



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2009-102

v.

Gloucester City (Camden)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the May 17, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that no further analysis is necessary because the parties settled the matter and the Complainant withdrew the matter from the GRC in a letter dated May 10, 2011.

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 May, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 1, 2011



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

John Paff¹
Complainant

GRC Complaint No. 2009-102

v.

Gloucester City (Camden)²
Custodian of Records

Records Relevant to Complaint:

1. The non-exempt portion of the first (1st) e-mail sent by Councilman Marchese after 12:01 a.m. on February 23, 2009 that related to municipal business.
2. The non-exempt portion of the first (1st) e-mail sent by Councilman Ferry after 12:01 a.m. on February 23, 2009 that related to municipal business.
3. The non-exempt portions of the first (1st) three (3) closed session meetings held on or after August 1, 2008.³

Request Made: March 3, 2009

Response Made: March 12, 2009 and March 20, 2009

Custodian: Kathy Jentsch⁴

GRC Complaint Filed: March 25, 2009⁵

Background

June 29, 2010

Government Records Council's ("Council") Interim Order. At its June 29, 2010 public meeting, the Council considered the June 22, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has complied with the Council's April 8, 2010 Interim Order by providing the Council with all records set forth in Paragraphs 3 and 5 of the Order within five (5) business days of receiving the Council's Order.

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

² No legal representation listed on file.

³ The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

⁴ The Custodian at the time of the Complainant's OPRA request and Denial of Access Complaint was Paul J. Kain.

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

2. The *In Camera* Examination set forth in the table below reveals the Custodian has lawfully denied access to the records listed in the document index pursuant to N.J.S.A. 47:1A-6.
3. Although the original Custodian unlawfully charged the Complainant \$7.50 to scan and e-mail records in violation of N.J.S.A. 47:1A-5.b. because said fee does not reflect actual cost of providing the copies, which is likely zero, and the agency's OPRA request form did not comply with N.J.S.A. 47:1A-5.f. at the time of the Complainant's request, the current Custodian did comply with the April 8, 2010 Interim Order by providing the requested executive session minutes for an *in camera* examination and disclosed the requested e-mails to the Complainant. Further, the original Custodian lawfully redacted the requested executive session minutes of August 4, 2008 and August 21, 2008 because the redacted information is exempt as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to OPRA (N.J.S.A. 47:1A-1.1.), contract negotiations pursuant to the Open Public Meetings Act (N.J.S.A. 10:4-12 and N.J.S.A. 47:1A-9.a.), and pending or anticipated litigation under the Open Public Meetings Act (N.J.S.A. 10:4-12) which is exempt under OPRA pursuant to N.J.S.A. 47:1A-9.a. The current Custodian also certifies that there were no redactions made to the September 2, 2008 executive session minutes. 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.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's April 8, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Complainant is not required to pay the Custodian's \$7.50 copy charge and Councilmen Marchese and Ferry disclosed the requested e-mails. 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.

Record or Redaction Number	Record Name/Date	Description of Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ⁶
1.	Executive Session Minutes of August 4, 2008	<u>Redaction 1</u> – Under section entitled “Mayor questioned CWA”, first (1 st) paragraph.	Redactions are exempt as contractual discussions regarding negotiations with the City’s unions and employment negotiations with the Chief of Police and Deputy Chief of Police pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	This redaction is lawful since this part of the executive session discussion is exempt as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to OPRA (<u>N.J.S.A. 47:1A-1.1.</u>) and contract negotiations pursuant to OPMA (<u>N.J.S.A. 10:4-12</u> and <u>N.J.S.A. 47:1A-9.a.</u>).

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.

		<u>Redaction 2</u> – Under section entitled “Mayor questioned CWA”, second (2 nd) paragraph.	Redactions are exempt as contractual discussions regarding negotiations with the City’s unions and employment negotiations with the Chief of Police and Deputy Chief of Police pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	This redaction is lawful since this part of the executive session discussion is exempt as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to OPRA (<u>N.J.S.A. 47:1A-1.1.</u>) and contract negotiations pursuant to OPMA (<u>N.J.S.A. 10:4-12</u> and <u>N.J.S.A. 47:1A-9.a.</u>).
2.	Executive Session Minutes of August 21, 2008	Redactions in fifth (5 th) paragraph.	Redactions are exempt as a discussion of litigation pursuant to <u>N.J.S.A. 47:1A-9.a.</u> and <u>N.J.S.A. 10:4-12.</u>	This redaction is lawful since this part of the executive session discussion is exempt as pending or anticipated litigation under OPMA (<u>N.J.S.A. 10:4-12</u>) which is exempt under OPRA pursuant to <u>N.J.S.A. 47:1A-9.a.</u>
3.	Executive Session Minutes of September 2, 2008	No redactions made.	No redactions made.	No redactions made.

July 12, 2010

Council's Interim Order distributed to the parties.

September 22, 2010

The GRC transmitted this complaint to the Office of Administrative Law for a determination of prevailing party attorney's fees.

May 10, 2011

Letter from the Complainant's Counsel to Administrative Law Judge (ALJ) Futey. Complainant's Counsel states that the matter was settled between the parties and the Complainant thus withdraws the complaint from the GRC.

Analysis

On May 10, 2011, the Complainant's Counsel informed the ALJ that the parties settled this matter and the Complainant now withdraws this complaint from the GRC. Therefore, no further analysis is necessary.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that no further analysis is necessary because the parties settled the matter and the Complainant withdrew the matter from the GRC in a letter dated May 10, 2011.

Approved By: Catherine Starghill, Esq.
Executive Director

May 17, 2011



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

June 29, 2010 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2009-102

v.

Gloucester City (Camden)
Custodian of Record

At the June 29, 2010 public meeting, the Government Records Council (“Council”) considered the June 22, 2010 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council’s April 8, 2010 Interim Order by providing the Council with all records set forth in Paragraphs 3 and 5 of the Order within five (5) business days of receiving the Council’s Order.
2. The *In Camera* Examination set forth in the table below reveals the Custodian has lawfully denied access to the records listed in the document index pursuant to N.J.S.A. 47:1A-6.
3. Although the original Custodian unlawfully charged the Complainant \$7.50 to scan and e-mail records in violation of N.J.S.A. 47:1A-5.b. because said fee does not reflect actual cost of providing the copies, which is likely zero, and the agency’s OPRA request form did not comply with N.J.S.A. 47:1A-5.f. at the time of the Complainant’s request, the current Custodian did comply with the April 8, 2010 Interim Order by providing the requested executive session minutes for an *in camera* examination and disclosed the requested e-mails to the Complainant. Further, the original Custodian lawfully redacted the requested executive session minutes of August 4, 2008 and August 21, 2008 because the redacted information is exempt as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to OPRA (N.J.S.A. 47:1A-1.1.), contract negotiations pursuant to the Open Public Meetings Act (N.J.S.A. 10:4-12 and N.J.S.A. 47:1A-9.a.), and pending or anticipated litigation under the Open Public Meetings Act (N.J.S.A. 10:4-12) which is exempt under OPRA pursuant to N.J.S.A.



47:1A-9.a. The current Custodian also certifies that there were no redactions made to the September 2, 2008 executive session minutes. 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.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's April 8, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Complainant is not required to pay the Custodian's \$7.50 copy charge and Councilmen Marchese and Ferry disclosed the requested e-mails. 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.

Record or Redaction Number	Record Name/Date	Description of Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination¹
1.	Executive Session Minutes of August 4, 2008	<u>Redaction 1</u> – Under section entitled "Mayor questioned CWA", first (1 st) paragraph.	Redactions are exempt as contractual discussions regarding negotiations with the City's unions and employment negotiations with the Chief	This redaction is lawful since this part of the executive session discussion is exempt as information generated by or on behalf of public employers or public employees

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

		<p><u>Redaction 2</u> – Under section entitled “Mayor questioned CWA”, second (2nd) paragraph.</p>	<p>of Police and Deputy Chief of Police pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Redactions are exempt as contractual discussions regarding negotiations with the City’s unions and employment negotiations with the Chief of Police and Deputy Chief of Police pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>	<p>in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to OPRA (<u>N.J.S.A. 47:1A-1.1.</u>) and contract negotiations pursuant to OPMA (<u>N.J.S.A. 10:4-12</u> and <u>N.J.S.A. 47:1A-9.a.</u>).</p> <p>This redaction is lawful since this part of the executive session discussion is exempt as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to OPRA (<u>N.J.S.A. 47:1A-1.1.</u>) and contract negotiations pursuant to OPMA (<u>N.J.S.A. 10:4-12</u> and <u>N.J.S.A. 47:1A-9.a.</u>).</p>
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2.	Executive Session Minutes of August 21, 2008	Redactions in fifth (5 th) paragraph.	Redactions are exempt as a discussion of litigation pursuant to <u>N.J.S.A. 47:1A-9.a.</u> and <u>N.J.S.A. 10:4-12.</u>	This redaction is lawful since this part of the executive session discussion is exempt as pending or anticipated litigation under OPMA (<u>N.J.S.A. 10:4-12</u>) which is exempt under OPRA pursuant to <u>N.J.S.A. 47:1A-9.a.</u>
3.	Executive Session Minutes of September 2, 2008	No redactions made.	No redactions made.	No redactions made.

Interim Order Rendered by the
Government Records Council
On The 29th Day of June, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: July 12, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
June 29, 2010 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2009-102

v.

**Gloucester City (Camden)²
Custodian of Records**

Records Relevant to Complaint:

1. The non-exempt portion of the first (1st) e-mail sent by Councilman Marchese after 12:01 a.m. on February 23, 2009 that related to municipal business.
2. The non-exempt portion of the first (1st) e-mail sent by Councilman Ferry after 12:01 a.m. on February 23, 2009 that related to municipal business.
3. The non-exempt portions of the first (1st) three (3) closed session meetings held on or after August 1, 2008.³

Request Made: March 3, 2009

Response Made: March 12, 2009 and March 20, 2009

Custodian: Kathy Jentsch⁴

GRC Complaint Filed: March 25, 2009⁵

Records Submitted for *In Camera* Examination: Executive Session Minutes of August 8, 2008, August 21, 2008 and September 2, 2008.

Background

April 8, 2010

Government Records Council's Interim Order. At the April 8, 2010 public meeting, the Government Records Council ("Council") considered the April 1, 2010 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. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline

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

² No legal representation listed on file.

³ The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

⁴ The Custodian at the time of the Complainant's OPRA request and Denial of Access Complaint was Paul J. Kain.

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

date upon which the requested closed session minutes would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009). The Council notes that although the Custodian failed to provide the Complainant with a further written response by his extended deadline of March 13, 2009, the Complainant's voluntary agreement to extend the deadline to March 20, 2009 moots any violation of OPRA.

2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Council must conduct an *in camera* review of the requested records (the first three (3) closed session meetings held on or after August 1, 2008, dated August 4, 2008, August 21, 2008 and September 2, 2008) to determine the validity of the Custodian's assertion that the redactions made to the requested closed session minutes are contractual discussions regarding negotiations with the City's unions and employment negotiations with the Chief of Police and Deputy Chief of Police, as well as a discussion of litigation pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12.
3. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see # 2 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁸, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. Because the Custodian's March 20, 2009 written response to the Complainant clarified that the Councilmen failed to respond to the Custodian's request for the requested e-mails, Councilmen Marchese and Ferry, via the current Custodian, must disclose the requested e-mails to the Complainant.
5. **Councilmen Marchese and Ferry shall comply with item # 4 above within five (5) business days from receipt of the Council's Interim Order, with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁹, to the Executive Director.¹⁰**

⁶ 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.

⁷ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

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."

⁹ "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."

¹⁰ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the

6. The Custodian's charge of \$7.50 to scan and e-mail records to the Complainant is a violation of N.J.S.A. 47:1A-5.b. because said fee does not reflect the actual cost of providing the copies, which is likely zero. See Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005). Thus, the Complainant is not required to pay the Custodian's \$7.50 charge.
7. Upon the GRC's review of the Complainant's OPRA request attached to his Denial of Access Complaint which was submitted on the agency's OPRA request form, it is confirmed that said OPRA request form does not contain "a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal" as is required by N.J.S.A. 47:1A-5.f. Therefore, the City's OPRA request form at the time of the Complainant's OPRA request violated N.J.S.A. 47:1A-5.f.
8. While the City's OPRA request form advises requestors that personnel records are exempt from disclosure (pursuant to N.J.S.A. 47:1A-10), the form does not also inform requestors that there are exceptions to the personnel record exemption under OPRA. Additionally, the statement contained on the City's OPRA request form which indicates that police investigation records are exempt from public access under OPRA is misleading because said statement fails to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. As such, pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008), a requestor may be deterred from submitting an OPRA request for certain police investigation reports or personnel records because the City's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records. However, in the Custodian's unsigned Statement of Information dated May 14, 2009, the Custodian stated that the City has since adopted the GRC's Model Request Form. The GRC accessed a copy of the City's OPRA request form from its website¹¹ on January 7, 2010. The OPRA request form posted to the City's website is the GRC's Model Request Form. As such, the Council declines to order the Custodian to amend the City's OPRA request form.
9. 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 outcome of the Council's *in camera* review as well as Councilmen Marchese and Ferry's compliance with the Council's Interim Order.
10. The Council defers analysis of whether the Complainant is a prevailing party pending the outcome of the Council's *in camera* review as well as Councilmen Marchese and Ferry's compliance with the Council's Interim Order.

record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

¹¹ http://www.cityofgloucester.org/government_files/OPRA.pdf

April 12, 2010

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

April 16, 2010¹²

Certification of the Custodian in response to the Council's Interim Order with the following attachments:

- Unredacted copy of the August 4, 2008 Executive Session Minutes
- Unredacted copy of the August 21, 2008 Executive Session Minutes
- Unredacted copy of the September 2, 2008 Executive Session Minutes
- Redaction Index
- Two (2) e-mails the GRC order the Custodian to disclose to the Complainant pursuant to the April 8, 2010 Interim Order, conclusion #5

The Custodian certifies that she has been performing the duties of Acting City Clerk since 2009, but was not the custodian at the time of the request for which this complaint is based. The Custodian further certifies that she is providing the records required by the GRC.

Analysis

Whether the Custodian complied with the Council's April 8, 2010 Interim Order?

At its April 8, 2010 public meeting, the Council determined that because the Custodian asserted that redactions made to the three (3) requested executive session minutes were lawfully made because they are contractual discussions regarding negotiations with the City's unions and employment negotiations with the Chief of Police and Deputy Chief of Police, as well as a discussion of litigation pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12., the Council must determine whether the legal conclusions asserted by the Custodian is/are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC ordered an *in camera* review of the requested records 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 three (3) requested unredacted executive session minutes, a redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the records provided were the records 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 April 19, 2010. The Council also ordered Councilmen Marchese and Ferry to disclose the requested e-mails to the Complainant.

The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection, a redaction index on April 19, 2010 and the e-mails

¹² The GRC received the Custodian's certification in response to the April 8, 2010 Interim Order on April 19, 2010.

provided by Councilmen Marchese and Ferry to be disclosed to the Complainant. Therefore, the Custodian timely complied with the Council’s April 8, 2010 Interim Order.

Whether the original Custodian unlawfully denied the Complainant access to the requested executive session minutes for August 4, 2008, August 21, 2008 and September 2, 2008?

The original Custodian asserted that he lawfully redacted the executive session minutes that the Complainant requested because the redactions are exempt as contractual discussions regarding negotiations with the City’s unions and employment negotiations with the Chief of Police and Deputy Chief of Police, as well as a discussion of litigation pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12.

OPRA provides that a government record does not include any information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position. N.J.S.A. 47:1A-1.1.

OPRA provides that it shall not abrogate any exemptions of a public record or government record from public access made pursuant to any other statute. N.J.S.A. 47:1A-9.a. And, the Open Public Meetings Act (N.J.S.A. 10:4-12(b)7.) provides that:

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

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

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

Record or Redaction Number	Record Name/Date	Description of Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination¹³

¹³ **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
 John Paff v. Gloucester City (Camden), 2009-102 – *In Camera* Findings and Recommendations of the Executive Director

1.	Executive Session Minutes of August 4, 2008	<p><u>Redaction 1</u> – Under section entitled “Mayor questioned CWA”, first (1st) paragraph.</p> <p><u>Redaction 2</u> – Under section entitled “Mayor questioned CWA”, second (2nd) paragraph.</p>	<p>Redactions are exempt as contractual discussions regarding negotiations with the City’s unions and employment negotiations with the Chief of Police and Deputy Chief of Police pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>Redactions are exempt as contractual discussions regarding negotiations with the City’s unions and employment negotiations with the Chief of Police and Deputy Chief of Police pursuant to</p>	<p>This redaction is lawful since this part of the executive session discussion is exempt as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to OPRA (<u>N.J.S.A. 47:1A-1.1</u>) and contract negotiations pursuant to OPMA (<u>N.J.S.A. 10:4-12</u> and <u>N.J.S.A. 47:1A-9.a</u>).</p> <p>This redaction is lawful since this part of the executive session discussion is exempt as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including</p>
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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.

			<u>N.J.S.A.</u> 47:1A-1.1.	documents and statements of strategy or negotiating position pursuant to OPRA (<u>N.J.S.A.</u> 47:1A-1.1.) and contract negotiations pursuant to OPMA (<u>N.J.S.A.</u> 10:4-12 and <u>N.J.S.A.</u> 47:1A-9.a.).
2.	Executive Session Minutes of August 21, 2008	Redactions in fifth (5 th) paragraph.	Redactions are exempt as a discussion of litigation pursuant to <u>N.J.S.A.</u> 47:1A-9.a. and <u>N.J.S.A.</u> 10:4-12.	This redaction is lawful since this part of the executive session discussion is exempt as pending or anticipated litigation under OPMA (<u>N.J.S.A.</u> 10:4-12) which is exempt under OPRA pursuant to <u>N.J.S.A.</u> 47:1A-9.a.
3.	Executive Session Minutes of September 2, 2008	No redactions made.	No redactions made.	No redactions made.

Thus, the original Custodian lawfully redacted the requested executive session minutes of August 4, 2008 and August 21, 2008 because the redacted information is exempt as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to OPRA (N.J.S.A. 47:1A-1.1.), contract negotiations pursuant to OPMA (N.J.S.A. 10:4-12 and N.J.S.A. 47:1A-9.a.), and pending or anticipated litigation under OPMA (N.J.S.A. 10:4-12) which is exempt under OPRA pursuant to N.J.S.A. 47:1A-9.a. The current Custodian certifies that there were no redactions made to the September 2, 2008 executive session minutes.

Whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

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

Although the original Custodian unlawfully charged the Complainant \$7.50 to scan and e-mail records in violation of N.J.S.A. 47:1A-5.b. because said fee does not reflect actual cost of providing the copies, which is likely zero, and the agency’s OPRA request form did not comply with N.J.S.A. 47:1A-5.f. at the time of the Complainant’s request, the current Custodian did comply with the April 8, 2010 Interim Order by providing the requested executive session minutes for an *in camera* examination and disclosed the requested e-mails from Councilmen Marchese and Ferry to the Complainant. Further, the original Custodian lawfully redacted the requested executive session minutes of August 4, 2008 and August 21, 2008 because the redacted information is exempt as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to OPRA (N.J.S.A. 47:1A-1.1.), contract negotiations pursuant to OPMA (N.J.S.A. 10:4-12 and N.J.S.A. 47:1A-9.a.), and pending or anticipated litigation under OPMA (N.J.S.A. 10:4-12) which is exempt under OPRA pursuant to N.J.S.A. 47:1A-9.a. The current Custodian also certifies that there were no redactions made to the September 2, 2008 executive session minutes. Therefore, it is concluded that the original 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)). The court in Buckhannon 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 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).”

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

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

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

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

prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

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

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.¹⁴ Those changes expand

¹⁴ 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.

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).”

However, in Mason, the New Jersey Supreme Court shifted the traditional burden of proof to the responding agency in one category of cases: when an agency has failed to respond *at all* to a request within seven business days. The Court noted that:

“OPRA requires that an agency provide access or a denial no later than seven business days after a request. The statute also encourages compromise and efforts to work through certain problematic requests. But under the terms of the statute, the agency must start that process with some form of response within seven business days of a request. *If an agency fails to respond at all within that time frame, but voluntarily discloses records after a requestor files suit, the agency should be required to prove that the lawsuit was not the catalyst for the agency's belated disclosure.* Such an approach is faithful to OPRA's clear command that an agency not sit silently once a request is made.” [Emphasis added]. Mason v. City Clerk of the City of Hoboken, 196 N.J. 51, 77 (2008).

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

In this complaint, the Custodian unlawfully charged the Complainant \$7.50 to scan and e-mail records in violation of N.J.S.A. 47:1A-5.b. because said fee does not reflect the actual cost of providing the copies, which is likely zero. Therefore, the Council ordered in its April 8, 2010 Interim Order that the Complainant is not required to pay the Custodian's \$7.50 charge. Additionally, the Council ordered in its April 8, 2010 Interim Order that the Custodian provide the requested executive session minutes for *in camera* examination to verify that the Custodian's asserted exemptions for redactions made are applicable to the redacted information. However, the *in camera* examination revealed that the Custodian's redactions were lawfully for the August 2, 2008 and August 21, 2008 executive session minutes and no redactions were made to the September 2, 2008 executive session minutes. Further, the City's OPRA request form did not conform to the requirements of N.J.S.A. 47:1A-5.f. at the time of the Complainant's request but does so comply now. Therefore, the

Council declined to order the Custodian to amend the form in its April 8, 2010 Interim Order.¹⁵

Therefore, pursuant to Teeters, *supra*, and the Council's April 8, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Complainant is not required to pay the Custodian's \$7.50 copy charge and Councilmen Marchese and Ferry disclosed the requested e-mails. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's April 8, 2010 Interim Order by providing the Council with all records set forth in Paragraphs 3 and 5 of the Order within five (5) business days of receiving the Council's Order.
2. The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the records listed in the document index pursuant to N.J.S.A. 47:1A-6.
3. Although the original Custodian unlawfully charged the Complainant \$7.50 to scan and e-mail records in violation of N.J.S.A. 47:1A-5.b. because said fee does not reflect actual cost of providing the copies, which is likely zero, and the agency's OPRA request form did not comply with N.J.S.A. 47:1A-5.f. at the time of the Complainant's request, the current Custodian did comply with the April 8, 2010 Interim Order by providing the requested executive session minutes for an *in camera* examination and disclosed the requested e-mails to the Complainant. Further, the original Custodian lawfully redacted the requested executive session minutes of August 4, 2008 and August 21, 2008 because the redacted information is exempt as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to OPRA (N.J.S.A. 47:1A-1.1.), contract negotiations pursuant to the Open Public Meetings Act (N.J.S.A. 10:4-12 and N.J.S.A. 47:1A-9.a.), and pending or anticipated litigation under the Open Public Meetings Act (N.J.S.A. 10:4-12) which is exempt under OPRA pursuant to N.J.S.A. 47:1A-9.a. The current Custodian also certifies that there were no redactions made to the September 2, 2008 executive session minutes.

¹⁵ Because the Council determined in its April 8, 2010 Interim Order that the issue of whether Gloucester City's OPRA request form complied with the requirements of N.J.S.A. 47:1A-5.f. was moot, such issue does not affect the determination of whether the Complainant is a prevailing party subject to an award of reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

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.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's April 8, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Complainant is not required to pay the Custodian's \$7.50 copy charge and Councilmen Marchese and Ferry disclosed the requested e-mails. 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 and
Approved By: Catherine Starghill, Esq.
Executive Director

June 22, 2010



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

INTERIM ORDER

April 8, 2010 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2009-102

v.

Gloucester City (Camden)
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date upon which the requested closed session minutes would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009). The Council notes that although the Custodian failed to provide the Complainant with a further written response by his extended deadline of March 13, 2009, the Complainant’s voluntary agreement to extend the deadline to March 20, 2009 moots any violation of OPRA.
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Council must conduct an *in camera* review of the requested records (the first three (3) closed session meetings held on or after August 1, 2008, dated August 4, 2008, August 21, 2008 and September 2, 2008) to determine the validity of the Custodian’s assertion that the redactions made to the requested closed session minutes are contractual discussions regarding negotiations with the City’s unions and employment negotiations with the Chief of Police and Deputy Chief of Police, as well as a discussion of litigation pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12.



3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see # 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. Because the Custodian's March 20, 2009 written response to the Complainant clarified that the Councilmen failed to respond to the Custodian's request for the requested e-mails, Councilmen Marchese and Ferry, via the current Custodian, must disclose the requested e-mails to the Complainant.
5. **Councilmen Marchese and Ferry shall comply with item # 4 above within five (5) business days from receipt of the Council's Interim Order, with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁴, to the Executive Director.⁵**
6. The Custodian's charge of \$7.50 to scan and e-mail records to the Complainant is a violation of N.J.S.A. 47:1A-5.b. because said fee does not reflect the actual cost of providing the copies, which is likely zero. *See* Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005). Thus, the Complainant is not required to pay the Custodian's \$7.50 charge.
7. Upon the GRC's review of the Complainant's OPRA request attached to his Denial of Access Complaint which was submitted on the agency's OPRA request form, it is confirmed that said OPRA request form does not contain "a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal" as is required by

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."

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."

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

N.J.S.A. 47:1A-5.f. Therefore, the City's OPRA request form at the time of the Complainant's OPRA request violated N.J.S.A. 47:1A-5.f.

8. While the City's OPRA request form advises requestors that personnel records are exempt from disclosure (pursuant to N.J.S.A. 47:1A-10), the form does not also inform requestors that there are exceptions to the personnel record exemption under OPRA. Additionally, the statement contained on the City's OPRA request form which indicates that police investigation records are exempt from public access under OPRA is misleading because said statement fails to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. As such, pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008), a requestor may be deterred from submitting an OPRA request for certain police investigation reports or personnel records because the City's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records. However, in the Custodian's unsigned Statement of Information dated May 14, 2009, the Custodian stated that the City has since adopted the GRC's Model Request Form. The GRC accessed a copy of the City's OPRA request form from its website⁶ on January 7, 2010. The OPRA request form posted to the City's website is the GRC's Model Request Form. As such, the Council declines to order the Custodian to amend the City's OPRA request form.
9. 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 outcome of the Council's *in camera* review as well as Councilmen Marchese and Ferry's compliance with the Council's Interim Order.
10. The Council defers analysis of whether the Complainant is a prevailing party pending the outcome of the Council's *in camera* review as well as Councilmen Marchese and Ferry's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 8th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

⁶ http://www.cityofgloucester.org/government_files/OPRA.pdf.

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: April 12, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 8, 2010 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2009-102

v.

**Gloucester City (Camden)²
Custodian of Records**

Records Relevant to Complaint:

1. The non-exempt portion of the first (1st) e-mail sent by Councilman Marchese after 12:01 a.m. on February 23, 2009 that related to municipal business.
2. The non-exempt portion of the first (1st) e-mail sent by Councilman Ferry after 12:01 a.m. on February 23, 2009 that related to municipal business.
3. The non-exempt portions of the first (1st) three (3) closed session meetings held on or after August 1, 2008.³

Request Made: March 3, 2009

Response Made: March 12, 2009 and March 20, 2009

Custodian: Kathy Jentsch⁴

GRC Complaint Filed: March 25, 2009⁵

Background

March 3, 2009

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.

March 12, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian requests an extension of time to comply with the Complainant's request for closed session minutes. The Custodian states that he anticipates completing this request on March 13, 2009 and will then forward the cost

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

² No legal representation listed on file.

³ The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

⁴ The Custodian at the time of the Complainant's OPRA request and Denial of Access Complaint was Paul J. Kain.

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

associated with said request to the Complainant. Also, the Custodian indicates “no reply” next to the Complainant’s request items for the e-mails of Councilmen Marchese and Ferry.

March 16, 2009

Letter from Complainant to Custodian. The Complainant agrees to an extension until March 20, 2009 for the Custodian to provide the requested closed session minutes. The Complainant also seeks clarification of the Custodian’s “no reply” notation next to the Complainant’s request items regarding the e-mails of Councilmen Marchese and Ferry.

March 20, 2009

Custodian’s subsequent response to the Complainant’s OPRA request. The Custodian states that he has enclosed the closed session minutes from August 4, 2008, August 21, 2008 and September 2, 2008. The Custodian also states that Councilmen Marchese and Ferry have not responded to the Complainant’s OPRA request which the Custodian forwarded to the Councilmen. Additionally, the Custodian states that the cost for the closed session minutes provided to the Complainant is \$7.50.

March 25, 2009

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

- Complainant’s OPRA request dated March 3, 2009.
- Custodian’s response to the Complainant’s OPRA request dated March 12, 2009.
- Letter from Complainant to Custodian dated March 16, 2009.
- Custodian’s subsequent response to the Complainant’s OPRA request dated March 20, 2009.

The Complainant states that he submitted his OPRA request on March 3, 2009 to receive records either via e-mail, facsimile or regular mail, whichever method was least expensive. The Complainant states that the Custodian responded in writing on March 12, 2009 and sought an extension of time to provide the requested closed session minutes, which the Complainant granted. The Complainant also states that the Custodian wrote “no reply” next to the Complainant’s requests for the e-mails of Councilmen Marchese and Ferry. The Complainant states that the Custodian also indicated that he would forward the cost associated with this request.

The Complainant states that he responded to the Custodian via letter dated March 16, 2009 inquiring what the Custodian meant by “no reply” in his written response to the Complainant’s OPRA request. The Complainant states that the Custodian responded on March 20, 2009 indicating that “no reply” meant that the Custodian had forwarded the Complainant’s OPRA request to Councilmen Marchese and Ferry and received no response from said Councilmen. Additionally, the Complainant states that the Custodian demanded \$7.50 for the ten (10) pages of records provided via e-mail and did not provide any explanation for the redactions made to the closed session minutes provided.

The Complainant asserts that e-mails in which public business is discussed are “public records” accessible under OPRA. Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). The Complainant contends that because the Custodian did not state that the requested e-mails do not exist or provide copies of the e-mails, the request is “deemed” denied pursuant to N.J.S.A. 47:1A-5.i.

Additionally, the Complainant states that although the Custodian did not provide any paper copies to the Complainant, the Custodian attempted to charge \$7.50 for the ten (10) pages of records that were e-mailed to the Complainant. The Complainant contends that pursuant to N.J.S.A. 47:1A-5.b., copying charges only apply for copies of printed matter. The Complainant also asserts that public agencies shall not charge for the transmission of electronic data. Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006). The Complainant asserts that because he requested copies of e-mails in electronic format, no physical copying of the records was required. The Complainant also contends that if any of the records requested by the Complainant did not exist in electronic format, the Custodian should have either faxed said records to the Complainant or converted them to electronic format.

Further, the Complainant states that although the Custodian provided the requested closed session minutes, the Custodian failed to identify the specific legal basis for the redactions made to said minutes, as required by N.J.S.A. 47:1A-5.g. The Complainant requests that the Council conduct an *in camera* review to determine the validity of the redactions. See Hartz Mountain v. NJSEA, 369 N.J. Super. 175, 183 (App. Div. 2004).

Furthermore, the Complainant states that N.J.S.A. 47:1A-5.f. mandates that public agencies include certain information on their OPRA request forms. The Complainant states that the City’s OPRA request form does not contain “a statement of the requestor’s right to challenge a decision by the public agency to deny access and the procedure for filing an appeal.” Also, the Complainant states that the City’s OPRA request form states that employee personnel files and police investigation records are not “public records” contrary to the exceptions contained in N.J.S.A. 47:1A-3.b. (listing criminal investigatory information that must be disclosed) and N.J.S.A. 47:1A-10 (listing personnel information that must be disclosed). The Complainant states that the Council has previously held that OPRA request forms containing false or misleading information constitute a denial of access. O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008).

In addition, the Complainant asks the Council to investigate whether Councilmen Marchese and Ferry knowingly and willfully violated OPRA by failing to respond to the Custodian’s request for any e-mails responsive to the Complainant’s OPRA request. See Johnson v. Oceanport, GRC Complaint No. 2007-107 (August 2009).

Thus, the Complainant seeks the following relief from the Council:

1. A finding that the Custodian violated OPRA by failing to provide the requested e-mails;
2. An order compelling the Custodian to disclose the requested e-mails;

3. An order compelling the Custodian to identify the specific legal basis for the redactions made to the requested closed session minutes and an *in camera* review to determine the validity of said redactions;
4. A finding that the Custodian violated OPRA by charging copy fees for records sent via e-mail;
5. A finding that the Custodian violated OPRA by utilizing an OPRA request form that contained false and misleading information and omitted information that is required by statute;
6. An order compelling the Custodian to adopt an OPRA request form that complies with OPRA;
7. A finding that the Complainant is a prevailing party entitled to an award of prevailing party attorney's fees; and
8. A determination of whether Councilmen Marchese and Ferry knowingly and willfully violated OPRA.

Also, the Complainant does not agree to mediate this complaint.

April 8, 2009

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

April 24, 2009

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for the SOI on April 8, 2009 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

April 24, 2009

E-mail from Custodian to GRC. The Custodian states that he is not in receipt of the GRC's correspondence dated April 8, 2009 and asks the GRC to re-send said correspondence.

April 24, 2009

E-mail from GRC to Custodian. The GRC re-sends its correspondence dated April 8, 2009.

May 14, 2009

Custodian's unsigned SOI. The Custodian states that his search for the requested records included forwarding the Complainant's OPRA request to the governing body, City Administrator and Mayor for records responsive, as well as conducting his own search for the closed session minutes provided to the Complainant. The Custodian states that to the best of his knowledge, no records responsive have been destroyed.

The Custodian states that Councilman Marchese did not provide any records responsive in a timely fashion, but provided e-mails to the City Administrator on March 22, 2009 and March 25, 2009; however, the Custodian states that the e-mails were not responsive to the Complainant's OPRA request. The Custodian states that he was informed that Councilman Ferry was not using e-mail at the time in question.

Regarding the \$7.50 copy charge, the Custodian states that ten (10) pages of records had to be scanned to provide an electronic version to be forwarded by e-mail so as not to incur postage. The Custodian states that his office has not and does not fax records.

Additionally, the Custodian states that the redactions made to the requested closed session minutes are contractual discussions regarding negotiations with the City's unions and employment negotiations with the Chief of Police and Deputy Chief of Police, as well as a discussion of litigation pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12. The Custodian also states that the City has since adopted the GRC's Model Request Form.

Further, the Custodian requests the following from the GRC:

1. A finding that the Custodian and the members of the governing body did not knowingly and willfully violate the provisions of OPRA regarding the Complainant's request for e-mails;
2. A finding that the specific legal basis for the redactions made to the closed session minutes have been provided, therefore no order from the GRC is needed;
3. A finding that the Custodian did not knowingly and willfully violate OPRA by charging copying fees for documents that needed to be scanned so they did not have to be mailed (\$7.50 v. \$8.09) and by doing so tried to provide the requested records in what the Custodian believed to be the least expensive manner;
4. A finding that the Custodian did not knowingly and willfully violate OPRA by utilizing an outdated OPRA request form which has since been replaced with the GRC's Model Request Form; and
5. A finding that the Complainant is not entitled to an award of reasonable prevailing party attorney fees.

May 14, 2009

E-mail from GRC to Custodian. The GRC states that it is in receipt of the Custodian's unsigned SOI; however, the GRC is not in receipt of the Custodian's completed SOI. The GRC requests that the Custodian re-send his SOI.

May 14, 2009

E-mail from Custodian to Complainant. The Custodian attaches his SOI.

May 18, 2009

E-mail from GRC to Custodian. The GRC acknowledges receipt of the Custodian's e-mail dated May 14, 2009. However, the GRC states that it cannot open the e-mail attachment. The GRC asks the Custodian to re-send his SOI in another electronic format, via fax, or via regular mail.

August 6, 2009

E-mail from GRC to Custodian. The GRC asks the Custodian to re-send his SOI in another electronic format, via fax, or via regular mail.

August 6, 2009

Automated e-mail from Custodian to GRC. The Custodian states that he will be out of the office for an undetermined amount of time and to contact Jack Lipsett, City Administrator, in the Custodian's absence.

August 28, 2009

E-mail from GRC to City Administrator. The GRC requests that the City Administrator re-send the Custodian's SOI to the GRC.

September 2, 2009

Assistant City Clerk sends another unsigned copy of the Custodian's SOI to the GRC.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA also provides that:

"*[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.*" (Emphasis added). N.J.S.A. 47:1A-5.g.

OPRA further provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access

... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request*... If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. *The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i, a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁶ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i, and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The Complainant submitted his OPRA request on March 3, 2009. The Custodian provided a written response on March 12, 2009, the seventh (7th) business day following receipt of said request, in which the Custodian requested an extension of time to comply with the Complainant’s request for closed session minutes. Specifically, the Custodian stated that he anticipated completing this request on March 13, 2009 and would then forward the cost associated with said request to the Complainant.

In Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said

⁶ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that “because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. [and] N.J.S.A. 47:1A-5.i.”

Similarly in this instant complaint, the Custodian provided the Complainant with a written response to his OPRA request on the seventh (7th) business day and requested an extension of time until March 13, 2009 to fulfill the Complainant’s request for closed session minutes. The Complainant extended the extension time until March 20, 2009.

Therefore, because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date upon which the requested closed session minutes would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey, supra. The Council notes that although the Custodian failed to provide the Complainant with a further written response by his extended deadline of March 13, 2009, the Complainant’s voluntary agreement to extend the deadline to March 20, 2009 moots any violation of OPRA.

Further, in the Custodian’s subsequent response to the Complainant’s request dated March 20, 2009 (the extended response time), the Custodian provided redacted copies of the requested closed session minutes, but failed to provide any specific legal basis for said redactions and the Custodian indicated the Councilmen did not respond to the Custodian’s request for the requested e-mails.

OPRA states that “[i]f the custodian of a government record asserts that part of a particular record is exempt from public access... the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5.g. Said provision also states that “[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.”

Here, the Custodian did not provide any legal basis for the redactions made to the requested closed session minutes until he submitted his unsigned SOI to the GRC. In said SOI, the Custodian asserts that the redactions made to the requested closed session minutes are contractual discussions regarding negotiations with the City’s unions and employment negotiations with the Chief of Police and Deputy Chief of Police, as well as a discussion of litigation pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12.

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 GRC⁷ 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:

⁷ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
John Paff v. Gloucester City (Camden), 2009-102 – Findings and Recommendations of the Executive Director

“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, *supra*, the Council must conduct an *in camera* review of the requested records (the first three (3) closed session meetings held on or after August 1, 2008, dated August 4, 2008, August 21, 2008 and September 2, 2008) to determine the validity of the Custodian’s assertion that the redactions made to the requested closed session minutes are contractual discussions regarding negotiations with the City’s unions and employment negotiations with the Chief of Police and Deputy Chief of Police, as well as a discussion of litigation pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12.

Additionally, because the Custodian’s March 20, 2009 written response to the Complainant clarified that the Councilmen failed to respond to the Custodian’s request for the requested e-mails, Councilmen Marchese and Ferry, via the current Custodian, must disclose the requested e-mails to the Complainant.

Also, the Complainant states that although the Custodian did not provide any paper copies to the Complainant, the Custodian attempted to charge \$7.50 for the ten (10) pages of records that were e-mailed to the Complainant. The Complainant contends that pursuant to N.J.S.A. 47:1A-5.b., copying charges only apply for copies of printed matter.

The Custodian stated in his SOI that ten (10) pages of documents had to be scanned to provide an electronic version to be forwarded by e-mail so as not to incur postage.

OPRA provides that government records may be purchased upon payment of the actual cost of duplicating the record. N.J.S.A. 47:1A-5.b. Said provision defines “actual cost” as “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...”

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

“[i]n adopting OPRA, the Legislature made clear that ‘government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.’ N.J.S.A. 47:1A-1. The imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication. N.J.S.A. 47:1A-5.b.”

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

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

Further, in Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the court cited Moore, *supra*, by stating that “[w]hen copies of public records

are purchased under the common law right of access doctrine, the public officer may charge only the actual cost of copying, which ordinarily should not include a charge for labor... Thus, the fees allowable under the common law doctrine are consistent with those allowable under OPRA.” 376 N.J. Super. at 279.

In this instant complaint, the Custodian stated that the \$7.50 fee relates to the scanning of the records to provide an electronic version to be forwarded by e-mail. The Custodian does not provide any evidence to support his assertion that \$7.50 is the actual cost of scanning and e-mailing records.

Therefore, the Custodian’s charge of \$7.50 to scan and e-mail records to the Complainant is a violation of N.J.S.A. 47:1A-5.b. because said fee does not reflect the actual cost of providing the copies, which is likely zero. *See* Libertarian Party of Central New Jersey, *supra*, Moore, *supra*, and Dugan, *supra*. Thus, the Complainant is not required to pay the Custodian’s \$7.50 charge.

Whether the Township’s OPRA request form violates OPRA?

OPRA provides that:

“[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

- (1) specific directions and procedures for requesting a record;
- (2) a statement as to whether prepayment of fees or a deposit is required;
- (3) the time period within which the public agency is required by [OPRA], to make the record available;
- (4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (5) space for the custodian to list reasons if a request is denied in whole or in part
- (6) space for the requestor to sign and date the form;
- (7) space for the custodian to sign and date the form if the request is fulfilled or denied. N.J.S.A. 47:1A-5.f.

The Complainant states that N.J.S.A. 47:1A-5.f. mandates that public agencies include certain information on their OPRA request forms. The Complainant states that the City’s OPRA request form does not contain “a statement of the requestor’s right to challenge a decision by the public agency to deny access and the procedure for filing an appeal.”

Upon the GRC's review of the Complainant's OPRA request attached to his Denial of Access Complaint which was submitted on the agency's OPRA request form, it is confirmed that said OPRA request form does not contain "a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal" as is required by N.J.S.A. 47:1A-5.f. Therefore, the City's OPRA request form at the time of the Complainant's OPRA request violated N.J.S.A. 47:1A-5.f.

Also, the Complainant states that the City's OPRA request form states that employee personnel files and police investigation records are not "public records" contrary to the exceptions contained in N.J.S.A. 47:1A-3.b. (listing criminal investigatory information that must be disclosed) and N.J.S.A. 47:1A-10 (listing personnel information that must be disclosed). The Complainant states that the Council has previously held that OPRA request forms containing false or misleading information constitute a denial of access. O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008).

The crux of the argument in O'Shea, supra, was based on language included on the Township of West Milford's official OPRA request form. This language, which asserted that personnel records would not be provided as part of an OPRA request, failed to include the exceptions to the personnel record exemption contained in N.J.S.A. 47:1A-10. The Complainant argued that the language created a barrier to public records. The Council held that "the Township's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records" and ordered the Township of West Milford to either delete the language or include the exceptions to personnel records afforded in N.J.S.A. 47:1A-10.

The facts presented in O'Shea, supra, are similar to the facts presented in this instant complaint. While the City's OPRA request form advises requestors that personnel records are exempt from disclosure (pursuant to N.J.S.A. 47:1A-10), the form does not also inform requestors that there are exceptions to the personnel record exemption under OPRA. Said exceptions are:

- 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.

N.J.S.A. 47:1A-1 provides that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain

exceptions...” Additionally, custodians must grant or deny access to records in accordance with the law. Thus, a requestor may be deterred from submitting an OPRA request for certain personnel records because the City’s form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records.

Similarly, the Complainant asserts that the Township’s OPRA request form makes another blanket statement that police investigation records are not public records. The Complainant states that N.J.S.A. 47:1A-3.b. expressly lists several exceptions to this rule.

OPRA does exempt from public access criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. However, OPRA also provides that:

“the following information concerning a *criminal investigation* shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

- where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;
- if an arrest has been made, information as to the name, address and age of any victims unless there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or Court Rule. In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim's family, and the integrity of any ongoing investigation, shall be considered;
- if an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;
- information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;
- information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;
- information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police; and
- information as to circumstances surrounding bail, whether it was posted and the amount thereof.” N.J.S.A. 47:1A-3.b. (Emphasis added).

Additionally, in Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009), the Council held that:

“...a police arrest report, is required to be maintained or kept on file by the Division of Archives and Records Management, therefore it is a government record subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. Further, this record contains certain information such as the arrested person's name, age, residence, occupation, marital status, time and place of arrest, charges, arresting agency, and other information which must be disclosed pursuant to N.J.S.A. 47:1A-3.b. Accordingly, this record must be released with appropriate redactions.”

Thus, an arrest report is a report concerning a criminal investigation that is partially subject to public access. In this complaint, the City's OPRA request form advises requestors that police investigation records are not subject to public access but fails to also inform requestors that portions of arrest reports, which are also records that pertain to a criminal investigation, are subject to public access pursuant to N.J.S.A. 47:1A-3.b.

Therefore, the statement contained on the City's OPRA request form which indicates that police investigation records are exempt from public access under OPRA is misleading because said statement fails to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. As such, pursuant to O'Shea, supra, a requestor may be deterred from submitting an OPRA request for certain police investigation reports because the City's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records.

In the Custodian's unsigned SOI dated May 14, 2009, the Custodian stated that the City has since adopted the GRC's Model Request Form. The GRC accessed a copy of the City's OPRA request form from its website⁸ on January 7, 2010. The OPRA request form posted to the City's website is the GRC's Model Request Form. As such, the Council declines to order the Custodian to amend the City's OPRA request form.

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 outcome of the Council's *in camera* review as well as Councilmen Marchese and Ferry's compliance with the Council's Interim Order.

⁸ http://www.cityofgloucester.org/government_files/OPRA.pdf.

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 outcome of the Council’s *in camera* review as well as Councilmen Marchese and Ferry’s compliance with the Council’s Interim Order..

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date upon which the requested closed session minutes would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009). The Council notes that although the Custodian failed to provide the Complainant with a further written response by his extended deadline of March 13, 2009, the Complainant’s voluntary agreement to extend the deadline to March 20, 2009 moots any violation of OPRA.
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Council must conduct an *in camera* review of the requested records (the first three (3) closed session meetings held on or after August 1, 2008, dated August 4, 2008, August 21, 2008 and September 2, 2008) to determine the validity of the Custodian’s assertion that the redactions made to the requested closed session minutes are contractual discussions regarding negotiations with the City’s unions and employment negotiations with the Chief of Police and Deputy Chief of Police, as well as a discussion of litigation pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12.
3. **The Custodian must deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see # 2 above), a document or redaction index¹⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹¹, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
4. Because the Custodian’s March 20, 2009 written response to the Complainant clarified that the Councilmen failed to respond to the Custodian’s request for

⁹The *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.

¹⁰ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹¹ "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."

the requested e-mails, Councilmen Marchese and Ferry, via the current Custodian, must disclose the requested e-mails to the Complainant.

5. **Councilmen Marchese and Ferry shall comply with item # 4 above within five (5) business days from receipt of the Council's Interim Order, with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹², to the Executive Director.¹³**
6. The Custodian's charge of \$7.50 to scan and e-mail records to the Complainant is a violation of N.J.S.A. 47:1A-5.b. because said fee does not reflect the actual cost of providing the copies, which is likely zero. *See Libertarian Party of Central New Jersey v. Murphy*, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005). Thus, the Complainant is not required to pay the Custodian's \$7.50 charge.
7. Upon the GRC's review of the Complainant's OPRA request attached to his Denial of Access Complaint which was submitted on the agency's OPRA request form, it is confirmed that said OPRA request form does not contain "a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal" as is required by N.J.S.A. 47:1A-5.f. Therefore, the City's OPRA request form at the time of the Complainant's OPRA request violated N.J.S.A. 47:1A-5.f.
8. While the City's OPRA request form advises requestors that personnel records are exempt from disclosure (pursuant to N.J.S.A. 47:1A-10), the form does not also inform requestors that there are exceptions to the personnel record exemption under OPRA. Additionally, the statement contained on the City's OPRA request form which indicates that police investigation records are exempt from public access under OPRA is misleading because said statement fails to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. As such, pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008), a requestor may be deterred from submitting an OPRA request for certain police investigation reports or personnel records because the City's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records. However, in the Custodian's unsigned Statement of Information dated May 14, 2009, the Custodian stated that the City has since adopted the GRC's Model Request Form. The GRC accessed a copy of the City's OPRA

¹² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

request form from its website¹⁴ on January 7, 2010. The OPRA request form posted to the City's website is the GRC's Model Request Form. As such, the Council declines to order the Custodian to amend the City's OPRA request form.

9. 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 outcome of the Council's *in camera* review as well as Councilmen Marchese and Ferry's compliance with the Council's Interim Order.
10. The Council defers analysis of whether the Complainant is a prevailing party pending the outcome of the Council's *in camera* review as well as Councilmen Marchese and Ferry's compliance with the Council's Interim Order.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 1, 2010

¹⁴ http://www.cityofgloucester.org/government_files/OPRA.pdf
John Paff v. Gloucester City (Camden), 2009-102 – Findings and Recommendations of the Executive Director