



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**FINAL DECISION**

**September 27, 2011 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2009-30

v.

Stillwater Township (Sussex)  
Custodian of Record

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

“I **FIND** that [the Custodian] testified truthfully and that she acted independently of [the Complainant’s] filing. As such, I **FIND** that his complaint was not the catalyst and **CONCLUDE** that he [the Complainant] is **not a prevailing party**. As such, no legal fees are warranted.” [Emphasis in original].

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

Final Decision Rendered by the  
Government Records Council  
On The 27<sup>th</sup> Day of September, 2011

Robin Berg Tabakin, Chair  
Government Records Council



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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: October 3, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2009-30**

v.

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

**Records Relevant to Complaint:**

1. Copies of the approved executive session minutes for August, September, October, and November 2008 unless said minutes were already provided pursuant to the December 2, 2008 OPRA request.
2. Copies of the August, September, October, and November 2008 resolutions authorizing Stillwater Township to go into executive session for said months.<sup>3</sup>

**Request Made:** January 5, 2009

**Response Made:** January 16, 2009

**Custodian:** Judith Fisher

**GRC Complaint Filed:** January 16, 2009<sup>4</sup>

**Background**

**January 26, 2010**

Government Records Council's ("Council") Interim Order. At its January 26, 2010 public meeting, the Council considered the January 19, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

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

<sup>2</sup> Represented by Howard A. Vex, Esq., of Courter, Kobert & Cohen (Hackettstown, NJ)

<sup>3</sup> The Complainant requests that the Custodian provide the requested records by e-mail or fax.

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

2. The unapproved, draft executive session meeting minutes dated November 18, 2008 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to the November 18, 2008 draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive minutes had not been approved by the governing body at the time of the Complainant's request.
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian provided the Complainant with all the records that she was legally obligated to disclose approximately nine (9) business days following the receipt of the Complainant's request, and because the November 18, 2008 draft minutes were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1., it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Based upon the contested facts of the case, the Council is unable to determine whether the filing of the Denial of Access Complaint in this matter brought about a change, voluntary or otherwise, in the Custodian's conduct. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the Complainant is a prevailing party and the amount of any award of reasonable attorney's fees.

#### **January 28, 2010**

Council's Interim Order distributed to the parties.

#### **September 20, 2010**

Complaint transmitted to the Office of Administrative Law

#### **August 11, 2011**

Administrative Law Judge (ALJ) Jeff S. Masin's Initial Decision.<sup>5</sup> The ALJ **FINDS** that the Complainant's Denial of Access Complaint was not the catalyst for the Custodian's change in action and thus the Complainant is not a prevailing party entitled to reasonable attorney's fees pursuant to N.J.S.A 47:1A-6. The ALJ further finds that the Custodian was unaware of the Complainant's Denial of Access Complaint dated January 16, 2009. More specifically, the ALJ states:

"The GRC considered [the Complainant's] complaint... [the Complainant's]...[OPRA request] was made to and received by Ms.

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<sup>5</sup> This matter was combined at OAL for adjudication with Wolosky v. Township of Stillwater (Sussex), GRC Complaint No. 2009-22 due to the commonality of parties and the issue of prevailing party fees. GRC Complaint No. 2009-22 is being adjudicated concurrently but separately with the matter herein.  
Jesse Wolosky v. Stillwater Township (Sussex), 2009-30 – Supplemental Findings and Recommendations of the Executive Director 2

Wunder, [clerk typist]...on January 5, 2009. The GRC found that while the Custodian's failure to respond to [the Complainant's] OPRA request...within seven (7) days was a "deemed" denial of the OPRA request under N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelly v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007), the requested unapproved minutes of the November 18, 2008, meeting constituted inter-agency or intra-agency advisory, consultative, or deliberative materials and were not government records as defined by OPRA. Therefore the denial [of access]...to [the Complainant] was lawful.

"...[T]he GRC could not determine whether the filing of the complaint had brought about a change, voluntary or otherwise, in the Custodian's conduct, [and] it could not determine without a full hearing before the OAL whether [the Complainant] was a prevailing party and entitled to reasonable attorney's fees. This was because the Custodian claimed that she had mailed the requested materials to [the Complainant] on January 16, 2010, the very same day that he filed his Complaint 2009-30 and that her action had been independent of and unconnected to any knowledge of [the Complainant's] filing with the GRC.<sup>6</sup> In view of that contention, it was unclear to the GRC whether the filing of the complaint prompted the mailing or whether the circumstance of the mailing was purely coincidental with...the filing of the complaint."

The ALJ ultimately concluded:

"[The Custodian] claimed that [she was not aware of the complaint on January 16, 2009, when she made copies and forwarded the late response to the Complainant from the Blairstown Post Office late in the day on January 16, 2009], despite any notice that [the Complainant] may have e-mailed to Ms. Wunder, on January 16, 2009. If [the Custodian] prepared and mailed that response to [the Complainant] without knowledge that he has filed a complaint alleging the failure of the Township to respond to his...OPRA request independent of the existence of the complaint filed that very same afternoon, then the complaint cannot have been the catalyst for her action. It is certainly possible that [the Custodian] knew of the complaint and then rushed to compile and mail the response that day, but it appears highly improbable that she was not truthful in her testimony. [The Custodian] was already late with the response and by the time of the hearing had been cleared of culpability for any fine under OPRA. [The Custodian] had nothing to gain...by shading the truth about what prompted her to act on January 16, 2009. It is probable that this is a case of pure coincidence between the filing of the complaint and the sending out of the late response."

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<sup>6</sup> It appears from the evidence of record that the correct date cited by the ALJ should have been January 16, 2009.

“I **FIND** that [the Custodian] testified truthfully and that she acted independently of [the Complainant’s] filing. As such, I **FIND** that his [the Complainant’s] complaint was not the catalyst and **CONCLUDE** that [the Complainant] is **not a prevailing party**. As such, no legal fees are warranted.”[Emphasis in original].

### Analysis

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

The GRC referred this matter to the Office of Administrative Law for a hearing to resolve the facts and to determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), and, if so, the amount that constitutes a reasonable attorney’s fee.

Specifically, the ALJ was tasked with determining whether the filing of this complaint initiated the Custodian to respond to the Complainant’s OPRA request. The ALJ was also tasked with determining whether the Complainant was a prevailing party entitled to reasonable attorney’s fees. The ALJ subsequently held:

“I **FIND** that [the Custodian] testified truthfully and that she acted independently of [the Complainant’s] filing. As such, I **FIND** that his complaint was not the catalyst and **CONCLUDE** that he [the Complainant] is **not a prevailing party**. As such, no legal fees are warranted.”<sup>7</sup>

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

“The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility.” In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div.), *certif. denied* 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, “under existing law, the [reviewing agency] must recognize and give due weight to the ALJ’s unique position and ability to make demeanor-based judgments.” Whasun Lee v. Board of Education of the Township of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. “When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ’s credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole.” Cavalieri v. Board of Trustees of Public Employees Retirement System, 368 N.J. Super. 527, 537 (App. Div. 2004).

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<sup>7</sup> The Complainant submitted no Exceptions to the ALJ’s decision to the GRC.  
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The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435 , 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." *Id.* at 443. Additionally, the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hospital v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

Here, the ALJ fairly summarized the testimony and evidence, explaining how he weighed the proofs before him and explaining why he credited, or discredited, certain testimony. The ALJ's conclusions are clearly aligned and consistent with those credibility determinations. Specifically, the ALJ stated that based on testimony given by the Custodian, it was clear that the Custodian was already late with her response and by the time of the GRC hearing had been cleared of any culpability for any fine under OPRA. The ALJ also stated that the Custodian had nothing to gain of consequence by shading the truth in her testimony and this is a case of pure coincidence between the filing of the complaint and the late response. As such, the Council can ascertain which testimony the ALJ accepted as fact, and further, that those facts provide a reasonable basis for the ALJ's conclusions.

Therefore, the Council should accept the ALJ's determination that the instant complaint was not the catalyst for the Custodian's response to the Complainant's OPRA request and that the Complainant is not a prevailing party entitled to reasonable attorney's fees.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council accept Administrative Law Judge Jeff S. Masin's decision dated August 11, 2011, which concludes:

"I **FIND** that [the Custodian] testified truthfully and that she acted independently of [the Complainant's] filing. As such, I **FIND** that his complaint was not the catalyst and **CONCLUDE** that he [the Complainant] is **not a prevailing party**. As such, no legal fees are warranted." [Emphasis in original].

Prepared By: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

September 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*

**INTERIM ORDER**

**January 26, 2010 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2009-30

v.

Stillwater Township (Sussex)  
Custodian of Record

At the January 26, 2010 public meeting, the Government Records Council (“Council”) considered the January 19, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The unapproved, draft executive session meeting minutes dated November 18, 2008 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to the November 18, 2008 draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive minutes had not been approved by the governing body at the time of the Complainant’s request.
3. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian provided the Complainant with all the records that she was legally obligated to disclose approximately nine (9) business days following the receipt of the Complainant’s request, and because the November 18, 2008 draft minutes were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1., it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.





4. Based upon the contested facts of the case, the Council is unable to determine whether the filing of the Denial of Access Complaint in this matter brought about a change, voluntary or otherwise, in the Custodian's conduct. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the Complainant is a prevailing party and the amount of any award of reasonable attorney's fees.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of January, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: January 28, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 26, 2010 Council Meeting**

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

**GRC Complaint No. 2009-30**

v.

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

**Records Relevant to Complaint:**

1. Copies of the approved executive session minutes for August, September, October, and November 2008 unless said minutes were already provided pursuant to the December 2, 2008 OPRA request.
2. Copies of the August, September, October, and November 2008 resolutions authorizing Stillwater Township to go into executive session for said months.<sup>3</sup>

**Request Made:** January 5, 2009

**Response Made:** January 16, 2009

**Custodian:** Judith Fisher

**GRC Complaint Filed:** January 16, 2009<sup>4</sup>

**Background**

**January 5, 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 via facsimile.

**January 16, 2009**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the ninth (9<sup>th</sup>) business day following receipt of such request. The Custodian grants access to all of the records requested except the November 2008 executive session minutes. The Custodian advises the Complainant that because the executive session minutes for November 18, 2008 have not yet been approved, the minutes will not be disclosed at this time. The Custodian states that the copying fee for the 40 pages of responsive records is \$17.50.

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

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

<sup>3</sup> The Complainant requests that the Custodian provide the requested records by e-mail or fax.

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

### **January 16, 2009**

Denial of Access Complaint filed with the Government Records Council (“GRC”).<sup>5</sup> The Complainant states that he filed the Denial of Access Complaint because Stillwater Township failed to respond to the Complainant’s January 5, 2009 OPRA request. The Complainant states that because the Custodian failed to respond in writing to the Complainant’s OPRA request within seven (7) business days, said request was “deemed” denied pursuant to N.J.S.A. 47:1A-5.i. The Complainant further argues that the Custodian should have granted the Complainant access to the records requested because the records were readily identifiable and easy to locate. Paff v. Borough of Roselle, GRC Complaint No. 2007-255 (April 2008).

Additionally, the Complainant requests that the GRC investigate whether the Custodian’s actions were a knowing and willful violation of OPRA. The Complainant argues that because Stillwater Township possesses a fax machine and an e-mail system, various means were available to the Custodian for responding to the Complainant’s request. The Complainant argues that because the Custodian possessed the means to respond to his request but failed to do so, the Custodian’s actions could rise to the level of a knowing and willful violation of OPRA.

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

- (1) Find that the Custodian violated OPRA and unlawfully denied the Complainant access to the records requested;
- (2) Order the Custodian to disclose the requested records; and
- (3) Find that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

### **February 5, 2009**

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

### **February 13, 2009**

Custodian’s SOI attaching the Complainant’s OPRA request dated January 5, 2009.<sup>6</sup> The Custodian certifies that the Complainant submitted his OPRA request via facsimile on January 5, 2009. The Custodian further certifies that she responded to the Complainant’s OPRA request on January 16, 2009 via certified mail. The Custodian also certifies that to fulfill the Complainant’s request, she checked the minute book and computer and reviewed the minutes.

The Custodian certifies that she will work with the new Township Attorney to assure that the minutes of all future public meetings and executive sessions of the Township Committee are kept in accordance with all legal requirements. The Custodian further certifies that OPRA requests will be addressed in a timely and comprehensive manner. The Custodian certifies that Stillwater Township is open to all recommendations that the Government Records Council may have.

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<sup>5</sup> The Complainant did not file any attachments with the Denial of Access Complaint.

<sup>6</sup> The Custodian includes additional material that is not relevant to this Denial of Access Complaint. Jesse Wolosky v. Stillwater Township (Sussex), 2009-30 – Findings and Recommendations of the Executive Director

### **July 9, 2009**

E-mail from the GRC to the Custodian. The GRC states that the Custodian has indicated that she responded to the Complainant's OPRA request via certified mail on January 16, 2009. The GRC requests that the Custodian provide a certification stating such, as well as any documentation which supports this assertion.

### **July 13, 2009**

Letter from the Custodian to the GRC with the following attachments:<sup>7</sup>

1. Letter from the Custodian to the Complainant dated January 16, 2009; and
2. Certified Mail and Return Receipt post card dated January 23, 2009.

The Custodian states that in response to the GRC's July 9, 2009 request, she has attached the documents listed above. The Custodian advises that her records indicate that as of this date the Township has not received payment for the records disclosed to the Complainant.

### **November 10, 2009**

E-mail from the GRC to the Custodian. The GRC requests that the Custodian provide a certification indicating whether she was aware of the fact that the Complainant filed this Denial of Access Complaint at the time of her response to his OPRA request on January 16, 2009.

### **November 13, 2009**

Letter from the Custodian to the GRC attaching a SOI signature page dated November 13, 2009.<sup>8</sup> In response to the GRC's November 10, 2009 e-mail, the Custodian states that to the best of her knowledge, she did not remember that the Complainant filed this Denial of Access Complaint at the time of her response.

## **Analysis**

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or

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<sup>7</sup> The Custodian includes additional material that is not relevant to this Denial of Access Complaint.

<sup>8</sup> The GRC requested that the Custodian provide a certification. However, the Custodian provided a letter and attached the signature page from a Statement of Information form which contained N.J. Court Rule 1:4-4 certification language.

in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

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

The Custodian responded in writing to the Complainant’s OPRA request on the ninth (9<sup>th</sup>) business day following receipt of the request granting access to all of the records requested except for the November 2008 executive session minutes. The Custodian advised the Complainant that the executive session minutes for November 2008 had yet to be approved and therefore would not be disclosed.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>9</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

While the Custodian’s actions resulted in a “deemed” denial, the Custodian’s denial of access regarding the November 2008 meeting minutes was lawful. As a

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<sup>9</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

general matter, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a “government record” as records either “made, maintained or kept on file in the course of [an agency’s] official business,” or “received” by an agency in the course of its official business, N.J.S.A. 47:1A-1.1, the statute also excludes from this definition a variety of documents and information. Ibid. See Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that “inter-agency or intra-agency advisory, consultative, or deliberative material” is not included within the definition of a government record. N.J.S.A. 47: 1A-1 .1.

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7<sup>th</sup> Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass’n. v. Dinkins, 807 F.Supp., 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn.App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it “reflect[s] that aspect of the agency’s function that precedes formal and informed decision making.” Id. at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004), the court reviewed an OPRA request to the Department of Corrections (“DOC”) for draft regulations and draft statutory revisions. The court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” Id. at 18. It further held:

“[t]he trial judge ruled that while appellant had not overcome the presumption of non-disclosure as to the entire draft, it was nevertheless entitled to those portions which were eventually adopted. Appellant appeals from the portions withheld and DOC appeals from the portions required to be disclosed. We think it plain that all these drafts, in their entirety, are reflective of the deliberative process. On the other hand, appellant certainly has full access to all regulations and statutory revisions ultimately adopted. We see, therefore, no basis justifying a conclusion that the presumption of nondisclosure has been overcome. Ibid. (Emphasis added.)”

Additionally, the GRC has previously ruled on the issue of whether draft meeting minutes are exempt from disclosure pursuant to OPRA. In Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council held that “...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.”

Thus, in accordance with the foregoing case law and the prior GRC decision in Parave-Fogg, *supra*, all draft minutes of a meeting held by a public body are entitled to the protection of the deliberative process privilege. Draft minutes are pre-decisional. In addition, they reflect the deliberative process in that they are prepared as part of the public body's decision making concerning the specific language and information that should be contained in the minutes to be adopted by that public body, pursuant to its obligation under the Open Public Meetings Act to "keep reasonably comprehensible minutes." N.J.S.A. 10:4-14.

Therefore, in the matter before the Council, the unapproved, draft executive session meeting minutes dated November 18, 2008 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, *supra*. Accordingly, the Custodian has borne her burden of proving a lawful denial of access to the November 18, 2008 draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive minutes had not been approved by the governing body at the time of the Complainant's request.

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

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

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

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

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

negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996)).

The Custodian responded in writing to the Complainant's OPRA request on the ninth (9<sup>th</sup>) business day granting access to all of the records requested except for the November 2008 executive session minutes which were not yet approved.

Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian provided the Complainant with all the records that she was legally obligated to disclose approximately nine (9) business days following the receipt of the Complainant's request, and because the November 18, 2008 draft minutes were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1., it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

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

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services ("DYFS"). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its



investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, supra, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The court in Mason, supra, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" Singer v. State, 95 N.J. 487, 495, cert denied (1984)."

The Complainant filed his Denial of Access Complaint with the GRC on January 16, 2009. The Custodian responded to the Complainant's OPRA request on January 16, 2009. On July 9, 2009, the GRC requested that the Custodian provide proof that she provided the Custodian a written response on January 16, 2009. On July 13, 2009, the Custodian submitted to the GRC a copy of the certified mail and return receipt for her written response sent to the Complainant. On November 10, 2009, the GRC requested a certification from the Custodian indicating whether she had knowledge of the current complaint at the time she responded to the Complainant's OPRA request. However instead of a certification, the Custodian provided a letter dated November 13, 2009 which attached the signature page of a Statement of Information form that contained N.J. Court Rule 1:4-4 certification language. Moreover, the letter does not clearly state whether the Custodian knew that the Complainant had filed this Denial of Access Complaint at the time of her January 16, 2009 response.

Based upon the contested facts of the case, the Council is unable to determine whether the filing of the Denial of Access Complaint in this matter brought about a change, voluntary or otherwise, in the Custodian's conduct. Therefore, this complaint should therefore be referred to the Office of Administrative Law for a determination of whether the Complainant is a prevailing party and the amount of any award of reasonable attorney's fees.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The unapproved, draft executive session meeting minutes dated November 18, 2008 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to the November 18, 2008 draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive minutes had not been approved by the governing body at the time of the Complainant's request.
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian provided the Complainant with all the records that she was legally obligated to disclose approximately nine (9) business days following the receipt of the Complainant's request, and because the November 18, 2008 draft minutes were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1., it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Based upon the contested facts of the case, the Council is unable to determine whether the filing of the Denial of Access Complaint in this matter brought about a change, voluntary or otherwise, in the Custodian's conduct. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the Complainant is a prevailing party and the amount of any award of reasonable attorney's fees.

Prepared By: Sherin Keys, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

January 19, 2010