



**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**

**January 25, 2011 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2009-15

v.

Township of Green (Sussex)  
Custodian of Record

At the January 25, 2011 public meeting, the Government Records Council (“Council”) considered the January 18, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, accepts the Administrative Law Judge’s Initial Decision dated December 28, 2010 in which the Judge approved the Notice of Settlement signed by the parties or their representatives, ordered the parties to comply with the settlement terms, and determined that these proceedings be concluded.

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

Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of January, 2011

Robin Berg Tabakin, Chair  
Government Records Council



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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: February 7, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 25, 2011 Council Meeting**

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-15**

v.

**Township of Green (Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Transcript of the most recently approved executive session minutes of the governing body, sent via either e-mail or fax.
2. Check registry data from January 1, 2003 to present, sent either via e-mail or on CD-ROM.<sup>3</sup>

**Request Made:** December 2, 2008

**Response Made:** December 9, 2008

**Custodian:** Linda Peralta

**GRC Complaint Filed:** January 5, 2009<sup>4</sup>

**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. The Custodian has complied with the intent of the Council's December 22, 2009 Interim Order by providing the Complainant access to the check registries that are maintained in the format requested, making the remaining check registries available to the Complainant by asking if he wished to receive them in PDF format, providing access by one (1) of the Complainant's preferred methods of delivery (e-mail), and providing access at the actual cost of duplication which is

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<sup>1</sup> Represented by Jonathan E. McMeen, Esq., (Sparta, NJ) and Walter M. Luers, Esq., (Oxford, NJ).

<sup>2</sup> Represented by William E. Hinkes, Esq., of Hollander, Streizik, Pasculli, Hinkes, Vandenberg & Hontz, LLC (Newton, NJ).

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

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

zero. However, because the Custodian failed to provide her completed legal certification to the GRC within the five (5) business days as ordered by the Council, the Custodian has not timely complied with the Council's December 22, 2009 Interim Order.

2. The Custodian violated N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide the requested executive session minutes by the Complainant's preferred method of delivery. However, the Custodian did ultimately grant the Complainant access to the executive session minutes by one of his preferred methods of delivery (facsimile). Additionally, while the Custodian improperly charged the Complainant \$25.00 for a CD-ROM of the requested check registry data pursuant to N.J.S.A. 47:1A-5.b., the Custodian ultimately complied with the intent of the Council's December 22, 2009 Interim Order by providing the Complainant access to the check registries that are maintained in the format requested, making the remaining check registries available to the Complainant by asking if he wished to receive them in PDF format, providing access by one (1) of the Complainant's preferred methods of delivery (e-mail), and providing access at the actual cost of duplication which is zero. However, because the Custodian failed to provide her completed legal certification to the GRC within the five (5) business days as ordered by the Council, the Custodian has not timely complied with the Council's December 22, 2009 Interim Order. Further, although the Township's OPRA request form initially violated OPRA because it contained misinformation regarding access to police investigation reports, the Custodian ultimately adopted the GRC's Model Request Form. Moreover, there is no evidence in the record suggesting that the Custodian's actions which amounted to her various violations of OPRA were intentional and deliberate, with knowledge of their wrongfulness and not merely negligent, heedless or unintentional. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's December 22, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian disclosed to the Complainant the requested executive session minutes by the Complainant's preferred method of delivery, the Custodian provided the Complainant access to the requested check registry data in the medium requested at the actual cost, and the Custodian adopted the GRC's Model Request Form. 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. The Custodian did not provide the Complainant access to the requested records in the medium requested or by the preferred method of delivery until after the filing of this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law. Specifically, N.J.S.A. 47:1A-5.d. provides that custodians must provide access to the requested records in the medium requested. 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.

**March 1, 2010**

Council's Interim Order distributed to the parties.

**June 23, 2010**

Complaint transmitted to the Office of Administrative Law ("OAL").

**December 28, 2010**

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

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

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

**Analysis**

No analysis required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council accept the Administrative Law Judge's Initial Decision dated December 28, 2010 in which the Judge approved the Notice of Settlement signed by the parties or their representatives, ordered the parties to comply with the settlement terms, and determined that these proceedings be concluded.

Prepared By: Dara Lownie  
Communications Manager/Information Specialist

Approved By: Catherine Starghill, Esq.  
Executive Director

January 18, 2011



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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Acting Commissioner*

**INTERIM ORDER**

**February 23, 2010 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2009-15

v.

Township of Green (Sussex)  
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the intent of the Council’s December 22, 2009 Interim Order by providing the Complainant access to the check registries that are maintained in the format requested, making the remaining check registries available to the Complainant by asking if he wished to receive them in PDF format, providing access by one (1) of the Complainant’s preferred methods of delivery (e-mail), and providing access at the actual cost of duplication which is zero. However, because the Custodian failed to provide her completed legal certification to the GRC within the five (5) business days as ordered by the Council, the Custodian has not timely complied with the Council’s December 22, 2009 Interim Order.
2. The Custodian violated N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide the requested executive session minutes by the Complainant’s preferred method of delivery. However, the Custodian did ultimately grant the Complainant access to the executive session minutes by one of his preferred methods of delivery (facsimile). Additionally, while the Custodian improperly charged the Complainant \$25.00 for a CD-ROM of the requested check registry data pursuant to N.J.S.A. 47:1A-5.b., the Custodian ultimately complied with the intent of the Council’s December 22, 2009 Interim Order by providing the Complainant access to the check registries that are maintained in the format requested, making the remaining check registries available to the Complainant by asking if he wished to receive them in PDF format, providing access by one (1) of the Complainant’s preferred methods of delivery (e-mail), and providing access at



the actual cost of duplication which is zero. However, because the Custodian failed to provide her completed legal certification to the GRC within the five (5) business days as ordered by the Council, the Custodian has not timely complied with the Council's December 22, 2009 Interim Order. Further, although the Township's OPRA request form initially violated OPRA because it contained misinformation regarding access to police investigation reports, the Custodian ultimately adopted the GRC's Model Request Form. Moreover, there is no evidence in the record suggesting that the Custodian's actions which amounted to her various violations of OPRA were intentional and deliberate, with knowledge of their wrongfulness and not merely negligent, heedless or unintentional. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's December 22, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian disclosed to the Complainant the requested executive session minutes by the Complainant's preferred method of delivery, the Custodian provided the Complainant access to the requested check registry data in the medium requested at the actual cost, and the Custodian adopted the GRC's Model Request Form. 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. The Custodian did not provide the Complainant access to the requested records in the medium requested or by the preferred method of delivery until after the filing of this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law. Specifically, N.J.S.A. 47:1A-5.d. provides that custodians must provide access to the requested records in the medium requested. 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 23<sup>rd</sup> Day of February, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: March 1, 2010**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-15**

**v.**

**Township of Green (Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Transcript of the most recently approved executive session minutes of the governing body, sent either via e-mail or fax.
2. Check registry data from January 1, 2003 to present, sent either via e-mail or on CD-ROM.<sup>3</sup>

**Request Made:** December 2, 2008

**Response Made:** December 9, 2008

**Custodian:** Linda Peralta

**GRC Complaint Filed:** January 5, 2009<sup>4</sup>

**Background**

**December 22, 2009**

Government Records Council's ("Council") Interim Order. At its December 22, 2009 public meeting, the Council considered the December 2, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian made the requested executive session minutes available to the Complainant within the statutorily mandated seven (7) business days, the Custodian violated OPRA at N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide said records to the Complainant by the Complainant's preferred method of delivery when the Custodian had the capability to do so. See O'Shea v. Township of Fredon (Sussex), GRC

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<sup>1</sup> Represented by Jonathan E. McMeen, Esq., (Sparta, NJ) and Walter M. Luers, Esq., (Oxford, NJ).

<sup>2</sup> Represented by William E. Hinkes, Esq., of Hollander, Streizik, Pasculli, Hinkes, Vandenberg & Hontz, LLC (Newton, NJ).

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

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

Complaint No. 2007-251 (April 2008), and Paff v. Borough of Sussex (Sussex), GRC Complaint No. 2008-38 (July 2008). However, the Custodian provided the requested executive session minutes to the Complainant via facsimile on January 9, 2009.

2. Because the Custodian certified that the requested deposit of \$25.00 was not a charge for the actual cost of any amount of CDs or a charge for actual labor cost, said charge is improper pursuant to N.J.S.A. 47:1A-5.b. As such, the Custodian must disclose to the Complainant the requested check registry upon payment of the actual cost of the CD-ROM pursuant to N.J.S.A. 47:1A-5.b. (it is unlikely that the actual cost of the CD-ROM is \$5.00). See Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) (holding that “[t]he imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication”).
3. **The Custodian shall comply with item # 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> to the Executive Director. The Custodian must include in said certification the actual cost of the CD-ROM which is likely less than \$5.00.**
4. The statement contained on the Township’s OPRA request form which indicates that police investigation reports are exempt from public access under OPRA is misleading because said statement fails to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. As such, pursuant to O’Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008), a requestor may be deterred from submitting an OPRA request for certain police investigation reports because the Township’s form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records.

However, the Custodian certified in her Statement of Information that the municipality is currently in the process of adopting the model form published by the GRC. The GRC accessed the Township’s OPRA request form from its website on October 7, 2009. The form posted to the website is the GRC’s Model Request Form. As such, the Council declines to order the Custodian to amend its OPRA request form.

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the

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<sup>5</sup> "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 Green (Sussex), 2009-15 – Supplemental Findings and Recommendations of the Executive Director 2

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 29, 2009**

Council's Interim Order distributed to the parties.

**January 5, 2010**

E-mail from Custodian to Complainant. The Custodian states that she has attached the check registers for the Township's main checking account and escrow account for the years 2004-2008. The Custodian states that she is unable to immediately provide said registers for the year 2003 because said year predated the Township's computer system.

The Custodian also states that she is unable to provide the Township's payroll check registers for the years 2003-2008 because they are maintained in paper format and are in storage.

Additionally, the Custodian states that she has attached the Township's disbursement journals for the years 2004-2008, which provide the requested data tables. The Custodian states that she is unable to immediately provide said journals for the year 2003 because said year predated the Township's computer system.

The Custodian states that she can provide the remaining records responsive to the Complainant electronically after the original records are retrieved from storage and scanned. The Custodian asks the Complainant if he wishes to receive said records electronically since he previously requested that he did not want records in PDF format.

**January 5, 2010<sup>6</sup>**

Custodian's response to the Council's Interim Order. The Custodian certifies that although the Council's Interim Order directed her to provide the check registry data to the Complainant on a CD-ROM, the Custodian provided most of the requested records via e-mail attachment, as was originally requested by the Complainant. The Custodian certifies that she provided the Complainant with the check registers and disbursement journals from 2004-2008 free of charge with no redactions.

The Custodian also certifies that she informed the Complainant that the payroll check registers for the years 2003-2008 and all other check registers for the year 2003 were maintained in paper format. The Custodian certifies that she advised the Complainant that said records could be scanned and produced electronically but could not be provided in non-PDF format as the Complainant requested.

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<sup>6</sup> The Custodian's certification is dated January 5, 2010; however, the GRC received said certification on January 6, 2010.

**January 5, 2010**

E-mail from GRC to Custodian's Counsel. The GRC asks Counsel to identify the date on which the Custodian provided her e-mail response to the Complainant.

**January 5, 2010**

E-mail from Custodian's Counsel to GRC. Counsel states that the Complainant sent her e-mail to the GRC on January 5, 2010.

**January 11, 2010**

E-mail from Complainant to GRC. The Complainant states that pursuant to the Council's Interim Order, the Custodian was to provide certified confirmation of compliance using the following language: "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." However, the Complainant states that the Custodian's certification includes the following language: "I certify that the above statements are true to the best of my knowledge. I am aware that if any of the above statements are willfully false."

Additionally, the Complainant asserts that the Custodian did not comply with the Council's Interim Order to provide the requested check registry data on a CD-ROM. The Complainant contends that providing the records took approximately ten (10) minutes and that his minimal effort could have taken place when the Complainant initially submitted his OPRA request.

Further, the Complainant states that the Custodian's response to his OPRA request was that at least one (1) CD-ROM would be required to provide the check registry data. However, the Complainant claims that the Custodian's statement is false because she did not have to use one (1) CD-ROM and instead e-mailed the requested records. The Complainant questions how much a CD-ROM costs and why the Custodian did not place the requested records on a CD-ROM as ordered by the Council.

**January 12, 2010**

E-mail from GRC to Custodian's Counsel. The GRC states that it appears the Custodian's certification was cut off at the end of the second sentence. The GRC requests that the Custodian re-send her certification using the following language: "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."

**January 13, 2010**

Custodian's re-submission of her certification with the following language: "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."

**January 13, 2010**

E-mail from Custodian's Counsel to GRC. Counsel states that the Custodian provided the requested check registry data via e-mail because the Complainant's OPRA request specifically requested said records either via e-mail or CD-ROM. Thus, Counsel contends that the Custodian complied with the Complainant's original OPRA request.

## Analysis

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

The Council's December 22, 2009 Interim Order directed the Custodian to disclose to the Complainant the requested check registry upon payment of the actual cost of the CD-ROM. The Council's Order also directed the Custodian to provide the GRC with certified confirmation of compliance. The Council ordered the Custodian to comply with its Interim Order within five (5) business days from receipt of said Order. The GRC distributed said Order to all parties on December 29, 2009 making the five (5) business day deadline January 6, 2010.

On January 5, 2010, the Custodian provided the Complainant with an e-mail response wherein the Custodian provided the Complainant with the following records responsive to his OPRA request:

1. Main checking and escrow account check registers for the years 2004-2008.
2. Disbursement journals for the years 2004-2008.

In said response, the Custodian also advised the Complainant that the following records were currently maintained in paper format and could be provided in PDF format once scanned:

1. Payroll check registers for the years 2003-2008.
2. Main checking and escrow account check registers for the year 2003.
3. Disbursement journals for the year 2003.

The Custodian asked the Complainant if he wished to receive these records once scanned, despite not being available in non-PDF format as originally requested.

Additionally, on January 6, 2010, the Custodian provided the GRC with her legal certification in which she certified that she provided the Complainant with all the records maintained electronically via e-mail free of charge with no redactions. The Custodian also certified that she advised the Complainant that the records maintained in paper format could be scanned and provided in PDF format.

However, on January 11, 2010, the Complainant e-mailed the GRC to advise that the Custodian's legal certification was incomplete because she failed to include the following language at the end of her certification "I am subject to punishment." The Complainant also asserted that because the Custodian provided the requested check registry data via e-mail and not CD-ROM as was ordered by the Council, the Custodian has not complied with the Council's Interim Order. Further, the Complainant questioned why the Custodian could not have provided said records via e-mail when the Complainant originally submitted his OPRA request.

On January 13, 2010, the Custodian re-submitted her legal certification to the GRC containing the full text of the certification language pursuant to N.J. Court Rule 1:4-

4. In said certification, the Custodian certified that she provided said records to the Complainant via e-mail because that is how the Complainant indicated he wished to receive said records in his OPRA request.

On January 5, 2010, within the five (5) business days as ordered by the Council, the Custodian provided the Complainant with the requested check registries that were available in the requested format. Additionally, the Custodian offered to make the remaining check registries available to the Complainant in PDF format if he wished because said registries are maintained in paper format and must be scanned to provide electronically. The Custodian made the requested check registries available to the Complainant via e-mail rather than on CD-ROM as ordered by the Council. The Complainant's OPRA request sought the check registry data from January 1, 2003 to present sent either via e-mail or on CD-ROM. Thus, although the Council directed the Custodian to provide said records via CD-ROM, pursuant to the Complainant's OPRA request, e-mail was also a sufficient method of delivery.

The Complainant questioned why the Custodian did not provide the records via e-mail after the Complainant submitted his OPRA request. However, the Complainant indicated that he sought access to said records via e-mail *or* CD-ROM. At the time of the Complainant's request, the Custodian chose to attempt to fulfill said request via CD-ROM. Thus, the Council's analysis was based on the Custodian's improper \$25.00 fee to provide records on CD-ROM because said fee did not reflect the actual cost of duplication pursuant to N.J.S.A. 47:1A-5.b. As such, the Council ordered the Custodian to provide said records upon the Complainant's payment of the actual cost of the CD-ROM.

Nevertheless, the Custodian's action of providing the records to the Complainant via e-mail adheres to the intent of the Council's Interim Order, even though said action does not adhere to the exact wording of the Order. The intent of the Order was for the Custodian to provide the Complainant access to the requested records in the medium requested upon payment of the actual cost of duplication. The Custodian did just that. She provided the Complainant access to the check registries that are maintained in the format requested; she made the remaining check registries available to the Complainant asking if he wished to receive them in PDF format; she provided access by one (1) of the Complainant's preferred methods of delivery (e-mail); and she provided access at the actual cost of duplication which is zero.

However, the Custodian failed to provide her completed legal certification to the GRC within the five (5) business days as ordered by the Council.

Therefore, the Custodian has complied with the intent of the Council's December 22, 2009 Interim Order by providing the Complainant access to the check registries that are maintained in the format requested, making the remaining check registries available to the Complainant asking if he wished to receive them in PDF format, providing access by one (1) of the Complainant's preferred methods of delivery (e-mail), and providing access at the actual cost of duplication which is zero. However, because the Custodian failed to provide her completed legal certification to the GRC within the five (5) business

days as ordered by the Council, the Custodian has not timely complied with the Council's December 22, 2009 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.

In the Council's December 22, 2009 Interim Order, the Council held that the Custodian violated OPRA at N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide the requested executive session minutes to the Complainant by the Complainant's preferred method of delivery when the Custodian had the capability to do so.

The Council also held that because the Custodian certified that the requested deposit of \$25.00 was not a charge for the actual cost of any amount of CDs or a charge for actual labor cost, said charge is improper pursuant to N.J.S.A. 47:1A-5.b. As such, the Council ordered the Custodian to disclose to the Complainant the requested check registry upon payment of the actual cost of the CD-ROM pursuant to N.J.S.A. 47:1A-5.b. The Council directed the Custodian to provide said records to the Complainant 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,<sup>7</sup> to the Executive Director. Also, the Council directed the Custodian to include in her certification the actual cost of the CD-ROM.

As previously stated in these Supplemental Findings and Recommendations of the Executive Director, the Custodian has complied with the intent of the Council's December 22, 2009 Interim Order by providing the Complainant access to the check registries that are maintained in the format requested, making the remaining check registries available to the Complainant by asking if he wished to receive them in PDF

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<sup>7</sup> "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 Green (Sussex), 2009-15 – Supplemental Findings and Recommendations of the Executive Director 7

format, providing access by one (1) of the Complainant's preferred methods of delivery (e-mail), and providing access at the actual cost of duplication which is zero. However, because the Custodian failed to provide her completed legal certification to the GRC within the five (5) business days as ordered by the Council, the Custodian has not timely complied with the Council's December 22, 2009 Interim Order.

Further, the Council held in its December 22, 2009 Interim Order that the statement contained on the Township's OPRA request form which indicates that police investigation reports are exempt from public access under OPRA is misleading because said statement fails to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. The Council concluded that pursuant to O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008), a requestor may be deterred from submitting an OPRA request for certain police investigation reports because the Township's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records.

However, the Council noted that the GRC accessed the Township's OPRA request form from its website on October 7, 2009. The form posted to the website is the GRC's Model Request Form. As such, the Council declined to order the Custodian to amend its OPRA request form.

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

In this instant complaint, the Custodian violated N.J.S.A. 47:1A-5.d and N.J.S.A. 47:1A-5.g by failing to provide the requested executive session minutes by the Complainant's preferred method of delivery. However, the Custodian did ultimately grant the Complainant access to the executive session minutes by one of his preferred methods of delivery (facsimile). Additionally, while the Custodian improperly charged the Complainant \$25.00 for a CD-ROM of the requested check registry data pursuant to N.J.S.A. 47:1A-5.b., the Custodian ultimately complied with the intent of the Council's December 22, 2009 Interim Order by providing the Complainant access to the check registries that are maintained in the format requested, making the remaining check registries available to the Complainant asking if he wished to receive them in PDF format, providing access by one (1) of the Complainant's preferred methods of delivery (e-mail), and providing access at the actual cost of duplication which is zero. However, because the Custodian failed to provide her completed legal certification to the GRC



within the five (5) business days as ordered by the Council, the Custodian has not timely complied with the Council's December 22, 2009 Interim Order. Further, although the Township's OPRA request form initially violated OPRA because it contained misinformation regarding access to police investigation reports, the Custodian ultimately adopted the GRC's Model Request Form. Moreover, there is no evidence in the record suggesting that the Custodian's actions which amounted to her various violations of OPRA were intentional and deliberate, with knowledge of their wrongfulness and not merely negligent, heedless or unintentional. 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 OPRA, N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award

of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

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

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

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

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

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-

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

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

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

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

attorney's fee award than was allowed by the majority in Buckhannon . . . .  
." *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

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

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

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

In this instant complaint filed on January 5, 2009, the Complainant sought a finding that the Custodian violated OPRA by not providing a copy of the requested executive session minutes in the medium requested. In its December 22, 2009 Interim Order, the Council held that the Custodian violated OPRA at N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide the requested executive session minutes to the Complainant by the Complainant's preferred method of delivery when the Custodian had the capability to do so. However, the Council also noted that the Custodian provided the requested executive session minutes to the Complainant via facsimile on January 9, 2009, four (4) business days following the filing of this Denial of Access Complaint.

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<sup>8</sup> 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.

Additionally, the Complainant sought a finding that the Custodian violated OPRA by demanding a \$25.00 deposit to produce a CD-ROM of the requested check registry. The Council held that because the Custodian certified that the requested deposit of \$25.00 was not a charge for the actual cost of any amount of CDs or a charge for actual labor cost, said charge is improper pursuant to N.J.S.A. 47:1A-5.b. As such, the Council ordered the Custodian to disclose to the Complainant the requested check registry upon payment of the actual cost of the CD-ROM pursuant to N.J.S.A. 47:1A-5.b. The Council directed the Custodian to provide said records to the Complainant 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,<sup>9</sup> to the Executive Director. Also, the Council directed the Custodian to include in her certification the actual cost of the CD-ROM.

As previously stated in these Findings and Recommendations of the Executive Director, the Custodian has complied with the intent of the Council's December 22, 2009 Interim Order by providing the Complainant access to the check registries that are maintained in the format requested, making the remaining check registries available to the Complainant asking if he wished to receive them in PDF format, providing access by one (1) of the Complainant's preferred methods of delivery (e-mail), and providing access at the actual cost of duplication which is zero.

Further, the Complainant sought a finding that the Township's OPRA request form violates OPRA because it is false and misleading. The Council held that the statement contained on the Township's OPRA request form which indicates that police investigation reports are exempt from public access under OPRA is misleading because said statement fails to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. The Council concluded that pursuant to O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008), a requestor may be deterred from submitting an OPRA request for certain police investigation reports because the Township's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records. However, the Council noted that the GRC accessed the Township's OPRA request form from its website on October 7, 2009. The form posted to the website is the GRC's Model Request Form. As such, the Council declined to order the Custodian to amend its OPRA request form.

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. Specifically, the Custodian disclosed to the Complainant the requested executive session minutes by the Complainant's preferred method of delivery, the Custodian provided the Complainant access to the requested check registry data in the medium requested at the actual cost, and the Custodian adopted the GRC's Model Request Form. 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. The Custodian did not provide the Complainant access to the requested records in the medium requested or by the

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<sup>9</sup> "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 Green (Sussex), 2009-15 – Supplemental Findings and Recommendations of the Executive Director 13

preferred method of delivery until after the filing of this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law. Specifically, N.J.S.A. 47:1A-5.d. provides that custodians must provide access to the requested records in the medium requested. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the intent of the Council's December 22, 2009 Interim Order by providing the Complainant access to the check registries that are maintained in the format requested, making the remaining check registries available to the Complainant by asking if he wished to receive them in PDF format, providing access by one (1) of the Complainant's preferred methods of delivery (e-mail), and providing access at the actual cost of duplication which is zero. However, because the Custodian failed to provide her completed legal certification to the GRC within the five (5) business days as ordered by the Council, the Custodian has not timely complied with the Council's December 22, 2009 Interim Order.
  
2. The Custodian violated N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide the requested executive session minutes by the Complainant's preferred method of delivery. However, the Custodian did ultimately grant the Complainant access to the executive session minutes by one of his preferred methods of delivery (facsimile). Additionally, while the Custodian improperly charged the Complainant \$25.00 for a CD-ROM of the requested check registry data pursuant to N.J.S.A. 47:1A-5.b., the Custodian ultimately complied with the intent of the Council's December 22, 2009 Interim Order by providing the Complainant access to the check registries that are maintained in the format requested, making the remaining check registries available to the Complainant by asking if he wished to receive them in PDF format, providing access by one (1) of the Complainant's preferred methods of delivery (e-mail), and providing access at the actual cost of duplication which is zero. However, because the Custodian failed to provide her completed legal certification to the GRC within the five (5) business days as ordered by the Council, the Custodian has not timely complied with the Council's December 22, 2009 Interim Order. Further, although the Township's OPRA request form initially violated OPRA because it contained misinformation regarding access to police investigation reports, the Custodian ultimately adopted the GRC's Model Request Form. Moreover, there is no evidence in the record suggesting that the Custodian's actions which amounted to her various violations of OPRA were intentional and deliberate, with knowledge of their wrongfulness and not merely negligent, heedless or unintentional. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's December 22, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian disclosed to the Complainant the requested executive session minutes by the Complainant's preferred method of delivery, the Custodian provided the Complainant access to the requested check registry data in the medium requested at the actual cost, and the Custodian adopted the GRC's Model Request Form. 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. The Custodian did not provide the Complainant access to the requested records in the medium requested or by the preferred method of delivery until after the filing of this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law. Specifically, N.J.S.A. 47:1A-5.d. provides that custodians must provide access to the requested records in the medium requested. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

February 16, 2010



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

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

**INTERIM ORDER**

**December 22, 2009 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2009-15

v.

Township of Green (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. Although the Custodian made the requested executive session minutes available to the Complainant within the statutorily mandated seven (7) business days, the Custodian violated OPRA at N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide said records to the Complainant by the Complainant’s preferred method of delivery when the Custodian had the capability to do so. See O’Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), and Paff v. Borough of Sussex (Sussex), GRC Complaint No. 2008-38 (July 2008). However, the Custodian provided the requested executive session minutes to the Complainant via facsimile on January 9, 2009.
2. Because the Custodian certified that the requested deposit of \$25.00 was not a charge for the actual cost of any amount of CDs or a charge for actual labor cost, said charge is improper pursuant to N.J.S.A. 47:1A-5.b. As such, the Custodian must disclose to the Complainant the requested check registry upon payment of the actual cost of the CD-ROM pursuant to N.J.S.A. 47:1A-5.b. (it is unlikely that the actual cost of the CD-ROM is \$5.00). See Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) (holding that “[t]he imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication”).





3. **The Custodian shall comply with item # 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director. The Custodian must include in said certification the actual cost of the CD-ROM which is likely less than \$5.00.**
4. The statement contained on the Township's OPRA request form which indicates that police investigation reports are exempt from public access under OPRA is misleading because said statement fails to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. As such, pursuant to O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008), a requestor may be deterred from submitting an OPRA request for certain police investigation reports because the Township's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records.

However, the Custodian certified in her Statement of Information that the municipality is currently in the process of adopting the model form published by the GRC. The GRC accessed the Township's OPRA request form from its website on October 7, 2009. The form posted to the website is the GRC's Model Request Form. As such, the Council declines to order the Custodian to amend its OPRA request form.

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 22<sup>nd</sup> 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.

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<sup>1</sup> "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."

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: December 29, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-15**

v.

**Township of Green (Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Transcript of the most recently approved executive session minutes of the governing body, sent either via e-mail or fax.
2. Check registry data from January 1, 2003 to present, sent either via e-mail or on CD-ROM.<sup>3</sup>

**Request Made:** December 2, 2008

**Response Made:** December 9, 2008

**Custodian:** Linda Peralta

**GRC Complaint Filed:** January 5, 2009<sup>4</sup>

**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 9, 2008**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5<sup>th</sup>) business day following receipt of such request. The Custodian states that a copy of the most recently approved executive session minutes is available for \$0.75. The Custodian also states that it is difficult to predict the number of CDs that will be required to fulfill the Complainant's request for check registry data. The Custodian states that because at least one (1) CD will be required, a \$25.00 deposit is requested to begin the process.

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<sup>1</sup> Represented by Jonathan E. McMeen, Esq., (Sparta, NJ) and Walter M. Luers, Esq., (Oxford, NJ).

<sup>2</sup> Represented by William E. Hinkes, Esq., of Hollander, Streizik, Pasculli, Hinkes, Vandenberg & Hontz, LLC (Newton, NJ).

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

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

**January 5, 2009**

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

- Complainant’s OPRA request dated December 2, 2008
- Custodian’s response to the Complainant’s OPRA request dated December 9, 2008

The Complainant states that he submitted his OPRA request on December 2, 2008 for records to be sent either by e-mail, fax, or on CD-ROM. The Complainant states that the Custodian provided a written response dated December 9, 2008 via facsimile and regular mail in which the Custodian sought a \$25.00 deposit before releasing the requested check register data, as well as \$0.75 for the release of the most recent executive session minutes.

The Complainant asserts that the Custodian violated OPRA because she failed to provide the requested records in the medium requested. The Complainant states that pursuant to N.J.S.A. 47:1A-5.d., “a custodian shall permit access to a government record and provide a copy thereof in the medium requested.” The Complainant states that he sought access to a copy of the most recent governing body executive session minutes via either e-mail or fax. The Complainant states that the Custodian ignored his request to receive the minutes via e-mail or fax and attempted to charge \$0.75 for a copy that would be made available. The Complainant asserts that the Township maintains both a fax machine and an e-mail system, yet failed to provide the record in the medium requested. As such, the Complainant asserts that the Custodian unlawfully denied access to the record.

Additionally, the Complainant states that pursuant to N.J.S.A. 47:1A-5.d.,<sup>5</sup> “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.” The Complainant states that the Custodian indicated that at least one (1) CD-ROM would be used to fulfill his OPRA request for the check registry and asked for a \$25.00 deposit to begin the process. The Complainant states that the Custodian did not provide any explanation regarding how she calculated said fee. The Complainant states that the GRC has previously recognized that blank CD-ROMs do not cost more than \$5.00. See Renna v. Township of Warren, GRC Complaint No. 2008-40 (November 2008 Interim Order); O’Shea v. Madison Public School District, GRC Complaint No. 2007-185 (April 2008 Interim Order)(invalidating \$31.50 charge for CD); O’Shea v. Township of Vernon, GRC Complaint No. 2007-207 (April 2008 Interim Order)(invalidating \$35.00 charge for CD).

Further, the Complainant asserts that if the Custodian is attempting to charge a special service charge pursuant to N.J.S.A. 47:1A-5.c., such a charge is not warranted here because fulfilling the request does not require an extraordinary amount of time and effort. The Complainant contends that the Custodian’s \$25.00 charge is arbitrary.

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<sup>5</sup> N.J.S.A. 47:1A-5.b.

The Complainant also claims that the Township's OPRA request form is misleading. The Complainant states that in O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008), the GRC held that if a public agency's OPRA form contained false or misleading information about OPRA, that constituted a denial of access. The Complainant states that the Township's OPRA request form indicates that police investigation reports are exempt from public access under OPRA. However, the Complainant asserts that said statement ignores the exceptions contained in N.J.S.A. 47:1A-3.b.

Moreover, the Complainant requests the following relief from the Council:

1. a finding that the Custodian violated OPRA by not providing a copy of the requested executive session minutes in the medium requested;
2. a finding that the Custodian violated OPRA by demanding a \$25.00 deposit to produce a CD-ROM of the requested check registry;
3. an order compelling the Custodian to disclose the requested executive session minutes to the Complainant;
4. a finding that the Township's OPRA request form violates OPRA because it is false and misleading;
5. a finding that the Complainant is a prevailing party and entitled to an award of prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6.

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

### **January 9, 2009**

Letter from Custodian to Complainant (via fax). The Custodian states that she has reviewed the Complainant's Denial of Access Complaint. The Custodian states that because it is now clear that a response to an OPRA request by fax is acceptable to the Complainant, she has enclosed the requested executive session minutes.

### **January 15, 2009**

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

### **January 22, 2009**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated December 2, 2008
- Custodian's response to the Complainant's OPRA request dated December 9, 2008
- Letter from Custodian to Complainant dated January 9, 2009

The Custodian certifies that she received the Complainant's OPRA request on December 2, 2008. The Custodian certifies that at the time of said request, she did not notice that the Complainant sought access to the executive session minutes via e-mail or fax. As such, the Custodian certifies that she provided the Complainant with a written response dated December 9, 2008 in which the Custodian stated that she would make said minutes available upon payment of \$0.75. The Custodian certifies that when she received the Complainant's Denial of Access Complaint, she realized that he sought

access to the executive session minutes via e-mail or fax. The Custodian certifies that she faxed said minutes to the Complainant on January 9, 2008.

Additionally, the Custodian certifies that in response to the Complainant's request for check registry data, the Custodian consulted with the Chief Financial Officer ("CFO") to determine what would be required to produce the requested records. The Custodian certifies that the CFO informed her that she could not be certain until she began processing the request. The Custodian certifies that she asked the Complainant for a \$25.00 deposit, which was not a charge for any amount of CDs or a charge for labor. The Custodian certifies that since her initial response to the Complainant's OPRA request, she has been advised by the computer consultant that the data requested can be provided on one (1) CD, which would require a \$5.00 copying charge.

Further, regarding the Township's OPRA request form, the Custodian certifies that she has recently learned that the Council determined that reference to examples of non-disclosable records such as personnel files is misleading and the Township is currently in the process of adopting the model form published by the GRC.

### Analysis

#### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA mandates that:

"[a] copy or copies of a government record may be purchased by any person...upon payment of the *actual cost* of duplicating the record...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..." (Emphasis added). N.J.S.A. 47:1A-5.b.

OPRA also provides that:

“[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium...” N.J.S.A. 47:1A-5.d.

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 certified that she received the Complainant’s OPRA request on December 2, 2008. The Custodian certified that at the time of said request, she did not notice that the Complainant sought access to the executive session minutes via e-mail or fax. As such, the Custodian certified that she provided the Complainant with a written response dated December 9, 2008 in which the Custodian stated that she would make said minutes available upon payment of \$0.75. The Complainant asserts that the Custodian violated OPRA by failing to provide the requested executive session minutes in the medium requested.

OPRA provides that a custodian must provide access to a requested record in the medium requested. N.J.S.A. 47:1A-5.d. In this complaint, the Complainant’s preferred medium was either electronic, for e-mail delivery, or paper for fax delivery.

Additionally, the Council has previously held that a custodian must also provide access to a requested record by the Complainant’s preferred method of delivery. Specifically, in O’Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), the Complainant elaborated in his request that a preference of e-mailing the requested records over having to pay copying costs would be ideal. The Council held that “[a]ccording to language of N.J.S.A. 47:1A-5.g., the Custodian was given two ways to comply and should have, therefore, responded acknowledging the Complainant’s preferences with a sufficient response for each.” The Council further held that “[a]lthough the Custodian responded in writing granting access to Items No. 1 and No. 3 in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response is insufficient because she failed to specifically address the Complainant’s preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g.”

Further, in Paff v. Borough of Sussex (Sussex), GRC Complaint No. 2008-38 (July 2008), the Complainant requested that the records be provided by e-mail or facsimile and the Custodian failed to address the method of delivery. The Council held that “while the Custodian may not have had the ability to scan and e-mail the requested record at the time of the request, the Custodian still had the ability to transmit documents via facsimile. Because the Custodian had the proper means to produce the requested paper record via facsimile, the Custodian has violated N.J.S.A. 47:1A-5.d.”

Similarly in this instant complaint, the Custodian did provide the Complainant with a written response within the statutorily mandated seven (7) business days and made the requested records available; however, the Custodian failed to provide said records to the Complainant via either e-mail or fax because the Custodian certified that at the time of said request, she did not notice that the Complainant sought access to the executive session minutes via e-mail or fax.

Therefore, although the Custodian made the requested executive session minutes available to the Complainant within the statutorily mandated seven (7) business days, the Custodian violated OPRA at N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide said records to the Complainant by the Complainant’s preferred method of delivery when the Custodian had the capability to do so. See O’Shea, supra, and Paff, supra. However, the Custodian provided the requested executive session minutes to the Complainant via facsimile on January 9, 2009.

Regarding the Complainant’s request for check registry data from January 1, 2003 to present, the Complainant sought access to said records either via e-mail or CD-ROM. The Custodian certified that she consulted with the Chief Financial Officer (“CFO”) to determine what would be required to produce the requested records. The Custodian certified that the CFO informed her that she could not be certain until she began processing the request. The Custodian certified that she asked the Complainant for a \$25.00 deposit, which was not a charge for any amount of CDs or a charge for labor. The Complainant asserts that the Custodian violated OPRA by demanding a \$25.00 deposit rather than charging the actual cost of the CD-ROM.

OPRA mandates that a custodian must charge the actual cost of duplicating the record. N.J.S.A. 47:1A-5.b. OPRA further states that the actual cost shall reflect the cost of materials and supplies used to make the copy but shall not include the cost of labor or any overhead expenses. The Custodian certified in her SOI that since her initial response to the Complainant’s OPRA request, she has been advised by the computer consultant that the data requested can be provided on one (1) CD which would require a \$5.00 copying charge. The Custodian does not indicate whether the actual cost of the CD is \$5.00.

Therefore, because the Custodian certified that the requested deposit of \$25.00 was not a charge for the actual cost of any amount of CDs or a charge for actual labor cost, said charge is improper pursuant to N.J.S.A. 47:1A-5.b. As such, the Custodian must disclose to the Complainant the requested check registry upon payment of the actual cost of the CD-ROM pursuant to N.J.S.A. 47:1A-5.b. (it is unlikely that the actual cost of the CD-ROM is \$5.00). See Libertarian Party of Central New Jersey v. Murphy, 384 N.J.



Super. 136 (App. Div. 2006) (holding that “[t]he imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication”).

### **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 claims that the Township’s OPRA request form is misleading. The Complainant states that in O’Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008), the GRC held that if a public agency’s OPRA form contained false or misleading information about OPRA, that constituted a denial of access. The Complainant states that the Township’s OPRA request form indicates that police investigation reports are exempt from public access under OPRA. However, the Complainant asserts that said statement ignores the exceptions contained in N.J.S.A. 47:1A-3.b.

OPRA at N.J.S.A. 47:1A-3.b. specifically states that:

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

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

Notwithstanding any other provision of this subsection, where it shall appear that the information requested or to be examined will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release, such information may be withheld. This exception shall be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety. Whenever a law enforcement official determines that it is necessary to withhold information, the official shall issue a brief statement explaining the decision.”

OPRA does exempt from public access criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. However, in Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2009), the Council held that:

“...a police arrest report, is required to be maintained or kept on file by the Division of Archives and Records Management, therefore it is a government record subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. Further, this record contains certain information such as the arrested person’s name, age, residence, occupation, marital status, time and place

of arrest, charges, arresting agency, and other information which must be disclosed pursuant to N.J.S.A. 47:1A-3.b. Accordingly, this record must be released with appropriate redactions.”

Thus, an arrest report is a police investigation report that is partially subject to public access.

In O’Shea, supra, the Council held that “while 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.” Similarly in this instant complaint, the Township’s OPRA request form advises requestors that police investigation reports are exempt from public access but fails to also inform requestors that portions of arrest reports are subject to public access pursuant to N.J.S.A. 47:1A-3.b. The Council also held in O’Shea, supra, that “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.” Similarly in this instant complaint, a requestor may be deterred from submitting an OPRA request for certain police investigation reports because the Township’s form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records.

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

However, the Custodian certified in her SOI that the municipality is currently in the process of adopting the model form published by the GRC. The GRC accessed the Township’s OPRA request form from its website on October 7, 2009. The form posted to the website is the GRC’s Model Request Form. As such, the Council declines to order the Custodian to amend its OPRA request form.

**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?**

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. Although the Custodian made the requested executive session minutes available to the Complainant within the statutorily mandated seven (7) business days, the Custodian violated OPRA at N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide said records to the Complainant by the Complainant's preferred method of delivery when the Custodian had the capability to do so. See O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), and Paff v. Borough of Sussex (Sussex), GRC Complaint No. 2008-38 (July 2008). However, the Custodian provided the requested executive session minutes to the Complainant via facsimile on January 9, 2009.
2. Because the Custodian certified that the requested deposit of \$25.00 was not a charge for the actual cost of any amount of CDs or a charge for actual labor cost, said charge is improper pursuant to N.J.S.A. 47:1A-5.b. As such, the Custodian must disclose to the Complainant the requested check registry upon payment of the actual cost of the CD-ROM pursuant to N.J.S.A. 47:1A-5.b. (it is unlikely that the actual cost of the CD-ROM is \$5.00). See Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) (holding that "[t]he imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication").
3. **The Custodian shall comply with item # 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> to the Executive Director. The Custodian must include in said certification the actual cost of the CD-ROM which is likely less than \$5.00.**
4. The statement contained on the Township's OPRA request form which indicates that police investigation reports are exempt from public access under OPRA is misleading because said statement fails to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. As such, pursuant to O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008), a requestor may be deterred from submitting an OPRA request for certain police investigation reports because the Township's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records.

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<sup>6</sup> "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."

However, the Custodian certified in her Statement of Information that the municipality is currently in the process of adopting the model form published by the GRC. The GRC accessed the Township's OPRA request form from its website on October 7, 2009. The form posted to the website is the GRC's Model Request Form. As such, the Council declines to order the Custodian to amend its OPRA request form.

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: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

December 9, 2009