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> . - This redaction is exempt as ACD as it contains recommendations, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
9.	Executive Session Minutes dated June 12, 2008	Wolosky v. Sparta Township/Clerk Limecrest Quarry	10:4-12(b)7 10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> . - These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
10.	Friday Memo dated January 4, 2007	1	47:1A-10 (Personnel) and -1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and

		2	47:1A-1.1 (ACD)	<p>recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>This redaction is exempt as ACD as it contains an opinion, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>
11.	Friday Memo dated January 12, 2007	6	47:1A-1.1 (ACD)	<p>This redaction is exempt as ACD as it contains an opinion/recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>
12.	Friday Memo dated March 2, 2007	9	47:1A-1.1 (ACD)	<p>These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>
13.	Friday Memo dated March 9, 2007 (Budget Update)	4	47:1A-1.1 (ACD)	<p>This redaction is exempt as ACD as it contains recommendations, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>
		7	47:1A-1.1 (ACD)	<p>Only the last sentence is exempt as ACD as it contains a recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1.</u> The Custodian must disclose the balance of this redaction.</p>
		8	47:1A-1.1 (ACD)	<p>These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative</p>

		10	47:1A-1.1 (ACD)	process pursuant to <u>N.J.S.A. 47:1A-1.1</u> . These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
14.	Friday Memo dated March 16, 2007	3	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
15.	Friday Memo dated April 13, 2007	2	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
16.	Friday Memo dated February 1, 2008	3	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
17.	Friday Memo dated March 14, 2008	4	47:1A-1.1 (ACD)	This redaction is exempt as ACD as they contain a recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
		6	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

18.	Friday Memo dated April 4, 2008	3 5	47:1A-10 (Personnel) 47:1A-1.1 (ACD)	These redactions are exempt as personnel discussion pursuant to <u>N.J.S.A. 47:1A-10</u> . This redaction is exempt as ACD as it contains an opinion, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
19.	Friday Memo dated April 11, 2008	3	47:1A-10 (Personnel)	The first (1st) sentence of this redaction is unlawfully because it is not exempt from disclosure under OPRA. The Custodian must disclose this sentence. The remainder of this redaction is exempt as information concerning individuals regarding medical, psychiatric or psychological history, diagnosis, treatment or evaluation pursuant to paragraph 4.b.1., Executive Order #26 (McGreevey) (August 13, 2002).
20.	Friday Memo dated April 25, 2008	2	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
21.	Friday Memo dated May 2, 2008	8	47:1A-1.1 (ACD)	This redaction is exempt as ACD as it contains an opinion, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
22.	Friday Memo dated May 9, 2008	7	47:1A-1.1 (ACD)	This redaction is exempt as ACD as is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
May 27, 2010 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-219

v.

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

Records Relevant to Complaint:

OPRA Request Dated July 9, 2008:

1. The meeting minutes in electronic format from each of the closed/executive sessions held by the Township Council during 2008, including but not limited to the Council's meetings on January 8, 2008; January 22, 2008; January 24, 2008; February 7, 2008; February 12, 2008; February 26, 2008; March 11, 2008; March 25, 2008; April 8, 2008; April 22, 2008; May 15, 2008; May 27, 2008; June 12, 2008; and June 26, 2008.
2. Each "Friday Memo" in electronic format from Henry Underhill (Township Manager) to the Township Council from January 1, 2007 to June 30, 2008.

OPRA Request dated July 31, 2008: Each "Friday Memo" in electronic format from Henry Underhill (Township Manager) to the Township Council from January 1, 2007 to December 31, 2007.

Requests Made: July 9, 2008, July 31, 2008 and August 1, 2008

Responses Made: July 21, 2008 and August 6, 2008

Custodian: Mary Coe³

GRC Complaint Filed: October 2, 2008⁴

Records Submitted for *In Camera* Examination:

Executive Session Minutes – January 8, 2008; January 17, 2008; February 7, 2008; March 4, 2008; March 25, 2008; April 8, 2008; April 22, 2008; May 15, 2008; and June 12, 2008.

Friday Memos – January 4, 2007; January 12, 2007; March 2, 2008; March 9, 2007 (Budget Update); March 16, 2007; April 13, 2007; February 1, 2008; March 14, 2008; April 4, 2008;

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ).

² Represented by Richard Stein of Laddey, Clark & Ryan law firm (Sparta, NJ).

³ Miriam Tower was the Custodian at the time of the Complainant's OPRA requests and Denial of Access Complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

April 11, 2008; April 25, 2008; May 2, 2008; May 9, 2008, May 23, 2008; and June 27, 2008.

Background

September 30, 2009

Government Records Council's Interim Order. At the September 30, 2009 public meeting, the Government Records Council ("Council") considered the September 23, 2009 Executive Director's Findings and Recommendations 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. The Custodian's insufficient responses to the Complainant's July 9, 2008 and July 31, 2008 OPRA requests 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The response to the July 9, 2008 OPRA request was insufficient because the Custodian did not provide all requested records and did not provide the lawful basis for the redactions made to the records pursuant to N.J.S.A. 47:1A-5.g. The response to the July 31, 2008 OPRA request was insufficient because the Custodian did not provide the extended date upon which the records would be provided, did not provide the records until twenty-two (22) business days following receipt of the request, and did not provide the lawful basis for the redactions made to the records. *See* Badini v. County of Hunterdon, GRC Complaint No. 2008-122 (June 2009) (custodian failed to inform the Complainant of a date certain within the statutorily mandated timeframe). *See also* Kohn v. Township of Livingston (Essex), GRC Complaint No. 2007-322 (June 2009).

2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following 2008 redacted executive session minutes and 2007 and 2008 Friday memos to determine the validity of the Custodian's assertion that the redacted information is exempt:

Executive Session Minutes – January 8, 2008; January 17, 2008; February 7, 2008; March 4, 2008; March 25, 2008; April 8, 2008; April 22, 2008; May 15, 2008; and June 12, 2008.

Friday Memos – January 4, 2007; January 12, 2007; March 2, 2008; March 9, 2007 (Budget Update); March 16, 2007; April 13, 2007; February 1, 2008; March 14, 2008; April 4, 2008; April 11, 2008; April 25, 2008; May 2, 2008; May 9, 2008, May 23, 2008; and June 27, 2008.

3. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #2 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁷, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 pending the Custodian's compliance with the Council's Interim Order.

October 5, 2009

Council's Interim Order ("Order") distributed to the parties.

October 7, 2009

Certification of the Current Custodian in response to the Council's Interim Order with the records requested for the *in camera* review and a redaction index. The Custodian certifies that she is the current Custodian, but was not the Custodian at the time of the request subject of this complaint. The current Custodian also certifies that the records enclosed are the records requested by the Council in its September 30, 2009 Interim Order. Additionally, the current Custodian certifies that there is no March 2, 2008 Friday Memo so she provided the March 2, 2007 Friday Memo since she believes this is the record requested.

March 3, 2010

E-mail from the GRC to the Custodian. The GRC states that in performing the *in camera* review of the records provided by the Custodian, it has been determined that the unredacted January 12, 2007 Friday Memo from Henry Underhill to the Township Council is not the record the Custodian previously provided to the Complainant pursuant to the request or to the GRC with the Statement of Information. The Custodian is instructed to provide the unredacted version of the memo previously provided to the Complainant and the GRC within two (2) business days.

March 3, 2010

E-mail from the Custodian to the GRC. The Custodian attaches the unredacted January 12, 2007 Friday Memo from Henry Underhill to the Township Council that the Custodian previously provided to the Complainant pursuant to the request or to the GRC with the Statement of Information.

⁵ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

May 14, 2010

E-mail from the GRC to the Custodian. The GRC states that in performing the *in camera* review of the records provided by the Custodian, it has been determined that the unredacted April 11, 2008 Friday Memo from Henry Underhill to the Township Council is not the record the Custodian previously provided to the Complainant pursuant to the request or to the GRC with the Statement of Information. The Custodian is instructed to provide the unredacted version of the memo previously provided to the Complainant and the GRC within two (2) business days.

May 17, 2010

E-mail from the Custodian to the GRC. The Custodian attaches the unredacted April 11, 2008 Friday Memo from Henry Underhill to the Township Council that the Custodian previously provided to the Complainant pursuant to the request or to the GRC with the Statement of Information.

Analysis**Whether the Custodian complied with the Council's September 30, 2009 Interim Order?**

At its September 30, 2009 public meeting, the Council determined that because the Custodian has asserted that the requested records were lawfully redacted because (1) the redactions made to the 2008 executive session minutes were necessary pursuant to Section 12 of the Open Public Meetings Act ("OPMA") as discussions relating to ongoing litigation, contract negotiations, land acquisitions or personnel matters and (2) the redactions made to the 2007 and 2008 Friday memos were necessary for matters to be kept confidential under Section 12 of OPMA or as advisory, consultative or deliberative material containing opinions or advice of the Township Manager to the Township Council, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested records were properly redacted.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on October 12, 2009.

The current Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and two separate redaction indices for executive session minutes and Friday Memos on October 7, 2009. However, the unredacted copies of two (2) Friday Memos from Henry Underhill to the Township Council were not the records the Custodian previously provided to the Complainant pursuant to the request or to the GRC with the Statement of Information. The Custodian did resubmit those unredacted

memos for the GRC's *in camera* review. Therefore, the current Custodian did not comply with the Council's September 30, 2009 Interim Order within the required time frame.

Whether the original Custodian unlawfully denied the Complainant access to the requested records?

The original Custodian argued that the redactions made to the 2008 executive session minutes were necessary pursuant to Section 12 of OPMA as discussions relating to (1) ongoing litigation, (2) contract negotiations, (3) land acquisitions or (4) personnel matters. The Custodian further argues that the redactions made to the 2007 and 2008 Friday memos were necessary for matters to be kept confidential under Section 12 of OPMA, or as advisory, consultative or deliberative material containing opinions or advice of the Township Manager to the Township Council. Conversely, the Complainant disputes the original Custodian's redactions to the requested 2008 executive session minutes and Friday memos from 2007 and 2008.

OPRA provides that:

[t]he provisions of this act ... shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to ... **any other statute**; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order. (Emphasis added.) N.J.S.A. 47:1A-9.a.

OPMA

The Open Public Meetings Act (N.J.S.A. 10:4-12) provides that:

b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:

(5) Any matter involving the purchase, lease or acquisition of real property with public funds, the setting of banking rates or investment of public funds, where it could adversely affect the public interest if discussion of such matters were disclosed.

(7) Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.

Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or

appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

Information Generated By or On Behalf of Public Employers or Public Employees in Connection with Collective Negotiation

Further, OPRA exempts from disclosure "... information which is deemed to be confidential ... information generated by or on behalf of public employers or public employees ... in connection with collective negotiations, including documents and statements of strategy or negotiating position ..." N.J.S.A. 47:1A-1.1.

Medial Information

4. The following records shall not be considered to be government records subject to OPRA:

b. Information concerning individuals as follows:

1. Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.

Executive Order #26 (McGreevey) (August 13, 2002).

Advisory, Consultative or Deliberative Material

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

In O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that "neither the statute nor the courts have defined the terms... 'advisory, consultative, or deliberative' [ACD] in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA's ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004)."

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized

privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, citing McClain, *supra*, 99 N.J. at 361-62, 492 A.2d 991.

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Redaction by Section Heading (for Executive Session Minutes) and Paragraph Number (for Friday Memos)	Custodian's Explanation/ Citation for Redactions (referencing <u>N.J.S.A.</u>)	Findings of the <i>In Camera</i> Examination ⁸
1.	Executive Session Minutes dated January 8, 2008	LMCC-Land Sale Monto/Karaski v. Township of Sparta Limecrest Developer and Tax Appeal Litigation	10:4-12(b)7 10:4-12(b)7 10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding contract negotiations pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> . - This redaction is exempt as attorney-client privileged advice regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> . - This redaction is exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> . Last redaction is exempt as ACD because it is a recommendation of the Mayor to the Council.
2.	Executive	Limecrest	10:4-12(b)7	- These redactions are

⁸ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

	Session Minutes dated January 17, 2008	Quarry, LLC v. Township of Sparta		exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
3.	Executive Session Minutes dated February 7, 2008	Lake Mohawk Country Club – Old DPW Building Cemex	10:4-12(b)7 10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> - This redaction is not appropriate because it is a statement of the Township’s settlement in Tax Court which is not exempt from disclosure since it is a public record of the Court. The Custodian must disclose this sentence.
4.	Executive Session Minutes dated March 4, 2008	Limecrest Quarry Limecrest LLC Tax Appeal	10:4-12(b)7 10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> . - These redactions are exempt as attorney-client privileged advice regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
5.	Executive Session Minutes dated March 25, 2008	Limecrest Quarry Tax Appeal LMCC Purchase of DPW Property on Newton Sparta Road Letter to Editor –	10:4-12(b)7 10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> . - This redaction is exempt as ACD as it contains opinion and recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A.</u>

		Councilman Murphy	10:4-12(b)7	47:1A-1.1. - These redactions are exempt as attorney-client privileged advice and strategy discussion regarding anticipated litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
6.	Executive Session Minutes dated April 8, 2008	Limecrest Quarry	10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
		Shared Services – Ogdensburg	10:4-12(b)7	- This redaction is exempt as ACD as it contains opinion and recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
		LMCC/DPW Grounds	10:4-12(b)7	- This redaction is exempt as ACD as it contains opinion and recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
7.	Executive Session Minutes dated April 22, 2008	Personnel – Maull	10:4-12(b)7	- This redaction is exempt as attorney-client privileged advice regarding anticipated litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
		Limecrest Quarry	10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A. 10:4-12(b)7</u> and <u>N.J.S.A. 47:1A-1.1</u> .
8.	Executive Session Minutes dated	Limecrest Litigation	10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and

	May 15, 2008	Contract Negotiations	10:4-12(b)7	<p>strategy discussion regarding pending litigation pursuant to <u>N.J.S.A.</u> 10:4-12(b)7 and <u>N.J.S.A.</u> 47:1A-1.1 .</p> <p>- This redaction is exempt as ACD as it contains recommendations, and is part of the deliberative process pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p>
9.	Executive Session Minutes dated June 12, 2008	Wolosky v. Sparta Township/Clerk	10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A.</u> 10:4-12(b)7 and <u>N.J.S.A.</u> 47:1A-1.1.
		Limecrest Quarry	10:4-12(b)7	- These redactions are exempt as attorney-client privileged advice and strategy discussion regarding pending litigation pursuant to <u>N.J.S.A.</u> 10:4-12(b)7 and <u>N.J.S.A.</u> 47:1A-1.1.
10.	Friday Memo dated January 4, 2007	1	47:1A-10 (Personnel) and -1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A.</u> 47:1A-1.1.
		2	47:1A-1.1 (ACD)	This redaction is exempt as ACD as it contains an opinion, and is part of the deliberative process pursuant to <u>N.J.S.A.</u> 47:1A-1.1.
11.	Friday Memo dated January 12, 2007	6	47:1A-1.1 (ACD)	This redaction is exempt as ACD as it contains an opinion/recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A.</u> 47:1A-1.1.

12.	Friday Memo dated March 2, 2007	9	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
13.	Friday Memo dated March 9, 2007 (Budget Update)	4	47:1A-1.1 (ACD)	This redaction is exempt as ACD as it contains recommendations, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
		7	47:1A-1.1 (ACD)	Only the last sentence is exempt as ACD as it contains a recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> . The Custodian must disclose the balance of this redaction.
		8	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
		10	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
14.	Friday Memo dated March 16, 2007	3	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
15.	Friday Memo dated April 13, 2007	2	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and

				recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
16.	Friday Memo dated February 1, 2008	3	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
17.	Friday Memo dated March 14, 2008	4	47:1A-1.1 (ACD)	This redaction is exempt as ACD as they contain a recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
		6	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
18.	Friday Memo dated April 4, 2008	3	47:1A-10 (Personnel)	These redactions are exempt as personnel discussion pursuant to <u>N.J.S.A. 47:1A-10</u> .
		5	47:1A-1.1 (ACD)	This redaction is exempt as ACD as it contains an opinion, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
19.	Friday Memo dated April 11, 2008	3	47:1A-10 (Personnel)	The first (1st) sentence of this redaction is unlawfully because it is not exempt from disclosure under OPRA. The Custodian must disclose this sentence. The remainder of this redaction is exempt as information concerning individuals regarding medical, psychiatric or psychological history,

				diagnosis, treatment or evaluation pursuant to paragraph 4.b.1., Executive Order #26 (McGreevey) (August 13, 2002).
20.	Friday Memo dated April 25, 2008	2	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
21.	Friday Memo dated May 2, 2008	8	47:1A-1.1 (ACD)	This redaction is exempt as ACD as it contains an opinion, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
22.	Friday Memo dated May 9, 2008	7	47:1A-1.1 (ACD)	This redaction is exempt as ACD as is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
23.	Friday Memo dated May 23, 2008	13	47:1A-1.1 (ACD)	These redactions are exempt as ACD as they contain opinions and recommendations, and are part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
24.	Friday Memo dated June 27, 2008	1	47:1A-10 (Personnel)	This redaction is exempt as personnel discussion pursuant to <u>N.J.S.A. 47:1A-10</u> .
		5	47:1A-1.1 (ACD)	This redaction is exempt as ACD as it contains a recommendation, and is part of the deliberative process pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

Thus, the original Custodian unlawfully redacted the February 7, 2008 executive session minutes for the section heading “Cemex” since this redaction is not appropriate because it is a statement of the Township’s settlement in Tax Court which is not exempt from disclosure as it is a record of the Court. Therefore, the current Custodian must disclose this sentence to the Complainant.

Additionally, the original Custodian unlawfully redacted the March 9, 2007 Friday Memo, paragraph 7 because only the last sentence is exempt as ACD as it contains a recommendation, and is part of the deliberative process pursuant to N.J.S.A. 47:1A-1.1. Therefore, the current Custodian must disclose the balance of this redaction to the Complainant. The original Custodian, however, did lawfully redact information from the remaining records and carried her burden of proof pursuant to N.J.S.A. 47:1A-6 relating to those records.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian did not comply with the Council's September 30, 2009 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order within five (5) business days of receiving the Council's Order.
2. **On the basis of the Council's determination in this matter, the current Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
 - a. The original Custodian unlawfully redacted the February 7, 2008 executive session minutes for the section heading "Cemex" since this redaction is not appropriate because it is a statement of the Township's settlement in Tax Court which is not exempt from disclosure as it is a public record of the Court. **Therefore, the current Custodian must disclose this sentence to the Complainant.**
 - b. The original Custodian unlawfully redacted the March 9, 2007 Friday Memo, paragraph 7 because only the last sentence is exempt as advisory, consultative or deliberative material as it contains a recommendation, and is part of the deliberative process pursuant to N.J.S.A. 47:1A-1.1. **Therefore, the current Custodian must disclose the balance of this redaction to the Complainant.**
 - c. The original Custodian unlawfully redacted the April 11, 2008 Friday Memo, paragraph 3 because the first (1st) sentence of that paragraph is not exempt from disclosure as personnel information under OPRA. **Therefore, the Custodian must disclose this sentence.**

The original Custodian, however, did lawfully redact information from the remaining records and carried her burden of proof pursuant to N.J.S.A. 47:1A-6 relating to those records.

Prepared and
Approved By: Catherine Starghill, Esq.
Executive Director

May 20, 2010



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

September 30, 2009 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2008-219

v.

Township of Sparta (Sussex)
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s insufficient responses to the Complainant’s July 9, 2008 and July 31, 2008 OPRA requests 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The response to the July 9, 2008 OPRA request was insufficient because the Custodian did not provide all requested records and did not provide the lawful basis for the redactions made to the records pursuant to N.J.S.A. 47:1A-5.g. The response to the July 31, 2008 OPRA request was insufficient because the Custodian did not provide the extended date upon which the records would be provided, did not provide the records until twenty-two (22) business days following receipt of the request, and did not provide the lawful basis for the redactions made to the records. *See* Badini v. County of Hunterdon, GRC Complaint No. 2008-122 (June 2009) (custodian failed to inform the Complainant of a date certain within the statutorily mandated timeframe). *See also* Kohn v. Township of Livingston (Essex), GRC Complaint No. 2007-322 (June 2009).



2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following 2008 redacted executive session minutes and 2007 and 2008 Friday memos to determine the validity of the Custodian's assertion that the redacted information is exempt:

Executive Session Minutes – January 8, 2008; January 17, 2008; February 7, 2008; March 4, 2008; March 25, 2008; April 8, 2008; April 22, 2008; May 15, 2008; and June 12, 2008.

Friday Memos – January 4, 2007; January 12, 2007; March 2, 2008; March 9, 2007 (Budget Update); March 16, 2007; April 13, 2007; February 1, 2008; March 14, 2008; April 4, 2008; April 11, 2008; April 25, 2008; May 2, 2008; May 9, 2008, May 23, 2008; and June 27, 2008.

3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of September, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: October 5, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-219

v.

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

Records Relevant to Complaint:

OPRA Request Dated July 9, 2008:

1. The meeting minutes in electronic format from each of the closed/executive sessions held by the Township Council during 2008, including but not limited to the Council's meetings on January 8, 2008; January 22, 2008; January 24, 2008; February 7, 2008; February 12, 2008; February 26, 2008; March 11, 2008; March 25, 2008; April 8, 2008; April 22, 2008; May 15, 2008; May 27, 2008; June 12, 2008; and June 26, 2008.
2. Each "Friday Memo" in electronic format from Henry Underhill (Township Manager) to the Township Council from January 1, 2007 to June 30, 2008.

OPRA Request dated July 31, 2008: Each "Friday Memo" in electronic format from Henry Underhill (Township Manager) to the Township Council from January 1, 2007 to December 31, 2007.

Requests Made: July 9, 2008, July 31, 2008 and August 1, 2008

Responses Made: July 21, 2008 and August 6, 2008

Custodian: Miriam Tower

GRC Complaint Filed: October 2, 2008³

Background

July 9, 2008

Complainant's first Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter from his attorney (on behalf of the Complainant).

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ).

² Represented by Richard Stein of Laddey, Clark & Ryan law firm (Sparta, NJ).

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

July 16, 2008

Custodian's response to the first OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that the request requires attorney review and that the Custodian will further respond by July 22, 2008.

July 16, 2008

Letter from the Complainant's Counsel to the Custodian. Counsel consents to the Custodian's adjournment of the Township's response time of the July 9, 2008 OPRA request until July 22, 2008.

July 21, 2008

Custodian's further response to the first OPRA request. The Custodian again responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian grants access to the requested executive session minutes for the following meetings: January 8, 2008 (redacted), January 17, 2008 (redacted), January 22, 2008, February 7, 2008 (redacted), February 12, 2008, February 26, 2008, March 4, 2008 (redacted), March 25, 2008 (redacted), April 8, 2008 (redacted), April 22, 2008 (redacted), May 15, 2008 (redacted) and June 12, 2008 (redacted). The Custodian further states that the June 27, 2008 executive session minutes are not yet approved.

The Custodian also grants access to the 2008 "Friday Memos" for the following dates: January 4, 2008, January 11, 2008, January 18, 2008, January 24, 2008, February 1, 2008 (redacted), February 8, 2008, February 14, 2008, February 22, 2008, February 29, 2008, March 7, 2008, March 14, 2008 (redacted), March 20, 2008, March 28, 2008, April 4, 2008 (redacted), April 11, 2008 (redacted), April 18, 2008 (redacted), April 25, 2008 (redacted), May 2, 2008 (redacted), May 9, 2008 (redacted), May 16, 2008, May 23, 2008 (redacted), June 6, 2008, June 20, 2008 and June 27, 2008 (redacted).

Further, the Custodian states that the records are available in written form only totaling 49 pages costing \$19.75. The Custodian asserts that to convert the records to electronic format would cost the Complainant \$67.53/hour for the Director of Information Technology's time for such conversion.

July 31, 2008

Complainant's second OPRA request. The Complainant again requests the "Friday Memos" for 2007 listed above on an official OPRA request form.⁴

August 6, 2008

Custodian's response to the second OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that she received the Complainant's July 31, 2008 OPRA request (one of three requests) on August 1, 2008 [of which only Item No. 4 (Friday Memos from Henry Underhill to Council from 1/1/07 to 12/31/07) is relevant to this complaint]. The Custodian further states that Item No. 4 requires review and possible redactions before the requested records may be provided. Additionally, the

⁴The Complainant also requested additional records which are not subject of this complaint.
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Custodian states that the review may require extensive time and an extension of the statutory response time is required and the Custodian will inform the Complainant when all of the records are available.

August 26, 2008

Letter from the Complainant's Counsel to the Custodian. Counsel states that he writes to follow-up on the Custodian's August 6, 2008 letter to the Complainant. Specifically, Counsel states that Item No. 4 of the July 31, 2008 request (memos from Henry Underhill to Council from 1/1/07 to 12/31/07) has not yet been provided or made available. Additionally, Counsel states that while OPRA allows records custodians to request more time to fulfill a request after seven (7) business days, the custodian must request and receive that consent instead of unilaterally granting themselves additional time. Lastly, Counsel requests that Item No. 4 be provided by August 31, 2008.

September 2, 2008

Fax Cover Sheet from Custodian to the Complainant. The fax cover sheet indicates that records responsive to Item No. 4 of the July 31, 2008 OPRA request are attached. (Also included are confirmation sheets generated from a fax machine).

October 2, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments⁵:

- Complainant's OPRA request dated July 9, 2008.
- Letter from the Custodian to the Complainant's Counsel dated July 21, 2008.
- Complainant's OPRA request dated July 31, 2008.
- Complainant's OPRA request dated August 1, 2008.
- Letter from the Custodian to the Complainant dated August 6, 2008.

The Complainant asserts that on July 9, 2008 he submitted an OPRA request for the records listed above. The Complainant further asserts that on July 21, 2009 the Custodian responded to said OPRA request by identifying twelve (12) redacted executive session minutes and twenty-four (24) redacted "Friday Memos" from 2008 only. The Complainant contends that the Custodian did not provide the requested memos for 2007 and did not state the legal basis why the minutes or the memos were redacted. The Complainant states that the Custodian requested \$19.75 for paper copies of the records identified for which the Complainant paid.

The Complainant states that he submitted another records request on July 31, 2008 for the 2007 "Friday Memos." The Complainant also states that he submitted yet another records request on August 1, 2008 for additional 2008 "Friday Memos." The Complainant asserts that on August 6, 2008, the Custodian unilaterally granted herself an adjournment to provide the requested records thus violating OPRA. The Complainant asserts that the Custodian provided additional "Friday Memos" on September 2, 2008 and September 15, 2008 which were also redacted without the Custodian providing the legal basis for such redactions. Further, the Complainant asserts that the Custodian provided

⁵ The Complainant also included redacted copies of the records provided by the Custodian.
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the redacted and unredacted versions of the July 13, 2007 “Friday Memo”⁶. The Complainant alleges that comparison of the two versions of this “Friday Memo” proves that the redactions are improper.

The Complainant argues that OPRA mandates that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.” Libertarian Party of Central New Jersey v. Murphy, 384 N.J.Super. 136, 139 (App.Div. 2006) (citing N.J.S.A. 47:1A-1). The Complainant further asserts that “[t]he purpose of OPRA ‘is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean County Prosecutor’s Office, 374 N.J.Super. 312, 329 (Law Div. 2004)). The Complainant also asserts that here there is no question that the records requested are public records under OPRA. Therefore, the Complainant argues that the Custodian violated OPRA and denied access to those public records in several ways.

First, the Complainant contends that the Custodian is guilty of a “deemed” denial because the Custodian initially only provided the 2008 “Friday Memos” when the Complainant clearly requested said memos for 2007 and 2008. The Complainant further contends that the Custodian only provided the 2007 memos after the Complainant submitted a second records request.

Second, the Complainant argues that the Custodian denied access and violated OPRA by providing a legally insufficient response that did not set forth a detailed and lawful basis for each and every redaction made to the requested memos and executive session minutes pursuant to Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (June 2008), Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005), and Barbara Schwarz v. N.J. Dept. of Human Services, GRC Complaint No. 2004-60 (February 2005).

The Complainant argues that defendants have the burden of stating the “specific basis” for denying access and to “produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality.” Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373, 382-3 (App.Div. 2003). The Complainant further argues that defendants must also explain their redactions in a manner that “will enable other parties to assess the applicability of the privilege or protection.” Paff v. N.J. Dept. of Labor, Board of Review, 379 N.J.Super. 346, 354-55 (App.Div. 2005). In such cases, the Complainant asserts that the court must perform an *in camera* review of the challenged records. Here, the Complainant urges that the Custodian should be ordered to either (1) produce unredacted versions of the records, or (2) submit each and every record for an *in camera* review by the GRC along with a document index describing the specific legal basis for each and every redaction.

⁶The Custodian later certifies in the Statement of Information that the remaining Friday Memos were provided to the Complainant on September 2, 2008 via fax (the fax cover sheet of which is included with the Statement of Information).

Lastly, the Complaint contends that the GRC should do the following:

- (1) find that the Custodian violated OPRA by not setting forth a detailed and lawful basis for the redactions;
- (2) find that the Custodian violated OPRA by not providing records pursuant to the Complainant's OPRA request and by not providing said records in a timely manner;
- (3) hold that the Complainant is the prevailing party and award a reasonable attorney's fee; and
- (4) determine, upon an investigation, whether the Custodian's actions were knowing and willful.

The Complainant does not agree to mediate this complaint.

October 9, 2008

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

October 20, 2008

Custodian's Statement of Information with the following attachments⁷:

- Complainant's OPRA request dated July 9, 2008.
- Letter from the Custodian to the Complainant's Counsel dated July 16, 2008.
- Letter from the Complainant's Counsel to the Custodian dated July 16, 2008.
- Letter from the Custodian to the Complainant's Counsel dated July 21, 2009.
- Letter from the Complainant's Counsel to the Custodian dated July 29, 2008.
- Complainant's OPRA request dated July 31, 2008.⁸
- Letter from the Custodian to the Complainant's Counsel dated August 6, 2008.
- Letter from the Complainant's Counsel to the Custodian dated August 26, 2008.
- Fax Cover Sheet from the Custodian to the Complainant dated September 2, 2008.

The Custodian certifies that her search for the requested records included making copies of all 2008 executive session minutes and sending them to the Township Attorney for review. Additionally, the Custodian certifies retrieving files in the Township Manager's office (the Friday Memos from 2007 to present), making copies of them and also sending them to the Township Attorney for review.

The Custodian also certifies that records that may have been responsive to the request were not destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

Further, the Custodian certifies that on July 9, 2008 she received a letter from Walter Luers, Esq. (on behalf of the Complainant) by fax requesting the records relevant to this complaint under the Open Public Meetings Act ("OPMA"), OPRA, and the New Jersey Common Law Right of Access. The Custodian certifies that the request did not

⁷ Various records responsive to the records requests relevant to this complaint were included with the SOI.

⁸ The Complainant also requested additional records which are not subject of this complaint.

include a completed Sparta Township Government Records Request Form and that the three (3) different access laws cited by the Complainant's Counsel all have different standards for providing government records to requestors. The Custodian certifies that she treated the letter as an OPRA request and responded to Mr. Luers by letter dated July 16, 2008 in an attempt to work cooperatively with the requestor.

The Custodian certified that Mr. Luers wrote to her on July 16, 2008 approving the extended response time of July 22, 2008 that the Custodian requested. The Custodian certified that on July 21, 2008 she wrote to Mr. Luers informing him that the requested records were ready. The Custodian further certifies that she inadvertently left out the requested 2007 Friday Memos from the Township Manager to the Council. The Custodian certified that in Mr. Luers' July 29, 2008 letter to the Custodian, it does not appear that he noticed the 2007 memos were omitted.

The Custodian certifies that records requiring possible redactions were sent to the Township Attorney and that the Complainant was kept abreast of when additional time for such review was required. The Custodian further certifies that the redactions made to the executive session minutes were pursuant to Section 12 of OPMA as discussions relating to ongoing litigation, contract negotiations, land acquisitions or personnel matters. Additionally, the Custodian states that the redactions were made in such a manner that identified the topic being discussed and the Township Attorney as the person providing advice to the Township Council. Also, the Custodian certifies that the Friday Memos were only redacted for matters to be kept confidential under Section 12 of OPMA or as advisory, consultative or deliberative material containing opinions or advice of the Township Manager to the Township Council.

The Custodian certifies that the Complainant and his Counsel have submitted well over 100 OPRA requests since December 12, 2007 requesting literally thousands of pages of government records in paper form or electronic format. The Custodian certifies that she has spent countless hours trying to keep up with responding to the Complainant's OPRA requests. Further the Custodian certifies that prior to this occasion, the Complainant has never filed a Denial of Access Complaint against her. The Custodian further certifies that she was led to believe that the manner in which she provided redacted executive session minutes or confidential memorandum from the Township Manager to the Township Council previously requested by the Complainant was acceptable since the Complainant never complained.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*”
(Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides in pertinent part that:

[a] custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof. N.J.S.A. 47:1A-5.g.

Further included in OPRA:

[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request , provided that the record is currently available and not in storage or archived. In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request ... 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.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

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. As also prescribed under 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. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁹ 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Additionally, OPRA provides that when a record cannot be provided within seven business days, the requestor must be advised by the custodian when the record can be made available and if the record is not made available by that time, access is deemed denied. N.J.S.A. 47:1A-5.i.

In this complaint, the Custodian responded to the July 9, 2008 OPRA request¹⁰ on July 16, 2008 or the fourth (4th) business day following receipt of such request requesting an extension of the statutory response time until July 22, 2008 so that the Township Attorney may review the requested records for possible redactions. The Complainant’s Counsel agreed to the extension by correspondence on the same date. The Custodian then responded on July 21, 2008 (before the extension expired) by providing access to records responsive to the OPRA request. However, the Custodian certifies that she inadvertently excluded the 2007 Friday memos and did not state the legal basis for redactions made to the executive session minutes and the Friday memos provided. Further, the Custodian did not provide the 2007 Friday memos until after the Complainant made a second OPRA request on July 31, 2008. Even then, the Custodian did not provide the 2007 Friday memos until September 2, 2008 or twenty-two (22) business days after the July 31, 2008 OPRA request (although the Custodian did initially respond to the July 31, 2008 OPRA request within the statutorily mandated response time such response simply requested an extension of time to respond pending the Township Attorney’s review of an undetermined length of time).

In response to both OPRA records requests (July 9, 2008 and July 31, 2008), the Custodian requested an extension of the statutorily mandated response time so that the Township Attorney could review the requested records for possible redactions. While records responsive to the July 9, 2008 OPRA request were provided within the extended response time, not all records were provided and redactions were unexplained. Further, no extended response date was stated for the July 31, 2008 OPRA request and records responsive were not provided for twenty-two (22) business days after the request, again with unexplained redactions.

⁹ It is the GRC’s position that 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.

¹⁰ While this records request was submitted via a letter without the agency’s official OPRA request form (and before the Appellate Division of NJ Superior Court’s decision in Renna v. County of Union, 407 N.J.Super. 230 (May 2009) not requiring the form) and is not a valid OPRA request, it should be noted that the Custodian certified in the Statement of Information that she treated the letter request as an OPRA request in an effort of cooperation with the requestor.

Therefore, the Custodian's extended responses to both OPRA requests were insufficient. The response to the July 9, 2008 OPRA request was insufficient because the Custodian did not provide all requested records and did not provide the lawful basis for the redactions made to the records pursuant to N.J.S.A. 47:1A-5.g.. The response to the July 31, 2008 OPRA request was insufficient because the Custodian did not provide the extended date upon which the records would be provided, did not provide the records until twenty-two (22) business days following receipt of the request, and did not provide the lawful basis for the redactions made to the records. See Badini v. County of Hunterdon, GRC Complaint No. 2008-122 (June 2009) (custodian failed to inform the Complainant of a date certain within the statutorily mandated timeframe). See also Kohn v. Township of Livingston (Essex), GRC Complaint No. 2007-322 (June 2009).

Therefore, the Custodian's insufficient responses to the Complainant's July 9, 2008 and July 31, 2008 OPRA requests 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Additionally, the Complainant disputes the Custodian's redactions to the requested 2008 executive session minutes and Friday memos from 2007 and 2008. The Custodian argues that the redactions made to the 2008 executive session minutes were necessary pursuant to Section 12 of OPMA as discussions relating to ongoing litigation, contract negotiations, land acquisitions or personnel matters. The Custodian further argues that the redactions made to the 2007 and 2008 Friday memos were necessary for matters to be kept confidential under Section 12 of OPMA or as advisory, consultative or deliberative material containing opinions or advice of the Township Manager to the Township Council.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC¹¹ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

"OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers."

The court also stated that:

"[t]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into

¹¹ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the following 2008 redacted executive session minutes and 2007 and 2008 Friday memos to determine the validity of the Custodian’s assertion that the redacted information is exempt:

Executive Session Minutes – January 8, 2008; January 17, 2008; February 7, 2008; March 4, 2008; March 25, 2008; April 8, 2008; April 22, 2008; May 15, 2008; and June 12, 2008.

Friday Memos – January 4, 2007; January 12, 2007; March 2, 2008; March 9, 2007 (Budget Update); March 16, 2007; April 13, 2007; February 1, 2008; March 14, 2008; April 4, 2008; April 11, 2008; April 25, 2008; May 2, 2008; May 9, 2008, May 23, 2008; and June 27, 2008.

Whether the Custodian’s delay in access to and denial of redacted information contained in 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 a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's insufficient responses to the Complainant's July 9, 2008 and July 31, 2008 OPRA requests 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The response to the July 9, 2008 OPRA request was insufficient because the Custodian did not provide all requested records and did not provide the lawful basis for the redactions made to the records pursuant to N.J.S.A. 47:1A-5.g. The response to the July 31, 2008 OPRA request was insufficient because the Custodian did not provide the extended date upon which the records would be provided, did not provide the records until twenty-two (22) business days following receipt of the request, and did not provide the lawful basis for the redactions made to the records. *See* Badini v. County of Hunterdon, GRC Complaint No. 2008-122 (June 2009) (custodian failed to inform the Complainant of a date certain within the statutorily mandated timeframe). *See also* Kohn v. Township of Livingston (Essex), GRC Complaint No. 2007-322 (June 2009).

2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following 2008 redacted executive session minutes and 2007 and 2008 Friday memos to determine the validity of the Custodian's assertion that the redacted information is exempt:

Executive Session Minutes – January 8, 2008; January 17, 2008; February 7, 2008; March 4, 2008; March 25, 2008; April 8, 2008; April 22, 2008; May 15, 2008; and June 12, 2008.

Friday Memos – January 4, 2007; January 12, 2007; March 2, 2008; March 9, 2007 (Budget Update); March 16, 2007; April 13, 2007; February 1, 2008; March 14, 2008; April 4, 2008; April 11, 2008; April 25, 2008; May 2, 2008; May 9, 2008, May 23, 2008; and June 27, 2008.

3. **The Custodian must deliver¹² to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #2 above), a document or redaction index¹³, as well as a legal certification from the Custodian, in**

¹² The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹³ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

accordance with N.J. Court Rule 1:4-4¹⁴, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

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 pending the Custodian's compliance with the Council's Interim Order.

Prepared and
Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009

¹⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
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