



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

March 29, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2009-12

v.

Township of Fredon (Sussex)
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed as the Complainant withdrew the complaint from the Office of Administrative Law, via letter from his legal counsel dated March 4, 2011, because the parties have settled. No further adjudication is required.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 29th Day of March, 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: March 30, 2011



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-12

v.

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

Records Relevant to Complaint: A copy of the most recently approved executive session minutes for the Township of Fredon.³

Request Made: December 2, 2008

Response Made: December 3, 2008

Custodian: Joanne Charner

GRC Complaint Filed: January 5, 2009⁴

Background

April 8, 2010

Government Records Council's ("Council") Interim Order. At its April 8, 2010 public meeting, the 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, found that:

1. The Custodian provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection and a redaction index on December 29, 2009. Therefore, the Custodian timely complied with the Council's December 22, 2009 Interim Order.
2. The *In Camera* review reveals that the Custodian lawfully denied access to the redacted portion of the requested record because the discussion relates to a matter for which the Township may become a party to litigation. Therefore, the governing body may exclude the public from such discussion since it is exempt from disclosure as it involves anticipated litigation pursuant to N.J.S.A. 10:4-12(b)7 and N.J.S.A. 47:1A-9.a.

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

² Represented by William Hinkes, Esq., of Hollander, Strelzik, Pasculli, Hinkes, Vandenberg & Hontz, LLC (Newton, NJ).

³ The Complainant requested additional records that are not the subject of this complaint.

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

3. Although the Township's OPRA request form did not conform to the minimum form requirements set forth in N.J.S.A. 47:1A-5.f. thus violating this provision of OPRA, the Custodian did certify that the request form has been revised pursuant to the standards set forth in paragraph 3 of the Council's December 22, 2009 Interim Order. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's December 22, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

April 12, 2010

Council's Interim Order distributed to the parties.

June 23, 2010

Complaint transmitted to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

March 4, 2011

Letter from Complainant's Counsel to Administrative Law Judge Mumtaz Bari-Brown. The Complainant's Counsel states that he is pleased to report that this matter has been settled by the parties and that the Complainant withdraws his complaint. Further, the Complainant's Counsel states that the matter may be closed.

Analysis

No analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed as the Complainant withdrew the complaint from the Office of Administrative Law, via letter from his legal counsel dated March 4, 2011, because the parties have settled. No further adjudication is required.

Approved By: Catherine Starghill, Esq.
Executive Director

March 22, 2011



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

INTERIM ORDER

April 8, 2010 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2009-12

v.

Township of Fredon (Sessex)
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 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 provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection and a redaction index on December 29, 2009. Therefore, the Custodian timely complied with the Council’s December 22, 2009 Interim Order.
2. The *In Camera* review reveals that the Custodian lawfully denied access to the redacted portion of the requested record because the discussion relates to a matter for which the Township may become a party to litigation. Therefore, the governing body may exclude the public from such discussion since it is exempt from disclosure as it involves anticipated litigation pursuant to N.J.S.A. 10:4-12(b)7 and N.J.S.A. 47:1A-9.a.
3. Although the Township’s OPRA request form did not conform to the minimum form requirements set forth in N.J.S.A. 47:1A-5.f. thus violating this provision of OPRA, the Custodian did certify that the request form has been revised pursuant to the standards set forth in paragraph 3 of the Council’s December 22, 2009 Interim Order. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council’s December 22, 2009 Interim Order, the Complainant has achieved



“the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees.

Interim Order Rendered by the
Government Records Council
On The 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.

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: April 12, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-12

v.

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

Records Relevant to Complaint: A copy of the most recently approved executive session minutes for the Township of Fredon.³

Request Made: December 2, 2008

Response Made: December 3, 2008

Custodian: Joanne Charner

GRC Complaint Filed: January 5, 2009⁴

Records Submitted for *In Camera* Examination: Executive session minutes dated October 23, 2008.

Background

December 22, 2009

Government Records Council's Interim Order. At the December 22, 2009 public meeting, the Government Records Council ("Council") considered the December 15, 2009 Executive Director's Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the October 23, 2008 executive session meeting minutes to determine the validity of the Custodian's assertion that pursuant to N.J.S.A. 10:4-12(b)7, she redacted from the minutes the portion of the discussion relating to anticipated or pending litigation.

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

² Represented by William Hinkes, Esq., of Hollander, Strelzik, Pasculli, Hinkes, Vandenberg & Hontz, LLC (Newton, NJ).

³ The Complainant requested additional records that are not the subject of this complaint.

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

2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Because public agencies are expressly directed to adopt an official OPRA request form, and because the Township of Fredon's official OPRA request form does not conform to the minimum form requirements set forth in N.J.S.A. 47:1A-5.f., the Custodian has violated N.J.S.A. 47:1A-5.f. The Custodian shall, therefore, amend the Township's current official OPRA request form to include all of the requirements set forth in N.J.S.A. 47:1A-5.f. Moreover, pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian shall either delete the definition of a public record from the Township of Fredon's OPRA request form, or amend the form to include the definition of a "government record" as set forth in N.J.S.A. 47:1A-1.1.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁸ to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

December 23, 2009

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

December 29, 2009

Certification of the Custodian in response to the Council's Interim Order with the unredacted executive session minutes of the Township Council's meeting dated October 23, 2008.

The Custodian certifies that she is the Municipal Clerk and the Custodian of the Township of Fredon and that the record enclosed is provided in compliance with the

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

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

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

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Council's December 22, 2009 Interim Order. The Custodian also certifies that the Fredon Township OPRA request form has been revised pursuant to the standards set forth in paragraph 3 of the Council's Interim Order.

Analysis

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

At its December 22, 2009 public meeting, the Council determined that because the Custodian has asserted that the requested record (Township Council's executive session minutes dated October 23, 2008) were lawfully redacted because the redacted portion is exempt from disclosure as discussions related to anticipated or pending litigation pursuant to N.J.S.A. 10:4-12(b)7., the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the record at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested record to determine the validity of the Custodian's assertion that the redacted portion of the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted document, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* review. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on January 4, 2010.

The Custodian provided the GRC with a legal certification, the unredacted record requested for the *in camera* review and a redaction index on December 29, 2009. Therefore, the Custodian timely complied with the Council's December 22, 2009 Interim Order.

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

The Custodian asserts that she lawfully redacted the requested record because the redacted portion is exempt from disclosure since the discussion relates to a matter for which the Township may become a party to litigation and for which the governing body may exclude the public pursuant to N.J.S.A. 10:4-12(b)7. Conversely, the Complainant asserts that the Custodian's redactions were unlawful.

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 Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ⁹
1.	Township of Fredon executive session minutes of October 23, 2008	First (1 st) paragraph redacted.	The first (1 st) paragraph was redacted pursuant to <u>N.J.S.A. 10:4-12(b)7</u> related to exclusion of the public from deliberations involving anticipated or pending litigation.	The first (1 st) paragraph was properly redacted because the discussion relates to a matter for which the Township may become a party to litigation. Therefore, the governing body may exclude the public from such discussion pursuant to <u>N.J.S.A. 10:4-12(b)7</u> . The discussion involves anticipated litigation.

Thus, the Custodian lawfully denied access to the redacted portion of the requested record because the discussion relates to a matter for which the Township may become a party

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

to litigation. Therefore, the governing body may exclude the public from such discussion since it is exempt from disclosure as it involves anticipated litigation pursuant to N.J.S.A. 10:4-12(b)7 and N.J.S.A. 47:1A-9.a.

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

OPRA states that:

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

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

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

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

Although the Township’s OPRA request form did not conform to the minimum form requirements set forth in N.J.S.A. 47:1A-5.f. thus violating this provision of OPRA, the Custodian did certify that the request form has been revised pursuant to the standards set forth in paragraph 3 of the Council’s December 22, 2009 Interim Order. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). 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.¹⁰ Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can

¹⁰ 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.

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.

Because public agencies are expressly directed to adopt an official OPRA request form, and because the Township of Fredon's official OPRA request form does not conform to the minimum form requirements set forth in N.J.S.A. 47:1A-5.f., the Custodian has violated N.J.S.A. 47:1A-5.f. Therefore, the Council ordered in its December 22, 2009 Interim Order that the Custodian shall amend the Township's current official OPRA request form to include all of the requirements set forth in N.J.S.A. 47:1A-5.f. Moreover, pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian was ordered to either delete the definition of a public record from the Township of Fredon's OPRA request form, or amend the form to include the definition of a “government record” as set forth in N.J.S.A. 47:1A-1.1. The Custodian subsequently provided certified confirmation to the GRC on December 29, 2009 that the Township of Fredon's request form has been revised pursuant to the standards set forth in paragraph 3 of the Council's December 22, 2009 Interim Order.

Therefore, pursuant to Teeters, *supra*, and the Council's December 22, 2009 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct.” *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing 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 provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection and a redaction index on December 29, 2009. Therefore, the Custodian timely complied with the Council's December 22, 2009 Interim Order.
2. The *In Camera* review reveals that the Custodian lawfully denied access to the redacted portion of the requested record because the discussion relates to a matter for which the Township may become a party to litigation. Therefore, the governing body may exclude the public from such discussion since it is exempt from disclosure as it involves anticipated litigation pursuant to N.J.S.A. 10:4-12(b)7 and N.J.S.A. 47:1A-9.a.
3. Although the Township's OPRA request form did not conform to the minimum form requirements set forth in N.J.S.A. 47:1A-5.f. thus violating this provision of OPRA, the Custodian did certify that the request form has been revised pursuant to the standards set forth in paragraph 3 of the Council's December 22, 2009 Interim Order. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's December 22, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

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

April 1, 2010



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

December 22, 2009 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2009-12

v.

Township of Fredon (Sussex)
Custodian of Record

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

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the October 23, 2008 executive session meeting minutes to determine the validity of the Custodian's assertion that pursuant to N.J.S.A. 10:4-12(b)7, she redacted from the minutes the portion of the discussion relating to anticipated or pending litigation.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Because public agencies are expressly directed to adopt an official OPRA request form, and because the Township of Fredon's official OPRA request form does not conform to the minimum form requirements set forth in N.J.S.A. 47:1A-5.f., the

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."



Custodian has violated N.J.S.A. 47:1A-5.f. The Custodian shall, therefore, amend the Township's current official OPRA request form to include all of the requirements set forth in N.J.S.A. 47:1A-5.f. Moreover, pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian shall either delete the definition of a public record from the Township of Fredon's OPRA request form, or amend the form to include the definition of a "government record" as set forth in N.J.S.A. 47:1A-1.1.

4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 22nd Day of December, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: December 23, 2009

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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-12

v.

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

Records Relevant to Complaint: A copy of the most recently approved executive session minutes for the Township of Fredon.³

Request Made: December 2, 2008

Response Made: December 3, 2008

Custodian: Joanne Charner

GRC Complaint Filed: January 5, 2009⁴

Background

December 2, 2008

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

December 3, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that access to the requested record is granted with redactions.

January 5, 2009

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

- Township of Fredon executive session meeting minutes dated October 23, 2008;
- Complainant's OPRA request dated December 2, 2008;
- Letter from the Custodian to the Complainant dated December 3, 2008.

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

² Represented by William Hinkes, Esq., of Hollander, Strelzik, Pasculli, Hinkes, Vandenberg & Hontz, LLC (Newton, NJ).

³ The Complainant requested additional records that are not the subject of this complaint.

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

The Complainant states that he filed his OPRA request on December 2, 2008 for the most recently approved executive session meeting minutes for the Township of Fredon's ("Fredon") governing body. The Complainant states that on December 3, 2008, the Custodian responded by letter stating that she would e-mail the minutes. The Complainant states that later that day the Custodian e-mailed a Microsoft Word version of Fredon's October 23, 2008 executive session minutes to the Complainant. The Complainant states the document did not appear to be a scan of Fredon's minutes but rather a Microsoft Word rendition of the text of the minutes. The Complainant states that the Custodian claimed that the minutes were redacted, but the minutes did not contain any portions that were blacked out. The Complainant states that the minutes stated "Redacted: Update on status of issues relating to pending litigation."

The Complainant also states that the Fredon's official OPRA request form states that employee personnel files are not public records but does not contain the exceptions set forth in OPRA to the general rule that personnel files are not public records. The Complainant further states that the Fredon's OPRA request form states that police investigation records are not public records and again fails to state OPRA's exceptions to the general rule which are contained in N.J.S.A. 47:1A-3.b.

The Complainant argues that in O'Shea v. Township of West Milford, GRC Complaint No. 2007-237, the GRC held that an OPRA form which contained false or misleading information about OPRA constituted a denial of access. The Complainant states that based on the O'Shea decision, the GRC should order Fredon to adopt the GRC's model request form.

The Complainant requests that the GRC:

- (1) find that the Custodian violated OPRA by not providing a bona fide copy of the requested executive session minutes,
- (2) find that the Custodian violated OPRA by not providing enough information regarding the redactions made to the executive minutes,
- (3) order the Custodian to make a bona fide copy of the executive session minutes available to the Complainant,
- (4) order Fredon to adopt the GRC's model request form, and
- (5) find that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

January 21, 2009

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

January 27, 2009⁵

Custodian's SOI with the following attachments:

- Fredon Township's executive session meeting minutes dated October 23, 2008;

⁵ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

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

The Custodian certifies that the record responsive to the Complainant’s request is Fredon’s executive session minutes dated October 23, 2008. The Custodian certifies that she provided the Complainant with a copy of said minutes with redactions on December 3, 2008. The Custodian certifies that she redacted from the minutes the discussion relating to anticipated or pending litigation pursuant to N.J.S.A. 10:4-12(b).7. The Custodian certifies that the Complainant does not assert that the redactions were inappropriate but rather condemns the method of redaction. The Custodian certifies that the GRC suggests on its website that custodians redact electronic records by deleting the material subject to redaction. The Custodian certifies that Fredon’s minutes are created and maintained electronically in Microsoft Word format. The Custodian certifies that the redactions were made in compliance with GRC guidelines.

The Custodian certifies that concerning redactions made to records for reasons of matters of pending litigation, GRC guidelines do not require custodians to identify the parties to the case, the docket number and the court in which the action is pending. The Custodian certifies that the GRC redaction guidelines states that the “[t]he bottom line is that the requester has the right to know the reason for the denial and the custodian has the responsibility to provide a reasonable explanation.” The Custodian certifies that she complied with the GRC’s redaction guidelines.

The Custodian certifies that until she attended a seminar regarding OPRA at Rutgers University, she was unaware of the GRC’s recent ruling that OPRA request forms which state that personnel and police investigation records are exempt from disclosure, without enumerating the statutory exceptions to such exemptions, were misleading and violated OPRA.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

The Custodian responded in writing to the Complainant’s OPRA request on the first (1st) business day following receipt stating that access to the requested record is granted with redactions. The Custodian certified that she redacted from the minutes the discussion relating to anticipated or pending litigation pursuant to N.J.S.A. 10:4-12(b).7. The Complainant stated that the October 23, 2008 executive session minutes were not a scan of the minutes but rather a Microsoft Word rendition of the text of the minutes; the Complainant disputes the method used to redact the minutes by the Custodian.

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 GRC⁶ in which the GRC dismissed the complaint by accepting the Custodian’s legal conclusion for the denial of access without further review. The court stated that:

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

The court also stated that:

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

Further, the court stated that:

⁶ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
Jesse Wolosky v. Township of Fredon (Sussex), 2009-12 – Findings and Recommendations of the Executive Director

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

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the October 23, 2008 executive session meeting minutes to determine the validity of the Custodian’s assertion that pursuant to N.J.S.A. 10:4-12(b).7, she redacted from the minutes the portion of the discussion relating to anticipated or pending litigation.

Whether the Township of Fredon’s OPRA request form complies with the requirements set forth in OPRA?

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 records because the Fredon’s form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to records.

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.

OPRA requires custodians to adopt a form to be used by requesters in making OPRA requests. N.J.S.A. 47:1A-5.f. OPRA sets forth the minimum information requirements of an OPRA request form, not the maximum. There is nothing in OPRA that prohibits a municipality from adopting a form that incorporates the requirements set forth in N.J.S.A. 47:1A-5.f., as well as additional useful information specific to that custodial agency. OPRA does not limit or exclude the inclusion of additional information as long as that information does not conflict with OPRA. Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009).⁷

The Complainant asserted that the Custodian violated OPRA because Fredon's official OPRA request form does not comply with the requirements set forth in N.J.S.A. 47:1A-5.f. The Complainant submitted his OPRA request on a Fredon's official OPRA request form which was provided to the GRC by both the Complainant and the Custodian.

The GRC has reviewed the official Fredon OPRA request form. This review revealed that Fredon's official OPRA request form lacks a statement of the requestor's right to challenge a decision by the agency to deny access, as well as a statement of the procedure for filing an appeal as required by N.J.S.A. 47:1A-5.f.(4). Furthermore, Fredon's official OPRA request form departs from OPRA by defining "public records" as "generally including those records determined to be public in accordance with P.L. 2001 c. 404. The term does not include employee personnel records, police investigation records, public assistance files or other matters in which there is a right of privacy or confidentially or which is specially exempted by law." This definition does not comport with the definition of a government record set forth at N.J.S.A. 47:1A-1.1.

In O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the complainant's counsel asserted that the Township's OPRA request form did not follow the GRC's model form and violated OPRA. Counsel stated that the Township's form indicated that public records do not include employee personnel files, but said form did not list the three (3) exceptions to OPRA's personnel record exemption pursuant to N.J.S.A. 47:1A-10. The Council ultimately ordered the Custodian to either delete or amend said statement to include the remainder of the applicable provision of OPRA.

Because public agencies are expressly directed to adopt an official OPRA request form, and because the Township of Fredon's official OPRA request form does not conform to the minimum form requirements set forth in N.J.S.A. 47:1A-5.f., the Custodian has violated N.J.S.A. 47:1A-5.f. The Custodian shall, therefore, amend the Township's current official OPRA request form to include all of the requirements set forth in N.J.S.A. 47:1A-5.f. Moreover, pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian shall either delete the definition of a public record from the Township of Fredon's OPRA request form, or amend the form to include the definition of a "government record" as set forth in N.J.S.A. 47:1A-1.1.

⁷ Affirmed on appeal regarding Paff v. City of East Orange (Essex), GRC Complaint No. 2007-297 (March 2008).

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

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

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the October 23, 2008 executive session meeting minutes to determine the validity of the Custodian's assertion that pursuant to N.J.S.A. 10:4-12(b)7, she redacted from the minutes the portion of the discussion relating to anticipated or pending litigation.
2. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁰ that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Because public agencies are expressly directed to adopt an official OPRA request form, and because the Township of Fredon's official OPRA request form does not conform to the minimum form requirements set forth in N.J.S.A. 47:1A-5.f., the Custodian has violated N.J.S.A. 47:1A-5.f. The Custodian shall, therefore, amend the Township's current official OPRA request form to include all of the requirements set forth in N.J.S.A. 47:1A-5.f. Moreover, pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian shall either delete the definition of a public record from the Township of Fredon's OPRA request form, or amend the form to include the definition of a "government record" as set forth in N.J.S.A. 47:1A-1.1.

⁸ 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.

⁹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹¹ to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 9, 2009

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."
Jesse Wolosky v. Township of Fredon (Sussex), 2009-12 – Findings and Recommendations of the Executive Director