



State of New Jersey

GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

September 27, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2009-22

v.

Township of Stillwater (Sussex)
Custodian of Record

At the September 27, 2011 public meeting, the Government Records Council (“Council”) considered the September 20, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council should accept Administrative Law Judge Jeff S. Masin’s decision dated August 11, 2011 as follows:

“I **FIND** that [the Complainant’s] complaint about the CD fee was unknown to them until February 5, and **CONCLUDE** that it was not a catalyst in the decision to revise the CD fee to a level commensurate with actual cost. Therefore ... I **CONCLUDE** that [the Complainant] is **not a prevailing party** and no attorney’s fees are warranted.”[Emphasis in original].

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 27th Day of September, 2011

Robin Berg Tabakin, Chair
Government Records Council



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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: October 3, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 27, 2011 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-22

v.

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

Records Relevant to Complaint:³

1. Copies of the most recently approved executive session meeting minutes (via facsimile or e-mail).
2. Copy of a compact disk or tape recording of the most recent regular public meeting.⁴

Request Made: December 2, 2008

Response Made: December 8, 2008

Custodian: Judith Fisher

GRC Complaint Filed: January 6, 2009⁵

Background

August 24, 2010

Government Records Council's ("Council") Interim Order. At its August 24, 2010 public meeting, the Council considered the August 17, 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, "this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts and to determine whether 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, 432 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), and, if so, the amount that constitutes a reasonable attorney's fee."

August 27, 2010

Council's Interim Order distributed to the parties.

¹ Represented by John McMeen, Esq., of The Law Office of John McMeen, LLC (Sparta, NJ).

² Represented by Lawrence Cohen, Esq., of Courier, Kobert & Cohen (Hackettstown, NJ).

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

⁴ The Complainant does not specify his preferred method of delivery for this request item.

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

September 22, 2010

Complaint transmitted to the Office of Administrative Law.

August 11, 2011

Administrative Law Judge (“ALJ”) Jeff S. Masin’s Initial Decision.⁶ The ALJ **FINDS** that the Custodian and Custodian’s Counsel were unaware of the Complainant’s continued interest in the CD fee issue, much less aware of the instant complaint regarding that fee. The ALJ states that when the Township of Stillwater (“Township”) Committee and Counsel met on January 20, 2009, they were already contemplating the need to adjust the fee system. Specifically, the ALJ states that:

“At hearing ... the ... Custodian ... testified that a request for items, including the CD, was received on December 2, 2008. In response, [the Complainant] was advised of the \$5 fee for the disk. On December 9, he e-mailed clerk typist Kathy Wunder as to the reason for the \$5 charge. On December 10 the [o]rdinance containing the charge was faxed to [the Complainant] ... he responded that ‘I would not like it to be mailed and I will not be picking it up.’ [The Custodian] noted that it was not unusual for someone to make an OPRA request and then decide not to pick up the requested materials. Given [the Complainant’s] response, she thought that ... that request was ‘done.’ [The Complainant] never responded to her or any other official that the cost for the CD was too high or illegal. On January 7, 2009 ... the GRC e-mailed [the Complainant] to acknowledge that the GRC had received his Denial of Access Complaint ... The e-mail contains no detail as [to] the content of the [c]omplaint...

During January 2009, [the Township] was undergoing a change in its legal representation ... [Counsel] was appointed on January 20, 2009 ... [Counsel] explained that as a result of ... involvement in municipal legal matters, he was aware that there were issues concerning the fees charged for OPRA requests ... [Counsel] prepared a new ordinance for Jefferson,⁷ early in 2009, dealing with tax and utility payments and electronic information. The ordinance was introduced on January 21, 2009, and adopted February 4. [Counsel] believed that it was drafted several weeks before his January 20 meeting with the ... Township Committee. As such, even before his appointment in [the Township], he was already addressing issues concerning OPRA fees in Jefferson. He was also aware of several activists such as Martin O’Shea, John Paff and [the Complainant] who were ‘challenging these issues’ and were very active ‘in my particular geographical area ... requesting records and then making sure that the ... municipalities comply with what they thought to be the requirement under’ OPRA. [Counsel] knew this had occurred in Jefferson.

⁶ This complaint was combined with GRC Complaint No. 2009-30 because of the commonality of the parties and the issue of prevailing party fees. GRC Complaint No. 2009-30 is being adjudicated concurrently but separately with the matter herein.

⁷ It appears from the context of the ALJ’s decision that Counsel for Stillwater also represents Jefferson Township and, in connection with that representation, was aware of the issues concerning fees charged for OPRA requests and accordingly prepared ordinances addressing such fees.

In the Minutes of the Executive Session of the Stillwater Township Committee on January 20, 2009, the following is noted in connection with a larger discussion of OPRA issues, ‘Fees were briefly discussed as well as how an OPRA request would be provided, via mail or pick-up.’ [Counsel] insisted that he was entirely unaware of [the Complainant’s] OPRA Complaint regarding the CD fee when he met with the [Township] Committee and when the brief discussion of OPRA fees took place. He did not learn about the [c]omplaint until ‘much later.’ ... [Counsel] insisted that [the Complainant’s] complaint played no role at all in the determination to change the ordinance in [the Township] to impose a cost for CDs that reflected the actual cost of the CD and jacket ... he was very aware of the issues regarding fees without that complaint serving as any goad to action because of the ‘hot’ nature of the topic. He recalled that the Township Committee asked his opinion and he said that ‘I’m going to have to review the ordinance.’

...

The Minutes of the February 3, 2009, Township Committee Meeting reflect that there was a discussion about ... the fees charged for paper copies and CDs. It was noted that the Township could only charge for actual cost and not for the time that it took to reproduce the item. The Minutes continue, ‘This is being challenged and their Attorney and Township Clerk are working on an amendment to the present ordinance.’ There is no reference to [the Complainant] or to his complaint, at least not so as to identify that the ‘challenge’ referred to involved [the Complainant] or an actual complaint to the GRC. There is, in the earlier portion of the Minutes detailing the OPRA issues, a reference to challenges made by activists concerning the Open Public Meetings Act and the business of the Township and there is reference to a letter from ‘Mr. Paff, who is a Libertarian, and he (sic) concerns will be addressed’ including the proper retention of e-mails. [The Custodian] testified that as of this meeting she had not told [Counsel] of the ... complaint regarding the CD fee, as she had not at that date even seen the complaint, or the other complaint for that matter.

The new fee ordinance, drafted by [Counsel], was introduced on March 3, 2009, and adopted on March 17, 2009.

Over date of February 5, 2009, the GRC transmitted to [the Custodian] a letter regarding ... [this complaint]. It required that she file a Statement of Information in response to the Complaint. [The Custodian] testified that either on or after February 11, the date when she received this letter, she also received a copy of the Complaint ... She had not told [Counsel] of the complaint about the CD fee prior to February 11.

[The Complainant] testified that when he received the e-mail about the \$5 charge for the CD and the subsequent copy of the ordinance, he knew, from past experience, that public officials would ‘usually’ just ‘blow him off’ if he were to call to their attention that the fee was illegally excessive. As such, he simply advised that he would not be picking up the disk and that it should not be mailed to him. This was not the first occasion where, confronted with an illegal charge for a CD or such item, he did not purchase the disk but instead filed a complaint with the GRC ... He believes that [the Township] actually received the complaint on January 5, 2009, because [the Complainant’s Counsel] cc’d Ms. Wunder when he sent the complaint to the GRC. By the time that the GRC ruled that the charge was illegal, [the Township] had changed its ordinance.”

The ALJ states that the main issue herein was, “... the CD fee ... [the Complainant] bears the burden to establish that the filing of his January 5, 2009, [c]omplaint with the GRC was the “catalyst” for the voluntary action of ... a change to the fee in the new Ordinance to the actual cost of the CD and jacket.” The ALJ notes that the Complainant may have to go beyond proving that the filing of this complaint alone effectuated an amendment to the Township’s fee ordinance: “... if the fee changes were already in process without the impetus of [this complaint], ... then [the Complainant’s] filing(s) did not act as the ‘catalyst’ and attorney’s fees are not warranted.” The ALJ reasons that the “...key to determining [this matter] is the credibility of the evidence offered by the Township that it acted ... without the impetus of knowledge of, and a need to respond to, [the Complainant’s complaint].”

The ALJ thus holds that:

“**I FIND** that [the Custodian] and [Counsel] were truthful witnesses and that they were unaware of [the Complainant’s] continued interest in the CD fee issue, much less aware that he had filed a formal complaint at GRC regarding that fee. When the Township Committee and its newly appointed attorney met on January 20, 2009, they already were contemplating the need to adjust the fee system, and proceeded accordingly. **I FIND** that [the Complainant’s] complaint about the CD fee was unknown to them until February 5, and **CONCLUDE** that it was not a catalyst in the decision to revise the CD fee to a level commensurate with actual cost. Therefore ... **I CONCLUDE** that [the Complainant] is **not a prevailing party** and no attorney’s fees are warranted.” [Emphasis in original].

In concluding that the Complainant was not a prevailing party entitled to reasonable attorney’s fees, the ALJ reasons that:

“... [the Custodian] contends that she did not know of the complaint, and surely of any specifics of it including any reference in it to the fee for the CD, until well after January 20, when [Counsel] came on board and when the Minutes of the Executive Session of the Township Committee reflect a brief discussion about fees that [Counsel] states was a reflection of his

own familiarity with the already “hot” issue of OPRA fees for various types of media, including CDs. He was aware of this from several sources, his role as a municipal attorney, that of his law firm, his role with the Local Government association, and the decisions of the GRC. It is no doubt true that the catalyst of this all may have been the activities of such activists as Martin O’Shea, John Paff and [the Complainant]. But the issue in this matter is not whether [the Complainant] and others may have served as general catalysts for action in municipalities, but whether [the Complainant’s] ... complaint about [the Township’s] fee was the specific catalyst that caused the change in the fee ... Having considered the testimony of the several witnesses, I am convinced that as of January 20, 2009 ... neither [Counsel], nor [the Custodian], nor anyone in the Township, was yet aware that [this complaint] had anything to do with the CD fee.”

The ALJ further noted that:

“... it must be noted that [the Complainant’s] conduct in regard to the CD may have done much to dissuade anyone of any impression that he was complaining to the GRC about that fee. Having requested the CD ... having been told of the \$5 charge and having been presented with the ordinance that he determined was illegal, he determined that instead of seeking to have any discussion whatsoever with any official of the Township to see if they would voluntarily change the fee, he decided that because other public officials, presumably in other municipalities, had ignored him, and/or perhaps other activists, that the proper approach was to simply bypass the Township and file a formal complaint with the GRC. By doing so after effectively telling Ms. Wunder that his interest in the CD was at an end (“don’t mail it and I will not be picking it up”), [the Complainant] effectively insulated the Township and its officials from any hint that he was pressing a concern about the fee. The only way they would then know of his informal, or indeed his formal objection, was by seeing the content of his complaint as filed with the GRC, an event that did not occur until about February 5. [The Complainant’s] direct filing of the complaint might be seen as ignoring [an] element of what the Supreme Court in Mason recognized as an important aspect of the OPRA process, for it noted that while ‘OPRA requires that an agency provide access or a denial no later than seven business days after a request’, it also added, ‘[t]he statute also encourages compromise and efforts to work through certain problematic requests.’ Perhaps had [the Complainant] objected to the Township about the fee before he filed the Complaint he might have received a positive response and the matter might have been resolved without the need for this aspect to be a part of the more general [c]omplaint ... He might have found that his mere informal objection might have rung bells with officials cognizant of what was occurring elsewhere. Perhaps he would not have received a response or at least a positive one. In the end, he chose a different path.”

Analysis

Whether the GRC should adopt, modify or reject the ALJ's Initial Decision dated August 11, 2011?

The GRC referred this matter to the Office of Administrative Law for “a hearing to resolve the facts and to determine whether 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, 432 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), and, if so, the amount that constitutes a reasonable attorney’s fee.”

Specifically, the ALJ was tasked with determining whether the filing of this complaint effectuated a change of the Township’s fee ordinance in regard to cost of providing records on CD. The ALJ was also tasked with determining whether the Complainant was a prevailing party entitled to reasonable attorney’s fees. The ALJ subsequently held that:

“**I FIND** that [the Custodian] and [Counsel] were truthful witnesses and that they were unaware of [the Complainant’s] continued interest in the CD fee issue, much less aware that he had filed a formal complaint at GRC regarding that fee. When the Township Committee and its newly appointed attorney met on January 20, 2009, they already were contemplating the need to adjust the fee system, and proceeded accordingly. **I FIND** that [the Complainant’s] complaint about the CD fee was unknown to them until February 5, and **CONCLUDE** that it was not a catalyst in the decision to revise the CD fee to a level commensurate with actual cost. Therefore ... **I CONCLUDE** that [the Complainant] is **not a prevailing party** and no attorney’s fees are warranted.”[Emphasis in original].⁸

The ALJ’s findings of fact are entitled to deference from the GRC because they are based upon the ALJ’s determination of the credibility of the parties.

“The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility.” In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div.), *certif. denied* 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, “under existing law, the [reviewing agency] must recognize and give due weight to the ALJ’s unique position and ability to make demeanor-based judgments.” Whasun Lee v. Board of Education of the Township of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. “When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ’s credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole.” Cavaliere v. Board of

⁸ The Complainant filed no Exceptions to the ALJ’s decision.

Trustees of Public Employees Retirement System, 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435 , 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." *Id.* at 443. Additionally, the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted.) St. Vincent's Hospital v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

Here, the ALJ fairly summarized the testimony and evidence, explaining how he weighed the proofs before him and explaining why he credited, or discredited, certain testimony. The ALJ's conclusions are clearly aligned and consistent with those credibility determinations. Specifically, the ALJ stated that based on testimony given by the Custodian and Counsel, it was clear that Township began discussing an amendment to the CD fee even prior to having knowledge of this complaint. The ALJ further stated that the Complainant never objected to the \$5.00 fee initially charged by the Borough and instead chose to simply file a complaint with the GRC instead. As such, the Council can ascertain which testimony the ALJ accepted as fact, and further, that those facts provide a reasonable basis for the ALJ's conclusions.

Therefore, the Council should accept the ALJ's determination that the instant complaint was not the catalyst in the Township's decision to revise their CD fee to comply with OPRA and that the Complainant was not a prevailing party entitled to reasonable attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council should accept Administrative Law Judge Jeff S. Masin's decision dated August 11, 2011 as follows:

"I **FIND** that [the Complainant's] complaint about the CD fee was unknown to them until February 5, and **CONCLUDE** that it was not a catalyst in the decision to revise the CD fee to a level commensurate with actual cost. Therefore ... I **CONCLUDE** that [the Complainant] is **not a prevailing party** and no attorney's fees are warranted." [Emphasis in original].

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 20, 2011



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

CHRIS CHRISTIE
Governor

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Lt. Governor

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Commissioner

INTERIM ORDER

August 24, 2010 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2009-22

v.

Township of Stillwater (Sussex)
Custodian of Record

At the August 24, 2010 public meeting, the Government Records Council ("Council") considered the August 17, 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 this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts and to determine whether 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, 432 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), and, if so, the amount that constitutes a reasonable attorney's fee.

Interim Order Rendered by the
Government Records Council
On The 24th Day of August, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Stacy Spera, Secretary
Government Records Council

Decision Distribution Date: August 27, 2010



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

**Supplemental Findings and Recommendations of the Executive Director
August 24, 2010 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-22

v.

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

Records Relevant to Complaint:³

1. Copies of the most recently approved executive session meeting minutes (via facsimile or e-mail).
2. Copy of a compact disk or tape recording of the most recent regular public meeting.⁴

Request Made: December 2, 2008

Response Made: December 8, 2008

Custodian: Judith Fisher

GRC Complaint Filed: January 6, 2009⁵

Background

April 8, 2010

Government Records Council's ("Council") Interim Order. At its April 18, 2010 public meeting, the Council considered the April 1, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has complied with the Council's February 23, 2010 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council's Order.
2. The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the redacted portion of the November 11, 2008 executive session minutes because the redacted discussion involves review

¹ Represented by John McMeen, Esq., of The Law Office of John McMeen, LLC (Sparta, NJ).

² Represented by Lawrence Cohen, Esq., of Courier, Kobert & Cohen (Hackettstown, NJ).

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

⁴ The Complainant does not specify his preferred method of delivery for this request item.

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

and compromise on multiple contractual terms for the position of the Chief of Police and is exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12.b(7). Additionally, the discussion is specifically exempt from disclosure under OPRA as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to N.J.S.A. 47:1A-1.1.

3. Although the Custodian unlawfully charged the Complainant \$5.00 for a compact disk of a requested audio recording, there is no evidence that the Complainant actually paid the proposed copying fee so the Council declined to order any refund to the Complainant. Additionally, the Council did not order disclosure of the compact disk at the actual cost because the Complainant indicated that he no longer desires a copy of the requested audio recording. Also, the Council's *in camera* review revealed that the Custodian's redactions to the November 10, 2008 executive session minutes were lawfully made for information relating to confidential contract negotiations pursuant to N.J.S.A. 10:4-12.b(7). Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved "the desired result because this complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City Clerk of the City of Hoboken, 196 N.J. 51, 77 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because no disclosure or refund was ordered by the Council. Therefore, the Complainant is not 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*.

April 13, 2010

Council's Interim Order distributed to the parties.

April 30, 2010

Complainant's Motion for Reconsideration of the Council's April 8, 2010 Final Decision. The Custodian requests that the GRC reconsider its April 8, 2010 Final Decision based on a mistake and new evidence. The Complainant requests that the GRC accept this request for reconsideration, although the Complainant acknowledges that said request is filed three (3) business days late.

The Complainant's Counsel submits a letter brief in support of the Complainant's request for reconsideration. Counsel states that in its April 8, 2010 Final Decision the Council held that the Complainant was not a prevailing party entitled to reasonable attorney's fees. Counsel argues that contrary to this finding, the Complainant was a prevailing party because the Complainant achieved the desired result, which was lowering the Township's charge for audio recordings. *See 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).

Counsel states that the Complainant alleged in his Denial of Access complaint filed in January 2009 that the Custodian's charge of \$5.00 for an audio recording of the requested public meetings violated OPRA because the charge was likely not the actual cost of duplicating the record. Counsel states that in its Final Order the GRC held that the \$5.00 charge was in fact unlawful. *See Wolosky v. Township of Stillwater (Sussex), GRC Complaint No. 2009-22 (April 2010), pg. 12, paragraph No. 3.*

Counsel alleges that it was the filing of this complaint that triggered the Custodian to reduce the cost of a CD to the actual cost as required under N.J.S.A. 47:1A-5.d. Counsel states the evidence of record shows that the Township changed the cost of a CD to \$0.35 on March 17, 2009 when it amended its ordinance regarding copying fees. Counsel argues that the Complainant hence achieved the voluntary change in the Custodian's behavior. Counsel notes that the GRC's findings in this complaint should mirror those in Wolosky v. Township of Montague (Sussex), GRC Complaint No. 2009-14 (April 2010).

Finally, Counsel reiterates that the Complainant should be deemed a prevailing party in this matter and therefore entitled to an award of reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

May 4, 2010

Custodian Counsel's objections to the Complainant's Motion for Reconsideration. First, Counsel argues that the Complainant filed his motion for reconsideration past the deadline, as openly admitted.

Second, Counsel contends that even if the GRC were to accept the Complainant's motion, the Council's April 8, 2010 decision is correct. Counsel asserts that because the allegations brought before the Township by Complainant and Complainant's Counsel are similar to those in many other complaints, it is nearly certain that the Complainant's Counsel has been compensated many times for the same piece of litigation. Counsel argues that awarding any additional prevailing party attorney's fees for this issue is inapposite to the intent and spirit of OPRA.

Counsel requests that the GRC advise whether this motion for reconsideration will be accepted for review so that he may submit a more formal opposition to said motion.

July 9, 2010

E-mail from the GRC to the Custodian. The GRC advises the Custodian that it has accepted the Complainant's Motion for Reconsideration and affords the Custodian's Counsel until July 16, 2010 to submit formal opposition to same.

July 16, 2010

Custodian's objections to the Motion for Reconsideration. The Custodian's Counsel emphasizes that this complaint arose as a result of the Complainant's allegations

that the Township failed to comply with the technical requirements of OPRA. The Custodian's Counsel avers that the GRC ultimately found that there was no issue with the nondisclosure of any records to the Complainant; instead finding that no issues remained regarding the Township's proposed fee for a CD of the requested meeting minutes because the Complainant voluntarily withdrew his request for same and never paid any monies to the Township.

The Custodian's Counsel argues that despite the facts present in the instant complaint, the Complainant's Counsel now requests that the GRC overlook its own strict regulations regarding requests for reconsideration. *N.J.A.C. 5:105-2.10*. The Custodian's Counsel asserts that this ten (10) business day limitation is clear and unambiguous. Counsel further asserts that no circumstances have been presented that could justify the bending of the ten (10) business day time period. The Custodian's Counsel requests that based on the foregoing, the Council dismiss the Complainant Counsel's Motion for Reconsideration as it is not properly before the Council.

The Custodian's Counsel asserts that, should the Council elect to reconsider its April 8, 2010 Final Decision, the Township requests full affirmation of the holding, as it is well reasoned based on the facts. The Custodian's Counsel contends that the Council correctly confirmed that the Custodian lawfully denied access to the redacted portions of the November 11, 2008 executive session meeting minutes. The Custodian's Counsel asserts that there was no violation of OPRA, intentional or otherwise. Moreover, the Custodian's Counsel argues that the Council properly concluded that the evidence of record did not indicate that the Complainant incurred any cost prior to withdrawing his request for the CD. The Custodian's Counsel alleged that the facts of this complaint support the Council's holding that no casual nexus exists between the Complainant's filing of this complaint and the relief ultimately achieved; therefore, the Complainant was not a prevailing party entitled to reasonable attorney's fees. *See N.J.S.A. 47:1A-6 and Teeters v. DYFS*, 387 *N.J. Super.* 423 (App. Div. 2006).

The Custodian's Counsel reiterates that for all of the foregoing reasons, the Township requests that the Council deny the Complainant Counsel's Motion for Reconsideration.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's April 8, 2010 Findings and Recommendations?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

The Council’s April 13, 2010 Final Decision found that the Complainant had:

“...not achieved “the desired result because this complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City Clerk of the City of Hoboken, 196 N.J. 51, 77 (2008), a factual causal nexus does not exist between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved because no disclosure or refund was ordered by the Council. Therefore, the Complainant is not 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.

The Council distributed its Final Decision to all parties on April 13, 2010. On April 30, 2010, the Complainant filed a Motion for Reconsideration, noting that said motion was three (3) days late.

In support of his motion for reconsideration, the Complainant’s Counsel argued that the Complainant was a prevailing party entitled to reasonable attorney’s fees because the Township lowered the cost of production of a CD from \$5.00 to \$0.35 after the filing of this Denial of Access complaint. The Complainant’s Counsel contended that the findings in this complaint should mirror those in Wolosky v. Township of Montague (Sussex), GRC Complaint No. 2009-14 (April 2010).

The Custodian’s Counsel, in a letter to the GRC dated May 4, 2010, noted that the Complainant’s Counsel openly admitted that the Motion for Reconsideration was tardy; however, the Custodian’s Counsel requested a chance to submit formal exceptions in the instance that the GRC accepts the motion for review. The GRC responded on July 9,

2010 advising that the motion had been accepted for review and that the Custodian's Counsel must submit the Township's objections by July 16, 2010.

The Custodian's Counsel submitted same on July 16, 2010. The Custodian's Counsel reiterated the Township's request to deny the Motion for Reconsideration based on its tardiness. Moreover, the Custodian's Counsel argued that the Council's April 8, 2010 Final Decision was accurate because it ultimately found that there was no issue with the nondisclosure of any records to the Complainant; instead finding that no issues remained regarding the Township's proposed fee for a CD of the requested meeting minutes because the Complainant voluntarily withdrew his request for same and never paid any monies to the Township. The Custodian's Counsel further alleged that the facts of this complaint support the Council's holding that no casual nexus exists between the Complainant's filing of this complaint and the relief ultimately achieved; therefore, the Complainant was not a prevailing party entitled to reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

The GRC must first address the issue of the Complainant's tardily filed Motion for Reconsideration.

The GRC's regulations at N.J.A.C. 5:105-2.10 govern the procedure for motions for reconsideration. Although the Custodian's Counsel rightly points out that the Complainant filed his Motion for Reconsideration three (3) days after the ten (10) business day deadline (also acknowledged by the Complainant in his filing of said motion), the GRC, "... at its own discretion, may reconsider any decision it renders." N.J.A.C. 5:105-2.10(a). Thus the GRC is considering this motion notwithstanding its lateness because it raises material issues as to the legal basis for the Council's decision.

The GRC will next address whether the Complainant has established in his motion for reconsideration of the Council's April 8, 2010 Findings and Recommendations that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing of the complaint.

In the Motion for Reconsideration, the Complainant's Counsel argues that the Complainant was a prevailing party entitled to reasonable attorney's fees because the Township lowered the cost of production of a CD from \$5.00 to \$0.35 after the instant Denial of Access complaint was filed.

In order for a complainant to qualify as a prevailing party entitled to reasonable attorney's fees under N.J.S.A. 47:1A-6, said complainant must achieve "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). 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 must exist between the complainant's filing of a Denial of Access complaint and the relief ultimately achieved.

The Complainant's Counsel contended that the findings in this complaint should mirror those in Wolosky v. Township of Montague (Sussex), GRC Complaint No. 2009-14 (April 2010).

In that case, the complainant submitted an OPRA request on December 2, 2008 for a copy of an audio recording of Montague's ("Township") most recent meeting. The custodian responded in writing on December 9, 2008 stating that access to the requested record is granted pending payment of \$5.00 for a CD. The complainant filed a Denial of Access complaint with the GRC on January 5, 2009, contending that the charge of \$5.00 was likely not the actual cost of the requested record on CD. Moreover, the complainant argued that the Township's OPRA request form contained blanket exemptions to disclosure but did not state OPRA's exceptions to the general rule against disclosure. The complainant requested the following relief:

- “(1) the Custodian violated OPRA by charging more than the actual cost for one copy of an audio recording on a compact disk;
- (2) order the Custodian to certify to the actual cost of a single compact disk;
- (3) order the Custodian to make a copy of the requested record available to the Complainant at actual cost;
- (4) find that Township's OPRA request form violates OPRA;
- (5) order the Township to adopt the GRC model request form; and
- (6) find that the Complainant is a prevailing party and order an award of reasonable attorneys' fees pursuant to N.J.S.A.47: 1A-6.” *Id.* On page 2 (Council's Interim Order dated February 23, 2010).

After the complaint was filed, the custodian certified in the Statement of Information (“SOI”) that she provided the requested CD to the Complainant free of charge.⁶ The custodian also argued that the complainant could not have been misled by the Township's OPRA request form when the form merely recites the statute.

The Council held in its February 23, 2010 Interim Order that although the proposed charge of \$5.00 was “not the actual cost,” the GRC declined to “order disclosure of the requested audio recording.” However, the Council did order the Township to:

“... remove from its form the section entitled “Exceptions to public access to government records” or amend the form to include the remainder of the applicable legal authorities governing the various exemptions listed in said section. Alternatively, the Custodian may adopt the GRC model request form in its entirety.” *Id.* On page 8.

Following receipt of the Council's February 23, 2010 Interim Order, the custodian provided certified confirmation of her compliance with said order on March 8, 2010. The Council subsequently held in its April 28, 2010 Interim Order that:

⁶ In response to the GRC's request for more information, the custodian certified on December 15, 2009 that she forwarded a copy of the requested CD free of charge to the complainant on August 12, 2009, or over seven (7) months following the filing of the complaint.

“[p]ursuant to Teeters, *supra*, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Specifically, the Custodian *provided the Complainant with a copy of the audio recording of the requested public meeting minutes at no charge following the filing of the instant complaint.* The Custodian *also revised the Township’s OPRA request form by deleting the entire section entitled “Exceptions to public access to government records” in January 2009.* Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because the Custodian’s charge of \$5.00 per CD for the requested audio recording of the public meeting dated February 4, 2008 is not the actual cost and in violation of N.J.S.A. 47:1A- 5.b. Additionally, the Township’s OPRA request form was in violation of N.J.S.A. 47:1A-5.f. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*...” (Emphasis added.) *Id.* on pages 7-8.

The Complainant here has raised issues regarding the significance of probative, competent evidence which requires the further development of the record. Specifically, Counsel alleges that it was the filing of this complaint that triggered the Custodian to reduce the cost of a CD to the actual cost as required under N.J.S.A. 47:1A-5.d. Counsel states the evidence of record shows that the Township changed the cost of a CD to \$0.35 on March 17, 2009 (over two (2) months after this complaint was filed) when it amended it’s ordinance regarding copying fees.

The Council therefore grants the Complainant’s motion for reconsideration for the limited purpose of developing the record in this regard. *See N.J.A.C. 5:105-2.10.* Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts and to determine whether 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, 432 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), and, if so, the amount that constitutes a reasonable attorney’s fee.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts and to determine whether 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, 432 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), and, if so, the amount that constitutes a reasonable attorney’s fee.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 17, 2010



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 8, 2010 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2009-22

v.

Stillwater Township (Sussex)
Custodian of Record

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

1. The Custodian has complied with the Council’s February 23, 2010 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council’s Order.
2. The *In Camera* Examination set forth in the table below reveals the Custodian has lawfully denied access to the redacted portion of the November 11, 2008 executive session minutes because the redacted discussion involves review and compromise on multiple contractual terms for the position of the Chief of Police and is exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12.b(7). Additionally, the discussion is specifically exempt from disclosure under OPRA as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to N.J.S.A. 47:1A-1.1.
3. Although the Custodian unlawfully charged the Complainant \$5.00 for a compact disk of a requested audio recording, there is no evidence that the Complainant actually paid the proposed copying fee so the Council declined to order any refund to the Complainant. Additionally, the Council did not order disclosure of the compact disk at the actual cost because the Complainant indicated that he no longer desires a copy of the requested audio recording. Also, the Council’s *in camera* review revealed that the Custodian’s redactions to the November 10, 2008 executive session minutes were lawfully



made for information relating to confidential contract negotiations pursuant to N.J.S.A. 10:4-12.b(7). Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved "the desired result because this complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City Clerk of the City of Hoboken, 196 N.J. 51, 77 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because no disclosure or refund was ordered by the Council. Therefore, the Complainant is not 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*.

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination¹
1	November 11, 2008 Executive Session Minutes	Contract negotiations with the Police Chief	The exclusion within the Open Public Meetings Act for contract negotiation discussions (<u>N.J.S.A. 10:4-12.b(7)</u>).	The redacted discussion involves review and compromise on multiple contractual terms for the position of the Chief of Police and is exempt from disclosure

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

				<p>pursuant to <u>N.J.S.A. 47:1A-9.a.</u> and <u>N.J.S.A. 10:4-12.b.(7)</u>. Additionally, the discussion is specifically exempt from disclosure under OPRA as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p>
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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 8th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: April 13, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-22

v.

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

Records Relevant to Complaint:³

Copies of:

1. Most recently approved executive session meeting minutes (via facsimile or e-mail).
2. A compact disk or tape recording of the most recent regular public meeting.⁴

Request Made: December 2, 2008

Response Made: December 8, 2008

Custodian: Judith Fisher

GRC Complaint Filed: January 6, 2009⁵

Records Submitted for *In Camera* Examination: November 11, 2008 Executive Session Minutes.

Background

February 23, 2010

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

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the November 10, 2008 executive session minutes to determine the validity of the Custodian's assertion that the redactions made to the requested closed session minutes were for confidential contract negotiations exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 10:4-12.7., as well as the

¹ Represented by John McMeen, Esq., of The Law Office of John McMeen, LLC (Sparta, NJ).

² Represented by Lawrence Cohen, Esq., of Courier, Kobert & Cohen (Hackettstown, NJ).

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

⁴ The Complainant does not specify his preferred method of delivery for this request item.

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

Complainant's contention that additional redactions were made to the requested minutes without explanation.

2. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁸, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Pursuant to N.J.S.A. 47:1A-5.b., Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the actual cost of duplicating the requested record. As such, the Custodian's charge of \$5.00 for a copy of the December 2, 2008 Stillwater public meeting is unreasonable and violates N.J.S.A. 47:1A-5.b. Because there is no evidence that the Complainant actually paid the proposed \$5.00 copying fee, the Council declines to order any refund to the Complainant.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

March 1, 2010

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

March 4, 2010⁹

Certification of the Custodian in response to the Council's Interim Order with the November 11, 2008 Executive Session Minutes attached. The Custodian certifies that she is the Custodian of Stillwater Township and the record attached is the true copy of the record requested by the Council for the *in camera* review. Further, the Custodian certified that the redactions pertain to a contract negotiation with the Police Chief in which various areas of his contract were discussed.

Analysis

⁶The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

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

⁹The GRC received the Custodian's certification on this date.

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

At its February 23, 2010 public meeting, the Council determined that because the Custodian has asserted that the requested redactions were lawful because the redactions pertain to a contract negotiation with the Police Chief, the Council must determine whether the legal conclusion asserted by the Custodian is properly applied to the record at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted record, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on March 8, 2010.

The Custodian provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection and an explanation of the redactions in lieu of a redaction index on March 4, 2010. Therefore, the Custodian timely complied with the Council's February 23, 2010 Interim Order.

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

The Custodian asserts that she lawfully denied the Complainant access to the redacted portion of the November 11, 2008 executive session minutes because the redactions pertain to a contract negotiation with the Police Chief. Conversely, the Complainant contends that additional redactions were made to the requested record without explanation.

OPRA provides that:

[t]he provisions of this act ... shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to ... *any other statute*; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order. (Emphasis added.) N.J.S.A. 47:1A-9.a.

The Open Public Meetings Act provides that: (N.J.S.A. 10:4-12)

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

(5) Any matter involving the purchase, lease or acquisition of real property with public funds, the setting of banking rates or investment of public funds, where it could adversely affect the public interest if discussion of such matters were disclosed.

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

Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

Information Generated By or On Behalf of Public Employers or Public Employees in Connection with Collective Negotiation

Further, OPRA exempts from disclosure “... information which is deemed to be confidential ... information generated by or on behalf of public employers or public employees ... in connection with collective negotiations, including documents and statements of strategy or negotiating position ...” N.J.S.A. 47:1A-1.1.

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

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination¹⁰

¹⁰ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor Jesse Wolosky v. Township of Stillwater (Sussex), 2009-22 – *In Camera* Findings and Recommendations of the Executive Director

1	November 11, 2008 Executive Session Minutes	Contract negotiations with the Police Chief	The exclusion within the Open Public Meetings Act for contract negotiation discussions (<u>N.J.S.A. 10:4-12.b(7)</u>).	The redacted discussion involves review and compromise on multiple contractual terms for the position of the Chief of Police and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-9.a.</u> and <u>N.J.S.A. 10:4-12.b(7)</u> . Additionally, the discussion is specifically exempt from disclosure under OPRA as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
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Thus, the Custodian lawfully denied access to the redacted portion of the November 11, 2008 executive session minutes because the redacted discussion involves review and compromise on multiple contractual terms for the position of the Chief of Police and is exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12.b(7). Additionally, the discussion is specifically exempt from disclosure under OPRA as information generated by or on behalf of public employers or public employees

make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to N.J.S.A. 47:1A-1.1.

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.

The Custodian responded to the Complainant’s OPRA request on the fourth (4th) business day following receipt of said request making a redacted copy of the November 10, 2008 executive session minutes available to the Complainant with redactions for information relating to confidential contract negotiations pursuant to N.J.S.A. 10:4-12.7. However, the Complainant contends that additional redactions were made to the requested record without explanation. Therefore, pursuant to Paff, supra, the GRC conducted an *in camera* review of the record to determine the validity of the Custodian’s asserted redactions, as well as the Complainant’s contention that additional redactions were made to the requested minutes without explanation.

The Complainant was also informed a charge of \$5.00 for a copy of the December 2, 2008 Stillwater public meeting was required, however, the Custodian provided no evidence that fulfilling the Complainant’s request required an extraordinary expenditure of time and effort pursuant to N.J.S.A. 47:1A-5.c or a substantial amount of manipulation or programming of information technology pursuant to N.J.S.A. 47:1A-5.d. Therefore, pursuant to N.J.S.A. 47:1A-5.b, Libertarian Party of Central New Jersey, supra, Moore, supra, and Dugan, supra, the Custodian was ordered to charge the actual cost of duplicating the requested record. As such, the Custodian’s charge of \$5.00 for a copy of the December 2, 2008 Stillwater public meeting is unreasonable and violates N.J.S.A. 47:1A-5.b. Because there is no evidence that the Complainant actually paid the proposed \$5.00 copying fee, the Council declined to order any refund to the Complainant.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian

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

Although the Custodian unlawfully charged the Complainant \$5.00 for a compact disk of a requested audio recording, there is no evidence that the Complainant actually paid the proposed copying fee so the Council declined to order any refund to the Complainant. Additionally, the Council did not order disclosure of the compact disk at the actual cost because the Complainant indicated that he no longer desires a copy of the requested audio recording. Also, the Council’s *in camera* review revealed that the Custodian’s redactions to the November 10, 2008 executive session minutes were lawfully made for information relating to confidential contract negotiations pursuant to N.J.S.A. 10:4-12.7. 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)). The court in Buckhannon stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The court in Mason, *supra*, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, cert denied (1984).”

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

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

“New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term “prevailing party” within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a

two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); *see also* Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

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

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC

preliminarily found in plaintiff's favor, the parties reached a settlement agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.¹¹ 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)."

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

"OPRA requires that an agency provide access or a denial no later than seven business days after a request. The statute also encourages compromise and efforts to work through certain problematic requests. But

¹¹ 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.

under the terms of the statute, the agency must start that process with some form of response within seven business days of a request. *If an agency fails to respond at all within that time frame, but voluntarily discloses records after a requestor files suit, the agency should be required to prove that the lawsuit was not the catalyst for the agency's belated disclosure.* Such an approach is faithful to OPRA's clear command that an agency not sit silently once a request is made." [Emphasis added]. Mason v. City Clerk of the City of Hoboken, 196 N.J. 51, 77 (2008).

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

In this complaint, the Custodian lawfully denied access to the redacted portion of the November 11, 2008 executive session minutes and the Council declined to order a refund of the \$5.00 fee unlawfully charged by the Custodian for a compact disk of a requested audio recording because there is no evidence that the Complainant paid this unlawfully fee and the Complainant indicated he no longer desired a copy of the audio recording. Therefore, the Complainant did not achieve any change in the Custodian's conduct as the result of filing a Denial of Access Complaint.

Pursuant to Teeters, *supra*, the Complainant has not achieved "the desired result because this complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because no disclosure or refund was ordered by the Council. Therefore, the Complainant is not 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*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's February 23, 2010 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council's Order.
2. The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the redacted portion of the November 11, 2008 executive session minutes because the redacted discussion involves review and compromise on multiple contractual terms for the position of the Chief of

Police and is exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12.b(7). Additionally, the discussion is specifically exempt from disclosure under OPRA as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to N.J.S.A. 47:1A-1.1.

3. Although the Custodian unlawfully charged the Complainant \$5.00 for a compact disk of a requested audio recording, there is no evidence that the Complainant actually paid the proposed copying fee so the Council declined to order any refund to the Complainant. Additionally, the Council did not order disclosure of the compact disk at the actual cost because the Complainant indicated that he no longer desires a copy of the requested audio recording. Also, the Council's *in camera* review revealed that the Custodian's redactions to the November 10, 2008 executive session minutes were lawfully made for information relating to confidential contract negotiations pursuant to N.J.S.A. 10:4-12.b(7). Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved "the desired result because this complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City Clerk of the City of Hoboken, 196 N.J. 51, 77 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because no disclosure or refund was ordered by the Council. Therefore, the Complainant is not 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*.

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

April 1, 2010



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

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. 2009-22

v.

Stillwater Township (Sussex)
Custodian of Record

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

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the November 10, 2008 executive session minutes to determine the validity of the Custodian’s assertion that the redactions made to the requested closed session minutes were for confidential contract negotiations exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 10:4-12.7., as well as the Complainant’s contention that additional redactions were made to the requested minutes without explanation.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**

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

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

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



3. Pursuant to N.J.S.A. 47:1A-5.b., Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the actual cost of duplicating the requested record. As such, the Custodian's charge of \$5.00 for a copy of the December 2, 2008 Stillwater public meeting is unreasonable and violates N.J.S.A. 47:1A-5.b. Because there is no evidence that the Complainant actually paid the proposed \$5.00 copying fee, the Council declines to order any refund to the Complainant.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: March 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-22

v.

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

Records Relevant to Complaint:³

Copies of:

1. Most recently approved executive session meeting minutes (via facsimile or e-mail).
2. A compact disk or tape recording of the most recent regular public meeting.⁴

Request Made: December 2, 2008

Response Made: December 8, 2008

Custodian: Judith Fisher

GRC Complaint Filed: January 6, 2009⁵

Background

December 2, 2008

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

December 8, 2008⁶

Custodian's response to the OPRA request. The Custodian responds via e-mail to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that a compact disk of the last Stillwater Township Committee public meeting held on December 2, 2008 is available for pick-up or mailing for a copying fee of \$5.00. The Custodian further states that a copy of the executive session minutes for November 10, 2008 will be faxed to the Complainant at the number provided in the request. The Custodian advises that information relating to confidential contract negotiations with the Stillwater Chief of Police has been redacted from the executive session minutes. The Custodian requests that Complainant inform her of his

¹ Represented by John McMeen, Esq., of The Law Office of John McMeen, LLC (Sparta, NJ).

² Represented by Lawrence Cohen, Esq., of Courier, Kobert & Cohen (Hackettstown, NJ).

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

⁴ The Complainant does not specify his preferred method of delivery for this request item.

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

⁶ Although the Custodian's response to the Complainant's OPRA request is dated December 5, 2008, it was electronically transmitted to the Complainant on December 8, 2008 via e-mail.

preferred method of delivery for the compact disk recording of the December 2, 2008 public meeting.

December 9, 2008

E-mail from the Complainant to the Custodian. The Complainant responds to the Custodian's e-mail instructing the Custodian to follow the preferred method of delivery for records responsive as set forth in his request.⁷ The Complainant requests that the Custodian justify the \$5.00 copying fee for the audio recording of the executive session minutes. The Complainant also informs the Custodian that he only received one (1) page of the executive session minutes sent to him via fax.

December 9, 2009

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that the agency was experiencing technical difficulties with the fax machine. The Custodian states that she will re-send the executive session minutes which consist of three (3) pages in total. The Custodian requests that the Complainant inform her if he does not receive all the pages.

December 10, 2008

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian that he is still awaiting an answer to the questions from his previous e-mail.

December 10, 2009

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that she was unaware of his questions. The Custodian also informs the Complainant that an audio recording of the most recent public meeting is available for pick-up or mailing. The Custodian states that pursuant to the Township's ordinance, the copying fee is \$5.00. The Custodian asks the Complainant if he will be picking up the compact disk or would he like it mailed to him.

December 11, 2008

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian that he no longer wants the compact disk.

January 6, 2009

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

- Complainant's OPRA request dated December 2, 2008;
- E-mail from the Custodian to the Complainant dated December 8, 2008 (with attachments);
- Facsimile transmission of the redacted November 11, 2009 executive session minutes dated December 8, 2008 (unsuccessfully transmitted);
- E-mail from the Complainant to the Custodian dated December 8, 2008;
- E-mail from the Custodian to the Complainant dated December 9, 2008;
- E-mail from the Complainant to the Custodian dated December 10, 2008;

⁷ The Complainant's OPRA request does not address the method of delivery for Request Item No. 2. Jesse Wolosky v. Stillwater Township (Sussex), 2009-22 – Findings and Recommendations of the Executive Director

- E-mail from the Custodian to the Complainant dated December 10, 2008;
- Facsimile transmission of the redacted November 11, 2009 executive session minutes dated December 10, 2008 (successfully transmitted); and
- E-mail from the Complaint to the Custodian dated December 11, 2008.

The Complainant states that he filed the Denial of Access Complaint because the Custodian violated OPRA when the Custodian failed to set forth a detailed lawful basis for each and every redaction that was made on the executive sessions minutes provided. The Complainant states that the Custodian merely stated that the minutes were redacted for the following reason: “Confidential Contract Negotiations with the Stillwater Chief of Police - 10:4-12(7).”

The Complainant argues that pursuant to various Government Records Council (“GRC”) decisions: “[The] Custodian's response was legally insufficient under OPRA because [she] failed to provide a written response setting forth a detailed and lawful basis for each redaction.” Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (June 2008); see Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005) (ordering the custodian to provide explanations for the redactions); Barbara Schwarz v. New Jersey Department of Human Services, GRC Complaint No. 2004-60 (February 2005) (requiring specific citations to the law allowing the redactions).

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

The Complainant contends that almost every sentence was redacted from the minutes provided. The Complainant asserts that paragraph 5 of the redacted minutes evidences the Custodian’s redaction of another subject heading without providing a reason for said redactions. The Complainant urges the GRC to adopt a “Sentence Rule” wherein custodians would be required to provide a reason for each sentence redacted, with a further requirement that the first word of each sentence, as well as the period ending a sentence, not be redacted.

The Complainant further states that the Custodian also violated OPRA when she assessed a \$5.00 copying fee to provide a copy of the Township’s most recent regular public meeting because the fee assessed is in excess of actual cost. The Complainant states that the GRC observed in Renna v. Township of Warren, GRC Complaint No. 2008-40 (April 2009), that a \$5.00 charge for a compact disk is likely not the actual cost pursuant to N.J.S.A. 47:1A-5.b. The Complainant argues that the Custodian must charge

actual cost pursuant to N.J.S.A. 47:1A-5.b. The Complainant further argues that absent extraordinary circumstances, actual cost is the material cost of providing the public with a copy, excluding labor and overhead. Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26, 31 (1962) (labor not included in actual cost under New Jersey common law); Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271, 280 (App. Div. 2005) (fees allowed under OPRA consistent with fees allowed under the Common Law Right of Access); Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) (direct cost of copying not appropriate standard); O'Shea v. Madison Public School District, GRC Complaint No. 2007-185 (December 2008); O'Shea v. Township of Vernon, GRC Complaint No. 2007-207 (April 2008). The Complainant contends that while under very limited circumstances OPRA permits a public agency to assess a fee in addition to the actual cost of duplication, none of those circumstances are present in the current complaint. N.J.S.A. 47:1A-5.d.

Based on the foregoing, the Complainant requests that the GRC:

- (1) find that the Custodian violated OPRA by not setting forth a detailed and lawful basis for the redactions made to the executive session minutes provided;
- (2) adopt a bright line rule regarding the redaction of records;
- (3) find that the Custodian violated OPRA by assessing a \$5.00 copying fee for a compact disk of the audio recording of the most recent regular public meeting;
- (4) find that the Complainant is a prevailing party and order an award of reasonable attorneys' fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

February 5, 2009

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

February 6, 2009

Letter certification from the Custodian to the GRC. The Custodian certifies that the Township previously surveyed the surrounding municipalities for their fee schedules and then set its fee schedule according to what the other municipalities were charging for both paper copies and compact disks. The Custodian certifies that the Township is currently researching these costs again and will be reviewing and revising the current ordinance.

February 13, 2009⁸

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated December 2, 2008;
- E-mail from the Custodian to the Complainant dated December 8, 2008 (with attachments);
- Facsimile transmission of the redacted November 11, 2009 executive session minutes dated December 8, 2008 (unsuccessfully transmitted);
- E-mail from the Complainant to the Custodian dated December 9, 2008;

⁸ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

- E-mail from the Custodian to the Complainant dated December 9, 2008;
- E-mail from the Complainant to the Custodian dated December 10, 2008;
- E-mail from the Custodian to the Complainant dated December 10, 2008;
- Facsimile transmission of the redacted November 11, 2009 executive session minutes dated December 10, 2008 (successfully transmitted);
- E-mail from the Complainant to the Custodian dated December 11, 2008; and
- Letter from the Custodian to the GRC dated February 6, 2009.

The Custodian certifies that the most recently approved executive session minutes were for the November 11, 2008 executive session, and were already disclosed to the Complainant pursuant to an OPRA request dated January 5, 2009.⁹ The Custodian certifies that Stillwater Township is open to all recommendations that the GRC may have regarding the handling of OPRA requests. The Custodian further certifies that she will work with the new Township Attorney to assure that the minutes of all future public meetings and executive sessions of the Township Committee are kept in accordance with all legal requirements. The Custodian further certifies that OPRA requests will be addressed in a timely and comprehensive manner.¹⁰

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

⁹ See Wolosky v. Stillwater Township, GRC Complaint No. 2009-30. The Custodian also requests that the GRC consolidate the adjudication of this complaint with that of Wolosky v. Stillwater Township, GRC Complaint No. 2009-30.

¹⁰ The Custodian does not address the following in the SOI: (1) search undertaken, (2) records retention/destruction schedule and (3) whether any records that were responsive to the request were destroyed.

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

The Custodian responded to the Complainant’s OPRA request on the fourth (4th) business day following receipt of said request making a redacted copy of the November 10, 2008 executive session minutes available to the Complainant. The Custodian stated that information relating to confidential contract negotiations with the Stillwater Chief of Police was redacted from the executive session minutes pursuant to N.J.S.A. 10:4-12.7. However, the Complainant contends that additional redactions were made to the requested record without explanation.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC¹¹ in which the GRC dismissed the complaint by accepting the Custodian’s legal conclusion for the denial of access without further review. The court stated that:

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

The court also stated that:

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

Further, the court stated that:

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

¹¹ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the November 10, 2008 executive session minutes to determine the validity of the Custodian’s assertion that the redactions made to the requested closed session minutes were for confidential contract negotiations exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 10:4-12.7., as well as the Complainant’s contention that additional redactions were made to the requested minutes without explanation.

Whether the Custodian violated OPRA by charging the \$5.00 copy cost enumerated in the Township’s ordinance rather than the actual cost of duplicating the requested record?

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

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

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

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

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

Whenever a records custodian asserts that fulfilling an OPRA records request requires an “extraordinary” expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5.c. In this regard, OPRA provides:

“Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary

business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*” (Emphasis added.) N.J.S.A. 47:1A-5.c.

OPRA also states 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...” (Emphasis added.) N.J.S.A. 47:1A-5.d.

The Custodian certified that the Township previously surveyed the surrounding municipalities for their fee schedules and then set its fee schedule according to what the other municipalities were charging for both paper copies and compact disks. The Custodian certifies that the Township is currently researching these costs again and will be reviewing and revising the current ordinance, which sets the copying fee for compact disks at \$5.00, in accordance with the Township’s findings.

While OPRA provides that paper copies of government records may be obtained upon payment of the actual cost of duplication not to exceed the enumerated rates of \$0.75/0.50/0.25 per page (N.J.S.A. 47:1A-5.b.), the Act does not provide explicit copy rates for any other medium. N.J.S.A. 47:1A-5.b. goes on to state that the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy. However, OPRA does provide that whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter cannot be reproduced by ordinary document copying equipment in ordinary business size, the public agency may charge in addition to the *actual cost* of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copies. N.J.S.A. 47:1A-5.c. Additionally, OPRA provides that when a request for a record in a medium not routinely used by an agency, not routinely developed or maintained by an agency, or requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the *actual cost of duplication*, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both. N.J.S.A. 47:1A-5.d.

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

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

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

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

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

Further, in Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the court cited Moore, *supra*, by stating that “[w]hen copies of public records are purchased under the common law right of access doctrine, the public officer may charge only the actual cost of copying, which ordinarily should not include a charge for labor... Thus, the fees allowable under the common law doctrine are consistent with those allowable under OPRA.” 376 N.J. Super. at 279.

In this complaint, the Complainant requested a compact disk of the December 2, 2008 Stillwater public meeting. The Custodian provided no evidence that indicates that fulfilling the Complainant’s request required an extraordinary expenditure of time and

effort pursuant to N.J.S.A. 47:1A-5.c. or a substantial amount of manipulation or programming of information technology pursuant to N.J.S.A. 47:1A-5.d.

Therefore, pursuant to N.J.S.A. 47:1A-5.b., Libertarian Party of Central New Jersey, supra, Moore, supra, and Dugan, supra, the Custodian must charge the actual cost of duplicating the requested record. As such, the Custodian's charge of \$5.00 for a copy of the December 2, 2008 Stillwater public meeting is unreasonable and violates N.J.S.A. 47:1A-5.b. Because there is no evidence that the Complainant actually paid the proposed \$5.00 copying fee, the Council declines to order any refund to the Complainant.

Ordinarily, the GRC would order disclosure of the requested audio recording at the custodial agency's actual cost. However, because the Complainant has indicated that he no longer desires a copy of the requested audio recording, the Council declines to order disclosure of same.

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

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

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the November 10, 2008 executive session minutes to determine the validity of the Custodian's assertion that the redactions made to the requested closed session minutes were for confidential contract negotiations exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 10:4-12.7., as well as the Complainant's contention that additional redactions were made to the requested minutes without explanation.
2. **The Custodian must deliver¹² to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or**

¹² The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.
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redaction index¹³, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁴, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

3. Pursuant to N.J.S.A. 47:1A-5.b., Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the actual cost of duplicating the requested record. As such, the Custodian's charge of \$5.00 for a copy of the December 2, 2008 Stillwater public meeting is unreasonable and violates N.J.S.A. 47:1A-5.b. Because there is no evidence that the Complainant actually paid the proposed \$5.00 copying fee, the Council declines to order any refund to the Complainant.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010

¹³ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁴ "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."