



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

Jesse Wolosky
Complainant

Complaint No. 2009-14

v.

Township of Montague (Sussex)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 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 the Custodian has complied with the Council’s March 29, 2011 Interim Order by providing certified confirmation within five (5) business days of receipt of this Interim Order to the Executive Director that the reasonable prevailing party attorney’s fees of \$3,490.50 was paid to the Complainant’s Counsel.

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

Final Decision Rendered by the
Government Records Council
On The 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**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-14

v.

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

Records Relevant to Complaint: Copy of an audio recording of Montague Township's ("Township") most recent regular public meeting.³

Request Made: December 2, 2008
Response Made: December 9, 2008
Custodian: Diana Francisco
GRC Complaint Filed: January 5, 2009⁴

Background

March 29, 2011

Government Records Council's ("Council") Interim Order. At its March 29, 2011 public meeting, the Council considered the March 22, 2011 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 the Executive Director respectfully recommends the Council accept the Initial Decision of the Honorable Walter M. Braswell, Administrative Law Judge, which orders that the Complainant be granted attorney fees in the amount of \$3,490.50, and modifies said decision to require certified confirmation of compliance on the part of the Custodian. **Therefore, the Custodian must provide certified confirmation within five (5) business days of receipt of this Interim Order to the Executive Director that the reasonable prevailing party attorney's fees of \$3,490.50 was paid to the Complainant's Counsel.**

March 30, 2011

Council's Interim Order distributed to the parties.

April 1, 2011

Custodian's response to the Council's Interim Order.

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

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

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

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

Analysis

Whether the Custodian complied with the Council's March 29, 2011 Interim Order?

At its March 29, 2011 public meeting, the Council determined that it would accept the Initial Decision of the Honorable Walter M. Braswell, Administrative Law Judge, which orders that the Complainant be granted attorney fees in the amount of \$3,490.50, and modifies said decision to require certified confirmation of compliance on the part of the Custodian. Therefore, the Custodian was ordered to provide certified confirmation within five (5) business days of receipt of this Interim Order to the Executive Director that the reasonable prevailing party attorney's fees of \$3,490.50 was paid to the Complainant's Counsel.

The Council ordered the Custodian to comply with the Interim Order within five (5) business days from receipt of the Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005)⁵ to the Executive Director. Such compliance was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on April 6, 2011.

The Custodian provided the GRC a legal certification that confirmations the reasonable prevailing party attorney's fees of \$3,490.50 was paid to the Complainant's Counsel on March 29, 2011. Therefore, the Custodian timely complied with the Council's March 29, 2011 Interim Order in a timely manner.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has complied with the Council's March 29, 2011 Interim Order by providing certified confirmation within five (5) business days of receipt of this Interim Order to the Executive Director that the reasonable prevailing party attorney's fees of \$3,490.50 was paid to the Complainant's Counsel.

Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
Jesse Wolosky v. Township of Montague (Sussex), 2009-14 – Supplemental Findings and Recommendations of the Executive Director



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CHRIS CHRISTIE
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LORI GRIFA
Commissioner

INTERIM ORDER

March 29, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2009-14

v.

Township of Montague (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, accepts the Initial Decision of the Honorable Walter M. Braswell, Administrative Law Judge, which orders that the Complainant be granted attorney fees in the amount of \$3,490.50, and modifies said decision to require certified confirmation of compliance on the part of the Custodian. **Therefore, the Custodian must provide certified confirmation within five (5) business days of receipt of this Interim Order to the Executive Director that the reasonable prevailing party attorney’s fees of \$3,490.50 was paid to the Complainant’s Counsel.**

Interim Order 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. 2009-14

v.

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

Records Relevant to Complaint: Copy of an audio recording of Montague Township's ("Township") most recent regular public meeting.³

Request Made: December 2, 2008

Response Made: December 9, 2008

Custodian: Diana Francisco

GRC Complaint Filed: January 5, 2009⁴

Background

April 28, 2010

Government Records Council's ("Council") Interim Order. At its April 28, 2010 public meeting, the Council considered the April 21, 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 and a copy of the revised Township OPRA request form on March 8, 2010. Therefore, the Custodian timely complied with the Council's February 23, 2010 Interim Order.
2. Although the Custodian's charge of \$5.00 per CD for the requested audio recording of the February 4, 2008 public meeting is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. and the Township's OPRA request form was in violation of N.J.S.A. 47:1A-5.f., the Custodian certified that she provided the Complainant with a copy of the requested audio recording free of charge and amended the Township's OPRA request form in accordance with the Council's February 23, 2010 Interim Order in a timely manner. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful

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

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

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

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

violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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 Custodian provided the Complainant with a copy of the audio recording of the requested public meeting minutes at no charge following the filing of the instant complaint. The Custodian also revised the Township’s OPRA request form by deleting the entire section entitled “Exceptions to public access to government records” in January 2009. 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 because the Custodian’s charge of \$5.00 per CD for the requested audio recording of the public meeting dated February 4, 2008 is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. Additionally, the Township’s OPRA request form was in violation of N.J.S.A. 47:1A-5.f. 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.

April 30, 2010

Council’s Interim Order distributed to the parties.

June 25, 2010

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

March 10, 2011

Initial Decision of the Honorable Walter M. Braswell, Administrative Law Judge (“ALJ”). In the Initial Decision, the ALJ states that “... it is clear that reasonable attorney fees are warranted in this matter. However, a relatively straightforward case such as this should not result in a windfall for the petitioner’s attorney. As addressed above, I have eliminated those portions of the petitioner’s fees that I deem to be excessive or otherwise unnecessary. Also, since the petitioner’s attorney acknowledges its straightforward nature and since there were very few legal risks inherent in this litigation, the petitioner should not be granted any enhancement of the attorney fees awarded ... Form the reasons set forth above, it is hereby **ORDERED** that the petitioner be granted attorney fees in the amount of \$3,490.50...”

Analysis

Whether the Council should accept, reject or modify the Administrative Law Judge's Initial Decision dated March 10, 2011?

In the Council's April 28, 2010 Interim Order, the Council determined that the Complainant was the prevailing party entitled to reasonable attorney fees pursuant to N.J.S.A. 47:1A-6. As such, the Council ordered that the complaint be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. In his Initial Decision, the Honorable Walter M. Braswell, ALJ held that

"... it is clear that reasonable attorney fees are warranted in this matter. However, a relatively straightforward case such as this should not result in a windfall for the petitioner's attorney. As addressed above, I have eliminated those portions of the petitioner's fees that I deem to be excessive or otherwise unnecessary. Also, since the petitioner's attorney acknowledges its straightforward nature and since there were very few legal risks inherent in this litigation, the petitioner should not be granted any enhancement of the attorney fees awarded ... Form the reasons set forth above, it is hereby **ORDERED** that the petitioner be granted attorney fees in the amount of \$3,490.50..."

The Council should accept the ALJ's Initial Decision with the modification that the Custodian must provide certified confirmation within five (5) business days of receipt of this Interim Order to the Executive Director that the reasonable prevailing party attorney's fees of \$3,490.50 was paid to the Complainant's Counsel.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Initial Decision of the Honorable Walter M. Braswell, Administrative Law Judge, which orders that the Complainant be granted attorney fees in the amount of \$3,490.50, and modifies said decision to require certified confirmation of compliance on the part of the Custodian. **Therefore, the Custodian must provide certified confirmation within five (5) business days of receipt of this Interim Order to the Executive Director that the reasonable prevailing party attorney's fees of \$3,490.50 was paid to the Complainant's Counsel.**

Approved By: Catherine Starghill, Esq.
Executive Director

March 22, 2011



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

INTERIM ORDER

April 28, 2010 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2009-14

v.

Montague Township (Sussex)
Custodian of Record

At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 21, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian provided the GRC with a legal certification and a copy of the revised Township OPRA request form on March 8, 2010. Therefore, the Custodian timely complied with the Council’s February 23, 2010 Interim Order.
2. Although the Custodian’s charge of \$5.00 per CD for the requested audio recording of the February 4, 2008 public meeting is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. and the Township’s OPRA request form was in violation of N.J.S.A. 47:1A-5.f., the Custodian certified that she provided the Complainant with a copy of the requested audio recording free of charge and amended the Township’s OPRA request form in accordance with the Council’s February 23, 2010 Interim Order in a timely manner. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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 Custodian provided the Complainant with a copy of the audio recording of the requested public meeting minutes at no charge following the filing of the instant complaint. The Custodian also revised the Township’s OPRA request form by deleting the entire section entitled “Exceptions to public access to government records” in January 2009. 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 because the Custodian's charge of \$5.00 per CD for the requested audio recording of the public meeting dated February 4, 2008 is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. Additionally, the Township's OPRA request form was in violation of N.J.S.A. 47:1A-5.f. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 28th 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.

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: April 30, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 28, 2010 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-14

v.

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

Records Relevant to Complaint: Copy of an audio recording of Montague Township's ("Township") most recent regular public meeting.³

Request Made: December 2, 2008

Response Made: December 9, 2008

Custodian: Diana Francisco

GRC Complaint Filed: January 5, 2009⁴

Background

February 23, 2010

Government Records Council's ("Council") Interim Order. At its February 23, 2010 public meeting, the Council considered the February 16, 2010 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. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), 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), the Custodian's charge of \$5.00 per CD for the requested audio recording of the public meeting dated February 4, 2008 is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. *See also* O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185. Further, the Custodian failed to bear her burden of proving that the charge was the actual cost pursuant to N.J.S.A. 47:1A-6.

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

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

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

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

2. Pursuant to O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian must either remove from its form the section entitled “exceptions to public access to government records” or amend the form to include the remainder of the applicable legal authorities governing the various exemptions listed in said section. Alternatively, the Custodian may adopt the GRC model request form in its entirety.
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Paragraph 2 of these Findings and Recommendations set forth above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005)⁵ to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

March 1, 2010

Council’s Interim Order distributed to the parties.

March 8, 2010⁶

Custodian’s response to the Council’s Interim Order. The Custodian certified she is the acting Township Clerk and Custodian. The Custodian also certified that in January 2009, she revised the Township’s OPRA request form to delete all printed material contained in the “Exceptions to Public Access to Government Records.” Further, the Custodian included a copy of the revised Township’s OPRA request form with this certification.

Analysis

Whether the Custodian complied with the Council’s February 23, 2010 Interim Order?

At its February 23, 2010 public meeting, the Council determined that pursuant to O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), “the Custodian must either remove from its form the section entitled “exceptions to public access to government records” or amend the form to include the remainder of the applicable legal authorities governing the various exemptions listed in said section. Alternatively, the Custodian may adopt the GRC model request form in its entirety.”

⁵ “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”

⁶ The GRC received the Custodian’s response on this date.

The Council therefore ordered the Custodian to comply with the Interim Order within five (5) business days from receipt of the Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005)⁷ to the Executive Director. Such compliance was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on March 8, 2010.

The Custodian provided the GRC with a legal certification and a copy of the revised Township OPRA request form on March 8, 2010. Therefore, the Custodian timely complied with the Council's February 23, 2010 Interim Order.

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).

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.”

Although the Custodian's charge of \$5.00 per CD for the requested audio recording of the February 4, 2008 public meeting is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. and the Township's OPRA request form was in violation of N.J.S.A. 47:1A-5.f., the Custodian certified that she provided the Complainant with a copy of the requested audio recording free of charge and amended the Township's OPRA request form in accordance with the Council's February 23, 2010 Interim Order in a timely manner. 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.⁸ Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

In this instant complaint, the Complainant initially filed this Denial of Access Complaint on January 5, 2009 because the Custodian assessed the Complainant a \$5.00 copying fee for an audio recording of the requested public meeting minutes in accordance with a Township ordinance and because the Township's OPRA request form had a section entitled "Exceptions to public access to government records" that list various exemptions from disclosure but fails to state OPRA's specific exceptions to the general rules against disclosure. After the filing of this complaint and in response to the Council's request for the Custodian's Statement of Information, the Custodian certified that a copy of the audio recording of the requested public meeting minutes was provided to the Complainant at no charge. Additionally, in its February 23, 2010 Interim Order, the Council ordered the Custodian to amend the Township's OPRA request form by either removing from the section entitled "exceptions to public access to government records" or amending the form to include the remainder of the applicable legal authorities governing the various exemptions listed in said section or adopt the GRC model request form in its entirety. As previously stated, the Custodian complied with said Order by providing certified confirmation to the GRC on March 8, 2010 that the Township's OPRA request form was revised to delete the entire section entitled "Exceptions to public access to government records" in January 2009.

Pursuant to Teeters, *supra*, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's

⁸ The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

conduct.” *Id.* at 432. Specifically, the Custodian provided the Complainant with a copy of the audio recording of the requested public meeting minutes at no charge following the filing of the instant complaint. The Custodian also revised the Township’s OPRA request form by deleting the entire section entitled “Exceptions to public access to government records” in January 2009. 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 because the Custodian’s charge of \$5.00 per CD for the requested audio recording of the public meeting dated February 4, 2008 is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. Additionally, the Township’s OPRA request form was in violation of N.J.S.A. 47:1A-5.f. 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 and a copy of the revised Township OPRA request form on March 8, 2010. Therefore, the Custodian timely complied with the Council’s February 23, 2010 Interim Order.
2. Although the Custodian’s charge of \$5.00 per CD for the requested audio recording of the February 4, 2008 public meeting is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. and the Township’s OPRA request form was in violation of N.J.S.A. 47:1A-5.f., the Custodian certified that she provided the Complainant with a copy of the requested audio recording free of charge and amended the Township’s OPRA request form in accordance with the Council’s February 23, 2010 Interim Order in a timely manner. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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 Custodian provided the Complainant with a copy of the audio recording of the requested public meeting minutes at no charge following the filing of the instant complaint. The Custodian also revised the Township’s OPRA request form by deleting the entire section entitled “Exceptions to public access to government records” in January 2009. 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 because the Custodian’s charge of \$5.00 per CD for the requested audio recording of the public meeting dated February 4, 2008 is not the actual cost and in violation of N.J.S.A. 47:1A-5.b.

Additionally, the Township's OPRA request form was in violation of N.J.S.A. 47:1A-5.f. 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

April 21, 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

February 23, 2010 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2009-14

v.

Montague Township (Sussex)
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 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. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), 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), the Custodian’s charge of \$5.00 per CD for the requested audio recording of the public meeting dated February 4, 2008 is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. *See also* O’Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185. Further, the Custodian failed to bear her burden of proving that the charge was the actual cost pursuant to N.J.S.A. 47:1A-6.
2. Pursuant to O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian must either remove from its form the section entitled “exceptions to public access to government records” or amend the form to include the remainder of the applicable legal authorities governing the various exemptions listed in said section. Alternatively, the Custodian may adopt the GRC model request form in its entirety.
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Paragraph 2 of these Findings and Recommendations set forth above within five (5) business days from receipt of this Order and**



simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005)¹ to the Executive Director.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
- 5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.**

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

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: March 1, 2010

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-14

v.

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

Records Relevant to Complaint: Copy of an audio recording of Montague Township's ("Township") most recent regular public meeting.³

Request Made: December 2, 2008

Response Made: December 9, 2008

Custodian: Diana Francisco

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 via facsimile transmission.

December 9, 2008

Custodian's response to the OPRA request. The Custodian responds in writing the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that access to the requested record is granted. The Custodian states that the copying fee is \$5.00 plus \$1.17 for postage.

January 5, 2009

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

- Montague Township Committee executive session meeting minutes dated October 14, 2008;
- Complainant's OPRA request dated December 2, 2008;
- Letter from the Custodian to the Complainant dated December 9, 2008.

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

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

³ The Complainant requested access to 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 the Custodian assessed a \$5.00 copying fee to provide a copy of an audio recording of the Township's most recent regular public meeting. The Complainant further states that it is extremely unlikely that a single compact disk cost \$5.00. The Complainant also states that in Renna v. Township of Warren, GRC Complaint No. 2008-40 (April 2009), the GRC observed that a \$5.00 charge for a compact disk is likely not the actual cost pursuant to N.J.S.A. 47:1A-5.b.

The Complainant argues that the Custodian must charge actual copying costs pursuant to N.J.S.A. 47: 1A-5.b. The Complainant further argues that absent extraordinary circumstances, actual cost is the material cost of providing the public with a copy of a requested record, excluding labor and overhead. Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26, 31 (1962) (labor not included in actual cost under New Jersey common law); Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271, 280 (App. Div. 2005) (fees allowed under OPRA consistent with fees allowed under the Common Law Right of Access); Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) (direct cost of copying not appropriate standard); O'Shea v. Madison Public School District, GRC Complaint No. 2007-185 (December 2008); O'Shea v. Township of Vernon, GRC Complaint No, 2007-207 (April 2008).

The Complainant also states that the Township's OPRA request form lists personnel records, inter-agency or intra-agency advisory communications and criminal investigatory records as exempt from disclosure. The Complainant states that in O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008), the GRC held that it was an unlawful denial of access if a public agency's OPRA form contained false or misleading information about OPRA. The Complainant argues that, like the form invalidated in O'Shea, the Township's OPRA request form contains blanket exemptions to disclosure but does not state OPRA's exceptions to the general rule against disclosure. The Complainant concludes that based on the decision in O'Shea, the GRC should order the Township to adopt the GRC's model request form.

The Complainant requests that the GRC find that:

- (1) the Custodian violated OPRA by charging more than the actual cost for one
(1) copy of an audio recording on a compact disk;
- (2) order the Custodian to certify to the actual cost of a single compact disk;
- (3) order the Custodian to make a copy of the requested record available to the
Complainant at actual cost;
- (4) find that Township's OPRA request form violates OPRA;
- (5) order the Township to adopt the GRC model request form; and
- (6) find that the Complainant is a prevailing party and order an award of
reasonable attorneys' fees pursuant to N.J.S.A.47: 1A-6.

The Complainant does not agree to mediate this complaint.

February 10, 2009

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

February 25, 2009

Custodian's SOI attaching a copy of the Township's Administrative Code. The Custodian certifies that she made a copy of the requested audio recording and advised the Complainant that the copying cost would be \$5.00 plus postage of \$1.17. The Custodian certifies that although the Complainant did not pay the copying fee, the Custodian made the record available to the Complainant free of charge.

The Custodian certifies that the Township replaced its recording system in July 2008. The Custodian also certifies that when the Township purchased the new recording system, the Township paid a total of \$6,998.00 which included 100 compact disks. The Custodian further certifies that the vendor failed to provide an itemized receipt for the purchase of the new system. The Custodian certifies that because she was unable to determine the actual cost for the compact disks, she charged the Complainant \$5.00 as established by Township's Ordinance §2-68.1G. The Custodian contends that if the Complainant had made his objection to the amount of the fee known to the Custodian, she would have attempted to accommodate the Complainant. However, the Custodian certifies that after her December 9, 2008 response to the Complainant's OPRA request, she did not hear from the Complainant until she received the Denial of Access Complaint.

The Custodian certifies that the language to which the Complainant objects is on the Township's OPRA request form for informational purposes only and is merely a condensed form of various provisions of OPRA. The Custodian also notes that the Complainant's request did not pertain to any of the exemptions listed on the Township's records request form. The Custodian contends that the Complainant could not have been misled by the Township's OPRA request form when the form merely recites the statute.

August 11, 2009⁵

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel advises the GRC that the Custodian provided the Complainant with a copy of the audio recording free of charge. The Custodian's Counsel argues that given this fact, there is no basis for the instant complaint.

December 11, 2009

E-mail from the GRC to the Custodian. The GRC requests that the Custodian provide a certification indicating the date the audio recording was disclosed to the Complainant and the circumstances surrounding same.

December 15, 2009

Certification from the Custodian to the GRC. The Custodian certifies that on August 12, 2009, she mailed the Complainant a copy of the audio recording of the Township Committee meeting requested by the Complainant free of charge.

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.

Analysis

Whether the Custodian violated OPRA by charging \$5.00 for a copy of an audio recording instead of the actual cost of duplicating 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.

OPRA sets forth the amount to be charged for a government record in printed form. Specifically, OPRA states:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the *actual cost* of duplicating the record.

Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following:

- First page to tenth page, \$0.75 per page;
- Eleventh page to twentieth page, \$0.50 per page;
- All pages over twenty, \$0.25 per page.

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

The Complainant contends that the Custodian’s charge of \$5.00 for a copy of an audio recording of the Township’s public meeting violates OPRA because said charge is greater than the actual cost of duplicating the records.

While OPRA provides that paper copies of government records may be obtained upon payment of the actual cost of duplication not to exceed the enumerated rates of \$0.75/0.50/0.25 per page (N.J.S.A. 47:1A-5.b.), the Act does not provide explicit copy rates for any other medium. N.J.S.A. 47:1A-5.b. goes on to state that the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy.

Thus, it appears that the Legislature included the central theme throughout OPRA that duplication cost should equal actual cost and when actual cost cannot be applied, the duplication cost should be reasonable. *See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006).*

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 complaint, the Complainant requested a copy of an audio recording of the Township's most recent public meeting. The Custodian responded granting access to the requested audio recording at a fee of \$5.00 plus \$1.17 in postage. The Custodian later certified that she provided a copy of the requested audio recording to the Complainant free of charge.

Therefore, pursuant to Spaulding, *supra*, Libertarian Party of Central New Jersey, *supra*, Moore, *supra*, and Dugan, *supra*, the Custodian's charge of \$5.00 for a copy of the requested audio recording is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. See also O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185. Further, the Custodian failed to bear her burden of proving that the charge was actual cost pursuant to N.J.S.A. 47:1A-6.

However, because the Custodian certified that she provided the Complainant with a copy of the requested audio recording free of charge, and because the Complainant has provided no evidence to refute this certification, the GRC declines to order disclosure of the requested audio recording.

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 alleged that the Township's OPRA request form lists personnel records, inter-agency or intra-agency advisory communications and criminal investigatory records as exempt from disclosure. The Custodian certified that the language to which the Complainant objects is for informational purposes only and is merely a condensed form of various provisions of OPRA. The Custodian contends that the Complainant could not have been misled by the Township's OPRA request form when the form merely recites the statute.

The purpose of OPRA is to provide public access to government records. However, under OPRA, not all government records are subject to public access. OPRA contains 24 specific exemptions to disclosure. Additionally, under OPRA a custodian is legally obligated to grant or deny access in accordance with the law.

In O'Shea, *supra*, the Council held that:

“[w]hile the Township's 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. 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 Township's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records.”

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 form in *O’Shea* clearly stated that various classes of records were exempt from disclosure but failed to include the exception to the rule against disclosure. 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 GRC has reviewed the Township’s official OPRA request form and finds that the Township’s form has a section entitled “Exceptions to public access to government records” that list various exemptions from disclosure but fails to state OPRA’s specific exceptions to the general rules against disclosure.

Therefore, pursuant to *O’Shea v. Township of West Milford*, GRC Complaint No. 2007-237 (May 2008), the Custodian must either remove from its form the section entitled “Exceptions to public access to government records” or amend the form to include the remainder of the applicable legal authorities governing the various exemptions listed in said section. Alternatively, the Custodian may adopt the GRC model request form in its entirety.

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 *Spaulding v. County of Passaic*, GRC Complaint No. 2004-199 (September 2006), *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), the Custodian’s charge of \$5.00 per CD for the requested audio recording of the public meeting dated February 4, 2008 is not the

actual cost and in violation of N.J.S.A. 47:1A-5.b. *See also O’Shea v. Madison Public School District (Morris)*, GRC Complaint No. 2007-185. Further, the Custodian failed to bear her burden of proving that the charge was the actual cost pursuant to N.J.S.A. 47:1A-6.

2. Pursuant to O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian must either remove from its form the section entitled “exceptions to public access to government records” or amend the form to include the remainder of the applicable legal authorities governing the various exemptions listed in said section. Alternatively, the Custodian may adopt the GRC model request form in its entirety.
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Paragraph 2 of these Findings and Recommendations set forth above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005)⁶ to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010

⁶ “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”
Jesse Wolosky v. Township of Montague (Sussex), 2009-14 – Findings and Recommendations of the Executive Director