



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. 2008-277

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 \$6,097.50.
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 25 percent fee enhancement, or \$1,310.62, under New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 156 – 158 (2005), *i.e.*, this case involved the Complainant’s dispute of a proposed special service charge for making audio copies of Township Council meetings rather than any blanket denial of access to government records, which is not an issue of first impression before the Council; the calculation of a special service charge is an area of settled law and one which the Council has decided on numerous occasions; the risk of failure was not high; and the records themselves, a summary of legal fees, a vendor bill list, and audio recordings of Township Council meetings, do not relate to an issue of significant public importance. Thus, no enhancement of the lodestar on Complainant Counsel’s claim for a reasonable prevailing party attorney fee under N.J.S.A. 47:1A-6 is appropriate. As such, only the requested prevailing party attorney fee of \$6,097.50 (\$225 x 27.1 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. 2008-277

v.

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

Records Relevant to Complaint:

April 3, 2008

4 CD-ROM audio copies of the Township of Sparta (“Township”) Council meeting held on March 25, 2008 in the Windows WAV format.

April 7, 2008³

1. A copy of the summary of all legal fees billed by the Sparta Township Attorney for December 2007 – March 2008.
2. A copy of the Township’s bill list by vendor ID for 2007.
3. A CD-ROM audio copy of the Township Council meeting held on November 27, 2007 in the Windows WAV format.
4. A CD-ROM audio copy of the Township Council meeting held on December 27, 2007 in the Windows WAV format.

April 9, 2008

A CD-ROM audio copy of the Township Council meeting held on April 8, 2008 in the Windows WAV format.

Requests Made: April 3, 2008, April 7, 2008 and April 9, 2008

Responses Made: April 7, 2008 and April 11, 2008

Custodian: Mary Coe⁴

GRC Complaint Filed: December 15, 2008⁵

Background

July 27, 2010

Government Records Council’s (“Council”) Interim Order. At its July 27, 2010 public meeting, the Council considered the July 20, 2010 Findings and Recommendations

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

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

³ The Complainant filed four (4) separate OPRA requests on April 7, 2008.

⁴ Miriam Tower is the original Custodian that handled the Complainant’s OPRA requests. However, Ms. Tower Custodian retired on December 5, 2008 and was replaced by Mary Coe.

⁵ The GRC received the Denial of Access Complaint on said date.

of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian made the requested records available to the Complainant on seven (7) CD-ROMs at a total cost of \$2.45 (or \$0.35 per CD-ROM) and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's May 27, 2010 Interim Order pursuant to N.J.S.A. 47:1A-5.b., and Mejias v. New Jersey Department of Corrections, GRC Complaint No. 2007-181 (July 2008).
2. Although the Custodian failed to bear her burden under N.J.S.A. 47:1A-6 of proving that the instant request for meeting recordings required a substantial amount of manipulation or programming of information technology and further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested meeting recordings was reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d., and failed to bear her burden under N.J.S.A. 47:1A-6 of proving that the reproduction of the requested summary of all legal fees billed by the Township Attorney for December 2007 to March 2008 and the requested vendor bill list for 2007 in fact required a substantial amount of manipulation or programming of information technology and further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested summary was reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d., the Custodian timely complied with the Council's May 27, 2010 Interim Order by making the requested records available to the Complainant upon payment of the required copying fee. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an 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. 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.

August 2, 2010

Council's Interim Order distributed to the parties.

September 2, 2010

Complaint transmitted to the Office of Administrative Law.

September 9, 2011

Administrative Law Judge ("ALJ") Leslie Z. Celentano's Initial Decision.⁶ 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 special services charges, the GRC held that petitioner was the prevailing party. He achieved the entirety of what he sought. Both the amount of time expended on the matter and his attorney's hourly rate are fair and reasonable. So, the full lodestar amount is reasonable. Moreover, a fee enhancement of 25 percent is warranted based on the high degree of success achieved, as well as the high risk of non-payment incurred.

...

As to GRC 10332-10—the special services charges, pursuant to N.J.S.A. 47:1A-6 petitioner is entitled to an award of attorney's fees in the amount of \$7,408.13, consisting of a lodestar of \$6,097.50 and a 25 percent fee enhancement of \$1,310.63 on 23.3 of the 27.1 hours expended prior to the GRC's July 27, 2010, decision regarding prevailing-party status."

Analysis

Whether the GRC should adopt, modify or reject the ALJ's Initial Decision dated July 27, 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).

⁶ The OAL combined this complaint with GRC Complaint No. 2008-219 because of the commonality of parties and the issue of prevailing party fees. GRC Complaint No. 2008-219 is being adjudicated concurrently but separately with the matter herein.

The ALJ subsequently held that:

“In [this matter], concerning the special services charges, the GRC held that petitioner was the prevailing party. He achieved the entirety of what he sought. Both the amount of time expended on the matter and his attorney’s hourly rate are fair and reasonable. So, the full lodestar amount is reasonable. Moreover, a fee enhancement of 25 percent is warranted based on the high degree of success achieved, as well as the high risk of non-payment incurred.

...

As to [this matter] —the special services charges, pursuant to N.J.S.A. 47:1A-6 petitioner is entitled to an award of attorney’s fees in the amount of \$7,408.13, consisting of a lodestar of \$6,097.50 and a 25 percent fee enhancement of \$1,310.63 on 23.3 of the 27.1 hours expended prior to the GRC’s July 27, 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 \$6,097.50.

Whether the Administrative Law Judge's award of a 25 percent fee enhancement on 23.3 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 Complainant's Counsel sought an hourly rate of \$225 for 27.1 hours of work, totaling \$6,097.50. The ALJ also noted that the Township did not object to the hourly rate or the time spent on the matter. The ALJ therefore determined that the \$225 hourly rate sought by Complainant's Counsel was reasonable. Counsel also sought a fee enhancement of \$2,621.25, a 50% enhancement on 23.3 of the 27.1 hours expended prior to the GRC's July 27, 2010 decision. The ALJ noted that “although the issue raised by petitioner was not one of great public importance, there was a high degree of success achieved, as well as a high risk – indeed the fact – of nonpayment.” Initial Decision at page 12. The ALJ therefore determined that “[b]ecause this was not a matter of great public importance, a 25 percent fee enhancement of the lodestar on petitioner's claim is reasonable.” *Ibid.*

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 Complainant filed a Denial of Access Complaint alleging an unlawful denial of access under OPRA to 1) a summary of all legal fees billed by the Sparta Township attorney for December 2007 to March 2008; 2) a copy of the Township’s bill list by vendor ID for 2007; 3) a CD-ROM audio copy of the Township Council meeting held on November 27, 2007, in Windows WAV format; and 4) a CD-ROM audio copy of the Township Council meeting held on December 27, 2007 in Windows WAV format.

Although the Council initially held that the proposed special service charge of \$67 per hour for making audio copies of the Township Council’s meetings in Windows WAV format, a file type not used by the Township, was appropriate, the Council reversed this

decision upon petitioner's motion for reconsideration and determined that no special service charge was warranted. The Council reduced the allowable special service charge to \$0.35 per CD-ROM for the recordings and reversed its earlier decision that authorized a special service charge for access to the requested Township legal bills and vendor lists. The Council therefore 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 the Complainant's dispute of a proposed special service charge for making audio copies of Township Council meetings rather than any blanket denial of access to government records. This is not an issue of first impression before the Council; the calculation of a special service charge 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, a summary of legal fees, a vendor bill list, and audio recordings of Township Council meetings, do not relate to an issue of significant public importance. 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 25 percent fee enhancement on 23.3 of the hours expended on the case, or \$1,310.62.

Therefore, the ALJ's award of a 25 percent fee enhancement on 23.3 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 25 percent fee enhancement, or \$1,310.62, under New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 156 – 158 (2005), *i.e.*, this case involved the Complainant's dispute of a proposed special service charge for making audio copies of Township Council meetings rather than any blanket denial of access to government records, which is not an issue of first impression before the Council; the calculation of a special service charge is an area of settled law and one which the Council has decided on numerous occasions; the risk of failure was not high; and the records themselves, a summary of legal fees, a vendor bill list, and audio recordings of Township Council meetings, do not relate to an issue of significant public importance. 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 \$6,097.50 (\$225 x 27.1 hours) is awarded to Complainant's Counsel.

Conclusions and Recommendations

The Executive Director respectfully recommends 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 \$6,097.50.
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 25 percent fee enhancement, or \$1,310.62, under New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 156 – 158 (2005), *i.e.*, this case involved the Complainant's dispute of a proposed special service charge for making audio copies of Township Council meetings rather than any blanket denial of access to government records, which is not an issue of first impression before the Council; the calculation of a special service charge is an area of settled law and one which the Council has decided on numerous occasions; the risk of failure was not high; and the records themselves, a summary of legal fees, a vendor bill list, and audio recordings of Township Council meetings, do not relate to an issue of significant public importance. Thus, no enhancement of the lodestar on Complainant Counsel's claim for a reasonable prevailing party attorney fee under N.J.S.A. 47:1A-6 is appropriate. As such, only the requested prevailing party attorney fee of \$6,097.50 (\$225 x 27.1 hours) is awarded to Complainant's Counsel.

Prepared By: Karyn Gordon, Esq.
In House 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

July 27, 2010 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2008-277

v.

Township of Sparta (Sussex)
Custodian of Record

At the July 27, 2010 public meeting, the Government Records Council (“Council”) considered the July 20, 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. Because the Custodian made the requested records available to the Complainant on seven (7) CD-ROMs at a total cost of \$2.45 (or \$0.35 per CD-ROM) and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council’s Interim Order, the Custodian has complied with the Council’s May 27, 2010 Interim Order pursuant to N.J.S.A. 47:1A-5.b., and Mejias v. New Jersey Department of Corrections, GRC Complaint No. 2007-181 (July 2008).
2. Although the Custodian failed to bear her burden under N.J.S.A. 47:1A-6 of proving that the instant request for meeting recordings required a substantial amount of manipulation or programming of information technology and further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested meeting recordings was reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d., and failed to bear her burden under N.J.S.A. 47:1A-6 of proving that the reproduction of the requested summary of all legal fees billed by the Township Attorney for December 2007 to March 2008 and the requested vendor bill list for 2007 in fact required a substantial amount of manipulation or programming of information technology and further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested summary was reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d., the Custodian timely complied with the Council’s May 27, 2010 Interim Order by making the requested records available to the



Complainant upon payment of the required copying fee. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an 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. 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.

Interim Order Rendered by the
Government Records Council
On The 27th Day of July, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: July 28, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 27, 2010 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-277

v.

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

April 3, 2008

4 CD-ROM audio copies of the Township of Sparta (“Township”) Council meeting held on March 25, 2008 in the Windows WAV format.

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April 9, 2008

A CD-ROM audio copy of the Township Council meeting held on April 8, 2008 in the Windows WAV format.

Requests Made: April 3, 2008, April 7, 2008 and April 9, 2008

Responses Made: April 7, 2008 and April 11, 2008

Custodian: Mary Coe⁴

GRC Complaint Filed: December 15, 2008⁵

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., of the Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Thomas Ryan, Esq., of Laddey, Clark & Ryan, LLC (Sparta, NJ).

³ The Complainant filed four (4) separate OPRA requests on April 7, 2008.

⁴ Miriam Tower is the original Custodian that handled the Complainant’s OPRA requests. However, Ms. Tower Custodian retired on December 5, 2008 and was replaced by Mary Coe.

⁵ 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 Complainant has met the required burden for reconsideration under Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996) by establishing that the Council's November 18, 2009 Interim Order determining that the special service charge proposed by the Custodian for the reproduction of the requested meeting recordings and the summary of legal bills was reasonable was based upon a "palpably incorrect or irrational basis."
2. Based on the evidence of record, the GRC finds that the Custodian has failed to bear her burden under N.J.S.A. 47:1A-6 of proving that the instant request for meeting recordings in fact requires a substantial amount of manipulation or programming of information technology and has further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested meeting recordings is reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d. See Rivera v. Town of Guttenberg, GRC Complaint No. 2006-154 (June 2008); Janney v. Estell Manor City, GRC Complaint No. 2006-105 (December 2007). The Custodian may therefore only charge the actual cost of the 11 CD-ROMs necessary to duplicate the meeting recordings, which the Custodian has certified is 35 cents each, for a total of \$3.85.
3. Based on the evidence of record set forth above, the GRC finds that the Custodian has failed to bear her burden under N.J.S.A. 47:1A-6 of proving that the reproduction of the requested summary of all legal fees billed by the Township Attorney for December 2007 to March 2008 and the requested vendor bill list for 2007 in fact requires a substantial amount of manipulation or programming of information technology and has further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested summary is reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d. The two (2) to (4) hours which the Custodian certified in the SOI would be required to scan, convert and save the requested vendor bill list and attorney's bills to PDF format do not rise to the level of a "substantial amount of manipulation or programming of information technology" sufficient to justify the proposed charges under N.J.S.A. 47:1A-5.d. See McBride v. Borough of Mantoloking (Ocean), 2009-138 (March 2010). The Custodian may, therefore, charge only the cost of the CD-ROM necessary to provide electronic copies of the requested records to the Complainant, or 35 cents.
4. **The Custodian shall comply with item # 2 and #3 above within five (5) business days from receipt of the Council's Interim Order and**

simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁶, to the Executive Director.⁷

5. 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.
6. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

June 2, 2010

Council's Interim Order distributed to the parties.

June 9, 2010

Letter from the Custodian to the Complainant. The Custodian states that pursuant to the Council's May 27, 2010 Interim Order, CD-ROM audio recordings of the Township Council meetings held on November 27, 2007, December 27, 2007 and April 8, 2008 in Windows WAV format have been created for disclosure. The Custodian states that four (4) CD-ROM audio copies of the Township Council meeting held on March 25, 2008 in Windows WAV format have also been created for disclosure. The Custodian lastly states that copies of the Township attorney's legal bills for the period between December 2007 and March 2008 and a copy of the Township's bill list by vendor ID for 2007 on CD-ROMs have been created for disclosure.

The Custodian states that pursuant to the Council's Interim Order, seven (7) CD-ROMs at a cost of \$0.35 per CD-ROM will be provided to the Complainant. The Custodian states that she will mail the CD-ROMs to the Complainant upon receipt of a check made payable to the Township in the amount of \$2.45. The Custodian states that the Complainant may also come to the Custodian's office during regular business hours to retrieve the CD-ROMs. The Custodian requests that the Complainant advise as to which method of delivery the Complainant would prefer.

June 9, 2010

Custodian's response to the Council's Interim Order, attaching a letter from the Custodian to the Complainant dated June 9, 2010. The Custodian certifies that she received the Council's May 27, 2010 Interim Order on June 2, 2010. The Custodian certifies that said order requested that the Custodian take the following actions within five (5) business days from receipt of the Council's order:

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."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

- Paragraph No. 2: Provide the Complainant with CD-ROM audio recordings of the Township’s Council meetings held on November 27, 2007, December 27, 2007 and April 8, 2008 in Windows WAV format and (4) CD-ROM audio recordings of the Township’s Council meeting held on March 25, 2008 (consisting of eleven (11) CD-ROM disks at a cost of \$0.35 per CD-ROM, for a total of \$3.85);
- Paragraph No. 3: Provide the Complainant on one (1) CD-ROM copies of legal bills from the Township Attorney for the period between December 2007 and March 2008 and the Township’s bill list by vendor ID for 2007 (at a cost of \$0.35 per CD-ROM); and
- Paragraph No. 4: Comply with paragraph No. 2 and paragraph No. 3 and provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

The Custodian certifies that the Township’s Director of Information Technology (“IT”) and the Township’s Chief Financial Officer (“CFO”) have prepared the requested records on CD-ROMs, including the requested meetings in Windows WAV format. Additionally, the Custodian certifies that the Director of IT was able to reproduce the information requested on seven (7) CD-ROMs. The Custodian certifies that she sent the attached letter to the Complainant via e-mail and first class mail, advising the Complainant that the requested records were available and could either be mailed or picked up in person upon payment of \$2.45.

Analysis

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

The Council’s May 27, 2010 Interim Order specifically directed the Custodian to provide access to eleven (11) CD-ROMs containing audio recordings in Windows WAV format of the requested Township Council meetings at the actual cost of \$0.35 per CD-ROM. Additionally, the Interim Order directed the Custodian to provide the Complainant with a CD-ROM containing copies of legal bills from the Township Attorney for the period between December 2007 and March 2008 and the Township’s bill list by vendor ID for 2007 at the actual cost of \$0.35 per CD-ROM. Said Order also directed the Custodian to provide certified confirmation of compliance to the GRC’s Executive Director within five (5) business days from receipt of said Order.

The Custodian responded to the Complainant on June 9, 2010, five (5) business days from receipt of the Council’s Order, stating that all of the requested records ordered to be disclosed were copied to seven (7) CD-ROMs and that the Complainant may either receive the CD-ROMs via regular mail or retrieve them in person at the Custodian’s office upon receipt of \$2.45. Moreover, the Custodian provided certified confirmation of said response to the GRC on the same day.

In Mejias v. New Jersey Department of Corrections, GRC Complaint No. 2007-181 (July 2008), the Council ordered the Custodian in its May 28, 2008 Interim Order to provide the requested annual reports to the Complainant. The Custodian certified on June

11, 2008 that the Complainant was advised that the records would be provided upon payment of copying costs. The Council held:

“because the Custodian informed the Complainant in writing that she would provide the requested records upon payment of the copy fee and because the Custodian is not required to release the requested records until payment is received pursuant to N.J.S.A. 47:1A-5.b. and [Paff, *supra*], as well as because the Custodian provided certified confirmation of compliance to the Executive Director within the five (5) business days as ordered by the Council, the Custodian has complied with the Council’s May 28, 2008 Interim Order.”

In the instant complaint, the Custodian sent a letter to the Complainant on June 9, 2010, advising that the requested records would be provided upon payment of the appropriate actual cost.

Therefore, because the Custodian made all of the requested records available to the Complainant on seven (7) CD-ROMs at a total cost of \$2.45 (or \$0.35 per CD-ROM) and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council’s Interim Order, the Custodian has complied with the Council’s May 27, 2010 Interim Order pursuant to N.J.S.A. 47:1A-5.b., and Mejias, *supra*.

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

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

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

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

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)).

In the instant complaint, although the Custodian failed to bear her burden under N.J.S.A. 47:1A-6 of proving that the instant request for meeting recordings required a substantial amount of manipulation or programming of information technology and further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested meeting recordings was reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d., and failed to bear her burden under N.J.S.A. 47:1A-6 of proving that the reproduction of the requested summary of all legal fees billed by the Township Attorney for December 2007 to March 2008 and the requested vendor bill list for 2007 in fact required a substantial amount of manipulation or programming of information technology and further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested summary was reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d., the Custodian timely complied with the Council's May 27, 2010 Interim Order by making the requested records available to the Complainant upon payment of the required copying fee. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an 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 the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

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

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

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

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

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

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

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.⁸ Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight business days later, or one day beyond the statutory

⁸ 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.

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 the instant complaint, in the Custodian's April 7, 2008 response to the Complainant's April 3, 2008 OPRA request, the Custodian stated that it would be necessary to convert the recording formats to comply with the Complainant's request, which would take approximately 3 ½ hours at \$67.00 per hour to fulfill the Complainant's April 3, 2008 OPRA request. The Custodian stated that a copy of the Council meeting held on March 25, 2008 in the FTR Gold System was provided to the Complainant at a cost of \$1.00 per CDROM.

In the Custodian's April 11, 2008 response to the OPRA requests dated April 7, 2008 and April 9, 2008, the Custodian stated that there were 24 records responsive to the Complainant's first OPRA request dated April 7, 2008 (seeking a summary of all legal fees billed by the Township Attorney for December 2007 – March 2008). The Custodian stated that the records responsive to this OPRA request consist of 24 pages at a total copying cost of \$13.50. The Custodian stated that the records responsive to the Complainant's second OPRA request dated April 7, 2008 consists of 501 pages with a special service charge of \$162.75. Regarding the Complainant's third (3rd) OPRA request dated April 7, 2008, the Custodian stated that a Windows WAV format copy of the Township Council meeting on November 27, 2007 is available for a special service charge of \$33.50 per half-hour for labor plus \$1.00 per CD-ROM. With regard to the Complainant's fourth (4th) OPRA request dated April 7, 2008, the Custodian stated that a Windows WAV format copy of the Township Council meeting on December 27, 2007 was available with a special service charge of \$33.50 per half-hour for labor plus \$1.00 for the CD-ROM. The Custodian stated that the records responsive to the April 9, 2008 OPRA request for a Windows WAV format copy of the Township Council meeting on April 8, 2008 was available for a special service charge of \$33.50 per half-hour for labor plus \$1.00 for the CD-ROM.

The Complainant filed the Denial of Access Complaint in this matter on December 15, 2008. As noted above, the Custodian in the instant matter made all the requested records available to the Complainant on June 9, 2010, for a total cost of \$2.45 (7 CDs x 35 cents).

Therefore, 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. 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. Because the Custodian made the requested records available to the Complainant on seven (7) CD-ROMs at a total cost of \$2.45 (or \$0.35 per CD-ROM) and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's May 27, 2010 Interim Order pursuant to N.J.S.A. 47:1A-5.b., and Mejias v. New Jersey Department of Corrections, GRC Complaint No. 2007-181 (July 2008).
2. Although the Custodian failed to bear her burden under N.J.S.A. 47:1A-6 of proving that the instant request for meeting recordings required a substantial amount of manipulation or programming of information technology and further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested meeting recordings was reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d., and failed to bear her burden under N.J.S.A. 47:1A-6 of proving that the reproduction of the requested summary of all legal fees billed by the Township Attorney for December 2007 to March 2008 and the requested vendor bill list for 2007 in fact required a substantial amount of manipulation or programming of information technology and further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested summary was reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d., the Custodian timely complied with the Council's May 27, 2010 Interim Order by making the requested records available to the Complainant upon payment of the required copying fee. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an 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. 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.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

July 20, 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. 2008-277

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 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. The Complainant has met the required burden for reconsideration under Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996) by establishing that the Council’s November 18, 2009 Interim Order determining that the special service charge proposed by the Custodian for the reproduction of the requested meeting recordings and the summary of legal bills was reasonable was based upon a “palpably incorrect or irrational basis.”
2. Based on the evidence of record, the GRC finds that the Custodian has failed to bear her burden under N.J.S.A. 47:1A-6 of proving that the instant request for meeting recordings in fact requires a substantial amount of manipulation or programming of information technology and has further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested meeting recordings is reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d. See Rivera v. Town of Guttenberg, GRC Complaint No. 2006-154 (June 2008); Janney v. Estell Manor City, GRC Complaint No. 2006-105 (December 2007). The Custodian may therefore only charge the actual cost of the 11 CD-ROMs necessary to duplicate the meeting recordings, which the Custodian has certified is 35 cents each, for a total of \$3.85.
3. Based on the evidence of record set forth above, the GRC finds that the Custodian has failed to bear her burden under N.J.S.A. 47:1A-6 of proving



that the reproduction of the requested summary of all legal fees billed by the Township Attorney for December 2007 to March 2008 and the requested vendor bill list for 2007 in fact requires a substantial amount of manipulation or programming of information technology and has further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested summary is reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d. The two (2) to (4) hours which the Custodian certified in to SOI would be required to scan, convert and save the requested vendor bill list and attorney's bills to PDF format do not rise to the level of a "substantial amount of manipulation or programming of information technology" sufficient to justify the proposed charges under N.J.S.A. 47:1A-5.d. See McBride v. Borough of Mantoloking (Ocean), 2009-138 (March 2010). The Custodian may, therefore, charge only the cost of the CD-ROM necessary to provide electronic copies of the requested records to the Complainant, or 35 cents.

4. **The Custodian shall comply with item # 2 and #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²**
5. 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.
6. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 27th Day of May, 2010

Robin Berg Tabakin, Chair
Government Records Council

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 2, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-277

v.

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

Records Relevant to Complaint:

April 3, 2008

4 CD-ROM audio copies of the Township of Sparta (“Township”) Council meeting held on March 25, 2008 in the Windows WAV format.

April 7, 2008³

1. A copy of the summary of all legal fees billed by the Sparta Township Attorney for December 2007 – March 2008.
2. A copy of the Township’s bill list by vendor ID for 2007.
3. A CD-ROM audio copy of the Township Council meeting held on November 27, 2007 in the Windows WAV format.
4. A CD-ROM audio copy of the Township Council meeting held on December 27, 2007 in the Windows WAV format.

April 9, 2008

A CD-ROM audio copy of the Township Council meeting held on April 8, 2008 in the Windows WAV format.

Requests Made: April 3, 2008, April 7, 2008 and April 9, 2008

Responses Made: April 7, 2008 and April 11, 2008

Custodian: Mary Coe⁴

GRC Complaint Filed: December 15, 2008⁵

Background

November 18, 2009

Government Records Council’s (“Council”) Interim Order. At its November 18, 2009 public meeting, the Council considered the November 10, 2009 Findings and

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

² Represented by Thomas Ryan, Esq., of Laddey, Clark & Ryan, LLC (Sparta, NJ).

³ The Complainant filed four (4) separate OPRA requests on April 7, 2008.

⁴ Miriam Tower is the original Custodian that handled the Complainant’s OPRA requests. However, Ms. Tower Custodian retired on December 5, 2008 and was replaced by Mary Coe.

⁵ The GRC received the Denial of Access Complaint on said date.

Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Complainant has requested records in a medium not routinely maintained by the Custodian and given the volume, extraordinary expenditure of time and effort and the extensive use of information technology necessary to fulfill the Complainant's first (1st) and second (2nd) OPRA requests dated April 7, 2008, a special service charge is warranted pursuant to N.J.S.A. 47:1A-5.c., N.J.S.A. 47:1A-5.d. and Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002).
2. The portion of the special service charge assessed based upon the hourly rate of the Director of Technology is unreasonable pursuant to N.J.S.A. 47:1A-5.c., Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), Renna v. County of Union, GRC Complaint No. 2004-134 (January 2005), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007). The Custodian must, therefore, disclose the records responsive to the Complainant's first (1st) and second (2nd) OPRA requests dated April 7, 2008 in the medium requested, using the hourly rate of the lowest paid qualified employee to calculate the labor portion of the special service charge pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d.
3. **The Custodian shall recalculate the appropriate rate in accordance with item #2 above and shall make available to the Complainant the requested records at this rate within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁶, to the Executive Director.**
4. Because the Complainant has requested audio recordings in a medium not routinely maintained by the Custodian, and because fulfilling the Complainant's OPRA requests dated April 3, 2009, April 9, 2009 and the third (3rd) and fourth (4th) OPRA requests dated April 7, 2009, would require an extraordinary expenditure of time and effort and an extensive use of information technology, a special service charge is warranted pursuant to Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002) and N.J.S.A. 47:1A-5.c.
5. The special service charge assessed by the Custodian is reasonable pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. because the Custodian has certified that the Director of Technology is the only Township employee capable of converting the records requested into the medium requested and that the fee assessed was based solely on the Director of Technology's base salary. Renna v. County of Union, GRC Complaint No. 2004-134 (January 2005), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006),

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."

Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007), Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002).

6. Because the Council has determined that the special service charge assessed by the Custodian for the Complainant's OPRA requests dated April 3, 2009, April 9, 2009 and the third (3rd) and fourth (4th) OPRA requests dated April 7, 2009, is valid and reasonable, the audio recordings of the March 25, 2008, April 8, 2008, November 27, 2007, and December 27, 2007 Township Council meetings shall not be disclosed to the Complainant until the Complainant pays the appropriate special service charge. The special service charge shall consist of the \$67.00 per hour labor cost initially assessed by the Custodian multiplied by the total number of hours of labor required to convert the audio recordings into the Windows WAV format plus the cost of materials pursuant to Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002) and N.J.S.A. 47:1A-5.c.
7. **The Custodian shall calculate the appropriate fee in accordance with item #6 above and shall make the exact amount of the fee available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Complainant shall comply with item # 6 above within five (5) business days from receipt of the Council's Interim Order by delivering to the Custodian (a) payment of a special service charge, or (b) a statement declining to purchase the records. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. Within seven (7) business days from receipt of the Council's Interim Order, the Custodian shall provide to the Executive Director a statement with regards to the Complainant's willingness or refusal to purchase the requested records, the amount of the special service charge, the total number of hours required to perform the medium conversion and confirmation that the records were so provided to the Complainant, if applicable. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.⁷**
8. 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.
9. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

November 20, 2009

Council's Interim Order distributed to the parties.

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."

November 23, 2009

Letter from the Custodian to the Complainant's Counsel.

The Custodian states that pursuant to Paragraph No. 3 of the Council's Interim Order, she has recalculated the special service charge using the hourly rate of the lowest paid qualified employee to calculate the labor portion of the special service charge.

The Custodian also states that the lowest paid employee qualified to manually scan the records responsive to the Complainant's first (1st) and second (2nd) OPRA requests dated April 7, 2008 and convert them to a PDF is Administrative Assistant Kate Chambers. The Custodian further states that Ms. Chamber's hourly rate is \$20.92 and that she estimates that it would take one (1) hour for Ms. Chamber to scan and convert the more than 700 records responsive to the Complainant request to a PDF, therefore the special service charge is \$20.92. The Custodian requests that the Complainant forward a check in the amount of \$20.92. The Custodian states that once she has received the check, she will forward the responsive records via e-mailed to the Complainant.

The Custodian states that the Director of Technology has advised that to convert the audio recordings of the four requested Council Meetings from the FTR Gold format to the Windows WAV format would take ten (10) hours. The Custodian states that at an hourly rate of \$67.00 per hour, the labor cost would be \$670.00. The Custodian also states that the Director of Technology has advised that approximately 11 CDs at \$.35 each would be required to convert the requested meetings. The Custodian advises that the total special charge for labor and materials is \$673.85.

The Custodian requests that the Complainant either deliver payment in the amount of \$673.85 to the Township of Sparta or advise the Custodian in writing that the Complainant declines to purchase the requested records within five (5) business days, as ordered by the GRC.

November 24, 2009

E-mail from the Complainant to the Custodian. The Complainant states that in regard to Paragraph 3 of the Council's November 18, 2009 Interim Order, the Complainant made an OPRA request on September 24, 2008 for the check registry for Sparta Township from January 2004 to September 2008 and received a copy of same on CD for a cost of \$1. The Complainant further states that on December 2, 2008, the Complainant made another OPRA request for the check registry for Sparta Township from January 2003 to December 2008 and received same via e-mail at no charge.

The Complainant contends that the requested records are maintained in electronic format on the municipal computers. The Complainant further contends that the check registry is the bill list, and that the summary of the legal fees billed by the Township attorney is in the check registry.

The Complainant questions why the Custodian would print out the requested records from an electronic format to a paper format, and then scan those pages back to an electronic format to be e-mailed to him.

The Complainant also states that, in regard to Paragraph 7 of the Council's November 18, 2009 Interim Order, in the past the Complainant has purchased from the Custodian's office copies of recordings of Township Council meeting minutes for November 27, 2007, December 27, 2007, as well as four (4) CDs of the March 25, 2008 and April 8, 2008 meetings. The Complainant asserts that those minutes were converted to WAV format and the actual hands-on manual interaction time was approximately two (2) to five (5) minutes for each meeting to be converted.

The Complainant further asserts that the Township possesses the hardware in its computer system to download the Council meetings in a WAV format after the FTR Gold program is opened on the desktop. The Complainant asserts that the format change is as easy as pressing the WAV format choice when downloading and saving the recording.

November 24, 2009

E-mail from the GRC Executive Director to the parties. The Executive Director states that she is concerned about the allegations raised by the Complainant in his e-mail to the Custodian dated November 24, 2009. The Executive Director further states that the Council may, of its own volition, reconsider its November 18, 2009 Interim Order if the Complainant does not request reconsideration thereof. The Executive Director also states that the GRC may have been misled regarding some material facts of the case and invites the Custodian and/or her Counsel to respond.

November 25, 2009

Letter from the Custodian to the Complainant's Counsel. The Custodian states that she provided the Director of Technology with a copy of the Complainant's November 24, 2009 e-mail for review of the Complainant's claim that FTR Gold recordings of the Township Council Meetings could be quickly and easily converted into the Windows WAV format.

The Custodian states that after reviewing the Complainant's e-mail, the Director of Technology stated that the Complainant was incorrect. However, the Custodian states that the Township's Director of Technology, on his own accord examined the duplication process more closely to see if he could shorten the time needed to manually convert the requested Township Council Meetings into the Windows WAV format. The Custodian states that after a considerable amount of time and effort, the Director of Technology, after conducting a timed test involving the requested Council sessions, discovered a way to reduce the time needed to convert the audio.

The Custodian states that the Director of Technology advised her that the time needed to convert the requested records is now 2.8 hours. The Custodian further states that the Complainant may disregard the initial special service charge of \$673.85 quoted in the Custodian's letter to the Complainant's Counsel dated November 23, 2009. The Custodian informs the Complainant that the special service charge is now \$191.00 for the time and materials required to convert the audio recordings of the requested Township Council meetings.

The Custodian requests that the Complainant either deliver to her a check in the amount of \$191 payable to the Township or advise the Custodian in writing that he declines to purchase the requested records.

November 25, 2009

Custodian's response to the Council's Interim Order attaching the Custodian's letter to the Complainant's Counsel dated November 23, 2009.

The Custodian certifies that she notified the Complainant and his attorney on November 23, 2009 that she recalculated the special service charge to convert and scan the records responsive to the Complainant's first (1st) and second (2nd) OPRA requests dated April 7, 2008 to be \$20.92 and that the requested records would be immediately e-mailed to the Complainant upon payment of the fee.

November 25, 2009

Letter from the Custodian to the GRC. The Custodian states that she is responding to the Executive Director's e-mail dated November 24, 2009.

The Custodian states that the Complainant seems to be trying to take advantage of the prior clerk's efforts to accommodate him by providing government records at a nominal cost or free of charge. The Custodian states that the fact that the prior Township Clerk may have provided government records to the Complainant without assessing the applicable special service charge does not preclude the Township from assessing a special service charge for responding to future requests for government records.

The Custodian states that the Director of Technology and the Chief Financial Officer have both advised the Custodian that the bill list requested by the Complainant is maintained within special municipal software that cannot be exported electronically. The Custodian states that the bill list must be printed and scanned into a PDF format before it can be sent electronically to a requestor. The Custodian also states that the attorney bills requested by the Complainant are received by the Township in paper form only and must also be scanned into a PDF to be sent to a requestor.

The Custodian states that regarding Paragraph No. 7 of the Council's Interim Order, she forwarded to the Director of Technology for review a copy of the Complainant's e-mail to her dated November 24, 2009. The Custodian states that the Director of Technology advised the Custodian that the Complainant is mistaken. The Custodian also states that she was informed that a manual conversion of the audio recordings to the requested Township Council meetings from the FTR Gold format to the Windows WAV format would still be required. The Custodian further states that she was advised that the following process is required to convert the requested records:

1. Create an export folder of each session requested
2. Locate and open the session (older sessions need to be pulled from archive.)
3. Select 70-74 minutes of the session and export to a WMA file format
4. Repeat the export for each 74-minute portion
5. Convert each WMA file to WAV file format
6. Author a CD for each file

7. Label each CD
8. Delete all temporary files exported

The Custodian states that in an attempt to accommodate the Complainant, the Director of Technology of his own volition studied the process further, and after running some tests, discovered a way to shorten the time needed to make the manual conversion of the requested audio recordings. The Custodian also states that she sent the Complainant a letter informing him that the Director of Technology was able to reduce the time required to convert the requested audio recordings, which reduced the associated special service fee.

The Custodian advises that she has complied with paragraph 3 of the Council's Interim Order and is currently awaiting the Complainant's response to disclose the records reference in Paragraph No. 7 of the Council's Interim Order.

November 30, 2009

E-mail from the Complainant to the Custodian. The Complainant responds to the Custodian's letter to the GRC dated November 25, 2009.

The Complainant states that he previously purchased compact disks for \$1.00 in the Windows WAV format from the Custodian's office for Township Council meetings for April 10, 2007, September 25, 2007, October 9, 2007, November 30, 2007, December 1, 2007, December 11, 2007, and February 26, 2008. The Complainant also states that he purchased a compact disk in the Windows WAV format from the present Custodian on at least one (1) prior occasion.

The Complainant states that he noticed for the first time that the Custodian attempted to overcharge him for CDs in the WAV format after his OPRA request dated April 3, 2008 when the Complainant requested four (4) copies of the March 25, 2008. The Complainant states that the Custodian sought to charge the Complainant \$67 for each of 3.5 hours of work, for a total charge of \$234.50 for labor, plus the cost of the CDs for the four (4) copies. The Complainant asks the Custodian what changed between February 26, 2008, when he could purchase a compact disk in the Windows WAV format for \$1.00 and April 3, 2008, when he could no longer do so.

The Complainant states that the Windows WAV format allows a user to play the compact disk on a CD player, DVD player or computer, whereas FTR Gold format can only be played on a computer using the FTR Gold Player.

The Complainant notes that the Custodian has repeatedly changed her position regarding the special service charge necessary to respond to his OPRA request. The Complainant observes that in the Custodian's November 23, 2009 letter, the Custodian quoted a cost of \$673.85 for 10 hours of work, and in the Custodian's November 25, 2009 letter to Complainant's Counsel, the Custodian quoted a charge of \$191.00 for 2.8 hours of work.

The Complainant states that he did not request that the Custodian convert the audio recordings from the FTR Gold format to the Windows WAV format, but rather the

Complainant requested the Custodian to download the Council meetings in WAV format. The Complainant states that he knows of at least a half a dozen municipalities that have the FTR Gold System that can download their Council Meetings in either the Windows WAV format or FTR Gold format for \$1.00 or less.

December 3, 2009

Complainant's Request for Reconsideration of the Council's November 18, 2009 Interim Order, attaching the following:

- Letter from the Custodian to the Complainant's Counsel dated November 23, 2009;
- E-mail from the Complainant's Counsel to the Custodian dated November 24, 2009;
- Letter from the Custodian to the Complainant's Counsel dated November 25, 2009;
- E-mail from the Complainant's Counsel to the Custodian dated November 30, 2009; and
- Complainant's certification dated December 2, 2009.

The Complainant requests that the Government Records Council reconsider its first (1st), fourth (4th), fifth (5th), sixth (6th), and seventh (7th) Conclusions and Recommendations in its November 18, 2009 Interim Order. The Complainant argues that the Custodian fraudulently concealed important information from the GRC. The Complainant contends that new evidence confirms the Complainant's position.

The Complainant certifies that he has personally witnessed township personnel operate the FTR Gold System to create an audio recording in the Windows WAV. The Complainant certifies that in order to create a compact disk in the Windows WAV format on the FTR Gold System, the operator must merely insert a blank CD-ROM into the computer and select Windows WAV format as the recording format. The Complainant argues that the Custodian is not required to convert the requested audio recordings into the Windows WAV format but rather must only download the audio recordings in the Windows WAV format. The Complainant contends that the Custodian could have created copies of the requested meetings in the Windows WAV format using the software on her desktop computer. The Complainant argues that because the Custodian has the capability to create audio recordings of Township meetings in Windows WAV format using its FTR Gold System, the Complainant's request does not seek records in a medium not routinely used by the Township and therefore no special service charge is warranted.

The Complainant also certifies that the Custodian previously disclosed audio recordings in the Windows WAV format for \$1.00 for the seven (7) requested Township Council meetings held on April 10, 2007, September 25, 2007, October 9, 2007, November 30, 2007, December 1, 2007, December 11, 2007 and February 26, 2008.

The Complainant states that the Custodian misled the GRC when she alleged that the vendor bill list was only available in hardcopy. The Complainant contends that according to a letter from the former Custodian, Miriam Tower, dated August 28, 2008,

the Township “does have the capability to electronically fax to you all of the above information [including bill lists].” The Complainant certifies that the only limitation the former Custodian placed on the Township’s ability to fax records was that due to the volume of the requested records, such records could not be faxed to the Complainant during regular business hours.⁸

The Complainant contends that contrary to the Custodian’s representations, she did not have to convert any data. The Complainant certifies that the check registry data is essentially the same information as the vendor bill list and is available in an electronic format. The Complainant also certifies that the requested summary of all legal bills from December 2007 to March 2008 is also maintained in electronic format and the totals thereof are included in the electronic check registry data on December 3, 2008. The Complainant also certifies that the Custodian e-mailed him a copy of the check registry data. The Complainant therefore concludes that the vendor bill lists could have been faxed to him electronically or e-mailed to him as an attachment. Additionally, the Complainant notes that the Custodian could have disclosed the check registry data for 2007 as she stated on December 3, 2008 in response to his December 2, 2008 OPRA request.

December 4, 2009

E-mail from the GRC to Craig Casey, Senior Sales Engineer for ForTheRecord.⁹ The GRC states that pursuant to a conversation with Mr. Casey, only the current version of FTR Gold System has the built-in capability to download or save in the Windows WAV format. The GRC confirms with Mr. Casey that there is a free add-on for the older versions of FTR Gold that will allow the older software to save or download in the Windows WAV format.

The GRC requests that Mr. Casey answer the following questions:

1. What is the specific name of the current version of FTR Gold System;
2. When did the add-on permitting users to save recordings in the Windows WAV format become available;
3. How are FTR users notified when new add-ons become available; and
4. Are there any additional equipment requirements if someone using an older version of FTR Gold wants to download the add-on.

December 7, 2009

E-mail from Mr. Casey to the GRC. Mr. Casey states that the add-on permitting users to save recordings in the Windows WAV format became available in 2002. Mr. Casey further states that FTR users are notified when new add-ons become available

⁸ The GRC’s review of the Complainant’s April 7, 2008 OPRA request reveals that the Complainant did not specify a method of delivery for the requested summary of legal fees billed by the Township Attorney from December 2007 to March 2008 or the requested copy of Sparta Township bill list by vendor identification number for 2007. However, Complainant’s Counsel states in the Denial of Access Complaint that by letter dated May 9, 2008, the Complainant requested through Counsel that the bill list and legal fees be scanned and converted into electronic format and delivered to the Complainant on CD.

⁹ ForTheRecord is the manufacturer of the FTR Gold system used by the Township of Sparta to record their Council meetings. Mr. Casey is the Senior Sales Engineer for ForTheRecord’s American Division.
Jesse Wolosky v. Township of Sparta (Sussex), 2008-277 – Supplemental Findings and Recommendations of the Executive Director 9

through its reseller channels and its website. Mr. Casey also states that any additional equipment requirement would depend on the add-on in use. Mr. Casey further states that the Save to Format add-on requires a compact disk burner to create audio compact disks.

December 11, 2009

E-mail from the Complainant to the GRC, attaching a letter from Vita Thompson, Municipal Clerk of the Township of Andover to the Complainant dated December 11, 2009. Ms. Thompson thanks the Complainant for showing her how to copy recordings of Council meetings from the FTR Gold system to WAV format. Ms. Thompson states that this was the first time that she copied a meeting onto a disc in WAV format although the Township of Andover has had the system for approximately five (5) years. Ms. Thompson states that the entire process took exactly four (4) minutes from start to finish to copy a representative Committee meeting recording.

December 18, 2009

E-mail from the GRC to the Custodian. The GRC states that additional information is required to adjudicate this complaint. The GRC requests that the Custodian provide a certification indicating the following:

1. The date upon which the Township purchased the FTR Gold system;
2. The date and nature of any upgrades since the system was purchased;
3. The name of the FTR Gold version currently in use; and
4. Whether the Township possesses a compact disk burner.

December 22, 2009

Certification from the Custodian to the Complainant. The Custodian certifies that after consulting with Michael Dempsey, the Township's Director of Technology, the FTR Gold System was installed on September 27, 2006 and no upgrades have been performed on the FTR Gold System since that time. The Custodian also certifies that the Township currently uses Version 2.2 of the FTR Gold System and has a compact disk burner.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's November 18, 2009 Interim Order?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Order dated November 18, 2009 on December 3, 2009, seven (7) business days from the issuance of the Council's Order.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

The Complainant requested that the Government Records Council reconsider its first (1st), fourth (4th), fifth (5th), sixth (6th), and seventh (7th) Conclusions and Recommendations in its November 18, 2009 Interim Order.

In the request for reconsideration, the Complainant argued that the Custodian fraudulently concealed important information from the GRC. The Complainant contended that new evidence confirms the Complainant’s position. The Complainant argued that the Custodian is not required to convert the requested audio recordings into the Windows WAV format but rather must only download the audio recordings in the Windows WAV format. The Complainant contended that the Custodian could have created copies of the requested meetings in the Windows WAV format using the software on her desktop computer. The Complainant argued that because the Custodian has the capability to create audio recordings of Township meetings in Windows WAV format using its FTR Gold System, the Complainant’s request does not seek records in a medium not routinely used by the Township and therefore no special service charge is warranted.

In support of these contentions, the Complainant submitted a certification that he personally witnessed Township personnel operate the FTR Gold System to create an audio recording in the Windows WAV format on previous occasions. The Complainant certified that in order to create a compact disk in the Windows WAV format on the FTR Gold System, the operator must merely insert a blank CD-ROM into the computer and select Windows WAV format as the recording format. The Complainant also certified that the Custodian previously disclosed audio recordings to him in the Windows WAV format for \$1.00 for seven (7) Township Council meetings held on April 10, 2007, September 25, 2007, October 9, 2007, November 30, 2007, December 1, 2007, December 11, 2007 and February 26, 2008.

Moreover, with regard to the Township's ability to fax the requested summary of legal fees and vendor bill list, the Complainant certified that the only limitation the former Custodian placed on the Township's ability to fax records was that due to the volume of the requested records, such records could not be faxed to the Complainant during regular business hours. The Complainant certified that the check registry data is essentially the same information as the vendor bill list and is available in an electronic format. The Complainant also certified that the requested summary of all legal bills from December 2007 to March 2008 is also maintained in electronic format and the totals thereof are included in the electronic check registry data on December 3, 2008. The Complainant also certified that the Custodian previously e-mailed him a copy of the check registry data.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra.*

The Complainant has met the required burden for reconsideration under Cummings; he has established that the Council's November 18, 2009 Interim Order determining that the special service charge proposed by the Custodian for the reproduction of the requested meeting recordings and the summary of legal bills was reasonable and was based upon a "palpably incorrect or irrational basis."

The Council therefore notes that, in addition to the evidence submitted by the Complainant in support of the request for reconsideration, the evidence of record in this matter shows the following with regard to the reproduction of the requested meeting recordings.

The Complainant filed an OPRA request for the records relevant to this complaint on April 3, 2008, April 7, 2008 and April 9, 2008. The Custodian responded to the April 3, 2008 OPRA request on April 7, 2008, stating that the Township uses the FTR Gold System for recording Council meetings. The Custodian further stated that the FTR Gold System is not compatible with the Windows WAV format. The Custodian stated that under OPRA, if a request is for a record in a medium not routinely used, developed or maintained by the Township or requiring a substantial amount of manipulation or programming of information technology, the Township may charge a special fee based on the cost for any extensive use of information technology or labor, as well as the actual cost of duplicating the record requested.

The Custodian further stated that the Director of Technology would convert the records requested to the Windows WAV format and copy same; this would require between 1 ½ - 2 ¼ hours and two (2) to four (4) CD-ROMs to convert one (1) copy of the audio recording of the March 25, 2008 Council meeting in the FTR Gold System into the Windows WAV format. The Custodian further stated that the FTR Gold System recordings that are longer than 70 minutes must be manually split into smaller segments then burned to CD-ROMs because Windows WAV formatted CD-ROMs only hold 74 minutes of standard audio. The Custodian stated that after the FTR Gold recording is converted into the Windows WAV format, each of the discs would then need to be

manually copied to make the four (4) copies the Complainant requested. The Custodian stated that it would take approximately 3 ½ hours to fulfill the Complainant's April 3, 2008 OPRA request. The Custodian also stated that converting a recording from the FTR Gold System into the Windows WAV format would degrade the audio quality. The Custodian stated that the Windows WAV recording would record everyone speaking simultaneously, while the FTR Gold Player software would allow the Complainant to listen to individual speakers during playback.

The Custodian also stated that a copy of the Council meeting held on March 25, 2008 in the FTR Gold System had been provided to the Complainant at a cost of \$1.00 per CD-ROM. The Custodian stated that she could also provide the Complainant with a free download of the Council meeting held on March 25, 2008 in FTR Gold System. The Custodian states that it would cost \$67.00 per hour for a total of 3 ½ hours to convert the FTR Gold System audio recording into the Windows WAV format.

With regard to the Complainant's third (3rd) OPRA request dated April 7, 2008, the Custodian stated that a Windows WAV format copy of the Township Council meeting on November 27, 2007 is available for a special service charge of \$33.50 per 1/2 hour for labor plus \$1.00 per CD-ROM.

With regard to the Complainant's fourth (4th) OPRA request dated April 7, 2008, the Custodian further stated that a Windows WAV format copy of the Township Council meeting on December 27, 2007 is available with a special service charge of \$33.50 per 1/2 hour for labor plus \$1.00 for the CD-ROM.

The Custodian stated that the records responsive to the April 9, 2008 OPRA request for a Windows WAV format copy of the Township Council meeting on April 8, 2008 is available for a special service charge of \$33.50 per 1/2 hour for labor plus \$1.00 for the CD-ROM.

Moreover, in a letter to Complainant's Counsel dated May 14, 2008, the Custodian stated that on one (1) prior occasion, she converted an audio recording originally in the FTR Gold System to a WAV formatted CD-ROM without charging the Complainant; however, the Custodian further stated that under N.J.S.A. 47:1A-5.d., the Township is entitled to charge a special service charge for converting the records requested by the Complainant and the Township would no longer waive the special service charge for the Complainant.

In the SOI submitted to the GRC on January 14, 2009, the Custodian certified that Michael Dempsey, the Director of Technology for the Township of Sparta, is the only individual with the technical expertise to accomplish the required conversion of formats in order to provide the requested copies of meeting recordings; Mr. Dempsey's hourly rate is \$67.53. The Custodian further certified that 3 ½ hours would be needed for Mr. Dempsey to convert the audio recording of the March 25, 2008 council meeting into the medium requested.

The Custodian also certified that Mr. Dempsey provided her with a memorandum detailing the process for converting FTR Gold System recordings to a Windows WAV

format CD-ROM. The Custodian certified that Mr. Dempsey's memorandum stated that conversion to a standard CD-ROM format becomes an involved process if the original recorded session exceeds 70 minutes. The Custodian certified that Mr. Dempsey's memorandum stated that because a CD-ROM can only hold 74 minutes of standard audio, FTR Gold recordings longer than 70 minutes must be manually split into smaller segments. The Custodian certified that Mr. Dempsey's memorandum also stated that this process is very time consuming and typically takes about 30-45 minutes per CD-ROM. The Custodian further certified that Mr. Dempsey stated that conversion of a typical council meeting would take about 1½ - 2 hours and would require 3-4 CD-ROMs and an addition ten (10) minutes per CD-ROM for each additional copy requested. The Custodian also certified that Mr. Dempsey stated that conversion degrades the audio quality and removes some functionality during playback. The Custodian certified that Mr. Dempsey stated that the free FTR Player software allows for segregation of recorded channels (microphones) during playback, which makes listening much easier.

The Custodian certified that pursuant to N.J.S.A. 47:1A-5.d., she properly assessed the Complainant a special service charge of \$67.53 per hour for the time spent by the Director of Technology to convert the records responsive to the Complainant's April 3, 2008, April 7, 2008 and April 9, 2008 OPRA requests. The Custodian further certified that the special service charge to convert the records requested into the medium requested was "...based on the cost for any extensive use of information technology or for the labor cost of the personnel providing the service that is actually incurred by the agency or attributable to the agency for the programming, clerical and supervisory assistance required or both." *Id.* The Custodian certified that she satisfied her obligation to provide the records requested in the April 3, 2008 OPRA request in a meaningful medium when she provided the Complainant with a copy of the audio recording of the Council Meeting of March 25, 2008 on a CD-ROM at a cost of a \$1.00 and a free download of the software needed to listen to the recording.

The Custodian further certified that as a courtesy, she previously waived the aforementioned special service charge for providing the Complainant with CD-ROMs in the Windows WAV format. The Custodian further certified that she is not barred from assessing a lawful special service charge where such a fee is warranted merely because she waived the special service charge as a courtesy in the past. The Custodian certified that she properly assessed a special service charge for converting the requested records into the media requested by the Complainant. The Custodian also certified that the special service charge assessed was based solely on Mr. Dempsey's hourly salary rate.

In her letter to Complainant's Counsel dated November 18, 2009, in response to the Council's Interim Order, the Custodian stated that ten (10) hours were necessary to convert the audio recordings of the four (4) requested Council Meetings from the FTR Gold format to the Windows WAV format. The Custodian further stated that at the Director of Technology's hourly rate of \$67.00 per hour, the labor cost would be \$670.00. The Custodian also stated that approximately 11 CDs at \$.35 each were necessary for the requested recordings; therefore, the total special charge for labor and materials is \$673.85.

However, the Custodian's letter dated November 25, 2009 to the Complainant's Counsel stated that Mr. Dempsey was able to reduce the time needed to convert the audio recordings after conducting a timed test involving the requested Council sessions. The Custodian therefore stated that 2.8 hours would be needed to duplicate the requested recordings and stated that the Complainant may disregard the initial special service charge of \$673.85 previously quoted; the new special service charge is \$191.00 for the time and materials required to convert the audio recordings of the requested Township Council meetings.

Moreover, on December 18, 2009, the GRC requested that the Custodian provide a certification indicating the following:

1. The date upon which the Township purchased the FTR Gold system;
2. The date and nature of any upgrades since the system was purchased;
3. The name of the FTR Gold version currently in use; and
4. Whether the Township possesses a compact disk burner.

The Custodian provided a certification on December 22, 2009 which established that the Township installed the FTR Gold System on September 27, 2006 and no upgrades have been performed on the FTR Gold System since that time. The Custodian also certified that the Township currently uses Version 2.2 of the FTR Gold System and has a compact disk burner.

The Custodian certified that the Township does not maintain the requested recordings of meetings minutes in the Windows WAV format, but instead utilizes the FTR Gold System version 2.2; the Custodian further certified that the Township possesses a compact disk burner. The Custodian initially contended that the Township would be required to expend ten (10) hours to convert the audio recordings of the four (4) requested Council Meetings from the FTR Gold format to the Windows WAV format at an hourly rate of \$67.00 per hour, plus approximately 11 CDs at \$.35 each for the requested recordings; therefore, the total special charge for labor and materials was \$673.85. However, the Custodian subsequently stated that 2.8 hours would be needed to duplicate the requested recordings and the new special service charge would be \$191.00 for the time and materials required to convert the audio recordings of the requested Township Council meetings.

The Complainant submitted evidence to establish that in order to create a compact disk in the Windows WAV format on the FTR Gold System, the operator must merely insert a blank CD-ROM into the computer and select Windows WAV format as the recording format. The Complainant also certified that the Custodian previously disclosed audio recordings to him in the Windows WAV format for \$1.00 for seven (7) Township Council meetings held on April 10, 2007, September 25, 2007, October 9, 2007, November 30, 2007, December 1, 2007, December 11, 2007 and February 26, 2008.

The Custodian also certified that she has provided the Custodian with recordings at no charge, but stated that this past practice in no way precludes the Township from charging a special service charge in this case.

In an effort to gain greater clarification regarding the manner in which the Custodian's recording equipment works, the GRC contacted Craig Casey, Senior Sales Engineer for ForTheRecord.¹⁰ Mr. Casey states that the add-on permitting users to save recordings in the Windows WAV format became available in 2002. Mr. Casey further states that FTR users are notified when new add-ons become available through its reseller channels and its website. Mr. Casey also states that any additional equipment requirement would depend on the add-on in use. Mr. Casey further states that the Save to Format add-on requires a compact disk burner to create audio compact disks.

N.J.S.A. 47:1A-5.d. requires that a Custodian provide access to a record and a copy of that record in the medium requested by a Complainant if the public agency maintains the record in that medium. N.J.S.A. 47:1A-5.d. further requires that if the request is for a record that requires a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.

Based on the evidence of record set forth above, the GRC finds that the Custodian has failed to bear her burden under N.J.S.A. 47:1A-6 of proving that the instant request for Council meeting recordings in fact requires a substantial amount of manipulation or programming of information technology and has further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested meeting recordings is reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d. *See Rivera v. Town of Guttenberg*, GRC Complaint No. 2006-154 (June 2008); *Janney v. Estell Manor City*, GRC Complaint No. 2006-105 (December 2007). The Custodian may therefore only charge the actual cost of the 11 CD-ROMs necessary to duplicate the meeting recordings, which the Custodian has certified is 35 cents each, for a total of \$3.85.

With regard to the production of copies of the requested summary of legal bills and the requested copy of the Township's bill list by vendor ID for 2007 (request items No. 1 and 2 of the Complainant's OPRA request dated April 7, 2008), the evidence of record indicates as follows.

The Custodian responded to the OPRA request dated April 7, 2008 on April 11, 2008, stating that there are 24 pages of records responsive to the Complainant's first OPRA request dated April 7, 2008 (seeking a summary of all legal fees billed by the Township Attorney for December 2007 – March 2008) at a copying cost of \$13.50 which will be provided once payment is made. The Custodian stated that the records responsive to the Complainant's second OPRA request dated April 7, 2008 consist of 501 pages, requiring a special service charge of \$162.75, which will also be provided once payment is made. The Custodian further stated that these records responsive total 525 pages which

¹⁰ ForTheRecord is the manufacturer of the FTR Gold system used by the Township of Sparta to record their Council meetings. Mr. Casey is the Senior Sales Engineer for ForTheRecord's American Division. Jesse Wolosky v. Township of Sparta (Sussex), 2008-277 – Supplemental Findings and Recommendations of the Executive Director

are maintained in paper format only. The Custodian also stated that under N.J.S.A. 47:1A-5.d., if the Township does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. The Custodian stated that 525 pages of records would have to be individually scanned and saved into a PDF format. The Custodian stated that the Township is permitted to assess a special service charge under these circumstances. The Custodian further stated that she already offered to provide the records requested in the first and second OPRA requests dated April 7, 2008 in their current paper medium.

The Custodian also stated that because the Township maintains these records in paper format only, converting the 525 responsive records to a PDF format would require a substantial amount of manipulation or programming of information technology.

By letter dated May 9, 2008, the Complainant requested through Counsel that the Custodian scan and convert the requested bill list and legal fees to electronic format and deliver same to the Complainant on a CD.

By letter to the Complainant's Counsel dated July 8, 2008,¹¹ the Custodian stated that the bill list by vendor ID for 2007 exists in electronic format, but that the record exists in a program known as Edmunds (commercially created for municipal finance) and cannot be exported to any other readable format. The Custodian requests that the Complainant's Counsel inform her whether the Complainant has Edmunds software. The Custodian states that if the Complainant does not have Edmunds software, the Custodian will have to print the requested bill list, scan the record, and save it as a PDF in order to send it via e-mail to the Complainant.

In the SOI submitted to the GRC on January 14, 2009, the Custodian certified that it would require between 2 to 4 hours for Mr. Dempsey to convert the vendor bill list and attorney's bills into the PDF medium requested.

However, the Complainant certified that the check registry data is essentially the same information as the vendor bill list and is available in an electronic format. The Complainant also certified that the requested summary of all legal bills from December 2007 to March 2008 is also maintained in electronic format and the totals thereof are included in the electronic check registry data on December 3, 2008. The Complainant also certified that the Custodian previously e-mailed him a copy of the check registry data.

The Complainant herein seeks electronic copies of a summary of legal fees billed by the Sparta Township Attorney from December 2007 to March 2008. The Custodian has certified that this record is maintained in paper format only and comprises 525 pages of responsive records. The Complainant also seeks an electronic copy of a bill list by vendor identification number for 2007; the Custodian has certified that this record is maintained electronically, but that it is maintained in a specific type of software which cannot be exported to another readable format. The Custodian has certified that it will

¹¹ Neither the Complainant nor the Custodian provided the GRC with a copy of this letter. However, the Custodian set forth the contents of the letter in the Statement of Information.

take between two (2) and four (4) hours for the Director of Technology to scan these records, and convert and save them to a PDF format.

As previously stated, N.J.S.A. 47:1A-5.d. requires that a Custodian provide access to a record and a copy of that record in the medium requested by a Complainant if the public agency maintains the record in that medium; if the request is for a record that requires a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.

Based on the evidence of record set forth above, the GRC finds that the Custodian has failed to bear her burden under N.J.S.A. 47:1A-6 of proving that the reproduction of the requested summary of all legal fees billed by the Township Attorney for December 2007 to March 2008 and the requested vendor bill list for 2007 in fact requires a substantial amount of manipulation or programming of information technology and has further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested summary is reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d. The two (2) to four (4) hours which the Custodian certified in the SOI would be required to scan, convert and save the requested vendor bill list and attorney's bills to PDF format do not rise to the level of a "substantial amount of manipulation or programming of information technology" sufficient to justify the proposed charges under N.J.S.A. 47:1A-5.d. See McBride v. Borough of Mantoloking (Ocean), 2009-138 (March 2010). The Custodian may, therefore, charge only the cost of the CD-ROM necessary to provide electronic copies of the requested records to the Complainant, or \$0.35 cents.

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

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

Whether the Complainant is 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" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees 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 Complainant has met the required burden for reconsideration under Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996) by establishing that the Council's November 18, 2009 Interim Order determining that the special service charge proposed by the Custodian for the reproduction of the requested meeting recordings and the summary of legal bills was reasonable was based upon a "palpably incorrect or irrational basis."
2. Based on the evidence of record, the GRC finds that the Custodian has failed to bear her burden under N.J.S.A. 47:1A-6 of proving that the instant request for meeting recordings in fact requires a substantial amount of manipulation or programming of information technology and has further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested meeting recordings is reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d. See Rivera v. Town of Guttenberg, GRC Complaint No. 2006-154 (June 2008); Janney v. Estell Manor City, GRC Complaint No. 2006-105 (December 2007). The Custodian may therefore only charge the actual cost of the 11 CD-ROMs necessary to duplicate the meeting recordings, which the Custodian has certified is 35 cents each, for a total of \$3.85.
3. Based on the evidence of record set forth above, the GRC finds that the Custodian has failed to bear her burden under N.J.S.A. 47:1A-6 of proving that the reproduction of the requested summary of all legal fees billed by the Township Attorney for December 2007 to March 2008 and the requested vendor bill list for 2007 in fact requires a substantial amount of manipulation or programming of information technology and has further failed to bear her burden of proving that the proposed special service charge associated with the reproduction of the requested summary is reasonable and based on the labor cost of personnel providing the service that is actually incurred by the agency, as required by N.J.S.A. 47:1A-5.d. The two (2) to (4) hours which the Custodian certified in to SOI would be required to scan, convert and save the requested vendor bill list and attorney's bills to PDF format do not rise to the level of a "substantial amount of manipulation or programming of information technology" sufficient to justify the proposed charges under N.J.S.A. 47:1A-5.d. See McBride v. Borough of Mantoloking (Ocean), 2009-138 (March 2010). The Custodian may, therefore, charge only the cost of the CD-ROM necessary to provide electronic copies of the requested records to the Complainant, or 35 cents.
4. **The Custodian shall comply with item # 2 and #3 above within five (5) business days from receipt of the Council's Interim Order and**

simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹², to the Executive Director.¹³

5. 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.
6. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Karyn G. Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

May 20, 2010

¹² "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."

¹³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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

November 18, 2009 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2008-277

v.

Township of Sparta (Sussex)
Custodian of Record

At the November 18, 2009 public meeting, the Government Records Council (“Council”) considered the November 10, 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. Because the Complainant has requested records in a medium not routinely maintained by the Custodian and given the volume, extraordinary expenditure of time and effort and the extensive use of information technology necessary to fulfill the Complainant’s first (1st) and second (2nd) OPRA requests dated April 7, 2008, a special service charge is warranted pursuant to N.J.S.A. 47:1A-5.c., N.J.S.A. 47:1A-5.d. and Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002).
2. The portion of the special service charge assessed based upon the hourly rate of the Director of Technology is unreasonable pursuant to N.J.S.A. 47:1A-5.c., Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), Renna v. County of Union, GRC Complaint No. 2004-134 (January 2005), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007). The Custodian must, therefore, disclose the records responsive to the Complainant’s first (1st) and second (2nd) OPRA requests dated April 7, 2008 in the medium requested, using the hourly rate of the lowest paid qualified employee to calculate the labor portion of the special service charge pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d.
3. **The Custodian shall recalculate the appropriate rate in accordance with item #2 above and shall make available to the Complainant the requested records at this rate within five (5) business days from receipt of the Council’s Interim**



Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.

4. Because the Complainant has requested audio recordings in a medium not routinely maintained by the Custodian, and because fulfilling the Complainant's OPRA requests dated April 3, 2009, April 9, 2009 and the third (3rd) and fourth (4th) OPRA requests dated April 7, 2009, would require an extraordinary expenditure of time and effort and an extensive use of information technology, a special service charge is warranted pursuant to Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002) and N.J.S.A. 47:1A-5.c.
5. The special service charge assessed by the Custodian is reasonable pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. because the Custodian has certified that the Director of Technology is the only Township employee capable of converting the records requested into the medium requested and that the fee assessed was based solely on the Director of Technology's base salary. Renna v. County of Union, GRC Complaint No. 2004-134 (January 2005), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007), Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002).
6. Because the Council has determined that the special service charge assessed by the Custodian for the Complainant's OPRA requests dated April 3, 2009, April 9, 2009 and the third (3rd) and fourth (4th) OPRA requests dated April 7, 2009, is valid and reasonable, the audio recordings of the March 25, 2008, April 8, 2008, November 27, 2007, and December 27, 2007 Township Council meetings shall not be disclosed to the Complainant until the Complainant pays the appropriate special service charge. The special service charge shall consist of the \$67.00 per hour labor cost initially assessed by the Custodian multiplied by the total number of hours of labor required to convert the audio recordings into the Windows WAV format plus the cost of materials pursuant to Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002) and N.J.S.A. 47:1A-5.c.
7. **The Custodian shall calculate the appropriate fee in accordance with item #6 above and shall make the exact amount of the fee available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Complainant shall comply with item # 6 above within five (5) business days from receipt of the Council's Interim Order by delivering to the Custodian (a) payment of a special service charge, or (b) a statement declining to purchase the records. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. Within seven (7) business days**

¹ "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."

from receipt of the Council's Interim Order, the Custodian shall provide to the Executive Director a statement with regards to the Complainant's willingness or refusal to purchase the requested records, the amount of the special service charge, the total number of hours required to perform the medium conversion and confirmation that the records were so provided to the Complainant, if applicable. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.²

8. 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.
9. 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 18th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: November 20, 2009

² "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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 18, 2009 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-277

v.

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

Records Relevant to Complaint:

April 3, 2008

4 CD-ROM audio copies of the Township of Sparta (“Township”) Council meeting held on March 25, 2008 in the Windows WAV format.

April 7, 2008³

1. A copy of the summary of all legal fees billed by the Sparta Township Attorney for December 2007 – March 2008.
2. A copy of the Township’s bill list by vendor ID for 2007.
3. A CD-ROM audio copy of the Township Council meeting held on November 27, 2007 in the Windows WAV format.
4. A CD-ROM audio copy of the Township Council meeting held on December 27, 2007 in the Windows WAV format.

April 9, 2008

A CD-ROM audio copy of the Township Council meeting held on April 8, 2008 in the Windows WAV format.

Requests Made: April 3, 2008, April 7, 2008 and April 9, 2008

Responses Made: April 7, 2008 and April 11, 2008

Custodian: Mary Coe⁴

GRC Complaint Filed: December 15, 2008⁵

Background

April 3, 2008

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

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

² Represented by Thomas Ryan, Esq., of Laddey, Clark & Ryan, LLC (Sparta, NJ).

³ The Complainant filed four (4) separate OPRA requests on April 7, 2008.

⁴ Miriam Tower is the original Custodian that handled the Complainant’s OPRA requests. However, Ms. Tower Custodian retired on December 5, 2008 and was replaced by Mary Coe.

⁵ The GRC received the Denial of Access Complaint on said date.

April 7, 2008

Complainant's Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on four (4) separate official OPRA request forms.

April 7, 2008

Custodian's response to the OPRA request dated April 3, 2008. The Custodian responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. The Custodian states that the Township uses the FTR Gold System for recording Council meetings. The Custodian further states that the FTR Gold System is not compatible with the Windows WAV format. The Custodian states that under OPRA, if a request is for a record in a medium not routinely used, developed or maintained by the Township or requiring a substantial amount of manipulation or programming of information technology, the Township may charge a special fee based on the cost for any extensive use of information technology or labor, as well as the actual cost of duplicating the record requested.

The Custodian states that the Director of Technology would be responsible for converting and copying the records requested. The Custodian states that it would take the Director of Technology between 1 ½ - 2 ¼ hours and two (2) to four (4) CD-ROMs to convert one (1) copy of the audio recording of the March 25, 2008 Council meeting in the FTR Gold System into the Windows WAV format. The Custodian further states that the FTR Gold System recordings that are longer than 70 minutes must be manually split into smaller segments then burned to CD-ROMs because Windows WAV formatted CD-ROMs only hold 74 minutes of standard audio. The Custodian states that after the FTR Gold recording is converted into the Windows WAV format, each of the discs would then need to be manually copied to make the four (4) copies the Complainant requested. The Custodian states that it would take approximately 3 ½ hours to fulfill the Complainant's April 3, 2008 OPRA request. The Custodian also states that converting a recording from the FTR Gold System into the Windows WAV format would degrade the audio quality. The Custodian states that the Windows WAV recording would record everyone speaking simultaneously, while the FTR Gold Player software would allow the Complainant to listen to individual speakers during playback.

The Custodian states that a copy of the Council meeting held on March 25, 2008 in the FTR Gold System has been provided to the Complainant at a cost of \$1.00 per CD-ROM. The Custodian states that she can also provide the Complainant with a free download of the Council meeting held on March 25, 2008 in FTR Gold System. The Custodian states that it would cost \$67.00 per hour for a total of 3 ½ hours to convert the FTR Gold System audio recording into the Windows WAV format.

April 9, 2008

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

April 11, 2008

Custodian's response to the OPRA requests dated April 7, 2008 and April 9, 2008. The Custodian responds in writing to the Complainant's OPRA requests on the fourth (4th) and second (2nd) business day, respectively, following receipt of such requests. The Custodian notes that she sent the Complainant a letter dated April 7, 2008 responding to the Complainant's April 3, 2008 OPRA request.

The Custodian states that there are 24 records responsive to the Complainant's first OPRA request dated April 7, 2008 (seeking a summary of all legal fees billed by the Township Attorney for December 2007 – March 2008). The Custodian states that the records responsive to this OPRA request consists of 24 pages at a copying cost of \$13.50 which will be provided once payment is made. The Custodian states that the records responsive to the Complainant's second OPRA request dated April 7, 2008 consists of 501 pages with a special service charge of \$162.75, which will also be provided once payment is made.

With regard to the Complainant's third (3rd) OPRA request dated April 7, 2008, the Custodian also states that a Windows WAV format copy of the Township Council meeting on November 27, 2007 is available for a special service charge of \$33.50 per 1/2 hour for labor plus \$1.00 per CD-ROM.

With regard to the Complainant's fourth (4th) OPRA request dated April 7, 2008, the Custodian further states that a Windows WAV format copy of the Township Council meeting on December 27, 2007 is available with a special service charge of \$33.50 per 1/2 hour for labor plus \$1.00 for the CD-ROM.

The Custodian states that the records responsive to the April 9, 2008 OPRA request for a Windows WAV format copy of the Township Council meeting on April 8, 2008 is available for a special service charge of \$33.50 per 1/2 hour for labor plus \$1.00 for the CD-ROM.

May 9, 2008

Letter from the Complainant's Counsel to the Custodian. The Complainant's Counsel requests that the Custodian convert the records responsive to the Complainant's first and second OPRA requests dated April 7, 2008 to an electronic format that could either be e-mailed to the Complainant or burned to a CD-ROM or DVD for him to pick up. The Complainant's Counsel states that attempts to impose a "special service charge" of \$67.00 per hour for converting the recordings of the December 27, 2007, March 25, 2008, and April 8, 2008, Township Council meetings into Windows WAV format violates OPRA.

The Complainant's Counsel also states that the special service charge for converting the CD-ROMs into the Windows WAV format appears too high. The Complainant's Counsel states that a special service charge is only justified if the records request "involves an extraordinary expenditure of time and effort to accommodate the request[.]" N.J.S.A. 47:1A-5.c. The Complainant's Counsel states that in Vessio v. Township of Barnegat, GRC Complaint No. 2006-70, the complainant sought records that required the Township of Barnegat to review 185 storage boxes over a fourteen-hour

period. The Complainant's Counsel states that in that case, the GRC held that a \$400.00 special service charge was reasonable. The Complainant's Counsel states that he does not see how converting files can take one half-hour. The Complainant's Counsel contends that the Township should use DVDs instead of CD-ROMs to the extent that a recording is longer than 74 minutes.

The Complainant's Counsel states that the Complainant was able to listen to CD-ROMs previously provided by the Township that appeared to be in Windows WAV format. The Complainant's Counsel requests that the Custodian review the special service charge. The Complainant's Counsel states that he will file a complaint with the GRC if he does not hear from the Custodian by May 16, 2008 or if the Custodian does not change her position on the special service charge.

May 14, 2008

Letter from the Custodian to the Complainant's Counsel. The Custodian states that Complainant Counsel's letter dated May 9, 2008 has not changed her position on the special service charge. The Custodian states that she can provide a complete audio recording of the March 25, 2008 Council Meeting on one (1) CD-ROM at a cost of \$1.00, as well as a free download of the FTR Gold System Program required to listen to the audio recording of the Township Council's meeting. The Custodian states that for \$1.00, the Complainant can have the records he requested.

The Custodian further states that neither N.J.S.A. 47:1A-5.c. nor the holding in Vessio v. Township of Barnegat, GRC Complaint No. 2006-70, apply to the Complainant's OPRA requests. The Custodian states that because the Complainant's requests raise issues relating to manipulation of technology and conversion of mediums, the Complainant's requests are governed by N.J.S.A. 47:1A-5.d. not N.J.S.A. 47:1A-5.c. The Custodian states that because the Complainant requested a copy of the audio recording of the March 25, 2008 Council Meeting in a medium not routinely used, developed or maintained by the Township and requiring a substantial amount of manipulation or programming of information technology, the Township may charge a special service charge based on the cost for any extensive use of information technology or labor.

The Custodian states that that on one (1) prior occasion, she converted an audio recording originally in the FTR Gold System to a WAV formatted CD-ROM without charging the Complainant. However, the Custodian states that under N.J.S.A. 47:1A-5.d., the Township is entitled to charge a special service charge for converting the records requested by the Complainant. The Custodian further states that the Township will no longer waive the special service charge.

The Custodian states that the records responsive to the first (1st) and second (2nd) OPRA requests dated April 7, 2008 total 525 pages which are maintained in paper format only. The Custodian also states that under N.J.S.A. 47:1A-5.d., if the Township does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. The Custodian further states that she has already offered to provide the records requested in the first and second OPRA requests dated April 7, 2008 in their current paper medium.

The Custodian states that because the Township maintains these records in paper format only, converting the 525 responsive records to a PDF format would require a substantial amount of manipulation or programming of information technology. The Custodian states that 525 pages of records would have to be individually scanned and saved into a PDF format. The Custodian states that the Township is permitted to assess a special service charge under these circumstances. In light of the possibility of a special service charge, the Custodian asks the Complainant to confirm his choice of medium. The Custodian further states that she will then provide the Complainant with an estimate of the special service charge for converting the records requested into the medium requested.

June 5, 2008⁶

Letter from the Complainant's Counsel to the Custodian. The Complainant's Counsel states that this letter is in response to the Custodian's May 14, 2008 letter. The Complainant's Counsel confirms that the Complainant would like copies of the 525 pages of records in electronic format. The Complainant's Counsel requests that the Custodian calculate the special service charge for converting the records responsive to the first (1st) and second (2nd) OPRA requests dated April 7, 2008 into an electronic medium.

July 7, 2008⁷

Letter from the Complainant's Counsel to the Custodian. The Complainant's Counsel states that this letter is in response to the Custodian's June 27, 2008 letter.⁸ The Complainant's Counsel states that in the May 14, 2008 letter, the Custodian wrote that the vendor bills and Township Attorney bills were maintained in paper format only. The Complainant's Counsel further states that in the June 27, 2008 letter and attached memorandum, the Director of Technology indicated that there would be an "export" of information, followed by a conversion. The Complainant's Counsel states that this suggests that the records requested exist in electronic format. The Complainant's Counsel requests that the Custodian confirm whether the bill list by vendor ID for 2007 exists in electronic format.

July 8, 2008⁹

Letter from the Custodian to the Complainant's Counsel. The Custodian states that the Complainant's Counsel is correct that the bill list by vendor ID for 2007 exists in electronic format. The Custodian further states that it is in a program known as Edmunds (commercially created for municipal finance) and cannot be exported to any other readable format. The Custodian requests that the Complainant's Counsel inform her whether the Complainant has Edmunds software. The Custodian states that if the Complainant does not have Edmunds software, they will have to proceed as suggested by the Director of Technology.

⁶ Neither the Complainant nor the Custodian provided the GRC with a copy of this letter. However, the Custodian sets forth the contents of the letter in the Statement of Information.

⁷ Neither the Complainant nor the Custodian provided the GRC with a copy of this letter. However, the Custodian sets forth the contents of the letter in the Statement of Information.

⁸ The GRC was not provided with a copy of the June 27, 2008 correspondence.

⁹ Neither the Complainant nor the Custodian provided the GRC with a copy of this letter. However, the Custodian sets forth the contents of the letter in the Statement of Information.

December 15, 2008

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

- Complainant’s OPRA request dated April 3, 2008;
- Complainant’s (4) OPRA requests dated April 7, 2008;
- Letter from the Custodian to the Complainant dated April 7, 2008;
- Letter from the Custodian to the Complainant dated April 11, 2008;
- Letter from the Complainant to the Custodian dated May 9, 2008;
- Letter from the Custodian to the Complainant dated May 14, 2008.

The Complainant states that he initiated this action because the Custodian sought several unwarranted special service charges for various OPRA requests.

The Complainant states that on April 3, 2008, he submitted an OPRA request for four (4) CD-ROM copies of the Township’s Council meeting on March 25, 2008 in Windows WAV format. The Complainant also states that the Custodian denied him access to the requested audio recordings by demanding that he pay a special service charge of approximately \$234.50 on April 7, 2008. The Complainant states that the Custodian’s estimated labor costs and time is too high. The Complainant states that although the Custodian claimed that FTR Gold System recordings longer than 70 minutes must be split onto two (2) CD-ROMs for duplication, the Custodian did not explain the reason for dividing the recordings. The Complainant states that the Custodian did not indicate how that hourly rate was calculated, including whether the hourly rate included any non-cash benefits. The Complainant also states that prior to the April 3, 2008 request, the Custodian provided CD-ROM recordings in the Windows WAV format, not FTR Gold System format. The Complainant further states that no justification was given for the sudden change.

The Complainant states that on April 7, 2008 and April 9, 2008, the Complainant submitted additional OPRA requests for copies of audio recordings of Township Council meetings in Windows WAV format, but the Custodian denied the requests by attempting to charge a \$67.00 per hour special service charge. The Complainant also states that the Custodian also attempted to charge the Complainant \$34.50 for each CD-ROM converted to WAV format.

The Complainant states that he objected to the special service charge for converting the CD-ROM files to Windows WAV format, and requested that the 501-page bill list by vendor ID and 24 pages of legal fees be converted into electronic format and delivered to the Complainant on a CD-ROM. The Complainant states that the Custodian refused to reconsider the special service charge in her letter dated May 14, 2008.

The Complainant states that at least seven (7) recordings of town council meetings have been provided to the Complainant in Windows WAV format for meetings held on April 10, 2007, September 25, 2007, October 9, 2007, November 30, 2007, December 1, 2007, December 11, 2007, and February 26, 2008.

The Complainant states that on June 5, 2008, the Complainant requested that the Custodian specify the special service charge, if any, for converting the 525 pages of responsive records to electronic format. The Complainant also states that it was his understanding that the 525 pages of responsive records already existed in an electronic format. The Complainant further states that in a letter dated June 27, 2008, the Custodian claimed that scanning all 525 pages would take between two (2) to four (4) hours and would cost \$67.53 per hour, for a total special service charge of approximately \$135.00-\$270.00.

The Complainant states that the records requested in the Complainant's various OPRA requests satisfies the definition of a government record set forth in N.J.S.A. 47:1A-1.1. Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006). The Complainant states that "[t]he purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Pub. 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 states that the Custodian violated OPRA because she quoted a special service charge for converting audio recording from FTR Gold System to Windows WAV format in excess of the fees permitted in OPRA. The Complainant states that for the foregoing reasons, the GRC should:

1. Find that the Custodian violated OPRA by failing to provide the records requested either at the public agency's direct cost or at a reasonable special service charge;
2. Order the Custodian to disclose the requested records immediately;
3. Find that the Complainant is the prevailing party and award reasonable attorneys' fee; and
4. Determine whether the Custodian's actions were knowing and willful.

The Complainant does not agree to mediate this complaint.

January 6, 2009

Request for the Statement of Information ("SOI") and Special Service Chart sent to the Custodian.

January 14, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 3, 2008;
- Complainant's OPRA request dated April 7, 2008;¹⁰
- Complainant's OPRA request dated April 9, 2008;
- Special Service Chart.

¹⁰ The Custodian attached to her SOI only the second of the two requests dated April 7, 2008. Jesse Wolosky v. Township of Sparta (Sussex), 2008-277 – Findings and Recommendations of the Executive Director

1. What records are requested?	Recording of March 25, 2008 council meeting, Vendor List for 2007, 501 pages & Township Attorney bills for January – March - 24 pages
2. Give a general nature description and number of the government records requested.	Audio Recordings & 525 pages of records
3. What is the period of time over which the records extend?	All of 2007 and the first three (3) months of 2008
4. Are some or all of the records sought archived or in storage?	No
5. What is the size of the agency (total number of employees)?	Approximately 100
6. What is the number of employees available to accommodate the records request?	One (1)
7. To what extent do the requested records have to be redacted?	N/A
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?	N/A
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?	N/A
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee or return records to their original storage place?	N/A
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	The Township has a full-time Director of Technology who is the only employee with the technical ability to convert government records from the records' original medium into the medium requested by the Complainant.
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly	Michael Dempsey, Director of Technology Yearly salary \$122,900.00 hourly rate \$67.53

rate?	
13. What is the availability of information technology and copying capabilities?	The Township has the ability to perform the medium conversion in house.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	It would require 3 ½ hours for the Director of Technology to convert the audio recording of the March 25, 2008 council meeting into the medium requested. It would require between 2-4 hours for the Director of Technology to convert the vendor bill list & attorney's bills into the medium requested.

The Custodian certifies that she contacted the Township's Director of Technology, Michael Dempsey, when she received the Complainant's April 3, 2008 OPRA request. The Custodian also certifies that Mr. Dempsey is the only employee with the technical ability to convert the records requested from their original medium into the medium requested by the Complainant. The Custodian also certifies that Mr. Dempsey provided her with a memorandum detailing the process for converting FTR Gold System recordings to a Windows WAV format CD-ROM. The Custodian certifies that Mr. Dempsey's memorandum stated that conversion to a standard CD-ROM format becomes an involved process if the original recorded session exceeds 70 minutes. The Custodian certifies that Mr. Dempsey's memorandum stated that because a CD-ROM can only hold 74 minutes of standard audio, FTR Gold recordings longer than 70 minutes must be manually split into smaller segments. The Custodian certifies that Mr. Dempsey's memorandum also stated that this process is very time consuming and typically takes about 30-45 minutes per CD-ROM. The Custodian further certifies that Mr. Dempsey stated that conversion of a typical council meeting would take about 1½ - 2 hours and would require 3-4 CD-ROMs and an addition ten (10) minutes per CD-ROM for each additional copy requested. The Custodian also certifies that Mr. Dempsey stated that conversion degrades the audio quality and removes some functionality during playback. The Custodian certifies that Mr. Dempsey stated that the free FTR Player software allows for segregation of recorded channels (microphones) during playback, which makes listening much easier.

The Custodian certifies that she responded to the Complainant's OPRA request dated April 3, 2008 on April 7, 2008, informing the Complainant of the imposition of a special service charge for converting the records requested. The Custodian further certifies that when the Complainant confirmed his choice of medium and paid the appropriate fees, she would provide the records requested. The Custodian certifies that she did not receive a response to her letter. The Custodian also certifies that instead, the Complainant filed several more OPRA requests on April 7, 2008 and one (1) additional OPRA request on April 9, 2008. The Custodian certifies that she responded to the Complainant's OPRA requests dated April 7, 2008 and April 9, 2008 on April 11, 2008. The Custodian also states that she received no response to this letter from the Complainant.

The Custodian certifies that on May 9, 2008, she received a letter from the Complainant's Counsel regarding the Custodian's April 7, 2008 and April 11, 2008

letters to the Complainant. The Custodian certifies that she responded to the Complainant Counsel's letter on May 14, 2008. The Custodian further certifies that on June 5, 2008, the Complainant's Counsel confirmed the election of the electronic medium for the first (1st) and second (2nd) OPRA requests dated April 7, 2008. The Custodian certifies that on July 7, 2008, the Complainant's Counsel questioned the original paper medium of the 501 pages of records responsive to the Complainant's first OPRA request dated April 7, 2008. The Custodian certifies that on July 8, 2008, she wrote to the Complainant's Counsel stating that the vendors' bills list for 2007 existed in an electronic format in a program known as Edmunds but the bills could only be exported in an electronic format to another Edmunds user.

The Custodian certifies that the special service charge that she assessed for the Complainant's April 3, 2008, April 7, 2008 and April 9, 2008 OPRA requests was permissible under OPRA. The Custodian certifies that for the year 2008, Mr. Dempsey's salary as Director of Technology was \$122,900. The Custodian further certifies that his hourly rate based on his salary alone equates to \$67.53 per hour.

The Custodian certifies that pursuant to N.J.S.A. 47:1A-5.d., she properly assessed the Complainant a special service charge of \$67.53 per hour for the time spent by the Director of Technology to convert the records responsive to the Complainant's April 3, 2008, April 7, 2008 and April 9, 2008 OPRA requests. The Custodian further certifies that the special service charge to convert the records requested into the medium requested was "...based on the cost for any extensive use of information technology or for the labor cost of the personnel providing the service that is actually incurred by the agency or attributable to the agency for the programming, clerical and supervisory assistance required or both." *Id.* The Custodian certifies that she satisfied her obligation to provide the records requested in the April 3, 2008 OPRA request in a meaningful medium when she provided the Complainant with a copy of the audio recording of the Council Meeting of March 25, 2008 on a CD-ROM at a cost of a \$1.00 and a free download of the software needed to listen to the recording.

The Custodian certifies that as a courtesy, she previously waived the aforementioned special service charge for providing the Complainant with CD-ROMs in the Windows WAV format. The Custodian further certifies that she is not barred from assessing a lawful special service charge where such a fee is warranted merely because she waived the special service charge as a courtesy in the past.

The Custodian certifies that she properly assessed a special service charge for converting the requested records into the mediums requested by the Complainant. The Custodian also certifies that the special service charge assessed was based solely on Mr. Dempsey's hourly salary rate.

Analysis

Whether the special service charge assessed by the custodian is warranted and reasonable pursuant to OPRA?

OPRA provides that:

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

OPRA further provides that:

“Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the *record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies*; provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance. The requestor shall have the opportunity to review and object to the charge prior to it being incurred.” (Emphasis added.) N.J.S.A. 47:1A-5.c.

OPRA also provides:

“A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. *If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record:*

- 1. in a medium not routinely used by the agency;*
- 2. not routinely developed or maintained by an agency; or*
- 3. requiring a substantial amount of manipulation or programming of information technology,*

the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.” N.J.S.A. 47:1A-5.d.

The Complainant submitted six (6) OPRA requests for which the Custodian assessed a special service charge. The Complainant's OPRA requests dated April 3, 2009, April 9, 2009 and the third (3rd) and fourth (4th) OPRA requests dated April 7, 2009 sought access to audio recordings of the March 25, 2008, April 8, 2008, November 27, 2007, and December 27, 2007 Township Council meetings, respectively, for which a \$67.00¹¹ per hour special service charge was assessed for converting the audio recordings from their original FTR Gold System format into the Windows WAV format. The Complainant's first (1st) and second (2nd) OPRA requests dated April 7, 2008 sought access to attorney bills and the 2007 vendors' bills list for which the Custodian identified 525 pages of responsive records. The Custodian has stated that she maintains the vendors' bills list for 2007 in a paper format but an electronic format exists in a program known as Edmunds which can only be accessed by another Edmunds user. The Complainant requested these records in an electronic format for which the Custodian assessed the same \$67.00 per hour special service charge as noted above for converting the paper records into the medium requested.

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

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

The determination of what constitutes an "extraordinary expenditure of time and effort" under OPRA must be made on a case by case basis and requires an analysis of a variety of factors. These factors were discussed in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. *Id.* at 193. Lenape assessed a special service charge due to the "extraordinary burden" placed upon the school district in responding to the request. *Id.*

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian's time was reasonable and consistent with N.J.S.A. 47:1A-5.c. *Id.* at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an "extraordinary expenditure of time and effort to accommodate" pursuant to OPRA:

¹¹ The Custodian named a special service charge of \$67.00 per hour for the April 3, 2007 request, then named \$33.50 per half an hour for the later requests. The GRC notes that this is essentially the same rate. *Jesse Wolosky v. Township of Sparta (Sussex), 2008-277 – Findings and Recommendations of the Executive Director*

- The volume of government records involved;
- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying;
- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination;¹² and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

The court determined that in the context of OPRA, the term “extraordinary” will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. *Id.* at 202. “[W]hat may appear to be extraordinary to one school district might be routine to another.” *Id.*

Recognizing that many different variables may affect a determination of whether a special service charge is reasonable and warranted, the GRC established an analytical framework for situations which may warrant an assessment of a special service charge. This framework incorporates the factors identified in the Courier Post case, as well as additional relevant factors. For the GRC to determine when and whether a special service charge is reasonable and warranted, a Custodian must provide a response to the following questions:

1. What records are requested?
2. Give a general nature description and number of the government records requested.
3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?

¹² With regard to this factor, the court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?
13. What is the availability of information technology and copying capabilities?
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

In the complaint now before the Council, the Custodian responded to the above questions as follows:

1. What records are requested?	Recording of March 25, 2008 council meeting, Vendor List for 2007, 501 pages & Township Attorney bills for January – March - 24 pages
2. Give a general nature description and number of the government records requested.	Audio Recordings & 525 pages of records
3. What is the period of time over which the records extend?	All of 2007 and the first three (3) months of 2008
4. Are some or all of the records sought archived or in storage?	No
5. What is the size of the agency (total number of employees)?	Approximately 100
6. What is the number of employees available to accommodate the records request?	One (1)
7. To what extent do the requested records have to be redacted?	N/A
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for	N/A

copying?	
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?	N/A
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee or return records to their original storage place?	N/A
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	The Township has a full-time Director of Technology who is the only employee with the technical ability to convert the records from their original medium into the medium requested by the Complainant.
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?	Michael Dempsey, Director of Technology Yearly salary \$122, 900.00 hourly rate \$67.53
13. What is the availability of information technology and copying capabilities?	The Township has the ability to perform the medium conversion.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	It would require 3 ½ hours for the Director of Technology to convert the audio recording of the March 25, 2008 council meeting into the medium requested. It would require between 2-4 hours for the Director of Technology to convert the vendor bill list & attorney's bills into the medium requested.

The Council first turns to the special service charge assessed for fulfilling the Complainant's first (1st) and second (2nd) OPRA requests dated April 7, 2008. OPRA permits a Custodian to charge a special service charge when "the record [requested] cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request." N.J.S.A. 47:1A-5.c. The Custodian has certified that converting the 525 pages of responsive records into a PDF format would require a substantial amount of time and manipulation of information technology. The Custodian further certified that 525 pages of records would have to be individually scanned and saved into a PDF format in order to transmit the records to the Complainant electronically. The Custodian certified that it would require two (2) to four (4) hours for the Director of Technology to convert the 525 pages of attorney's bills and the vendors' bills list into the medium requested.

Because the Complainant has requested records in a medium not routinely maintained by the Custodian and given the volume, extraordinary expenditure of time and effort and the extensive use of information technology necessary to fulfill the Complainant's first (1st) and second (2nd) OPRA requests dated April 7, 2008, a special service charge is warranted pursuant to N.J.S.A. 47:1A-5.c., N.J.S.A. 47:1A-5.d. and Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002).

Because fulfilling the Complainant's first (1st) and second (2nd) OPRA requests dated April 7, 2008 warrants a special service charge, the Council must now address whether said fee is reasonable. In Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), the Appellate Division held that it would be appropriate to calculate the hourly wage rates of the clerical and professional staff involved in satisfying a request and multiplying those figures by the total hours spent, if the Custodian can prove that the professional level of human resource was needed to fulfill the request.

In Renna v. County of Union, GRC Complaint No. 2004-134 (January 2005), the complainant requested all press releases and publicity photos for the years 1999, 2000, 2001, and 2002. The GRC found that, based upon the extraordinary effort required to fulfill the Complainant's request, a special service charge was warranted. However, the GRC reduced the amount of the special service charge. The custodian stated that a total of 80 hours of labor were required to fulfill the complainant's OPRA request. The custodian stated that the agency's photographer was needed to compile the publicity photos for 35 of the 80 hours and a clerk was needed to compile the press releases for 35 hours also. The GRC reduced the special service charge by the 35 hours assessed for the photographer's time because the photographer's expertise was not needed to fulfill the request. The Council found that the labor to be completed by the photographer could be completed by the clerk at a lower hourly rate.

Moreover, in Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007), the Council held that the custodian's estimate of the level of human resources used and the number of hours assessed was excessive. The Council further held that while the custodian may have been the only employee who could determine which minutes were approved or which minutes were in draft form, the Clerk Typist was capable of photocopying the requested records. The Council found the special service charge unreasonable because the custodian was not the lowest paid qualified employee capable of fulfilling the request.

In the complaint now before the Council, the Custodian has detailed the tasks necessary to fulfill the Complainant's first (1st) and second (2nd) OPRA requests dated April 7, 2008. The Custodian has certified that the Director of Technology would be responsible for converting the 525 pages of responsive records by scanning each page). The Custodian also certified that Mr. Dempsey's salary as Director of Technology was \$122,900.00 for the year 2008. The Custodian further certified that his hourly rate based on his salary alone equates to \$67.53 per hour.

However, the Custodian has not submitted any proof that converting the paper copies of the attorney's bills and vendors' bills list into a PDF format would require the

elevated skills of the Director of Technology. Therefore, the evidence of record does not support a finding that the Director of Technology is the lowest paid hourly employee qualified to convert the records requested. As in Renna, supra, and Janney, supra, the tasks that are expected to be completed by the higher paid employee, in this case the Director of Technology, can be completed by a lower paid employee.

Thus, the portion of the special service charge assessed based upon the hourly rate of the Director of Technology is unreasonable pursuant to N.J.S.A. 47:1A-5.c., Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), Renna v. County of Union, GRC Complaint No. 2004-134 (January 2005), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007). The Custodian must, therefore, disclose the records responsive to the Complainant's first (1st) and second (2nd) OPRA request dated April 7, 2008 in the medium requested, using the hourly rate of the lowest paid qualified employee to calculate the labor portion of the special service charge pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d.

The Council now turns its attention to the special service charge assessed for duplicating the requested audio recordings. The Complainant's OPRA requests dated April 3, 2009, April 9, 2009 and the third (3rd) and fourth (4th) OPRA requests dated April 7, 2009 sought access to audio recordings of the March 25, 2008, April 8, 2008, November 27, 2007, and December 27, 2007 Township Council meetings, respectively. The Complainant requested that the Custodian convert the audio recording into the Windows WAV format. The Custodian certified that Mr. Dempsey is the only employee with the technical ability to convert the records requested from their original medium into the medium requested by the Complainant. The Custodian also certified that Mr. Dempsey provided her with a memorandum detailing the process for converting FTR Gold System recordings to a Windows WAV format CD-ROM. The Custodian further certified that Mr. Dempsey's memorandum stated that conversion to a standard CD-ROM format becomes an involved process if the original recorded session exceeds 70 minutes. The Custodian certified that Mr. Dempsey's memorandum stated that because a CD-ROM can only hold 74 minutes of standard audio, FTR Gold recordings longer than 70 minutes must be manually split into smaller segments. The Custodian certified that Mr. Dempsey's memorandum also stated that this process is very time consuming and typically takes about 30-45 minutes per CD-ROM. The Custodian further certified that Mr. Dempsey stated that conversion of a typical council meeting would require 1½ - 2 hours and three (3) to four (4) CD-ROMs plus an addition ten (10) minutes per CD-ROM for each additional copy requested.

Because the Complainant has requested the audio recordings in a medium not routinely maintained by the Custodian, and because fulfilling the Complainant's OPRA requests dated April 3, 2009, April 9, 2009 and the third (3rd) and fourth (4th) OPRA requests dated April 7, 2009 would require an extraordinary expenditure of time and effort and an extensive use of information technology, a special service charge is warranted pursuant to Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002) and N.J.S.A. 47:1A-5.c.

Moreover, the special service charge assessed by the Custodian is reasonable pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. because the Custodian has certified that the Director of Technology is the only Township employee capable of converting the records requested into the medium requested and that the fee assessed was based solely on the Director of Technology's base salary. Renna v. County of Union, GRC Complaint No. 2004-134 (January 2005), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007), Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002).

Therefore, the Custodian shall disclose the audio recordings of the March 25, 2008, April 8, 2008, November 27, 2007, and December 27, 2007 Township Council meetings upon the Complainant's payment of the \$67.00 per hour special service charge initially assessed by the Custodian.

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

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

Whether the Complainant is 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. Because the Complainant has requested records in a medium not routinely maintained by the Custodian and given the volume, extraordinary expenditure of time and effort and the extensive use of information technology necessary to fulfill the Complainant's first (1st) and second (2nd) OPRA requests dated April 7, 2008, a special service charge is warranted pursuant to N.J.S.A. 47:1A-5.c., N.J.S.A. 47:1A-5.d. and Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002).
2. The portion of the special service charge assessed based upon the hourly rate of the Director of Technology is unreasonable pursuant to N.J.S.A. 47:1A-5.c., Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), Renna v. County of Union, GRC Complaint No. 2004-134 (January 2005), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007). The Custodian must, therefore, disclose the records responsive to the Complainant's first (1st) and second (2nd)

OPRA requests dated April 7, 2008 in the medium requested, using the hourly rate of the lowest paid qualified employee to calculate the labor portion of the special service charge pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d.

3. **The Custodian shall recalculate the appropriate rate in accordance with item #2 above and shall make available to the Complainant the requested records at this rate within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹³, to the Executive Director.**
4. Because the Complainant has requested audio recordings in a medium not routinely maintained by the Custodian, and because fulfilling the Complainant's OPRA requests dated April 3, 2009, April 9, 2009 and the third (3rd) and fourth (4th) OPRA requests dated April 7, 2009, would require an extraordinary expenditure of time and effort and an extensive use of information technology, a special service charge is warranted pursuant to Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002) and N.J.S.A. 47:1A-5.c.
5. The special service charge assessed by the Custodian is reasonable pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. because the Custodian has certified that the Director of Technology is the only Township employee capable of converting the records requested into the medium requested and that the fee assessed was based solely on the Director of Technology's base salary. Renna v. County of Union, GRC Complaint No. 2004-134 (January 2005), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007), Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002).
6. Because the Council has determined that the special service charge assessed by the Custodian for the Complainant's OPRA requests dated April 3, 2009, April 9, 2009 and the third (3rd) and fourth (4th) OPRA requests dated April 7, 2009, is valid and reasonable, the audio recordings of the March 25, 2008, April 8, 2008, November 27, 2007, and December 27, 2007 Township Council meetings shall not be disclosed to the Complainant until the Complainant pays the appropriate special service charge. The special service charge shall consist of the \$67.00 per hour labor cost initially assessed by the Custodian multiplied by the total number of hours of labor required to convert the audio recordings into the Windows WAV format plus the cost of materials pursuant to Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002) and N.J.S.A. 47:1A-5.c.
7. **The Custodian shall calculate the appropriate fee in accordance with item #6 above and shall make the exact amount of the fee available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Complainant shall comply with item # 6 above within five (5) business days from receipt of the Council's Interim Order by**

¹³ "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."

delivering to the Custodian (a) payment of a special service charge, or (b) a statement declining to purchase the records. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. Within seven (7) business days from receipt of the Council's Interim Order, the Custodian shall provide to the Executive Director a statement with regards to the Complainant's willingness or refusal to purchase the requested records, the amount of the special service charge, the total number of hours required to perform the medium conversion and confirmation that the records were so provided to the Complainant, if applicable. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.¹⁴

8. 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.
9. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 10, 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."
Jesse Wolosky v. Township of Sparta (Sussex), 2008-277 – Findings and Recommendations of the Executive Director