



**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*

**RICHARD E. CONSTABLE, III**  
*Acting Commissioner*

**FINAL DECISION**

**March 27, 2012 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2009-242

v.

Frankford Township (Sussex)  
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 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, dismisses this complaint because the Complainant withdrew his complaint via e-mail to the GRC dated March 7, 2012 (via legal counsel) because the parties have reached a settlement agreement in this matter. Therefore, no further adjudication is required.

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

Final Decision Rendered by the  
Government Records Council  
On The 27<sup>th</sup> Day of March, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Catherine Starghill, Executive Director  
Government Records Council

**Decision Distribution Date: April 3, 2012**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
March 27, 2012 Council Meeting**

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

**GRC Complaint No. 2009-242**

v.

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

**Records Relevant to Complaint:**

1. Audio recording of the most recent public meeting.
2. Minutes of every executive session held during July 1, 2008 to June 30, 2009 that has been approved in PDF. format.<sup>3</sup>

**Request Made:** June 30, 2009

**Response Made:** July 8, 2009

**Custodian:** Patty Bussow<sup>4</sup>

**GRC Complaint Filed:** August 11, 2009

**Background**

**July 26, 2011**

Government Records Council's ("Council") Interim Order. At its July 26, 2011 public meeting, the Council considered the July 19, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian timely complied with the Council's May 24, 2011 Interim Order by providing unredacted copies of the July 24, 2008, August 28, 2008 and October 23, 2008 executive session minutes to the Complainant within five (5) business days and simultaneously providing certified confirmation of said compliance to the Executive Director.
2. The Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for redacting the responsive minutes pursuant to Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008), violated N.J.S.A. 47:1A-5.b. by charging an unreasonable fee for an audio recording and

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Glenn C. Kienz, Esq., of Weiner, Lesniak (Parsippany, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> The evidence of record indicates that the Custodian of Record at the time of the Complainant's OPRA request was Louanne Cular, who designated the current Custodian to handle this request.

unlawfully denied access to the redacted portions of the July 24, 2008, August 28, 2008 and October 23, 2008 executive session minutes. However, the Custodian timely complied with both the Council's January 25, 2011 and May 24, 2011 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's January 25, 2011 and May 24, 2011 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, [Teeters], and [Mason]. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

#### **July 27, 2011**

Council's Interim Order distributed to the parties.

#### **August 5, 2011**

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

#### **March 7, 2012**

E-mail from the Complainant's Counsel to the GRC, attaching a letter from Counsel to the Honorable Caridad F. Rigo, Administrative Law Judge ("ALJ"), dated March 7, 2012. Counsel states that pursuant to the terms of a settlement agreement reached between the parties, the Complainant withdraws this complaint.

#### **Analysis**

No analysis required.

#### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council dismiss this complaint because the Complainant withdrew his complaint via e-mail to the GRC dated March 7, 2012 (via legal counsel) because the parties have reached a settlement agreement in this matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

March 20, 2012



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**INTERIM ORDER**

**July 26, 2011 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2009-242

v.

Frankford Township (Sussex)  
Custodian of Record

At the July 26, 2011 public meeting, the Government Records Council (“Council”) considered the July 19, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian timely complied with the Council’s May 24, 2011 Interim Order by providing unredacted copies of the July 24, 2008, August 28, 2008 and October 23, 2008 executive session minutes to the Complainant within five (5) business days and simultaneously providing certified confirmation of said compliance to the Executive Director.
2. The Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for redacting the responsive minutes pursuant to Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008), violated N.J.S.A. 47:1A-5.b. by charging an unreasonable fee for an audio recording and unlawfully denied access to the redacted portions of the July 24, 2008, August 28, 2008 and October 23, 2008 executive session minutes. However, the Custodian timely complied with both the Council’s January 25, 2011 and May 24, 2011 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council’s January 25, 2011 and May 24, 2011 Interim Orders, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law.



Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of July, 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: July 27, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
July 26, 2011 Council Meeting**

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

**GRC Complaint No. 2009-242**

v.

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

**Records Relevant to Complaint:**

1. Audio recording of the most recent public meeting.
2. Minutes of every executive session held during July 1, 2008 to June 30, 2009 that has been approved in PDF. format.<sup>3</sup>

**Request Made:** June 30, 2009

**Response Made:** July 8, 2009

**Custodian:** Patty Bussow<sup>4</sup>

**GRC Complaint Filed:** August 11, 2009

**Background**

**May 24, 2011**

Government Records Council's ("Council") Interim Order. At its May 24, 2011 public meeting, the Council considered the April 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, found that:

1. The Custodian has complied with the Council's January 25, 2011 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order for the *in camera* inspection, providing the Complainant with the audiotape at the actual cost, and providing the Executive Director with the requisite legal certifications of compliance within five (5) business days of receiving the Council's Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of**

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Glenn C. Kienz, Esq., of Weiner, Lesniak (Parsippany, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> The evidence of record indicates that the Custodian of Record at the time of the Complainant's OPRA request was Louanne Cular, who designated the current Custodian to handle this request.

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

3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

**May 26, 2011**

Council's Interim Order distributed to the parties.

**June 1, 2011**

Custodian's response to the Council's Interim Order attaching the following:

- Executive session minutes dated July 24, 2008.
- Executive session minutes dated August 28, 2008.
- Executive session minutes dated October 23, 2008.

The Custodian certifies that she has complied with the Council's May 24, 2011 Interim Order by providing the Complainant with unredacted copies of the executive session minutes dated July 24, 2008, August 28, 2008 and October 23, 2008.

**Analysis**

**Whether the Custodian complied with the Council's May 24, 2011 Interim Order?**

At its May 24, 2011 public meeting, the Council ordered the Custodian to "comply with the Council's Findings of the In Camera Examination ... within five (5) business days from receipt of the Council's order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director." The Custodian provided the Complainant with the unredacted minutes and simultaneously provided certified confirmation of compliance of the Council's May 24, 2011 Interim Order to the Executive Director on June 1, 2011, or the third (3) business day after receipt of the Council's Order.

Therefore, the Custodian timely complied with the Council's May 24, 2011 Interim Order by providing unredacted copies of the July 24, 2008, August 28, 2008 and October 23, 2008 executive session minutes to the Complainant within five (5) business days and simultaneously providing certified confirmation of said compliance to the Executive Director.



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

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Felder 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).

The Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for redacting the responsive minutes pursuant to Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008), violated N.J.S.A. 47:1A-5.b. by charging an unreasonable fee for the requested audio recording and unlawfully denied access to the redacted portions of the July 24, 2008, August 28, 2008 and October 23, 2008 executive session minutes. However, the Custodian timely complied with both the Council’s January 25, 2011 and May 24, 2011 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

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

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

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

Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that “[a] plaintiff is considered a prevailing party ‘when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.’” *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); *see also* Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart “generously” defines “a prevailing party [a]s one who succeeds ‘on any significant issue in litigation [that] achieves some of the benefit the parties

sought in bringing suit" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

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

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4

(repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.<sup>5</sup> Those changes expand counsel fee awards under OPRA.” Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

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

In the Denial of Access Complaint at issue here, the Complainant’s Counsel requested that the GRC order the Custodian to provide a certification as to the actual cost of the audio recording sought and provide said recording at that cost. Counsel further requested that the GRC conduct an *in camera* review of the redacted minutes.

In its January 25, 2011 Interim Order, the Council held that the Custodian had violated N.J.S.A. 47:1A-5.b. and ordered her to provide the Complainant and GRC a legal certification as to the actual cost of providing the audio recording sought. The Council further ordered that the Custodian provide the audio recording to the Complainant at the actual cost and provide certified confirmation of such to the Executive Director within five (5) business days of receipt of the Council’s Order. The Council additionally ordered submission of the executive session minutes sought by the Complainant for an *in camera* review. The Custodian provided certified confirmation of her compliance with the Council’s Order on February 10, 2011.

The Council subsequently conducted an *in camera* review and found that the Custodian unlawfully denied access to the redacted portions of the executive session minutes at issue. Based on the foregoing, the Council ordered in its May 24, 2011 Interim Order that the Custodian disclose unredacted copies of the minutes to the

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<sup>5</sup> The significance of awarding fees to “requestors” and not “plaintiffs” is less clear because OPRA’s fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC’s more information mediation route; the phrase “requestors” may simply have been used to encompass both groups. Likewise, one cannot obtain an “order” from the GRC, so the absence of that language in OPRA is not necessarily revealing.

Complainant. The Custodian provided certified confirmation of compliance with the Council's Order on June 1, 2011. The evidence of record clearly indicates that this complaint brought about a change in the actions of the Custodian; thus, the Complainant is a prevailing party entitled to reasonable attorney's fees.

Pursuant to Teeters, *supra*, and the Council's January 25, 2011 and May 24, 2011 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian timely complied with the Council's May 24, 2011 Interim Order by providing unredacted copies of the July 24, 2008, August 28, 2008 and October 23, 2008 executive session minutes to the Complainant within five (5) business days and simultaneously providing certified confirmation of said compliance to the Executive Director.
2. The Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for redacting the responsive minutes pursuant to Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008), violated N.J.S.A. 47:1A-5.b. by charging an unreasonable fee for an audio recording and unlawfully denied access to the redacted portions of the July 24, 2008, August 28, 2008 and October 23, 2008 executive session minutes. However, the Custodian timely complied with both the Council's January 25, 2011 and May 24, 2011 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's January 25, 2011 and May 24, 2011 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the

Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

July 19, 2011



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

INTERIM ORDER

May 24, 2011 Government Records Council Meeting

Jesse Wolosky  
Complainant

Complaint No. 2009-242

v.

Frankford Township (Sussex)  
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 2011 *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 January 25, 2011 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order for the *in camera* inspection, providing the Complainant with the audiotape at the actual cost, and providing the Executive Director with the requisite legal certifications of compliance within five (5) business days of receiving the Council’s Order.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.





<b>Record or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>1</sup></b>
1)	Executive Session Minutes dated July 24, 2008	Employees names	In the 2 <sup>nd</sup> and 4 <sup>th</sup> paragraphs, employees' names were removed pursuant to <u>N.J.S.A. 47:1A-10</u> as personnel records.	These redactions were unlawful because these personnel matters were resolved within a few days after the meeting at issue and pursuant to case law must be disclosed upon resolution before the date of the OPRA request (June 30, 2009). <u>See South Jersey Publishing Company v. New Jersey Expressway Authority</u> , 124 N.J. 478, 591 A.2d 921 (1991).
2)	Executive Session Minutes dated August 28, 2008	Entire second (2 <sup>nd</sup> ) paragraph	The entire second (2 <sup>nd</sup> ) paragraph was redacted pursuant to <u>N.J.S.A. 47:1A-10</u> as personnel records.	This redaction was unlawful because this personnel matter (involving information generated by or on behalf of public employers or

<sup>1</sup> **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>public employees in connection with any sexual harassment complaint filed with a public employer exempt pursuant to <u>N.J.S.A. 47:1A-1.1.</u>) was resolved September 5, 2008 and pursuant to case law must be disclosed upon resolution before the date of the OPRA request (June 30, 2009). <i>See South Jersey Publishing Company v. New Jersey Expressway Authority</i>, 124 N.J. 478, 591 A.2d 921 (1991) and <i>Joanne Payton v. New Jersey Turnpike Authority</i>, 148 N.J. 524, 691 A.2d 321 (1997).</p>
3)	Executive Session Minutes dated October 23, 2008	Entire first (1 <sup>st</sup> ) paragraph	The entire first (1 <sup>st</sup> ) paragraph was redacted pursuant to <u>N.J.S.A. 47:1A-10</u> as personnel records.	<p>The Custodian inaccurately identified the redacted paragraph as the first (1<sup>st</sup>) when in fact it is the second (2<sup>nd</sup>) paragraph.</p> <p>This redaction was unlawful because this personnel matter was resolved at the meeting at issue and pursuant</p>

				to case law must be disclosed upon resolution before the date of the OPRA request (June 30, 2009). <u>See South Jersey Publishing Company v. New Jersey Expressway Authority</u> , 124 N.J. 478, 591 A.2d 921 (1991).
4)	Executive Session Minutes dated February 17, 2009	No redactions were made.	No redactions were made.	No redactions were made.

Interim Order Rendered by the  
Government Records Council  
On The 24<sup>th</sup> Day of May, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: May 26, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2009-242**

v.

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

**Records Relevant to Complaint:**

1. Audio recording of the most recent public session meeting.
2. Minutes of every executive session meeting held during July 1, 2008 to June 30, 2009 that has been approved in PDF. format.<sup>3</sup>

**Request Made:** June 30, 2009

**Response Made:** July 8, 2009

**Custodian:** Patty Bussow<sup>4</sup>

**GRC Complaint Filed:** August 11, 2009

**Records Submitted for *In Camera* Examination:**

1. Executive Session Meeting Minutes dated July 24, 2008.
2. Executive Session Meeting Minutes dated August 28, 2008.
3. Executive Session Meeting Minutes dated October 23, 2008.
4. Executive Session Meeting Minutes dated February 17, 2009.<sup>5</sup>

**Background**

**January 25, 2011**

Government Records Council's Interim Order. At the January 25, 2011 public meeting, the Government Records Council ("Council") considered the January 18, 2011 Executive Director's Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. Because the Custodian failed to provide a specific lawful basis for the redactions to the requested executive session minutes, the Custodian's response to the Complainant's OPRA request Item No. 2 is insufficient pursuant to N.J.S.A.

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

<sup>2</sup> Represented by Glenn C. Kienz, Esq., of Weiner, Lesniak (Parsippany, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> The evidence of record indicates that the Custodian of Record at the time of the Complainant's OPRA request was Louanne Cular, who designated the current Custodian to handle this request.

<sup>5</sup> The Custodian certified on September 2, 2010 that these four (4) sets of meeting minutes were the only sets of minutes provided to the Complainant which contained redactions.

- 47:1A-5.g. and Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008). *See also* Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (May 2010)(noting that N.J.S.A. 47:1A-5.g. requires a custodian of record to indicate the specific basis for noncompliance), O’Shea v. Township of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009) *and* Frost v. North Hudson Regional Fire & Rescue (Hudson), GRC Complaint No. 2008-198 (December 2009).
2. 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 following to determine the validity of the Custodian’s assertion that the records contain information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1. and personnel information pursuant to N.J.S.A. 47:1A-10:
    1. **Executive Session Meeting Minutes dated July 24, 2008.**
    2. **Executive Session Meeting Minutes dated August 28, 2008.**
    3. **Executive Session Meeting Minutes dated October 23, 2008.**
    4. **Executive Session Meeting Minutes dated February 17, 2009.**
  3. **The Custodian must deliver<sup>6</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index,<sup>7</sup> as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>8</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
  4. Pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962) and Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the “actual cost” of duplicating the requested records. As such, the Custodian’s charge of \$25.00 for an audio recording is unreasonable and in violation of N.J.S.A. 47:1A-5.b. **The Custodian shall submit a legal certification providing the “actual cost” incurred by the Township to produce the audiotape and provide the requested record to the Complainant at the “actual cost” and shall not include the cost of labor or other overhead expenses associated with making the copy. *See also* O’Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008).**

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<sup>6</sup> 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.

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

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

5. **The Custodian shall comply with Item No. 4 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>9</sup> to the Executive Director.<sup>10</sup>**
6. 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

#### **February 4, 2011**

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

#### **February 10, 2011**

Three separate certifications of the Custodian in response to the Council's Interim Order with the requested records for the *in camera* inspection. The Custodian certifies that she is the Municipal Clerk for the Township of Frankford in the County of Sussex and that in compliance with the January 25, 2011 Interim Order by the Government Records Council, which she received via e-mail on Monday, February 7, 2011:

- 1) The actual cost incurred by the Township to produce the audiotape requested by the Complainant is \$1.48, not including the cost of labor or other overhead expenses associated with making the copy;
- 2) The Complainant picked up the requested audiotape on February 10, 2011, which was supplied to him at actual cost not including the cost of labor or other overhead expenses associated with making the copy; and
- 3) The records provided herein, specifically, the Executive Session minutes dated July 24, 2008, August 28, 2008, October 23, 2008 and February 17, 2009, are the records requested by the Government Records Council for the *in camera* inspection.

#### **March 22, 2011**

E-mail from the GRC to the Custodian. The GRC states that it needs additional information in order to adjudicate this complaint. The GRC asks the Custodian to provide a legal certification indicating the date upon which the personnel matters redacted from the Executive Session minutes dated July 24, 2008, August 28, 2008 and October 23, 2008 were resolved/concluded/acted upon. Further, the GRC asks the Custodian to indicate if the matters are still pending. The GRC requests that the Custodian submit the legal certification by end of business on Friday, March 25, 2011.

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<sup>9</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>10</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

### **March 23, 2011**

Custodian's Certification. The Custodian certifies that she is the Municipal Clerk for Frankford Township, but was not the Clerk at the time of the request subject of this complaint. Further, the Custodian certifies that upon review of the Executive Session minutes, Open Session minutes and the personnel files of those employees at issue in the Executive Session minutes and that to the best of her knowledge the following addresses the resolution of the personnel issues discussed:

- 1) July 24, 2008 – the redacted matter appears to have been settled by the previous Municipal Clerk/Administrator within a few days after the meeting.
- 2) August 28, 2008 – the redacted matter was settled on September 5, 2008.
- 3) October 23, 2008 – the redacted matter was settled at the time of the meeting and no further action was taken.

### **Analysis**

#### **Whether the Custodian complied with the Council's January 25, 2011 Interim Order?**

At its January 25, 2011 public meeting, the Council determined that because the Custodian asserted that the requested records were lawfully redacted because the records contain information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1. and personnel information pursuant to N.J.S.A. 47:1A-10, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the Council ordered an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted documents, 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 February 11, 2011.

The Council also determined that the Custodian must charge the "actual cost" of duplicating the requested records. As such, the Council ruled that the Custodian's charge of \$25.00 for an audio recording is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Council therefore ordered the Custodian to submit a legal certification providing the "actual cost" incurred by the Township to produce the audiotape and provide the requested record to the Complainant at the "actual cost" which must not include the cost of labor or other overhead expenses associated with making the copy.

The Custodian provided the GRC with three separate legal certifications stating the actual cost of the audiotape, that she provided to audiotape to the Complainant for \$1.48, and that the records requested by the Council for the *in camera* inspection are the records she provided. The Custodian also provided the unredacted records requested for the *in camera*

inspection and a redaction index on February 10, 2011. Therefore, the Custodian timely complied with the Council's January 28, 2011 Interim Order.

**Whether the Custodian unlawfully denied the Complainant access to the redacted portions of the requested records?**

The Custodian asserts that she lawfully denied the Complainant access to the redacted portions of the requested records because the records contain information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1. and personnel information pursuant to N.J.S.A. 47:1A-10. Conversely, the Complainant asserts that the Custodian's redactions were unlawful.

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 (N.J.S.A. 10:4-12) provides that:

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

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.

OPRA also provides that:

Notwithstanding the provisions of P.L. 1963, c. 73 (*C. 47:1A-1 et seq.*) or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:



an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;

personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

OPRA further provides that “[a] government record shall not include the following information which is deemed to be confidential for the purposes of ... [OPRA] ... : information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer ...” N.J.S.A. 47:1A-1.1.

Additionally, OPRA excludes from the definition of a government record any record within the attorney client privilege. N.J.S.A. 47:1A-1.1. In New Jersey, protecting confidentiality within the attorney-client relationship has long been recognized by the courts. *See, e.g. Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18 (App. Div. 1989). In general, the attorney-client privilege renders as confidential communications between a lawyer and a client made in the course of that professional relationship. *See N.J.S.A.* 2A: 84A-20 and Fellerman v. Bradley, 99 N.J. 493, 498-99 (1985). Rule 504 (1) of the New Jersey Rules of Evidence provides that communications between a lawyer and client, “in the course of that relationship and in professional confidence, are privileged....” Such communications as discussion of litigation strategy, evaluation of liability, potential monetary exposure and settlement recommendations are considered privileged. The Press of Atlantic City v. Ocean County Joint Insurance Fund, 337 N.J. Super. 480, 487 (Law Div. 2000). Also confidential are mental impressions, legal conclusions, and opinions or theories of attorneys. In Re Environmental Ins. Actions, 259 N.J. Super. 308, 317 (App. Div. 1992).

The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system." Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 27-8 (App.Div.1989). The attorney-client privilege protects communications between a lawyer and the client made in the course of that professional relationship, and particularly protects information which, if disclosed, would jeopardize the legal position of the client. N.J.S.A. 2A:84A-20; RPC 1.6. The New Jersey Supreme Court has observed that RPC 1.6 “expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client.” In re Advisory Opinion No. 544 of N.J. Sup. Court, 103 N.J. 399, 406 (1986).

Redaction of otherwise public documents is appropriate where protection of privileged or confidential subject matter is a concern. South Jersey Publishing Co., Inc. v. N. J. Expressway Authority, 124 N.J. 478, 488-9 (1991). Moreover, whether the matter contained in the requested documents pertains to pending or closed cases is important, because the need for confidentiality is greater in pending matters. Keddie v. Rutgers, State University, 148 N.J. 36, 54 (1997). Nevertheless, "[e]ven in closed cases. . .attorney work-product and documents containing legal strategies may be entitled to protection from disclosure." *Id.*

Further, when determining whether the public's right to know, as embodied in the Common Law, in the old Right to Know Law, and in the Open Public Meetings Act, requires the disclosure of the minutes and related documents of a governmental meeting properly held in executive session once the matter under discussion has been resolved fully, the New Jersey Supreme Court held that a governing body cannot withhold permanently the minutes from disclosure and the compelling public interest in favor or informing the public of the basis for governmental decision making mandates disclosure. South Jersey Publishing Company v. New Jersey Expressway Authority, 124 N.J. 478, 591 A.2d 921 (1991).

Lastly, citing to South Jersey Publishing Company, *supra*, the New Jersey Supreme Court held that if a public body legitimately conducts a meeting in closed session, it nevertheless must make the minutes of that meeting promptly available to the public unless full disclosure would subvert the purpose of a particular exception to the Open Public Meetings Act. However, given the Legislature's strongly stated intent to effectuate broad public participation in the affairs of governmental bodies, few cases will require even partial nondisclosure – including discussions of employee sexual harassment complaints filed under the Law Against Discrimination. Joanne Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 691 A.2d 321 (1997).

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

<b>Record or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>11</sup></b>

<sup>11</sup> **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

1)	Executive Session Minutes dated July 24, 2008	Employees names	In the 2 <sup>nd</sup> and 4 <sup>th</sup> paragraphs, employees' names were removed pursuant to <u>N.J.S.A. 47:1A-10</u> as personnel records.	These redactions were unlawful because these personnel matters were resolved within a few days after the meeting at issue and pursuant to case law must be disclosed upon resolution before the date of the OPRA request (June 30, 2009). <u>See South Jersey Publishing Company v. New Jersey Expressway Authority</u> , 124 N.J. 478, 591 A.2d 921 (1991).
2)	Executive Session Minutes dated August 28, 2008	Entire second (2 <sup>nd</sup> ) paragraph	The entire second (2 <sup>nd</sup> ) paragraph was redacted pursuant to <u>N.J.S.A. 47:1A-10</u> as personnel records.	This redaction was unlawful because this personnel matter (involving information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer exempt pursuant to <u>N.J.S.A. 47:1A-1.1</u> .) was resolved September 5, 2008 and pursuant to case law must

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>be disclosed upon resolution before the date of the OPRA request (June 30, 2009). See <u>South Jersey Publishing Company v. New Jersey Expressway Authority</u>, 124 N.J. 478, 591 A.2d 921 (1991) and <u>Joanne Payton v. New Jersey Turnpike Authority</u>, 148 N.J. 524, 691 A.2d 321 (1997).</p>
3)	Executive Session Minutes dated October 23, 2008	Entire first (1 <sup>st</sup> ) paragraph	The entire first (1 <sup>st</sup> ) paragraph was redacted pursuant to <u>N.J.S.A. 47:1A-10</u> as personnel records.	<p>The Custodian inaccurately identified the redacted paragraph as the first (1<sup>st</sup>) when in fact it is the second (2<sup>nd</sup>) paragraph.</p> <p>This redaction was unlawful because this personnel matter was resolved at the meeting at issue and pursuant to case law must be disclosed upon resolution before the date of the OPRA request (June 30, 2009). See <u>South Jersey Publishing Company v. New Jersey Expressway Authority</u>, 124</p>

				<u>N.J.</u> 478, 591 A.2d 921 (1991).
4)	Executive Session Minutes dated February 17, 2009	No redactions were made.	No redactions were made.	No redactions were made.

Thus, the Custodian unlawfully denied access to the redacted information contained in the requested records because the personnel matters discussed in the relevant executive sessions were resolved before the date of the OPRA request according to the March 23, 2011 certification of the present Custodian, and as such must be disclosed pursuant to applicable case law.

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

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

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

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council’s January 25, 2011 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order for the *in camera* inspection, providing the Complainant with the audiotape at the actual cost, and providing the Executive Director with the requisite legal certifications of compliance within five (5) business days of receiving the Council’s Order.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
3. 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.

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

Approved By: Catherine Starghill, Esq.  
Executive Director

April 20, 2011



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**INTERIM ORDER**

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

Jesse Wolosky  
Complainant

Complaint No. 2009-242

v.

Frankford Township (Sussex)  
Custodian of Record

At the January 25, 2011 public meeting, the Government Records Council (“Council”) considered the January 18, 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:

1. Because the Custodian failed to provide a specific lawful basis for the redactions to the requested executive session minutes, the Custodian’s response to the Complainant’s OPRA request Item No. 2 is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008). *See also* Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (May 2010)(noting that N.J.S.A. 47:1A-5.g. requires a custodian of record to indicate the specific basis for noncompliance), O’Shea v. Township of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009) *and* Frost v. North Hudson Regional Fire & Rescue (Hudson), GRC Complaint No. 2008-198 (December 2009).
2. 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 following to determine the validity of the Custodian’s assertion that the records contain information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1. and personnel information pursuant to N.J.S.A. 47:1A-10:
  1. **Executive Session Meeting Minutes dated July 24, 2008.**
  2. **Executive Session Meeting Minutes dated August 28, 2008.**
  3. **Executive Session Meeting Minutes dated October 23, 2008.**
  4. **Executive Session Meeting Minutes dated February 17, 2009.**



3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index,<sup>2</sup> as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. Pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962) and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the "actual cost" of duplicating the requested records. As such, the Custodian's charge of \$25.00 for an audio recording is unreasonable and in violation of N.J.S.A. 47:1A-5.b. **The Custodian shall submit a legal certification providing the "actual cost" incurred by the Township to produce the audiotape and provide the requested record to the Complainant at the "actual cost" and shall not include the cost of labor or other overhead expenses associated with making the copy. See also O'Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008).**
5. **The Custodian shall comply with Item No. 4 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup>**
6. 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.
7. 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 25<sup>th</sup> Day of January, 2011

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<sup>1</sup> 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.

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

<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>4</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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



Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: February 4, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2009-242**

v.

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

**Records Relevant to Complaint:**

1. Audio recording of the most recent public session meeting.
2. Minutes of every executive session meeting held during July 1, 2008 to June 30, 2009 that has been approved in PDF. format.<sup>3</sup>

**Request Made:** June 30, 2009

**Response Made:** July 8, 2009

**Custodian:** Patty Bussow<sup>4</sup>

**GRC Complaint Filed:** August 11, 2009

**Background**

**June 30, 2009**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant states that his preferred method of delivery is via e-mail.

**July 8, 2009**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5<sup>th</sup>) business day following receipt of such request.

The Custodian states that original audio recordings are stored on tape. The Custodian states that the Township has the ability to make copies of the original audio tape, for which the cost per local ordinance is \$25.00 per tape. The Custodian notes that the Township does not have the ability to provide the Complainant copies in any other format. The Custodian states that she will not duplicate the audio recording until the Complainant has advised that he wishes to obtain the record at the cost provided.

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

<sup>2</sup> Represented by Glenn C. Kienz, Esq., of Weiner, Lesniak (Parsippany, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> The evidence of record indicates that the Custodian of Record at the time of the Complainant's OPRA request was Louanne Cular, who designated the current Custodian to handle this request.

The Custodian states that she will be able to provide the requested executive session minutes via e-mail as requested by the Complainant. The Custodian states that no charge will be incurred for said minutes. The Custodian states that the requested minutes will be provided to the Complainant on July 9, 2009.

**July 8, 2009**

E-mail from the Complainant to the Custodian. The Complainant thanks the Custodian for her response to request Item No. 1. Further, the Complainant acknowledges that the Custodian will forward the records responsive to request Item No. 2 on July 9, 2009.

**July 9, 2009**

E-mail from Custodian to the Complainant with attachments. The Custodian states that the requested executive session minutes have been scanned in a protected word format. The Custodian requests that the Complainant advise if any problem opening the attached records should arise.

**August 11, 2009**

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

- Complainant’s OPRA request dated June 30, 2009.
- E-mail from the Custodian to the Complainant dated July 8, 2009.
- E-mail from the Complainant to the Custodian dated July 8, 2009.
- E-mail from the Custodian to the Complainant dated July 9, 2010 (with attachments).
- Records responsive to request Item No. 2:<sup>5</sup>
  - Executive session minutes dated July 24, 2008 (with what appears to be redactions).
  - Executive session minutes dated August 28, 2008 (with what appears to be redactions).
  - Executive session minutes dated October 23, 2008 (with what appears to be redactions).
  - Executive session minutes dated February 17, 2009 (with what appears to be redactions).<sup>6</sup>

The Complainant’s Counsel states that this action is being brought against Frankford Township (“Township”) for the following reasons: (1) the Complainant was denied access to the audio recording responsive to request Item No. 1 when the Custodian attempted to charge the Complainant a fee of \$25.00 per audio tape; and (2) the Custodian redacted portions of the meeting minutes responsive to request Item No. 2

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<sup>5</sup> Additional meeting minutes were provided; however, the Complainant’s Counsel only attached those minutes containing redactions made by the Custodian. The GRC subsequently received a legal certification from the Custodian that only (4) sets of minutes contained redactions. See Custodian’s certification dated September 2, 2010.

<sup>6</sup> Because the Custodian did not state in her response that the minutes were redacted nor did she provide a specific lawful basis for such redactions, and although it appears that the Custodian employed a method of “whiting out” the requested minutes, it is uncertain whether redactions were actually made.

without providing a specific lawful basis for the redactions. Counsel also requests that the GRC perform an *in camera* review to determine whether the redactions were lawful.

#### Request Item No. 1: Audio cassette recording

Counsel states that the Complainant submitted an OPRA request to the Township via facsimile on June 30, 2009. Counsel states that the Custodian responded in writing on July 8, 2009 stating that the Township could duplicate the requested audio tape at a cost of \$25.00 per tape per local ordinance. Counsel avers that the Complainant declined to obtain a copy of the requested record due to the high cost.

Counsel argues that it is extremely unlikely that the Township's proposed fee represents the actual cost of producing the requested audio tape. Counsel states that as the GRC recently observed in Renna v. Township of Warren (Somerset), GRC Complaint No. 2008-40 at pg. 13 (November 2008 Interim Order), even a charge of \$5.00 for a CD is "likely not" the "actual cost" as is required to be charged pursuant to N.J.S.A. 47:1A-5.b.

Counsel asserts that the GRC should follow New Jersey case law and the GRC's own line of decisions holding that a public agency must charge the "actual cost" of duplicating a record in the medium requested. N.J.S.A. 47:1A-5.b. Counsel avers that absent extraordinary circumstances, "actual cost" is the material cost of providing the record, excluding labor and overhead. *See* Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26, 31 (1962)(holding that labor is not included in "actual cost" under New Jersey common law); Dugan v. Camden County Clerks Office, 376 N.J. Super. 271, 280 (App. Div. 2005)(holding that fees allowed under OPRA consistent with fees allowed under Common Law Right of Access); Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 141 (App. Div. 2006)(holding that "direct" cost of copying not an appropriate standard) and O'Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008 Interim Order). Counsel states that N.J.S.A. 47:1A-5.b provides that, "[t]he 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 ..." unless a special service charge is warranted.<sup>7</sup>

Counsel avers that the Custodian may argue that the \$25.00 fee reflects a special service charge; however, certain conditions set forth in OPRA must be met:

"[i]f a request is for a record: 1) in a medium not routinely used by the agency; 2) not routinely developed or maintained by an agency; or 3) 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,

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<sup>7</sup> Counsel notes that the type of medium furnished is not at issue in this complaint.  
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and supervisory assistance required, or both.” (Emphasis added.) N.J.S.A. 47:1A-5.d.

Counsel asserts that the Custodian did not undertake the necessary process to prove that disclosure of the requested audio tape at the proposed copying cost would fall under any of the conditions above.<sup>8</sup>

#### Request Item No. 2: Executive session minutes

Counsel first notes that the minutes provided to the Complainant appear to be redacted because of the broad areas of blank space contained therein. Counsel notes that it is not clear what material was redacted because the redactions were not clearly delineated nor specifically identified.

Counsel argues that assuming that the four (4) sets of meeting minutes attached to the Denial of Access Complaint were redacted, the Custodian’s response is legally insufficient because she failed to provide a specific lawful basis for each redaction. *See Paff v. Borough of Lavallette (Ocean)*, GRC Complaint No. 2007-209 (June 2008 Interim Order)(holding that “[t]he Custodian’s response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction.”) *See also Paff v. Township of Plainsboro*, GRC Complaint No. 2005-29 (July 2005)(ordering the Custodian to provide explanations for redactions); *and Schwartz v. New Jersey Department of Human Services*, GRC Complaint No. 2004-60 (February 2005)(requiring specific citations to the law allowing redactions). Counsel contends that in this complaint, there is no way to determine the basis for the redactions made by the Custodian.

Counsel respectfully requests the following relief:

1. A determination that the Custodian violated OPRA by charging more than the actual cost for a copy of an audio tape;
2. A determination ordering the Custodian to certify to the actual cost of its audio tapes;
3. A determination ordering the Custodian to make copies of the audio tape available to the Complainant at the actual cost;
4. A determination ordering the Custodian to provide the specific, lawful basis for each redaction and to provide the records to the GRC for an *in camera* review;
5. A determination that the Complainant is a prevailing party subject to an award of reasonable attorney’s fees pursuant to N.J.S.A. 47:1A-6; and
6. After an investigation, a determination regarding whether the Custodian knowingly and willfully violated OPRA.

The Complainant does not agree to mediate this complaint.

#### **September 9, 2009**

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

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<sup>8</sup> Counsel asserts that the Complainant requested that the Custodian justify the \$25.00 fee; however, there is no evidence in the record to corroborate this assertion.

**September 15, 2009**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 30, 2009.
- E-mail from the Custodian to the Complainant dated July 8, 2009.

The Custodian certifies that her search for the requested records included locating the audio tape and meeting minutes responsive to the Complainant's OPRA request.

The Custodian also certifies no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

The Custodian certifies that she received the Complainant's OPRA request on June 30, 2009. The Custodian certifies that she responded to the Complainant on July 8, 2009 stating that the cost to produce a duplicate copy of the audio tape would be \$25.00 per tape per local ordinance. Moreover, the Custodian certifies that she advised the Complainant that the requested meeting minutes would be provided via e-mail on July 9, 2009.

The Custodian asserts that she responded to the Complainant's request in a timely manner and to the best of her ability. The Custodian argues that she supplied the Complainant with the cost of reproducing the audio tapes based on a Township ordinance, from which the Custodian asserts she was not at liberty to deviate. The Custodian avers that the fee ordinance is currently under review by the Township's governing body and is expected to be amended within the next month.

The Custodian certifies that redacted copies of the meeting minutes were provided to the Complainant via e-mail on July 9, 2009. The Custodian certifies that all nine (9) sets of meeting minutes contained redactions for attorney-client privilege and employee matters pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10.

Finally, the Custodian certifies that at the time of the Complainant's OPRA request, the Custodian of Record was Ms. Louanne Cular ("Ms. Cular"), Municipal Clerk and Township Administrator. The Custodian certifies that Ms. Cular designated the Custodian, then the Deputy Clerk, to handle the Complainant's OPRA request. The Custodian certifies that Ms. Cular retired from her position effective August 1, 2009 whereupon the Custodian took over Ms. Cular's duties.

**August 31, 2010**

E-mail from the GRC to the Custodian. The GRC states that it has reviewed the SOI and needs additional information. The GRC states that the Custodian asserted in the SOI that the fee ordinance was currently under review by the Township's governing body and was expected to be amended within the next month. The GRC requests that the Custodian legally certify to the following:

1. Whether the Township amended its fee schedule and if so, on what date?

2. Please provide a copy of the fee schedule to the GRC reflecting the cost for a cassette tape.

The GRC requests that the Custodian submit the requested legal certification no later than September 3, 2010.

**September 1, 2010**

Custodian's legal certification attaching Ordinance No. 2009-14. The Custodian certifies that the Township amended its fee schedule for public records by adopting Ordinance No. 2009-14 on October 20, 2009. The Custodian certifies that the ordinance sets the cost of a cassette tape at "actual cost."

**September 1, 2010**

E-mail from the GRC to the Custodian. The GRC states that it is in receipt of the Custodian's legal certification. The GRC states that upon further review of this complaint, more information is needed. The GRC states that the Complainant's Counsel attached only four (4) of the nine (9) sets of meeting minutes to the Denial of Access Complaint, which has caused some confusion as to whether only those four (4) contained redactions or whether all nine (9) sets contained redactions. Moreover, the GRC states that it is unclear whether the Township was reviewing the fee ordinance prior to the Complainant's OPRA request. The GRC requests that based on the foregoing, the Custodian legally certify to the following:

1. Whether all nine (9) sets of minutes provided to the Complainant contained redactions?
2. Whether the Township was reviewing the fee ordinance for an amendment prior to the Complainant's OPRA request?
3. If not, whether the Complainant's Denial of Access Complaint forced the Township to review and amend the ordinance?

The GRC requests that the Custodian submit the requested legal certification no later than September 3, 2010.

**September 2, 2010**

Custodian's supplemental legal certification. The Custodian certified that only four (4) sets out of nine (9) sets of executive session minutes provided to the Complainant contained redactions.<sup>9</sup>

Further, the Custodian certifies that to the best of her knowledge, there was no discussion about amending the fee ordinance prior to the Complainant's OPRA request. The Custodian certifies that the filing of the instant Denial of Access Complaint on August 10, 2009 created a need to review the fee ordinance, a process the Custodian initiated with the Township Committee.

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<sup>9</sup> The Custodian's certification herein conflicts with her certification in the SOI that all nine (9) sets of meeting minutes contained redactions; however, the Custodian's certification of this date agrees with the Complainant's assertion in the Denial of Access Complaint regarding redactions of meeting minutes.  
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## Analysis

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA also provides that:

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

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

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

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



The Complainant's Counsel argues in the Denial of Access Complaint that redacting information from a government record without providing a specific lawful basis therefor is a violation of N.J.S.A. 47:1A-5.g. The Complainant's Counsel cited to Paff v. Borough of Lavallette (Ocean), GRC Complaint No. 2007-209 (June 2008 Interim Order), Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005) and Schwartz v. New Jersey Department of Human Services, GRC Complaint No. 2004-60 (February 2005) in which the GRC held that a custodian must provide a specific lawful basis for redactions. The Complainant's Counsel argued that the Custodian's response was legally insufficient because she failed to provide a specific lawful basis for each redaction.

The issue of providing a specific lawful basis for redactions at the time of the denial has been ruled on previously by the Council. In Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008), the custodian responded in writing on the fifth (5<sup>th</sup>) business day after receipt of the complainant's OPRA request providing access to the requested executive session minutes with redactions. The complainant filed a Denial of Access Complaint arguing that the custodian has violated OPRA by failing to provide a specific lawful basis for the redactions made to the responsive meeting minutes. The Council held that:

“[a]lthough the Custodian responded to the Complainant's July 31, 2007 OPRA request by providing the redacted executive session minutes within the statutorily mandated seven (7) business days time frame required by N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction. *See Paff v. Township of Plainsboro*, GRC Complaint No. 2005-29, (July 2005)(ordering the custodian to provide redacted executive session minutes with a detailed and lawful basis for each redacted part.). *See also Barbara Schwarz v. NJ Department of Human Services*, GRC Complaint No. 2004-60, (February, 2005)(setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial.). Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A- 5.g.”

The facts of this complaint are similar to Paff in that the Custodian in this matter responded in a timely manner providing access to the requested executive session minutes with redactions, however, the Custodian herein failed to provide a specific lawful basis for said redactions.

Therefore, because the Custodian failed to provide a specific lawful basis for the redactions to the requested executive session minutes, the Custodian's response to the Complainant's OPRA request Item No. 2 is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff, supra. *See also Renna v. Union County Improvement Authority*, GRC Complaint No. 2008-86 (May 2010)(noting that N.J.S.A. 47:1A-5.g. requires a custodian of record to indicate the specific basis for noncompliance), O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009) and Frost v. North

Hudson Regional Fire & Rescue (Hudson), GRC Complaint No. 2008-198 (December 2009).

The GRC next turns to the issue of whether the Custodian unlawfully denied access to the redacted portions of the executive session minutes provided.

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 GRC<sup>10</sup> 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, 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 following to determine the validity of the Custodian’s assertion that the records contain information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1. and personnel information pursuant to N.J.S.A. 47:1A-10:

1. Executive Session Meeting Minutes dated July 24, 2008.

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<sup>10</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).  
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2. Executive Session Meeting Minutes dated August 28, 2008.
3. Executive Session Meeting Minutes dated October 23, 2008.
4. Executive Session Meeting Minutes dated February 17, 2009.<sup>11</sup>

The GRC notes that although it has not previously addressed in a complaint what constitutes an appropriate redaction, guidance for properly redacting records is found in the “Handbook for Records Custodians,” posted on the GRC’s website:

“[i]f a record contains material that must be redacted, such as a social security number or unlisted phone number, *redaction must be accomplished by using a visually obvious method that shows the requestor the specific location of any redacted material in the record.* For example, if redacting a social security number or similar type of small-scale redaction, custodians should:

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 requestor.” (Emphasis added.) *Id.* at page 14.

In this complaint, the Custodian appears to have used a method of redaction in which the Custodian copied the minutes with a blank sheet of paper covering the material to be redacted, thus “whiting out” certain entries in the minutes. This method does not show the requestor the specific location of the redacted material or the volume of material redacted; thus, the specific location of the material underlying the redactions made was not visually obvious to the Complainant.

As discussed above, the Custodian has a duty under OPRA to provide a specific lawful basis for redactions. The method of redaction employed by the Custodian in this complaint does not allow for the Custodian to conform with this duty because any basis provided cannot be matched with those blank sections of minutes provided to the Complainant. Therefore, the Custodian’s method of “whiting out” portions of the requested minutes is not “a visually obvious method that shows ... the specific location of any redacted material in the record” and is thus not appropriate under OPRA.

**Whether the Custodian violated OPRA by charging the copy costs enumerated in the Township’s ordinance rather than the actual cost of duplicating the requested records?**

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.

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<sup>11</sup> The Custodian certified on September 2, 2010 that these four (4) sets of meeting minutes were the only sets of minutes provided to the Complainant which contained redactions.  
Jesse Wolosky v. Frankford Township (Sussex), 2009-242 – Findings and Recommendations of the Executive Director

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 Complainant contends that the Custodian’s charge of \$25.00 per audio cassette of the Township’s most recent public meeting violates OPRA because said charge is in excess of the actual cost of duplicating the records.

While OPRA provides that paper copies of government records may be obtained upon payment of the actual cost of duplication not to exceed the enumerated rates of \$0.75/0.50/0.25 per page (N.J.S.A. 47:1A-5.b.), the Act does not provide explicit copy

rates for any other medium. N.J.S.A. 47:1A-5.b. goes on to state that the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy. 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 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.

Moreover, the GRC has decided on this issue previously in O’Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008), the custodian responded to the complainant’s OPRA request for an audio recording of the Council’s May 14, 2007 public and executive session in a timely manner stating that the cost for a meeting disc would be \$35.00. The custodian also requested that the complainant indicate whether he would like the custodian to prepare the record. Subsequently, the complainant filed a Denial of Access Complaint arguing that the proposed fee did not represent the “actual cost,” and that copying fees prescribed in a Township ordinance, Chapter 250, Article II § 250.9(E), appear to violate OPRA.

In O’Shea, the custodian argued in the SOI that she did not deny access because she provided the complainant with the cost to produce the requested record and never received a response. The complainant’s counsel advised the GRC on December 5, 2009 that the Township amended its ordinance to reflect copying of audio and video tapes and photographs to actual cost. Counsel argued that the amended ordinance amounted to the Township’s admission that the prior charges violated OPRA.

Based on the evidence in that complaint, the Council was tasked with deciding on whether the custodian violated OPRA by charging the fee enumerated in the Township’s ordinance rather than the actual cost of duplication of the requested record. The Council held that:

“... pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962) and Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the actual cost of duplicating the requested records. As such, the Custodian’s charge of \$35.00 for an audio

recording of the requested meeting minutes is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must provide the requested records to the Complainant and charge the actual cost of the audiotape and shall not include the cost of labor or other overhead expenses associated with making the copy.”

The facts of the matter currently before the Council are similar to the facts in O’Shea. Specially, the Complainant herein requested an audio recording of meeting minutes. The Custodian responded in writing in a timely manner stating that duplication of the audio cassette responsive would cost \$25.00 per tape pursuant to a Township ordinance and requested that the Complainant advise as to whether he would like the Custodian to duplicate the record. The Complainant subsequently filed a Denial of Access Complaint disputing the proposed charge and arguing that it is extremely unlikely that the Township’s proposed fee represents the actual cost of producing the requested audio tape.

In the SOI, the Custodian asserted that she was not at liberty to deviate from the current ordinance but that the Township was reviewing the ordinance and would possibly amend same in either late July or early August. The GRC later requested the Custodian legally certify as to whether the ordinance was amended. On September 1, 2010, the Custodian confirmed that the Township officially amended its ordinance on October 20, 2009 to reflect that actual cost applies to the duplication of audio tapes. Further, the Custodian certified that the filing of the instant Denial of Access Complaint created a need to review the fee ordinance, a process the Custodian initiated with the Township Committee.

Therefore, pursuant to N.J.S.A. 47:1A-5.b., Spaulding, supra, Libertarian Party of Central New Jersey, supra, Moore, supra, and Dugan, supra the Custodian must charge the “actual cost” of duplicating the requested records. As such, the Custodian’s charge of \$25.00 for an audio recording is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian shall submit a legal certification providing the actual cost incurred by the Township to produce the audiotape and provide the requested record to the Complainant at the “actual cost” and shall not include the cost of labor or other overhead expenses associated with making the copy. *See also O’Shea, supra.*

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

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

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

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

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to provide a specific lawful basis for the redactions to the requested executive session minutes, the Custodian's response to the Complainant's OPRA request Item No. 2 is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008). *See also* Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (May 2010)(noting that N.J.S.A. 47:1A-5.g. requires a custodian of record to indicate the specific basis for noncompliance), O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009) *and* Frost v. North Hudson Regional Fire & Rescue (Hudson), GRC Complaint No. 2008-198 (December 2009).
2. 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 following to determine the validity of the Custodian's assertion that the records contain information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1. and personnel information pursuant to N.J.S.A. 47:1A-10:
  1. **Executive Session Meeting Minutes dated July 24, 2008.**
  2. **Executive Session Meeting Minutes dated August 28, 2008.**
  3. **Executive Session Meeting Minutes dated October 23, 2008.**
  4. **Executive Session Meeting Minutes dated February 17, 2009.**
3. **The Custodian must deliver<sup>12</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index,<sup>13</sup> as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>14</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. Pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962) and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the "actual cost" of duplicating the requested records.

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<sup>12</sup> 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.

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

<sup>14</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



As such, the Custodian's charge of \$25.00 for an audio recording is unreasonable and in violation of N.J.S.A. 47:1A-5.b. **The Custodian shall submit a legal certification providing the "actual cost" incurred by the Township to produce the audiotape and provide the requested record to the Complainant at the "actual cost" and shall not include the cost of labor or other overhead expenses associated with making the copy. See also O'Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008).**

5. **The Custodian shall comply with Item No. 4 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>15</sup> to the Executive Director.<sup>16</sup>**
6. 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.
7. 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: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

January 18, 2011

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<sup>15</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>16</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.