



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

February 24, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2008-278

v.

Township of Frankford (Sussex)
Custodian of Record

At the February 24, 2011 public meeting, the Government Records Council (“Council”) considered the February 17, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, accepts the Administrative Law Judge’s Initial Decision dated February 10, 2011 in which the Judge approved the Stipulation of Settlement signed by the parties or their representatives and ordered the parties to comply with the settlement terms and determined that these proceedings be concluded.

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 24th Day of February, 2011

Robin Berg Tabakin, Chair
Government Records Council



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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: February 28, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-278

v.

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

Records Relevant to Complaint:

1. Audio recording of the last regular public meeting of the Township of Frankford in CD or tape format
2. Transcript (hard copy) of the most recent Township of Frankford executive session minutes that has been approved sent via e-mail or fax.³

Request Made: December 2, 2008

Response Made: December 3, 2008

Custodian: Patricia Bussow⁴

GRC Complaint Filed: December 17, 2008⁵

Background

February 23, 2010

Government Records Council's ("Council") Interim Order. At its February 23, 2010 public meeting, the Council considered the February 16, 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, found that:

1. Because the Custodian provided access to the Complainant to the requested executive session meeting minutes dated August 28, 2008, with redactions, on December 29, 2009 and provided certified confirmation of compliance with the Council's December 22, 2009 Interim Order on December 29, 2009, four (4) business days after the Interim Order was issued, the Custodian has complied with the Council's December 22, 2009 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.g. in her response to the Complainant's OPRA request by unlawfully denying access to the entire record when only a portion of the record was exempt from disclosure pursuant to the

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

² Represented by Glenn C. Kienz, Esq., of Weiner & Lesniak LLP (Parsippany, NJ).

³ The Complainant requested additional records that are not subject of this Denial of Access Complaint.

⁴ The Custodian at the time of the Complainant's OPRA request was Louanne Cular.

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

Open Public Meetings Act and failed to bear her burden of proving that the proposed \$25 per audio tape copying fee was permissible under OPRA, the Custodian complied with the Council's December 22, 2009 Interim Order and provided the Complainant with the requested records with redactions in compliance with the Council's December 22, 2009 Interim Order. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's December 22, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

June 24, 2010

Complaint transmitted to the Office of Administrative Law

February 10, 2011

Administrative Law Judge's (ALJ) Initial Decision.⁶ The ALJ **FINDS** that:

1. The parties of have voluntarily agreed to the settlement as evidenced by their signatures of their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

As such the ALJ **CONCLUDES** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

Analysis

No analysis required.

⁶ OAL consolidated this complaint with Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (February 2010) by Court Order on September 23, 2010.
Jesse Wolosky v. Township of Frankford (Sussex), 2008-278 – Supplemental Findings and Recommendations of the Executive Director

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Administrative Law Judge's Initial Decision dated February 10, 2011 in which the Judge approved the Stipulation of Settlement signed by the parties or their representatives and ordered the parties to comply with the settlement terms and determined that these proceedings be concluded.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 17, 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
Acting Commissioner

INTERIM ORDER

February 23, 2010 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2008-278

v.

Township of Frankford (Sussex)
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 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 provided access to the Complainant to the requested executive session meeting minutes dated August 28, 2008, with redactions, on December 29, 2009 and provided certified confirmation of compliance with the Council’s December 22, 2009 Interim Order on December 29, 2009, four (4) business days after the Interim Order was issued, the Custodian has complied with the Council’s December 22, 2009 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.g. in her response to the Complainant’s OPRA request by unlawfully denying access to the entire record when only a portion of the record was exempt from disclosure pursuant to the Open Public Meetings Act and failed to bear her burden of proving that the proposed \$25 per audio tape copying fee was permissible under OPRA, the Custodian complied with the Council’s December 22, 2009 Interim Order and provided the Complainant with the requested records with redactions in compliance with the Council’s December 22, 2009 Interim Order. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council’s December 22, 2009 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Additionally, pursuant to Mason v. City of



Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 23rd Day of February, 2010

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: March 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 23, 2010 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-278

v.

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

Records Relevant to Complaint:

1. Audio recording of the last regular public meeting of the Township of Frankford in CD or tape format;
2. Transcript (hard copy) of the most recent Township of Frankford executive session minutes that has been approved sent via e-mail or fax.³

Request Made: December 2, 2008

Response Made: December 3, 2008

Custodian: Louanne Cular

GRC Complaint Filed: December 17, 2008⁴

Background

December 22, 2009

Government Records Council's ("Council") Interim Order. At its December 22, 2009 public meeting, the Council considered the December 9, 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, found that:

1. The Custodian has complied with the Council's September 30, 2009 Interim Order by providing the Council with all records set forth in Paragraphs 2 and 4 of the Order within five (5) business days of receiving the Council's Order.
2. The Custodian unlawfully denied access to the requested records because OPRA requires that when only a portion of a government record is exempt from disclosure, a custodian must redact from a copy of the record that portion which is exempt and disclose the remainder of the record. N.J.S.A. 47:1A-5.g. The Custodian unlawfully denied access to the entire record when only a

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

² Represented by Kevin Benbrook, Esq., of Benbrook & Benbrook (Clinton, NJ).

³ The Complainant requested additional records that are not the subject of this Denial of Access Complaint.

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

portion of the record was exempt from disclosure pursuant to the Open Public Meetings Act regarding a personnel matter and a litigation matter for which a governing body is allowed to exclude the public. N.J.S.A. 10:4-12(b)(7) and (8).

3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the [below] table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4⁵ to the Executive Director.**

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination⁶
1	August 28, 2008 Executive Session Minutes	Executive session minutes from the Township of Frankford’s August 28, 2008 Council Meeting	The Custodian asserts that disclosure would reveal a personnel matter exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-10 and a litigation matter exempt from disclosure under the attorney-client privilege	The executive session minutes are disclosable except that the paragraph entitled “Personnel – DPW” is exempt from disclosure under OPMA because the discussion is that of a personnel matter pursuant to <u>N.J.S.A.</u> 10:4-12(b)(8).

⁵ "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."

⁶ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

			<p>pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p>	<p>With regards to the paragraph entitled “OPRA violation suit ...” the text of the paragraph is disclosable but the remainder of the paragraph’s title is exempt from disclosure under OPMA because it reveals the parties of anticipated litigation and is thus exempt pursuant to <u>N.J.S.A.</u> 10:4-12(b)(7).</p> <p>Therefore, the Custodian must disclose the minutes with redactions made for:</p> <ul style="list-style-type: none"> (1) the entire paragraph entitled “Personnel – DPW” except its title is disclosable, and (2) the remainder of the paragraph title which begins “OPRA violation suit” except that the text of the paragraph is disclosable. <p>The remainder of the record must</p>
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				be disclosed to the Complainant.
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December 23, 2009

Council’s Interim Order distributed to the parties.

December 29, 2009

Custodian’s response to the Council’s Interim Order. The Custodian⁷ certifies that she provided the Complainant with a copy of the requested executive session meeting minutes dated August 28, 2008 with redactions, on this date, four (4) business days after the Council’s Interim Order was issued. The Custodian further certifies that she provided such record at no cost to the Complainant and in the format requested.

Analysis

Whether the Custodian complied with the Council’s December 22, 2009 Interim Order?

The Council’s December 22, 2009 Interim Order required disclosure of the requested executive session meeting minutes dated August 28, 2008 with redactions made for:

- (1) the entire paragraph entitled “Personnel – DPW” except its title is disclosable, and
- (2) the remainder of the paragraph title which begins “OPRA violation suit” except that the text of the paragraph is disclosable.

The Custodian certified that she provided the Complainant access to the requested executive session meeting minutes dated August 28, 2008, with redactions, on December 29, 2009, four (4) business days after the Interim Order was issued.

Because the Custodian provided access to the Complainant of the requested executive session meeting minutes dated August 28, 2008, with redactions, on December 29, 2009 and provided certified confirmation of compliance with the Council’s December 22, 2009 Interim Order on December 29, 2009, four (4) business days after the Interim Order was issued, the Custodian has complied with the Council’s December 22, 2009 Interim Order.

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

⁷ Patricia Bussow provided the certified confirmation of compliance with the Council’s December 22, 2009 Interim Order in her capacity as the Acting Clerk for the Township of Frankford. Ms. Bussow certifies that Louanne Cular, the Municipal Clerk with respect to whom the instant matter was initiated, retired on August 1, 2009.
 Jesse Wolosky v. Township of Frankford (Sussex), 2008-278 – Supplemental Findings and Recommendations of the Executive Director 4

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.

The Custodian complied with the Council’s September 30, 2009 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order (copies of the requested executive session meeting minutes dated August 28, 2008) within five (5) business days of receiving the Council’s Order. Moreover, by letter dated October 7, 2009, the Custodian noted that she could not provide a legal certification that a refund of copy fees for audio tapes was given to the Complainant, as required by the Council in its September 30, 2009 Interim Order, because the Complainant never paid for the audio tapes he requested. The Custodian also complied with the Council’s December 22, 2009 Interim Order by providing to the Complainant a copy of the requested executive session meeting minutes dated August 28, 2008, with redactions, on December 29, 2009 and provided certified confirmation of compliance with the Council’s December 22, 2009 Interim Order on December 29, 2009, four (4) business days after the Interim Order was issued.

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

Although the Custodian violated N.J.S.A. 47:1A-5.g. in her response to the Complainant’s OPRA request by unlawfully denying access to the entire record when only a portion of the record was exempt from disclosure pursuant to the Open Public Meetings Act and failed to bear her burden of proving that the proposed \$25 per audio tape copying fee was permissible under OPRA, the Custodian complied with the

Council's December 22, 2009 Interim Order and provided the Complainant with the requested records with redactions in compliance with the Council's December 22, 2009 Interim Order. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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)(NJDP), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.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 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 matter before the Council, the Custodian initially denied access to the requested executive session meeting minutes dated August 28, 2008 in their entirety on the grounds that said minutes contained personnel and litigation matters. The Complainant filed his Denial of Access Complaint on December 17, 2008. After an *in camera* examination of the requested record, by Interim Order dated December 22, 2009, the Council ordered the Custodian to release the executive session meeting minutes dated August 28, 2008 with redactions. The Custodian released such record on December 29, 2009. Therefore, the action sought by the Complainant came about due to the filing of the Denial of Access Complaint in this matter.

Pursuant to Teeters, *supra*, and the Council's December 22, 2009 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

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.

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 provided access to the Complainant to the requested executive session meeting minutes dated August 28, 2008, with redactions, on December 29, 2009 and provided certified confirmation of compliance with the Council's December 22, 2009 Interim Order on December 29, 2009, four (4) business days after the Interim Order was issued, the Custodian has complied with the Council's December 22, 2009 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.g. in her response to the Complainant's OPRA request by unlawfully denying access to the entire record when only a portion of the record was exempt from disclosure pursuant to the Open Public Meetings Act and failed to bear her burden of proving that the proposed \$25 per audio tape copying fee was permissible under OPRA, the Custodian complied with the Council's December 22, 2009 Interim Order and provided the Complainant with the requested records with redactions in compliance with the Council's December 22, 2009 Interim Order. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's December 22, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

December 22, 2009 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2008-278

v.

Township of Frankford (Sussex)
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council ("Council") considered the December 9, 2009 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council's September 30, 2009 Interim Order by providing the Council with all records set forth in Paragraphs 2 and 4 of the Order within five (5) business days of receiving the Council's Order.
2. The Custodian unlawfully denied access to the requested records because OPRA requires that when only a portion of a government record is exempt from disclosure, a custodian must redact from a copy of the record that portion which is exempt and disclose the remainder of the record. N.J.S.A. 47:1A-5.g. The Custodian unlawfully denied access to the entire record when only a portion of the record was exempt from disclosure pursuant to the Open Public Meetings Act regarding a personnel matter and a litigation matter for which a governing body is allowed to exclude the public. N.J.S.A. 10:4-12(b)(7) and (8).
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4¹ to the Executive Director.**

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."



Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ²
1	August 28, 2008 Executive Session Minutes	Executive session minutes from the Township of Frankford's August 28, 2008 Council Meeting	The Custodian asserts that disclosure would reveal a personnel matter exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10</u> and a litigation matter exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	The executive session minutes are disclosable except that the paragraph entitled "Personnel – DPW" is exempt from disclosure under OPMA because the discussion is that of a personnel matter pursuant to <u>N.J.S.A. 10:4-12(b)(8)</u> . With regards to the paragraph entitled "OPRA violation suit ..." the text of the paragraph is disclosable but the remainder of the paragraph's title is exempt from disclosure under OPMA because it

² **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				<p>reveals the parties of anticipated litigation and is thus exempt pursuant to <u>N.J.S.A. 10:4-12(b)(7)</u>.</p> <p>Therefore, the Custodian must disclose the minutes with redactions made for:</p> <p>(1) the entire paragraph entitled “Personnel – DPW” except its title is disclosable, and</p> <p>(2) the remainder of the paragraph title which begins “OPRA violation suit” except that the text of the paragraph is disclosable.</p> <p>The remainder of the record must be disclosed to the Complainant.</p>
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Interim Order Rendered by the
Government Records Council
On The 22nd Day of December, 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: December 23, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
December 22, 2009 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-278

v.

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

Records Relevant to Complaint:

1. Audio recording of the last regular public meeting of the Township of Frankford in CD or tape format;
2. Transcript (hard copy) of the most recent Township of Frankford executive session minutes that has been approved sent via e-mail or fax.³

Request Made: December 2, 2008

Response Made: December 3, 2008

Custodian: Louanne Cular

GRC Complaint Filed: December 17, 2008⁴

Records Submitted for *In Camera* Examination: Executive Session Minutes for the August 28, 2008 Council meeting.

Background

September 30, 2009

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

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the transcript of the August 28, 2008 executive session meeting minutes to determine the validity of the Custodian's assertion that the record contains privileged material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

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

² Represented by Kevin Benbrook, Esq., of Benbrook & Benbrook (Clinton, NJ).

³ The Complainant requested additional records that are not the subject of this Denial of Access Complaint.

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

2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the transcript from the August 28, 2008 executive session meeting minutes, a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁷, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Pursuant to N.J.S.A. 47:1A-5.b., N.J.S.A. 47:1A-5.c., and The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191 (Law Div. 2002), a special service fee is not warranted because the Custodian has failed to prove that the duplication process requires an extraordinary expenditure of time or effort and has submitted no proof that the actual cost of duplication is \$25 per audio tape. The Custodian has therefore violated N.J.S.A. 47:1A-5.b. and N.J.S.A. 47:1A-5.c.
4. Although the Custodian has not met her burden of proving that the \$25 per audio tape copying fee is permissible under OPRA, N.J.S.A. 47:1A-5.b. permits the Custodian to charge the actual cost of duplication. Accordingly, the Custodian must charge the Complainant only the actual cost of the audio cassettes and no cost for the approximate 1 hour the Custodian claims is required to make the tapes because like in Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian is not required to stand watch during the duplication of the recording. The Custodian need only set up the recording device, push a button, walk away and return to switch cassettes until the end of the duplication process. Therefore, the Custodian is required to refund the cost charged to the Complainant to the extent it exceeds the actual cost of the audio cassettes. **The Custodian must provide a legal certification, in accordance with N.J. Court Rule 1:4-4⁸, that the refund has been given to the Complainant and the amount of the refund as directed by the Council. Such certification must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 pending the Custodian's compliance with the Council's Interim Order.

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

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

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

⁸ "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."

October 5, 2009

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

October 7, 2009

Certification of the Custodian in response to the Council's Interim Order with the unredacted executive session minutes for the August 28, 2008 Council meeting. The Custodian certifies that she was not the custodian at the time of the denial at issue in this complaint. However, the Custodian further certifies that she was appointed Acting Municipal Clerk effective August 1, 2009. The Custodian also certifies that the record enclosed is the record requested for an *in camera* review by the Council in its September 30, 2009 Interim Order. Further, the Custodian certifies that no refund has been given for the duplication cost for the audio tape because the Complainant did not pay for the audio tapes he requested.

Analysis

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

At its September 30, 2009 public meeting, the Council determined that because the Custodian has asserted that the requested August 28, 2008 executive session minutes were lawfully denied because disclosure would reveal a personnel matter exempt from disclosure pursuant to N.J.S.A. 47:1A-10 and a litigation matter exempt from disclosure under the attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1., the Council must determine whether the legal conclusion asserted by the Custodian is properly applied to the record at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested record to determine the validity of the Custodian's assertion that the requested record was properly denied.

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

The Custodian provided the GRC with a legal certification and the unredacted record requested (executive session minutes for the August 28, 2008 Council meeting) for the *in camera* inspection on October 7, 2009. Therefore, the Custodian complied with the Council's September 30, 2009 Interim Order.

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

The Custodian asserts that she lawfully denied the Complainant access to the August 28, 2008 executive session minutes because disclosure of the those records would reveal a personnel matter exempt from disclosure pursuant to N.J.S.A. 47:1A-10 and a litigation

matter exempt from disclosure under the attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1. Conversely, the Complainant asserts that although meeting minutes usually contain sensitive material that may be subject to redaction under OPRA, such sensitivity does not entitle the Custodian to withhold the entire record. Further, the Complainant argues that the Custodian unlawfully denied access to the record requested and violated OPRA because she did not set forth a detailed and lawful basis for withholding the transcript of the meeting minutes in its entirety.

Under the Open Public Meeting Act (N.J.S.A. 10:4 et seq.), a public body may exclude the public only from that portion of a meeting at which the public body discusses:

- Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party. Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer. (N.J.S.A. 10:4-12(b)(7))
- Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting. (N.J.S.A. 10:4-12(b)(8)).

Personnel Records

OPRA provides that the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

- an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;
- personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
- data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record. N.J.S.A. 47:1A-10.

Attorney-Client Privilege

OPRA excludes from the definition of a government record any record within the attorney client privilege. N.J.S.A. 47:1A-1.1. In New Jersey, protecting confidentiality within the attorney-client relationship has long been recognized by the courts. *See, e.g. Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18 (App. Div. 1989). In general, the attorney-client privilege renders as confidential communications between a lawyer and a client made in the course of that professional relationship. *See N.J.S.A.* 2A: 84A-20 and Fellerman v. Bradley, 99 N.J. 493, 498-99 (1985). Rule 504 (1) of the New Jersey Rules of Evidence provides that communications between a lawyer and client, “in the course of that relationship and in professional confidence, are privileged....” Such communications as discussion of litigation strategy, evaluation of liability, potential monetary exposure and settlement recommendations are considered privileged. The Press of Atlantic City v. Ocean County Joint Insurance Fund, 337 N.J. Super. 480, 487 (Law Div. 2000). Also confidential are mental impressions, legal conclusions, and opinions or theories of attorneys. In Re Environmental Ins. Actions, 259 N.J. Super. 308, 317 (App. Div. 1992).

The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system." Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 27-8 (App.Div.1989). The attorney-client privilege protects communications between a lawyer and the client made in the course of that professional relationship, and particularly protects information which, if disclosed, would jeopardize the legal position of the client. N.J.S.A. 2A:84A-20; RPC 1.6. The New Jersey Supreme Court has observed that RPC 1.6 “expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client.” In re Advisory Opinion No. 544 of N.J. Sup. Court, 103 N.J. 399, 406 (1986).

Redaction of otherwise public documents is appropriate where protection of privileged or confidential subject matter is a concern. South Jersey Publishing Co., Inc. v. N. J. Expressway Authority, 124 N.J. 478, 488-9 (1991). Moreover, whether the matter contained in the requested documents pertains to pending or closed cases is important, because the need for confidentiality is greater in pending matters. Keddie v. Rutgers, State University, 148 N.J. 36, 54 (1997). Nevertheless, “[e]ven in closed cases. . .attorney work-product and documents containing legal strategies may be entitled to protection from disclosure.” *Id.*

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

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ⁹
1	August 28, 2008 Executive Session Minutes	Executive session minutes from the Township of Frankford's August 28, 2008 Council Meeting	The Custodian asserts that disclosure would reveal a personnel matter exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10</u> and a litigation matter exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	The executive session minutes are disclosable except that the paragraph entitled "Personnel – DPW" is exempt from disclosure under OPMA because the discussion is that of a personnel matter pursuant to <u>N.J.S.A. 10:4-12(b)(8)</u> . With regards to the paragraph entitled "OPRA violation suit ..." the text of the paragraph is disclosable but the remainder of the paragraph's title is exempt from disclosure under OPMA because it reveals the parties of anticipated

⁹ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				<p>litigation and is thus exempt pursuant to <u>N.J.S.A. 10:4-12(b)(7)</u>.</p> <p>Therefore, the Custodian must disclose the minutes with redactions made for:</p> <p>(1) the entire paragraph entitled “Personnel – DPW” except its title is disclosable, and</p> <p>(2) the remainder of the paragraph title which begins “OPRA violation suit” except that the text of the paragraph is disclosable.</p> <p>The remainder of the record must be disclosed to the Complainant.</p>
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Thus, the Custodian unlawfully denied access to the requested record because OPRA requires that when only a portion of a government record is exempt from disclosure, a custodian must redact from a copy of the record that portion which is exempt and disclose the remainder of the record. N.J.S.A. 47:1A-5.g. The Custodian unlawfully denied access to the entire record when only a portion of the record was exempt from disclosure pursuant to the Open Public Meetings Act regarding a personnel matter and a litigation matter for which a governing body is allowed to exclude the public. N.J.S.A. 10:4-12(b)(7) and (8).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's September 30, 2009 Interim Order by providing the Council with all records set forth in Paragraphs 2 and 4 of the Order within five (5) business days of receiving the Council's Order.
2. The Custodian unlawfully denied access to the requested records because OPRA requires that when only a portion of a government record is exempt from disclosure, a custodian must redact from a copy of the record that portion which is exempt and disclose the remainder of the record. N.J.S.A. 47:1A-5.g. The Custodian unlawfully denied access to the entire record when only a portion of the record was exempt from disclosure pursuant to the Open Public Meetings Act regarding a personnel matter and a litigation matter for which a governing body is allowed to exclude the public. N.J.S.A. 10:4-12(b)(7) and (8).
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4¹⁰ to the Executive Director.**

Prepared and

Approved By: Catherine Starghill, Esq.
Executive Director

December 9, 2009

¹⁰ "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 Frankford (Sussex), 2008-278 – *In Camera* Findings and Recommendations of the Executive Director



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

September 30, 2009 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2008-278

v.

Township of Frankford (Sussex)
Custodian of Record

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

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the transcript of the August 28, 2008 executive session meeting minutes to determine the validity of the Custodian's assertion that the record contains privileged material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the transcript from the August 28, 2008 executive session meeting minutes, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

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

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

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



3. Pursuant to N.J.S.A. 47:1A-5.b., N.J.S.A. 47:1A-5.c., and The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191 (Law Div. 2002), a special service fee is not warranted because the Custodian has failed to prove that the duplication process requires an extraordinary expenditure of time or effort and has submitted no proof that the actual cost of duplication is \$25 per audio tape. The Custodian has therefore violated N.J.S.A. 47:1A-5.b. and N.J.S.A. 47:1A-5.c.

4. Although the Custodian has not met her burden of proving that the \$25 per audio tape copying fee is permissible under OPRA, N.J.S.A. 47:1A-5.b. permits the Custodian to charge the actual cost of duplication. Accordingly, the Custodian must charge the Complainant only the actual cost of the audio cassettes and no cost for the approximate 1 hour the Custodian claims is required to make the tapes because like in Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian is not required to stand watch during the duplication of the recording. The Custodian need only set up the recording device, push a button, walk away and return to switch cassettes until the end of the duplication process. Therefore, the Custodian is required to refund the cost charged to the Complainant to the extent it exceeds the actual cost of the audio cassettes. **The Custodian must provide a legal certification, in accordance with N.J. Court Rule 1:4-4⁴, that the refund has been given to the Complainant and the amount of the refund as directed by the Council. Such certification must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

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

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

Robin Berg Tabakin, Chair
Government Records Council

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

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: October 5, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-278

v.

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

Records Relevant to Complaint:

1. Audio recording of the last regular public meeting of the Township of Frankford in CD or tape format;
2. Transcript (hard copy) of the most recent Township of Frankford executive session minutes that has been approved sent via e-mail or fax.³

Request Made: December 2, 2008

Response Made: December 3, 2008

Custodian: Louanne Cular

GRC Complaint Filed: December 17, 2008⁴

Background

December 2, 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.

December 3, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that the last regular public meeting of the Township of Frankford was held on November 25, 2008. The Custodian also states that a total of four (4) audio tapes are available for pick up at a cost of \$100.00. The Custodian further states that the most recent executive session minutes that have been approved were for the August 28, 2008 meeting. The Custodian also states that the transcript of these meeting minutes is not disclosable because they contain personnel and litigation matters.

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

² Represented by Kevin Benbrook, Esq., of Benbrook & Benbrook (Clinton, NJ).

³ The Complainant requested additional records that are not the subject of this Denial of Access Complaint.

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

December 4, 2008

Facsimile transmission from the Complainant to the Custodian. The Complainant asks why the cost of the audio tapes is \$100.00. The Complainant requests that the Custodian fax or e-mail to him the August 28, 2008 transcript of the executive session meeting minutes.

December 17, 2008

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

- Complainant’s OPRA request dated December 2, 2008;
- Letter from the Custodian to the Complainant dated December 3, 2008;
- E-mail from the Complainant to the Custodian dated December 4, 2008.

The Complainant states that he was denied access to the requested August 28, 2008 executive session meeting transcript and to the audio recording of the November 25, 2008 public meeting when the Custodian attempted to charge the Complainant \$100.00 for copies of four (4) audio tapes.

The Complainant argues that the \$100.00 charge for copies of the four (4) audio tapes does not reflect the Township of Frankford's actual cost. The Complainant further argues that, as the GRC observed in Renna v. Township of Warren, GRC Complaint No. 2008-40 (November 2008), even a \$5.00 charge for a CD-ROM is “likely not” the “actual cost” pursuant to N.J.S.A. 47:1A-5.b. The Complainant argues that public agencies must charge actual cost for duplication. N.J.S.A. 47:1A-5.b. The Complainant argues that absent extraordinary circumstances, actual cost is the material cost of providing the public with a copy, excluding labor and overhead. Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26, 31 (1962) (labor not included in actual cost under New Jersey common law); Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271, 280 (App. Div. 2005) (fees allowed under OPRA consistent with fees allowed under the Common Law Right of Access); Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) (direct cost of copying not appropriate standard);⁵ O'Shea v. Madison Public School District, GRC Complaint No. 2007-185 (April 2008); O'Shea v. Township of Vernon, GRC Complaint No. 2007-207 (April 2008).

The Complainant argues that N.J.S.A. 47:1A-5.b limits the cost of a record to “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” unless a special service charge is warranted. The Complainant states that the Custodian may argue that the \$25.00 per audio tape fee reflects a special service charge. The Complainant argues that for non-paper records, such as the tapes requested here, OPRA allows no special service charge unless the conditions of N.J.S.A. 47: 1A-5.d are met. The Complainant argues that this provision authorizes a special service charge only if the “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

⁵ The GRC understands the Complainant’s use of “direct cost” to mean indirect cost which would include overhead.

manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special service charge. . . [reasonably] based . . . on the cost for any extensive use of information technology. . .” The Complainant states that the Custodian has offered no evidence that any of the three (3) stated conditions apply.

The Complainant states that although minutes usually contain sensitive material that may be subject to redaction under OPRA, such sensitivity does not entitle the Custodian to withhold the entire record. The Complainant argues that OPRA mandates that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public's right of access.” Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) (citing N.J.S.A. 47:1A-1).

The Complainant argues that there is no question that the records requested are public records under OPRA. (N.J.S.A. 47: 1A-1.1. (defining public records broadly as “any paper” “made, maintained or kept on file” in the course of a public agency's business.)). The Complainant argues that the Custodian unlawfully denied access to the record requested and violated OPRA because she did not set forth a detailed and lawful basis for withholding the transcript of the meeting minutes in its entirety.

The Complainant argues that if the Custodian's position is interpreted as redacting the entire document, the Custodian did not set forth a specific law (such as OPRA or the Open Public Meetings Act) that authorized her to withhold the record. Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (June 2008); see Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005) (ordering the custodian to provide explanations for the redactions); Barbara Schwarz v. New Jersey Department of Human Services, GRC Complaint No. 2004-60 (February 2005) (requiring specific citations to the law allowing the redactions).

The Complainant argues that, to the extent that the Custodian's behavior may be interpreted as asserting attorney-client privilege, the Custodian has the burden of stating the specific basis for denying access and to “produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality.” Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003). The Complainant argues that the Custodian must also explain the redactions in a manner that “will enable other parties to assess the applicability of the privilege or protection.” Paff v. New Jersey Department of Labor, Board of Review, 379 N.J. Super. 346, 354-55 (App. Div. 2005). The Complainant argues that in such cases, the GRC must perform an *in camera* review of the record requested. Hartz Mountain v. NJSEA, 369 N.J. Super. 175, 183 (App. Div. 2004) (“We think it plain that under OPRA . . . the Court is obliged, when a claim of confidentiality or privilege is made by the public custodian of the record, to inspect the challenged document in camera to determine the validity of the claim.”).

The Complainant requests that the GRC:

1. Find that the Custodian violated OPRA by charging more than the actual cost for copies of audio tapes;
2. Order the Custodian to certify to the GRC the actual cost of copying its audio tapes;
3. Order the Custodian to make copies of the audio tapes available to the Complainant at the agency's actual cost;
4. Order the Custodian to produce a copy of the August 28, 2008 transcript of executive session meeting minutes, with redactions as allowed by law and with the reasons for any such redactions;
5. Find that the Complainant is the prevailing party and order an award of reasonable attorney fees pursuant to N.J.S.A. 47:1A-6;
6. Investigate whether the Custodian knowingly and willfully violated OPRA.

The Complainant did not agree to mediate this complaint.

January 6, 2009

Request for the Statement of Information sent to the Custodian.

January 6, 2009

Letter from the GRC to the Custodian. The GRC states that, in order to the GRC to determine whether a special service charge was warranted in this case, the Custodian must complete the GRC's 14-point analysis for special service charges.

January 13, 2009

Custodian's Statement of Information ("SOI").⁶ The Custodian certifies that that the transcript from the August 28, 2008 meeting falls under the exemptions for attorney-client privilege and personnel records and therefore is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10. The Custodian further certifies that on December 2, 2008, she provided the Complainant with the audio recording of the November 25, 2008 meeting of the governing body.⁷

January 13, 2009

Letter from the Custodian to the GRC. The Custodian provides the following responses to the special service fee chart.

Questions	Custodian's Response
1. What records are requested?	Audio recording of last regular public meeting.
2. Give a general nature description and number of the government records requested.	Meeting cassette tapes of the last regular public meeting, when reproduced total approximately 4 cassette tapes.
3. What is the period of time over which the records extend?	One meeting on November 25, 2008 lasting approximately 2 1/2 hours.
4. Are some or all of the records	No.

⁶ The Custodian did not submit any supporting documents with the SOI.

⁷ The Custodian assessed the Complainant a duplication fee of \$25.00 per audio tape for a total of \$100.00. Jesse Wolosky v. Township of Frankford (Sussex), 2008-278 – Findings and Recommendations of the Executive Director

sought archived or in storage?	
5. What is the size of the agency (total number of employees)?	36 Employees.
6. What is the number of employees available to accommodate the records request?	2 Employees.
7. To what extent do the requested records have to be redacted?	None.
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?	Level of personnel: Municipal Clerk/Administrator Hourly rate: \$41.09 Number of hours required: Approximately 1 hour
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?	Level of personnel: Municipal Clerk/Administrator Hourly rate: \$41.09 Number of hours required: Approximately 1 hour
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?	Level of personnel: Municipal Clerk/Administrator Hourly rate: \$41.09 Number of hours required: Approximately 5 minutes
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	The Municipal Clerk is the official custodian of all of the Township's records.
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?	Louanne Cular Municipal Clerk/Administrator Hourly rate: \$41.09
13. What is the availability of	The Township owns and maintains a cassette reformatter.

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.	Identify and locate records: 10 minutes Copy or prepare for inspection: 1 hour produce and return documents : 1 hour

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

The Complainant submitted an OPRA request for the most recently approved transcript from the Township of Frankford executive session meeting minutes. The Custodian informed the Complainant that the most recently approved executive session minutes were for the August 28, 2008 meeting. The Custodian denied the Complainant access to the requested executive session minutes stating that the transcript of the meeting minutes was not disclosable because the minutes contained personnel and litigation

matters. The Custodian argued in the SOI that the executive session meeting minutes contained attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-10.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁸ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

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

The court also stated that:

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

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

Therefore, pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the August 28, 2008 executive session minutes to determine the validity of the Custodian’s assertion that the record contains privileged material which is exempt from disclosure as attorney-client privileged and containing personnel discussions pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-10.

⁸ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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Whether the special service charge assessed by the Custodian for a recording of the Township of Frankford November 25, 2008 meeting 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.

The Complainant submitted an OPRA request for the audio recording of the last regular public meeting of the Township of Frankford in CD or tape format. At the time the Complainant submitted his OPRA request, the most recent meeting was held on November 25, 2008. The Custodian indicated that the meeting was recorded on four (4) separate audio tapes and the copying cost for each tape was \$25.00. The Complainant challenged the fee charged by the Township of Frankford stating that the \$25 fee does not reflect the Township of Frankford’s actual cost for duplicating the record 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:

- 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;⁹ 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

⁹ 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.

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?
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:

Questions	Custodian's Response
1. What records are requested?	Audio recording of last regular public meeting.
2. Give a general nature	Meeting cassette tapes of the last regular public meeting, when reproduced total

description and number of the government records requested.	approximately 4 cassette tapes.
3. What is the period of time over which the records extend?	One meeting on November 25, 2008 lasting approximately 2 1/2 hours.
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)?	36 Employees.
6. What is the number of employees available to accommodate the records request?	2 Employees.
7. To what extent do the requested records have to be redacted?	None.
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?	Level of personnel: Municipal Clerk/Administrator Hourly rate: \$41.09 Number of hours required: Approximately 1 hour
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?	Level of personnel: Municipal Clerk/Administrator Hourly rate: \$41.09 Number of hours required: Approximately 1 hour
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?	Level of personnel: Municipal Clerk/Administrator Hourly rate: \$41.09 Number of hours required: Approximately 5 minutes
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	The Municipal Clerk is the official custodian of all of the Township's records.

12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?	Louanne Cular Municipal Clerk/Administrator Hourly rate: \$41.09
13. What is the availability of information technology and copying capabilities?	The Township owns and maintains a cassette reformatter.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	Identify and locate records: 10 minutes Copy or prepare for inspection: 1 hour produce and return documents : 1 hour

OPRA permits a Custodian to charge a special service fee 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 stated that the Township of Frankford possesses the equipment necessary to duplicate the record requested. The Custodian has also stated that only ten (10) minutes are required to locate the record. While the Custodian has stated that she requires one (1) hour to copy the audio tapes and another hour to produce or return the recording, the Custodian has not indicated that the duplication process requires any extraordinary expenditure of time or effort on the Custodian’s part. The evidence of record suggests that after locating the record and loading the reformatter, the Custodian need only activate the machine for duplication to occur.

Therefore, pursuant to N.J.S.A. 47:1A-5.b., N.J.S.A. 47:1A-5.c., and The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191 (Law Div. 2002), a special service fee is not warranted because the Custodian has failed to prove that the duplication process requires an extraordinary expenditure of time or effort and has submitted no proof that the actual cost of duplication is \$25 per audio tape. The Custodian has therefore violated N.J.S.A. 47:1A-5.b. and N.J.S.A. 47:1A-5.c.

The Custodian should be mindful of the Appellate Division of the New Jersey Superior Court’s decision in Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006). In that case, the court held that a \$55 fee charged for conversion to a computer diskette of meeting minutes was both excessive and unreasonable under OPRA. The court stated that “the only discernable rationale for the fee is to discourage the public from requesting the information in this format. Such a policy is not legally sustainable.” Further, the court noted that “[t]he imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication. N.J.S.A. 47:1A-5.b. ...” The court ultimately allowed a

charge of less than \$1.50 for each computer diskette and no charge for the time it took for the custodian to download the records to the diskette because the custodian was not required to stand watch during the actual download.

Although the Custodian has not met her burden of proving that the \$25 per audio tape copying fee is permissible under OPRA, N.J.S.A. 47:1A-5.b. permits the Custodian to charge the actual cost of duplication. Accordingly, the Custodian must charge the Complainant only the actual cost of the audio cassettes and no cost for the approximate 1 hour the Custodian claims is required to make the tapes because like in Libertarian Party of Central New Jersey, supra, the Custodian is not required to stand watch during the duplication of the recording. The Custodian need only set up the recording device, push a button, walk away and return to switch cassettes until the end of the duplication process. Therefore, the Custodian is required to refund the cost charged to the Complainant to the extent it exceeds the actual cost of the audio cassettes.

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. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the transcript of the August 28, 2008 executive session meeting minutes to determine the validity of the Custodian’s assertion that the record contains privileged material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹⁰ to the Council in a sealed envelope nine (9) copies of the transcript from the August 28, 2008 executive session meeting minutes, a document or redaction index¹¹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-**

¹⁰ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹¹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

4¹², that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

3. Pursuant to N.J.S.A. 47:1A-5.b., N.J.S.A. 47:1A-5.c., and The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191 (Law Div. 2002), a special service fee is not warranted because the Custodian has failed to prove that the duplication process requires an extraordinary expenditure of time or effort and has submitted no proof that the actual cost of duplication is \$25 per audio tape. The Custodian has therefore violated N.J.S.A. 47:1A-5.b. and N.J.S.A. 47:1A-5.c.
4. Although the Custodian has not met her burden of proving that the \$25 per audio tape copying fee is permissible under OPRA, N.J.S.A. 47:1A-5.b. permits the Custodian to charge the actual cost of duplication. Accordingly, the Custodian must charge the Complainant only the actual cost of the audio cassettes and no cost for the approximate 1 hour the Custodian claims is required to make the tapes because like in Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian is not required to stand watch during the duplication of the recording. The Custodian need only set up the recording device, push a button, walk away and return to switch cassettes until the end of the duplication process. Therefore, the Custodian is required to refund the cost charged to the Complainant to the extent it exceeds the actual cost of the audio cassettes. **The Custodian must provide a legal certification, in accordance with N.J. Court Rule 1:4-4¹³, that the refund has been given to the Complainant and the amount of the refund as directed by the Council. Such certification must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 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

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 "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."

September 23, 2009