



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

January 31, 2012 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2009-281

v.

Borough of Manasquan (Monmouth)
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council’s March 29, 2011 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council’s Order.
2. The Custodian has borne his burden of proof under N.J.S.A. 47:1A-6 of a lawful denial of access to the requested records pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12 and N.J.S.A. 47:1A- 9.a. Thus, the GRC declines to address whether the Custodian knowingly and willfully violated OPRA because no violation has occurred.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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 31st Day of January, 2012

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: February 3, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
January 31, 2012 Council Meeting**

John Paff¹
Complainant

GRC Complaint No. 2009-281

v.

Borough of Manasquan (Monmouth)²
Custodian of Records

Records Relevant to Complaint: Copies of executive session minutes for the most recent three (3) executive sessions held by the Borough of Manasquan (“Borough”) for which minutes are available in whole or part.³

Request Made: April 28, 2009

Response Made: May 5, 2009

Custodian: Colleen Scimeca

GRC Complaint Filed: October 13, 2009⁴

Background

March 29, 2011

Government Records Council’s (“Council”) Interim Order. At its March 29, 2011 public meeting, the Council considered the March 22, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The method of “whiting out” the executive session portion of the minutes provided did not allow the Complainant to clearly identify the specific location. Therefore, the Custodian’s method of “whiting out” 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. N.J.S.A. 47:1A-5.g.
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 records to determine the validity of the Custodian’s assertion

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

² Represented by James J. Kinneally, III, Esq., of the Law Offices of James J. Kinneally, III (Manasquan, NJ).

³ The Complainant requested additional records that are not at issue in this complaint.

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

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 matters and contract negotiations pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12:

1. Executive Session Minutes dated March 9, 2009.
 2. Executive Session Minutes dated March 16, 2009.
 3. Executive Session Minutes dated March 23, 2009.
3. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁷, 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. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

March 30, 2011

Council's Interim Order distributed to the parties.

April 6, 2011

Letter from Custodian's Counsel to the GRC. Counsel provides a copy of the following records pursuant to the Council's March 30, 2011 Interim Order:

- Certification of the Custodian dated April 5, 2011;
- Nine (9) unredacted copies of executive session minutes dated March 9, 2009, March 16, 2009 and March 23, 2009;
- Redaction Index for the subject records.

Analysis

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

At its March 29, 2011 public meeting, the Council determined that the GRC must conduct an *in camera* review of the requested executive session minutes dated March 9,

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

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

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

2009, March 16, 2009 and March 23, 2009 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 matters and contract negotiations pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, 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 records provided are the records 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 April 6, 2011.

The Custodian's Counsel provided the records for an *in camera* review and the Custodian's certified confirmation of compliance to the Executive Director on April 6, 2011.

Therefore, the Custodian timely complied with the Council's March 29, 2011 Interim Order by providing the records for an *in camera* review and Custodian's certified confirmation of compliance to the Executive Director within the extended deadline to comply with said Order.

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

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

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the In Camera Examination⁸
March 9, 2009	Executive session minutes	Redacted to delete discussion of Item No. 1, a	<u>Item No. 1:</u> <u>N.J.S.A. 47:1A-1.1</u> permits attorney client	<u>Item No. 1:</u> This redaction is lawful because the

⁸ **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>litigation issue, and Item No. 2, a personnel issue.</p>	<p>privileged communication to remain privileged.</p> <p><u>Item No. 2:</u> <u>N.J.S.A. 10:4-12</u> allows governing bodies to exclude the public from discussion of personnel matters. <u>N.J.S.A. 47:1A-9.a.</u> allows exemptions from disclosure contained in other statutes to apply under OPRA.</p>	<p>matter discussed involves a matter of pending or anticipated litigation pursuant to OPMA <u>N.J.S.A. 10:4-12</u> and <u>N.J.S.A. 47:1A-9.a.</u></p> <p><u>Item No. 2:</u> This redaction is lawful since this part of the executive session discussion is exempt as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to OPRA (<u>N.J.S.A. 47:1A-1.1.</u>) and contract negotiations pursuant to OPMA (<u>N.J.S.A. 10:4-12</u> and</p>
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				<u>N.J.S.A.</u> 47:1A- 9.a.).
March 16, 2009	Executive session minutes	Redacted to delete discussion of Item No. 1, a contract negotiations issue, and Item No. 2, a personnel issue. ⁹	<p><u>Item No. 1:</u> <u>N.J.S.A.</u> 47:1A-1.1 permits attorney client privileged communication to remain privileged.</p> <p><u>Item No. 2:</u> <u>N.J.S.A.</u> 10:4-12 allows governing bodies to exclude the public from discussion of personnel matters. <u>N.J.S.A.</u> 47:1A-9.a. allows exemptions from disclosure contained in other statutes to apply under OPRA.</p>	<p><u>Item No. 1:</u> This redaction is lawful since this part of the executive session discussion is exempt as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to OPRA (<u>N.J.S.A.</u> 47:1A- 1.1.) and contract negotiations pursuant to OPMA (<u>N.J.S.A.</u> 10:4-12 and <u>N.J.S.A.</u> 47:1A- 9.a.).</p> <p><u>Item No. 2:</u> This redaction is lawful since this part of the executive</p>

⁹ The Custodian also certified that Item No. 2 of the March 16, 2009 executive session minutes is a continuation of Item No. 2 of the March 9, 2009 executive session minutes.

				session discussion is exempt as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to OPRA (<u>N.J.S.A. 47:1A- 1.1.</u>) and contract negotiations pursuant to OPMA (<u>N.J.S.A. 10:4-12 and N.J.S.A. 47:1A- 9.a.</u>).
March 23, 2009	Executive session minutes	Redacted to delete discussion of Item No. 1, an ongoing litigation matter, Item No. 2, a police personnel matter, and Item No. 3, a personnel matter. Also, Item No. 3 has become a potential litigation matter	<p><u>Item No. 1:</u> <u>N.J.S.A. 47:1A- 1.1</u> permits attorney client privileged communication to remain privileged.</p> <p><u>Item No. 2:</u> <u>N.J.S.A. 10:4-12</u> allows governing bodies to exclude the public from discussion of</p>	<u>Item No. 1:</u> This redaction is lawful since this part of the executive session discussion is exempt as information which is a communication between a public agency and its insurance carrier, administrative

		<p>since the last executive session.</p>	<p>personnel matters. <u>N.J.S.A. 47:1A-9.a.</u> allows exemptions from disclosure contained in other statutes to apply under OPRA.</p>	<p>service organization or risk management office pursuant to <u>N.J.S.A. 47:1A-1.1;</u></p> <p><u>Item No. 2:</u> This redaction is lawful because it concerns personnel matters pursuant to <u>N.J.S.A. 10:4-12,</u> applicable to OPRA under <u>N.J.S.A. 47:1A-9.a.</u></p> <p><u>Item No. 3:</u> This redaction is lawful because this part of the executive session discussion is exempt as information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant</p>
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				to OPRA (<u>N.J.S.A.</u> 47:1A- 1.1.) and contract negotiations pursuant to OPMA (<u>N.J.S.A.</u> 10:4-12 and <u>N.J.S.A.</u> 47:1A- 9.a.) and because it concerns matters of pending or anticipated litigation pursuant to <u>N.J.S.A.</u> 10:4- 12 and <u>N.J.S.A.</u> 47:1A- 9.a.
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Thus, the Custodian has borne his burden of proof under N.J.S.A. 47:1A-6 of a lawful denial of access to the requested records pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12 and N.J.S.A. 47:1A- 9.a. Thus, the GRC declines to address whether the Custodian knowingly and willfully violated OPRA because no violation has occurred.

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 (7th 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. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) 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)."

The Council's *in camera* examination of the subject records disclosed that the Custodian lawfully denied access to such records under OPRA pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12 and N.J.S.A. 47:1A- 9.a.

Therefore, pursuant to Teeters, *supra*, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason, *supra*, no factual

causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's March 29, 2011 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council's Order.
2. The Custodian has borne his burden of proof under N.J.S.A. 47:1A-6 of a lawful denial of access to the requested records pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12 and N.J.S.A. 47:1A- 9.a. Thus, the GRC declines to address whether the Custodian knowingly and willfully violated OPRA because no violation has occurred.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

January 24, 2012



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
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LORI GRIFA
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INTERIM ORDER

March 29, 2011 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2009-281

v.

Borough of Manasquan (Monmouth)
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The method of “whiting out” the executive session portion of the minutes provided did not allow the Complainant to clearly identify the specific location. Therefore, the Custodian’s method of “whiting out” 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. N.J.S.A. 47:1A-5.g.
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 records 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 matters and contract negotiations pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12:
 1. Executive Session Minutes dated March 9, 2009.
 2. Executive Session Minutes dated March 16, 2009.
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3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with**

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

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



N.J. Court Rule 1:4-4³, 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. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of March, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: March 30, 2011

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

John Paff¹
Complainant

GRC Complaint No. 2009-281

v.

Borough of Manasquan (Monmouth)²
Custodian of Records

Records Relevant to Complaint: Copies of executive session minutes for the most recent three (3) executive sessions held by the Borough of Manasquan (“Borough”) for which minutes are available in whole or part.³

Request Made: April 28, 2009

Response Made: May 5, 2009

Custodian: Colleen Scimeca

GRC Complaint Filed: October 13, 2009⁴

Background

April 28, 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.⁵

May 5, 2009

Letter from the Custodian’s Counsel to the Custodian. The Custodian’s Counsel states that he is in receipt of the Complainant’s OPRA request which was received on April 28, 2009. The Custodian’s Counsel states that executive session minutes dated March 9, 2009, March 16, 2009 and March 23, 2009 are responsive to the Complainant’s OPRA request.

The Custodian’s Counsel states that the March 9, 2009 minutes are not subject to disclosure. The Custodian’s Counsel states that Item No. 1 of the minutes pertains to ongoing litigation, an exemption which will no longer apply upon conclusion of same. The Custodian’s Counsel states that Item No. 2 of the minutes pertains to personnel matters and is not subject to disclosure.

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

² Represented by James J. Kinneally, III, Esq., of the Law Offices of James J. Kinneally, III (Manasquan, NJ).

³ The Complainant requested additional records that are not at issue in this complaint.

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

⁵ The Complainant sent his OPRA request to the Borough via facsimile after business hours on April 27, 2009.

The Custodian's Counsel states that the March 16, 2009 minutes are not subject to disclosure. The Custodian's Counsel states that Items No. 1 and No. 2 of the minutes pertain to contract negotiations.

The Custodian's Counsel states that the March 23, 2009 minutes are not subject to disclosure. The Custodian's Counsel states that Item No. 1 of the minutes pertains to a litigation matter, an exemption to disclosure which will no longer apply upon conclusion of same. The Custodian's Counsel states that Item No. 2 of the minutes pertains to a personnel matter and that Item No. 3 of the minutes pertains to contract negotiations.⁶

The Custodian's Counsel states that the three (3) sets of meeting minutes requested are being withheld in their entirety based on the foregoing reasons.

May 5, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian forwards the Custodian Counsel's letter dated May 5, 2009 to the Complainant.

May 7, 2009

Letter from the Complainant to the Custodian's Counsel.⁷ The Complainant states that the Custodian forwarded a copy of the Custodian Counsel's May 5, 2009 written response denying access to even redacted copies of the responsive meeting minutes. The Complainant requests that the Custodian's Counsel ask the Custodian to reevaluate her position regarding the release of the responsive minutes and amend her decision.⁸

May 11, 2009

Facsimile from the Custodian to the Complainant on the ninth (9th) business day following receipt of the request attaching the following:

- Executive session minutes dated March 9, 2009 (with redactions).
- Executive session minutes dated March 16, 2009 (with redactions).
- Executive session minutes dated March 23, 2009 (with redactions).⁹

October 13, 2009

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

⁶ The items referred to by the Custodian's Counsel correspond with the general nature description of issues to be discussed in public session contained within each resolution.

⁷ The Complainant attached Judge Lawson's February 13, 2009 Law Division Order in Paff v. Keyport Borough Council et al. to his letter. The Complainant stated that the order required the Borough of Keyport to comply with N.J.S.A. 10:4-14 of the Open Public Meeting Act ("OPMA"). The GRC notes that it has no authority over OPMA pursuant to N.J.S.A. 47:1A-7.b.

⁸ The Complainant also requests that he be contacted via facsimile or e-mail because regular mail, which is being forwarded to a different address, is delayed.

⁹ The Custodian also attached resolutions for each executive session as requested by the Complainant.

- Complainant's OPRA request dated April 27, 2009.
- Letter from the Custodian's Counsel to the Custodian dated May 5, 2009.
- Letter from the Complainant's Counsel to the Custodian's Counsel dated May 7, 2009.
- Facsimile cover sheet from the Custodian to the Complainant attaching:
 - Executive session minutes dated March 9, 2009 (with redactions).
 - Executive session minutes dated March 16, 2009 (with redactions).
 - Executive session minutes dated March 23, 2009 (with redactions).

The Complainant's Counsel states that this complaint is being brought before the GRC because the Custodian redacted the requested executive session minutes without sufficiently identifying the specific lawful basis for said redactions. The Complainant's Counsel also contends that the redactions appear overly broad.

The Complainant's Counsel states that the Complainant submitted an OPRA request to the Borough on April 27, 2009. The Complainant's Counsel states that the Custodian's Counsel responded to the OPRA request in writing on May 5, 2009 identifying executive session minutes dated March 9, 2009, March 16, 2009 and March 23, 2009 as responsive to the Complainant's OPRA request; however, the Custodian's Counsel denied access to said minutes. The Complainant's Counsel asserts that the Custodian's Counsel stated that the March 9, 2009 minutes contained information regarding ongoing litigation and personnel matters which are privileged. The Complainant's Counsel contends that rather than redacting and disclosing the minutes, the Custodian's Counsel denied access to the minutes in their entirety. The Complainant's Counsel maintains that the Custodian's Counsel took the same position regarding the March 16, 2009 and March 23, 2009 minutes, stating that such minutes contained privileged litigation and contract negotiation matters and were therefore not disclosable.

The Complainant's Counsel states that the Complainant responded to the Custodian's Counsel on May 7, 2009 requesting that the Custodian amend her decision denying access to the responsive meeting minutes in their entirety.

The Complainant's Counsel states that the Borough faxed several documents to the Complainant on May 11, 2009. The Complainant's Counsel states that the faxed documents were redacted copies of the responsive meeting minutes. The Complainant's Counsel states that no lawful basis was given for the redactions which spanned ten (10) pages.

The Complainant's Counsel states that OPRA provides access to approved meeting minutes when requested. The Complainant's Counsel states that if meeting minutes contain confidential or privileged information, a custodian should provide copies of the minutes with appropriate redactions. *See O'Shea v. Township of Fredon (Sussex)*, GRC Complaint No. 2007-251 (April 2008) and *Paff v. City of Plainfield*, GRC Complaint No. 2006-103 (February 2007).

The Complainant's Counsel contends that the minutes at issue herein have been approved by the Borough; therefore, they are subject to disclosure with appropriate

redactions. The Complainant's Counsel argues that although the Borough's May 5, 2009 response provides general reasons for withholding the minutes in their entirety, no specific lawful basis was indicated for the complete redaction of such minutes. The Complainant's Counsel asserts that even if the GRC deems the Borough's May 5, 2009 response as an explanation for the redactions, the Borough still failed to identify which explanations would apply to the redactions.

Moreover, the Complainant's Counsel argues that the limited explanation of the redactions do not match the items discussed in executive session. The Complainant's Counsel asserts that the reasons given for withholding the March 9, 2009 minutes (ongoing litigation and a personnel matter) do not comport with the resolutions that authorized each executive session.¹⁰

The Complainant's Counsel asserts that the resolution that authorized the March 9, 2009 executive session identifies "Disputed water line repair issue" and "Shore Community Alliance Grant agreement;" neither is a litigation or personnel item. The Complainant's Counsel further states that the resolution that authorized the March 16, 2009 executive session identifies "Shore Community Alliance Grant agreement" and "Contract negotiations – Municipal Court Judge." The Complainant's Counsel states that according to the Borough's response, both items pertained to contract negotiations. The Complainant's Counsel states that it is important to note that although "Shore Community Alliance Grant agreement" is listed on both the March 9, 2009 and March 16, 2009 resolutions, the Borough's reason for withholding information about the agreement changes from potential litigation to contract negotiations. The Complainant's Counsel asserts that this is an example of how it is unclear whether the Borough is accurately portraying the lawful basis for redacting the minutes. The Complainant's Counsel argues that this trend continues in the March 23, 2009 minutes, which according to the resolution dealt with "Shore Community Alliance Grant agreement," "Letter from Bob Cash of 3/17/09 re: Borough Hall insurance settlement" and "Police Personnel Issue." The Complainant's Counsel notes that the Borough denied access to the minutes concerning these issues as pertaining to litigation matters, personnel matters and contract negotiations, respectively.

The Complainant's Counsel requests the following relief:

1. [a] determination that the Custodian violated OPRA by not identifying the specific lawful basis for redacting the meeting minutes responsive;
2. [a] determination that the GRC must conduct an *in camera* review of the meeting minutes responsive to determine whether the asserted exemptions apply or whether information should be disclosed to the Complainant; and
3. [a] determination that the Complainant is a prevailing party entitled to a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

October 30, 2009

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

¹⁰ See FN No. 9.

November 9, 2009

E-mail from the GRC to the Custodian’s Counsel. The GRC states that pursuant to an earlier telephone conversation, the GRC is granting an extension of one (1) business day, or until November 10, 2009, to provide the requested SOI.

November 10, 2009

Custodian’s SOI¹¹ with no attachments.

The Custodian certifies that her search involved retrieving the requested closed session minutes and forwarding them to the Custodian’s Counsel for a legal opinion.

The Custodian also certifies that whether records that may have been 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”) is not applicable in this complaint.

The Custodian certifies that the Complainant faxed an OPRA request to the Borough after hours on April 27, 2009. The Custodian certifies that she responded to the Complainant by providing the Complainant a copy of the Custodian Counsel’s letter dated May 5, 2009 . The Custodian certifies that she provided access to the requested records with redactions via facsimile on May 11, 2009.

The Custodian states that the Borough’s response is as follows:

Records Responsive	Records Provided	Reason for Redactions
Executive session minutes dated March 9, 2009.	Yes. Redacted in entirety.	Redactions of discussion of Item No. 1 (a litigation issue) and Item No. 2 (regarding the Shore Community Alliance director) pursuant to <u>N.J.S.A. 47:1A-1.1.</u> , which allows for the exemption of attorney-client privileged information. <u>N.J.S.A. 47:1A-9.a.</u> and <u>N.J.S.A. 10:4-12</u> , which allows a governing body to exclude the public from discussions of personnel matters.
Executive session minutes dated March 16, 2009.	Yes. Redacted in entirety.	Redaction of Item No. 1 (regarding the Shore Community Alliance director) and Item No. 2 (contract negotiations for the municipal court judge) pursuant

¹¹ The GRC notes that the Custodian’s Counsel forwarded an unsigned copy of the SOI to the GRC stating that the Custodian had to leave the office unexpectedly and had not signed the SOI. The Custodian’s Counsel stated that he would forward the signature page once the Custodian returned to the office. The Custodian’s Counsel eventually forwarded the signature page to the GRC on January 5, 2010.

		to <u>N.J.S.A.</u> 47:1A-1.1., which allows for the exemption of attorney-client privileged information. <u>N.J.S.A.</u> 47:1A-9.a. and <u>N.J.S.A.</u> 10:4-12, which allows a governing body to exclude the public from discussions of personnel matters.
Executive session minutes dated March 23, 2009.	Yes. Redacted in entirety.	Redaction of Item No. 1 (regarding the Shore Community Alliance director, which had also become a potential litigation matter), Item No. 2 (ongoing litigation matter) and Item No. 3 (police personnel matter) pursuant to <u>N.J.S.A.</u> 47:1A-1.1., which allows for the exemption of attorney-client privileged information, except the police personnel matter. <u>N.J.S.A.</u> 47:1A-9.a. and <u>N.J.S.A.</u> 10:4-12, which allows a governing body to exclude the public from discussions of personnel matters.

December 21, 2009

The Complainant Counsel’s response to the Custodian’s SOI. The Complainant’s Counsel states that this complaint was filed because the meeting minutes provided in response to the Complainant’s OPRA request were redacted and that said redactions were not sufficiently explained by the Custodian. The Complainant’s Counsel avers that the court’s holding in Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003) and Paff v. New Jersey Department of Labor, Board of Review, 379 N.J. Super. 346, 254-55 (2005)(citing Rule 4:10-2(3)), further support the Complainant’s position that the Custodian’s failure to provide a general nature description of each redaction resulted in an insufficient response.

Analysis

Whether the Custodian unlawfully denied access to the requested executive session minutes?

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 states 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 therefore. 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.

In the matter currently before the Council, the Custodian certified in the SOI that after receiving the Complainant’s OPRA request she retrieved the minutes responsive and forwarded them to the Custodian’s Counsel for a legal opinion. The Custodian’s Counsel provided said opinion in a letter to the Custodian on May 5, 2009 at which time the Custodian forwarded said letter to the Complainant.

The portion of the Custodian Counsel’s letter relevant to this complaint is divided into three (3) paragraphs. Each paragraph addresses one (1) set of minutes responsive to the Complainant’s OPRA request. The Custodian’s Counsel identifies each item contained within the minutes (as delineated in each accompanying resolution) and provides an explanation as to why each item is exempt from disclosure.

OPRA provides that if a Custodian is “unable to comply with a request for access, then the Custodian shall indicate the specific basis” for noncompliance. N.J.S.A. 47:1A-5.g. The Custodian in this complaint forwarded the Custodian Counsel’s letter setting forth certain specific reasons for denying access to the requested minutes; however, absent

from the Custodian Counsel's letter is a citation to a specific legal authority supporting non-disclosure, such as a statute, executive order, regulation, etc. The GRC notes that even though the Custodian's Counsel provided reasonable explanations for exempting access to the requested minutes, the addition of a statutory citation would have reinforced the Custodian Counsel's position.

Moreover, the GRC previously discussed what constitutes an appropriate redaction in Wolosky v. Andover Regional School District (Sussex), GRC Complaint No. 2009-94 (April 2010). In that complaint, the Custodian provided access to executive session minutes containing the statement "[t]his matter remains confidential due to [ACD] materials not subject to public disclosure," under the headings for individual subject matters discussed in executive session. The GRC found that it appeared that the Custodian made electronic redactions to the meeting minutes responsive prior to disclosing such minutes to the Complainant. The GRC explained that:

“[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.) [Handbook for Records Custodians] at page 14.

It appears that the Custodian “electronically” redacted the meeting minutes by deleting this material and inserting the phrase “[t]his matter remains confidential due to [ACD] materials not subject to public disclosure,” as opposed to redacting the information using a “visually obvious method that shows the specific location of any redacted material...” This method does not show the requestor the specific location of the redacted material or the volume of material redacted. Although the Custodian eventually did release the requested records, the specific location of the redactions made was not visually obvious.” *Id.* at page 12-13.

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” the executive session portion of the minutes in their entirety. This method does not show a 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.

The method of “whiting out” the executive session portion of the minutes provided did not allow the Complainant to clearly identify the specific location. Therefore, the Custodian's method of “whiting out” 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. N.J.S.A. 47:1A-5.g.

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 GRC¹² 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 records 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 matters and contract negotiations pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12:

1. Executive Session Minutes dated March 9, 2009.
2. Executive Session Minutes dated March 16, 2009.
3. Executive Session Minutes dated March 23, 2009.

¹² Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
John Paff v. Borough of Manasquan (Monmouth), 2009-281 – Findings and Recommendations of the Executive Director

Whether the Custodian's denial of access to the redacted portions contained within the requested executive session minutes rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The method of "whiting out" the executive session portion of the minutes provided did not allow the Complainant to clearly identify the specific location. Therefore, the Custodian's method of "whiting out" 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. N.J.S.A. 47:1A-5.g.
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 records 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 matters and contract negotiations pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12:
 1. Executive Session Minutes dated March 9, 2009.
 2. Executive Session Minutes dated March 16, 2009.
 3. Executive Session Minutes dated March 23, 2009.
3. **The Custodian must deliver¹³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index¹⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁵, that the records provided are the records requested by the Council for the *in camera* inspection. Such**

¹³ 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.

¹⁴ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁵ "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."

delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

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

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 22, 2011