



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

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

**FINAL DECISION**

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

Richard Rivera  
Complainant

Complaint No. 2009-331

v.

Township of Monroe Police Department (Middlesex)  
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, dismisses this complaint because the Complainant withdrew his complaint via e-mail to the GRC dated March 5, 2012 (via legal counsel) because the parties have settled this matter. Therefore, no further adjudication is required.

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

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

Robin Berg Tabakin, Chair  
Government Records Council

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

Catherine Starghill, Executive Director  
Government Records Council

**Decision Distribution Date: April 4, 2012**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Richard Rivera<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-331**

v.

**Township of Monroe Police Department  
(Middlesex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of Internal Affairs Summary Reports (“IAASR”) from 2001 to 2008.

**Request Made:** April 9, 2009

**Response Made:** April 9, 2009

**Custodian:** Sharon Doerfler, Clerk<sup>3</sup>

**GRC Complaint Filed:** December 28, 2009<sup>4</sup>

**Background**

**May 24, 2011**

Government Records Council’s (“Council”) Interim Order. At its May 24, 2011 public meeting, the Council considered the April 20, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian provided certified confirmation to the Executive Director of the GRC on February 10, 2011 that she remitted \$4.00 to the Complainant on the same date, the Custodian complied with the Council’s January 25, 2011 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.b. by charging \$10.76 pursuant to N.J.S.A. 39:4-131 for copying and mailing eight (8) pages of records in response to the Complainant’s OPRA request, the Custodian refunded the \$4.00 overcharge within the five (5) business day time period required by the Council’s January 25, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive

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

<sup>2</sup> Represented by Kevin Boris, Esq., Shain, Schaffer & Rafanello, PC (Bernardsville, NJ).

<sup>3</sup> The evidence of record indicates that D. LaMantia responded to the Complainant’s OPRA request.

<sup>4</sup> The Complaint was signed on December 28, 2009. The record is unclear as to when the GRC received the Denial of Access Complaint.

element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

**June 3, 2011**

Council's Interim Order distributed to the parties.

**August 5, 2011**

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

**March 5, 2012**

E-mail from the Complainant's Counsel to the GRC, attaching a letter from Counsel to the Honorable Kimberly Moss, Administrative Law Judge ("ALJ"), dated March 5, 2012. Counsel states that the Complainant withdraws this complaint because the parties have settled this matter.

**Analysis**

No analysis required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council dismiss this complaint because the Complainant withdrew his complaint via e-mail to the GRC dated March 5, 2012 (via legal counsel) because the parties have settled this matter. Therefore, no further adjudication is required.

Prepared By: Karyn Gordon, Esq.  
In House Counsel

Approved By: Catherine Starghill, Esq.  
Executive Director

March 20, 2012



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

INTERIM ORDER

May 24, 2011 Government Records Council Meeting

Richard Rivera  
Complainant

Complaint No. 2009-331

v.

Township of Monroe Police Department (Middlesex)  
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 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, finds that:

1. Because the Custodian provided certified confirmation to the Executive Director of the GRC on February 10, 2011 that she remitted \$4.00 to the Complainant on the same date, the Custodian complied with the Council’s January 25, 2011 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.b. by charging \$10.76 pursuant to N.J.S.A. 39:4-131 for copying and mailing eight (8) pages of records in response to the Complainant’s OPRA request, the Custodian refunded the \$4.00 overcharge within the five (5) business day time period required by the Council’s January 25, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and the Council’s January 25, 2011 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be



referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

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

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Richard Rivera<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-331**

v.

**Township of Monroe, Police Department  
(Middlesex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of: Internal Affairs Summary Reports (“IAASR”) from 2001 to 2008.

**Request Made:** April 9, 2009

**Response Made:** April 9, 2009

**Custodian:** Sharon Doerfler, Clerk<sup>3</sup>

**GRC Complaint Filed:** December 28, 2009<sup>4</sup>

**Background**

**January 25, 2011**

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

1. Because the Custodian’s charge pursuant to N.J.S.A. 39:4-131 of \$10.76 for copying and mailing eight (8) pages of records in response to the Complainant’s OPRA request therefore violated N.J.S.A. 47:1A-5.b. and created an unreasonable burden upon the Complainant’s right of access, the correct amount of the copying fees under N.J.S.A. 47:1A-5.b. for copying eight (8) pages of records responsive to the Complainant’s OPRA request is \$.75 x 8, or \$6.00, plus the costs of postage and the Custodian must therefore refund the amount overcharged, \$4.00, to the Complainant.
  
2. **The Custodian shall refund to the Complainant \$4.00, representing the amount overcharged for copying costs of records responsive to the**

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

<sup>2</sup> Represented by Kevin Boris, Esq., Shain, Schaffer & Rafanello, PC (Bernardsville, NJ).

<sup>3</sup> The evidence of record indicates that D. LaMantia responded to the Complainant’s OPRA request

<sup>4</sup> The Complaint was signed on December 28, 2009. The record is unclear as to when the GRC received the Denial of Access Complaint.

**Complainant's OPRA request, and shall simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 (2005) to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**

3. Because N.J.S.A. 47:1A-1 et seq. contains no specific statute of limitations on denial of access complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of limitations in OPRA bars the GRC's adjudication of the Complainant's denial of access complaint in the instant matter.
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 pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

**February 4, 2011**

Council's Interim Order distributed to the parties.

**February 10, 2011**

Custodian's response to the Council's Interim Order. The Custodian provides certified confirmation that on February 10, 2011, she refunded \$4.00 to the Complainant via U.S. Mail.

**Analysis**

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

At its January 25, 2011 public meeting, the Council determined that because the Custodian unlawfully overcharged the Complainant \$4.00 for copies of records requested pursuant to OPRA, the Custodian must refund such overcharge to the Complainant within five (5) business days of receipt of the Council's Interim Order, or no later than February 11, 2011. On February 10, 2011, the Custodian provided certified confirmation that she remitted \$4.00 to the Complainant on the same date. Therefore, the Custodian complied with the Council's January 25, 2011 Interim Order.

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

OPRA states that:

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

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

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

In the matter before the Council, the Custodian charged \$10.76 pursuant to N.J.S.A. 39:4-131 for copying and mailing eight (8) pages of records in response to the Complainant’s OPRA request, which violated N.J.S.A. 47:1A-5.b.

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

Although the Custodian violated N.J.S.A. 47:1A-5.b. by charging \$10.76 pursuant to N.J.S.A. 39:4-131 for copying and mailing eight (8) pages of records in response to the Complainant’s OPRA request, the Custodian refunded the \$4.00 overcharge within the five (5) business day time period required by the Council’s January 25, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:



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

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

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

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

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

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

sanctioned change in the legal relationship of the parties." *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

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

prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

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

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.<sup>5</sup> Those changes expand counsel fee awards under

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<sup>5</sup> The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's Richard Rivera v. Township of Monroe, Police Department (Middlesex), 2009-331 – Supplemental Findings and Recommendations of the Executive Director

OPRA.” Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

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

In the matter before the Council, the Complainant asserted in the Denial of Access Complaint that the Custodian did not explain the copying fees charged. In its Interim Order dated January 25, 2011, the Council determined that the Custodian violated N.J.S.A. 47:1A-5.b. when she charged the Complainant \$10.76 pursuant to N.J.S.A. 39:4-131 for copying and mailing eight (8) pages of records in response to the Complainant’s OPRA request and required the Custodian to refund \$4.00 representing the amount overcharged. The Custodian certified that she refunded such overcharge to the Complainant on February 10, 2011.

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

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more information mediation route; the phrase “requestors” may simply have been used to encompass both groups. Likewise, one cannot obtain an “order” from the GRC, so the absence of that language in OPRA is not necessarily revealing.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided certified confirmation to the Executive Director of the GRC on February 10, 2011 that she remitted \$4.00 to the Complainant on the same date, the Custodian complied with the Council's January 25, 2011 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.b. by charging \$10.76 pursuant to N.J.S.A. 39:4-131 for copying and mailing eight (8) pages of records in response to the Complainant's OPRA request, the Custodian refunded the \$4.00 overcharge within the five (5) business day time period required by the Council's January 25, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and the Council's January 25, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Karyn Gordon, Esq.  
In House Counsel

Approved By: Catherine Starghill, Esq.  
Executive Director

April 20, 2011



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**INTERIM ORDER**

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

Richard Rivera  
Complainant

Complaint No. 2009-331

v.

Township of Monroe Police Department (Middlesex)  
Custodian of Record

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

1. Because the Custodian’s charge pursuant to N.J.S.A. 39:4-131 of \$10.76 for copying and mailing eight (8) pages of records in response to the Complainant’s OPRA request violated N.J.S.A. 47:1A-5.b. and created an unreasonable burden upon the Complainant’s right of access, and because the correct amount of the copying fees under N.J.S.A. 47:1A-5.b. for copying eight (8) pages of records responsive to the Complainant’s OPRA request is \$.75 x 8, or \$6.00, plus the costs of postage, the Custodian must therefore refund the amount overcharged, \$4.00, to the Complainant.
2. **The Custodian shall refund to the Complainant \$4.00, representing the amount overcharged for copying costs of records responsive to the Complainant’s OPRA request, and shall simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 (2005) to the Executive Director, within five (5) business days of receipt of the Council’s Interim Order.**
3. Because N.J.S.A. 47:1A-1 et seq. contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of limitations in OPRA bars the GRC’s adjudication of the Complainant’s Denial of Access Complaint in the instant matter.
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 pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

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

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Richard Rivera<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-331**

v.

**Township of Monroe, Police Department (Middlesex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of Internal Affairs Summary Reports (“IAASR”) from 2001 to 2008.

**Request Made:** April 9, 2009

**Response Made:** April 9, 2009

**Custodian:** Sharon Doerfler, Clerk<sup>3</sup>

**GRC Complaint Filed:** December 28, 2009<sup>4</sup>

**Background**

**April 9, 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.

**April 9, 2009**

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the same business day as receipt of such request. The Custodian states that access to the requested record is granted pending payment of \$10.76.

**May 8, 2009**

Letter from the Complainant to the Custodian. The Complainant states that a member of the Monroe Township Police Department informed him that the records requested are available and that the cost for same is \$10.76 for eight (8) pages of records. The Complainant states that he specifically asked for a written invoice for the records responsive to the OPRA request and that such invoice should be faxed to the fax number provided; the Complainant states that he has not received such an invoice.

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

<sup>2</sup> Represented by Kevin Boris, Esq., Shain, Schaffer & Rafanello, PC (Bernardsville, NJ).

<sup>3</sup> The evidence of record indicates that D. LaMantia, Records Custodian for the Monroe Township Police Department, responded to the Complainant’s OPRA request

<sup>4</sup> The Complaint was signed on December 28, 2009. The record is unclear as to when the GRC received the Denial of Access Complaint.



The Complainant states that he has enclosed a check in the amount of \$10.76. The Complainant further states that if the cost associated with the instant OPRA request does not comply with OPRA, the Complainant will file a civil suit or a Denial of Access Complaint with the GRC.

**December 28, 2009**

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:<sup>5</sup>

- Complainant’s OPRA request dated April 9, 2009
- Custodian’s response to the OPRA request dated April 9, 2009
- Letter from the Complainant to the Custodian dated May 8, 2009
- Receipt from the Township to the Complainant in the amount of \$10.76 dated May 20, 2009
- IAASR reports from 2001 to 2008

The Complainant asserts that he filed this Complaint because the Custodian did not identify how she calculated the copying charges assessed for the requested records and because the charges assessed exceed the maximum costs for paper copies allowed in OPRA.

The Complainant asserts that he submitted an OPRA request to the Township on April 9, 2009, seeking IAASR reports for 2001 to 2008.<sup>6</sup> The Complainant further asserts that the IAASR reports are not subject to any privilege. The Complainant also asserts that the Custodian charged \$10.76 for copies of the requested records.

The Complainant states that although he paid the requested copying fee, he questioned the veracity of the charge. The Complainant states that the records requested consisted on eight (8) pages. The Complainant states that if 78 cents representing postage is deducted from the charge, the Custodian charged \$1.25 per page, which the Complainant asserts is both in excess of the 75-cent per page fee set forth in OPRA and also exceeds the 35-cent per page fee listed on the Township’s official OPRA request form.

The Complainant states that the Custodian has attempted to charge him the fee permitted by N.J.S.A. 39:4-131, pursuant to which police departments may charge \$5.00 for the first three (3) pages of an accident report and \$1.00 for each page thereafter. The Complainant states that N.J.S.A. 39:4-131 is not applicable to the matter herein because the Complainant did not request copies of accident reports. The Complainant asserts that IAASRs are different from accident reports. *See Donato v. Jersey City Police Department*, GRC Complaint No. 2005-251 (April, 2007)(discussing N.J.S.A. 39:4-131 and its applicability to police accident reports).

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<sup>5</sup> The Complainant attached additional materials not relevant to the adjudication of this complaint.

<sup>6</sup> The Complainant states that an IAASR report is a standard, one page report completed by police departments that summarizes the status of pending complaints against that police department. Richard Rivera v. Township of Monroe, Police Department (Middlesex), 2009-331 – Findings and Recommendations of the Executive Director

The Complainant contends that, absent the applicability of a special service charge, the Custodian should have charged the 35-cent per page charge enumerated in the Township's official OPRA request form.

The Complainant notes that, although the Custodian received the OPRA request on April 9, 2009, a written response to the request was prepared on May 20, 2009, well in excess of the statutorily mandated seven (7) business day response limit for a custodian to respond to an OPRA request or request an extension of time to respond thereto.

The Complainant contends that, although the records requested have been provided to the Complainant, the excessive copying fee charged violated OPRA and, therefore, access to the requested records was denied.

The Complainant requests that the GRC find that the Custodian violated OPRA by charging a copy fee in excess of the maximum cost allowed by OPRA and find that the Complainant is a prevailing party entitled to an award of prevailing party attorney fees.

The Complainant does not agree to mediate this complaint.

**January 14, 2010**

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

**January 22, 2010**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 9, 2009<sup>7</sup>
- Custodian's Public Records Request Response dated April 9, 2009
- Internal Affairs Summary Report forms from 2001 to 2008 (eight (8) pages)
- Letter from the Complainant to the Custodian dated May 8, 2009
- Receipt from the Township to the Complainant in the amount of \$10.76 dated May 20, 2009

The Custodian certifies that the Complainant filed the instant OPRA request on April 9, 2009, and that the Custodian responded to same in writing on April 9, 2009 and May 20, 2009. The Custodian further certifies that the Complainant's request sought IAASR's for 2001 to 2008, a total of eight (8) pages. The Custodian also certifies that the requested records must be retained by the agency permanently. The Custodian certifies that such records were provided in their entirety to the Complainant on May 20, 2009 and were not redacted.

The Custodian argues that on April 9, 2009, the Complainant submitted an OPRA request seeking Internal Affairs Summary Report Forms for 2001 to 2008. The Custodian states that on the same day, Darlene LaMantia, Records Custodian with the Monroe

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<sup>7</sup> The copy of the OPRA request provided by the Custodian bears a handwritten note that the Custodian responded to such request on May 20, 2009.

Township Police Department, forwarded the OPRA request to Sergeant Marc Jimenez and that Sergeant Jimenez compiled the requested records, composed of eight (8) separate pages. The Custodian states that Ms. LaMantia responded to the Complainant on April 9, 2009, acknowledging receipt of the OPRA request and informing him that upon receipt of his check for \$10.76 for copying cost, the requested records will be provided to him.

The Custodian asserts that sometime prior to May 8, 2009, the Complainant telephoned the Monroe Township Police Department and was again informed that the cost associated with the request was \$10.76. The Custodian states that the Complainant forwarded a check for same, but stated that he would file a civil suit or access complaint if the cost did not comply with OPRA. The Custodian asserts that the Complainant's payment was received on or about May 20, 2009 and the requested records were provided to him in unredacted form.

The Custodian argues that Ms. LaMantia's calculation of the cost was reasonable and based upon N.J.S.A. 39:4-131 and Section 39-3 of the Monroe Code. The Custodian states that N.J.S.A. 39:4-131 regulates the fees concerning requests for motor vehicle accident reports and allows for payment of five (5) dollars for the first three (3) pages, and one (1) dollar for each page thereafter. The Custodian states that at the time Ms. LaMantia processed the Complainant's OPRA request, she was under the impression that this statute applied to all requests for police records. As a result of this misunderstanding, Ms. LaMantia charged the Complainant \$5.00 for the first three (3) pages of his request, \$5.00 for the next five (5) pages, and \$.76 for postage.

The Custodian states that any misunderstandings regarding the charges for police records have now been resolved and that for all requests for police records, other than those involving motor vehicle accidents, all clerks in the Township have been instructed to charge \$.75 for the first 10 pages, \$.50 for pages 11 through 20 and \$.25 per page thereafter. The Custodian also states that Sharon Doerfler, the Township Clerk, will be conducting a tutorial for the Monroe Township Police Department records Custodian.

The Custodian argues that the Complainant has alleged that the \$10.76 charge for records requested was excessive and violated OPRA. The Custodian argues that N.J.S.A. 47:1A-7.b. concerns the right of a person to file a denial of access complaint concerning a denial of access to a government record. The Custodian argues that even if the \$10.76 charge did not comply with N.J.S.A. 47:1A-5.b., the Complainant received all the requested records and the charge did not prevent him from receiving said records. *See Bart v. City of Paterson Housing Auth.*, 403 N.J. Super. 609 (App. Div.), *cert denied*, 198 N.J. 316 (2008). The Custodian notes that if the Complainant was charged \$.75 per page, the charge would have been \$6.76, a mere four (4) dollars different than the amount actually remitted.

The Custodian states that he anticipates that the Complainant will seek to rely on the Appellate Division's decision in Fisher v. Div. of Law, 400 N.J. Super. 61 (2008), where the court found that if a public agency has conditioned its production of a government record on the payment of a special service charge, the requester may challenge either his obligation to pay such a charge or the amount of the charge. The

Custodian states that Fisher is not applicable to the instant matter because there, the requestor was completely prevented from obtaining the records requested and because the amount charged was \$1,877.33, considerably more than the charge herein. Moreover, the Custodian asserts that no special service charges are at issue in the instant matter. The Custodian states that even if the Complainant was overcharged by \$4.00, the amount was so trivial that it did not and could not have prevented the Complainant from obtaining the records requested.

The Custodian also contends that the instant Denial of Access Complaint is barred because it was not filed within 45 days of the alleged denial of access, as required by the holding of Mason v. City of Hoboken, 196 N.J. 51, 69 (2008). The Custodian asserts that, although the Court did not specifically address the limitations period applicable to actions filed with the GRC, that the reasoning of its decision is equally applicable to the within matter. The Custodian observed that the Mason court noted that the mediation process before the GRC is not governed by a statute of limitations, but notes that the Complainant did not seek mediation herein. The Custodian asserts that principles of fundamental fairness dictate that a requester who is time barred from filing a complaint in Superior Court should also be prevented from submitting the same allegations before the GRC. The Custodian states that because the Monroe Township Police Department is entitled to have the within dispute brought and addressed in a rapid manner, the GRC should dismiss the complaint.

The Custodian maintains that the fee charged by the Monroe Township Police Department was not facially inordinate nor did it place an unreasonable burden on the Complainant's right of access. In support of this argument, the Custodian cites to Libertarian Party of Cent. N.J. v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006); Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26, 31 (1962); Home News Publishing Co. v. Department of Health, 239 N.J. Super. 172, 182 (App. Div. 1990); Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 53 (1995) for the proposition that copying fees must be reasonable and cannot be used as a tool to discourage access. The Custodian asserts that the Complainant's access to the requested records was not hampered in any way. The Custodian also asserts that even if there was a slight overcharge, said overcharge was the result of a mistake and not employed as a tool to discourage the Complainant. The Custodian reiterates that Ms. LaMantia mistook the application of N.J.S.A. 39:4-131 to the instant matter and states that Laufgas v. N.J. Turnpike Auth., 156 N.J. 436, 438 (1998), held that the statute authorizing state police to collect a \$10.00 fee for each certified copy of motor vehicle accident reports is not unreasonable or inconsistent with the statute imposing per page costs for routine inspection and copying of records.

The Custodian therefore contends that the GRC should determine that the \$10.76 copying fee did not place an unreasonable burden on the Complainant's right of access.

The Custodian also disputes the Complainant's request for a finding that he is the prevailing party and an award of reasonable attorney's fees. The Custodian asserts that OPRA does not include a rebuttable presumption that a requestor has prevailed and is entitled to attorney fees. Mason v. City of Hoboken, 196 N.J. 51, 77 (2008). Concerning this issue, the Custodian states that N.J.A.C. 5:105-2.13(a) states in pertinent part that:

“Reasonable attorney's fees shall be awarded when the requestor is successful (or partially successful) in obtaining access to government records after a denial of access complaint filed with the Council, access was improperly denied and the requested records are disclosed pursuant to a determination of the Council or voluntary settlement agreement between the parties.” *N.J.A.C. 5:105-2.13(a)*.

The Custodian states that the records custodian replied to the Complainant's request on the same day it was received. The Custodian further states that the Complainant promptly received unredacted copies of the requested records prior to his filing of the Denial of Access Complaint. The Custodian states that under these circumstances, the burden of proof lies with the Complainant to prove that the lawsuit was the catalyst for his receipt of records. *Mason*, 196 *N.J.* at 76. The Custodian states that the Complainant cannot meet this burden because he received all records by May 20, 2009.

The Custodian states that even if the GRC finds that the Complainant is a prevailing party, the Complainant's request for attorney fees should be denied or reduced. The Custodian asserts that the New Jersey Supreme Court has recognized that “the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate, a calculation known as the lodestar.” *New Jerseyans for a Death Penalty Moratorium v. N.J. Department of Corrections*, 185 *N.J.* 137, 153 (2005), quotations omitted. The Custodian asserts that simply utilizing the lodestar is problematic when “the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be...excessive.” *Szczepansky v. Newcomb Med. Ctr.*, 141 *N.J.* 346, 355 (1995). The Custodian asserts that in awarding attorney fees it must be determined if “the expenditure of counsel's time on the entire litigation was reasonable in relation to the actual relief obtained...and, if not, reduce the award proportionally.” *N. Bergen Rec. Transp., Inc. v. Trailer Leasing Co.*, 158 *N.J.* 561, 572 (1999).

The Custodian asserts that at the most, the Complainant was overcharged \$4.00 and that litigation of this issue is entirely unwarranted because the Complainant could have requested mediation, which is much less formal and expensive, rather than file a Denial of Access Complaint. The Custodian asserts that in light of the fact that the Complainant's award would be so insignificant compared to an award of counsel fees, the GRC should deny the Complainant's request for same.

#### **May 4, 2010**

Letter from Complainant's Counsel to the GRC. Complainant's Counsel responds to the Custodian's SOI as follows.

Counsel asserts that Custodian's Counsel admits that the Custodian overcharged the Complainant by applying *N.J.S.A. 39:4-131*, which is only applicable to accident reports. Counsel further asserts that the Complainant repeatedly advised the Custodian that she was overcharging him but that she did nothing to correct her misunderstanding.

Counsel contends that the GRC has long exercised jurisdiction over complaints involving overcharges of copying fees. O’Shea v. Township of Vernon, GRC Complaint No. 2007-207 (March 2008). Counsel states that fees that are imposed in excess of actual costs “create[] an unreasonable burden upon plaintiff’s right of access and is not rationally related to the actual cost of reproducing the records.” Libertarian Party of Cent. N.J. v. Murphy, 384 N.J. Super. 136 (App. Div. 2006). Counsel contends that, although the O’Shea and Libertarian cases were in the context of overcharges for CDs, the principle is the same. Counsel asserts that OPRA sets a maximum authorized cost for paper copies and the Custodian herein charged the Complainant a per page copying fee in excess of that maximum authorized cost; thus, while the Complainant has not literally been denied access to the records he requested, the Custodian unreasonably burdened the Complainant’s right of access by overcharging him.

Counsel further contends that, although the Custodian argues that the amount by which the Complainant was overcharged is *de minimus*, the overcharge here was 67% (\$10 for eight pages instead of \$6 for eight pages). Counsel asserts that a 67% overcharge cannot be characterized as legitimate.

Counsel also asserts that there is no statute of limitations to file a Denial of Access Complaint before the GRC, either in OPRA itself or in the regulations that implement OPRA; therefore, the Complainant’s complaint was timely filed.

Finally, Counsel asserts that if the GRC orders the Custodian to refund the amount overcharged to the Complainant, the GRC should also find that the Complainant is a prevailing party entitled to attorneys’ fees. Counsel again notes that the Complainant twice advised the Custodian that she was overcharging him for the records requested and the Custodian did nothing to correct the overcharges until the instant Complaint was filed.

### Analysis

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA provides that:

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

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

first page to tenth page, \$0.75 per page;  
eleventh page to twentieth page, \$0.50 per page  
all pages over twenty, \$0.25 per page.” N.J.S.A. 47:1A-5.b.

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 before the Council, the evidence of record indicates that the Complainant’s OPRA request sought copies of Internal Affairs Summary Reports from 2001 to 2008; the evidence of record further indicates that the responsive records encompassed eight (8) pages. Moreover, the evidence of record is clear that the Custodian charged the Complainant \$10.76 for copying and mailing the eight (8) pages of responsive records. The Custodian admits in the SOI that this amount is incorrect and resulted from a misapplication of N.J.S.A. 39:4-131 to the Complainant’s request, but argues that the fee charged by the Monroe Township Police Department was not facially inordinate nor did it place an unreasonable burden on the Complainant’s right of access. The Custodian further asserts that the Township has taken steps to ensure that copying fees pursuant to OPRA requests are correctly charged.

The Custodian’s argument is incorrect and has no basis in the law; the \$10.76 copy fee charged for the eight (8) pages of responsive records provided to the Complainant is excessive and violates OPRA.

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

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

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

first page to tenth page, \$0.75 per page;  
eleventh page to twentieth page, \$0.50 per page  
all pages over twenty, \$0.25 per page.

The actual cost of duplicating the record shall be the cost of materials and supplies used to make the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section....” N.J.S.A. 47:1A-5.b.<sup>8</sup>

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

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

Moreover, fees that are imposed in excess of actual costs “create[] an unreasonable burden upon plaintiff’s right of access and is not rationally related to the actual cost of reproducing the records.” Libertarian Party of Cent. N.J. v. Murphy, 384 N.J. Super. 136 (App. Div. 2006). *See* O’Shea v. Township of Vernon, GRC Complaint No. 2007-207 (March 2008).

Although Custodian’s Counsel cites to Laufgas v. N.J. Turnpike Auth., 156 N.J. 436, 438 (1998) for the proposition that N.J.S.A. 39:4-131 is not inconsistent with N.J.S.A. 47:1A-5.b., Laufgas is not applicable to this matter because it was decided under the Right to Know Law, N.J.S.A. 47:1A-1 et seq., which was replaced by OPRA in July 2002. Moreover, the Custodian’s reliance on Fisher v. Div. of Law, 400 N.J. Super.

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<sup>8</sup> The New Jersey Legislature amended OPRA to change the per page copy fees effective November 9, 2010. However, the above-referenced copying fees were in effect at the time of the Complainant’s OPRA request on April 9, 2009.



61 (2008) is misplaced since a special service charge is not at issue in the matter now before the Council.

The Custodian's charge pursuant to N.J.S.A. 39:4-131 of \$10.76 for copying and mailing eight (8) pages of records in response to the Complainant's OPRA request therefore violated N.J.S.A. 47:1A-5.b. and created an unreasonable burden upon the Complainant's right of access. The correct amount of the copying fees under N.J.S.A. 47:1A-5.b. for eight (8) pages of records responsive to the Complainant's OPRA request is \$.75 x 8, or \$6.00, plus the costs of postage.<sup>9</sup>

Therefore, because the Custodian's charge pursuant to N.J.S.A. 39:4-131 of \$10.76 for copying and mailing eight (8) pages of records in response to the Complainant's OPRA request violated OPRA and created an unreasonable burden upon the Complainant's right of access, the Custodian violated N.J.S.A. 47:1A-5.b. The correct amount of the copying fees under N.J.S.A. 47:1A-5.b. for copying eight (8) pages of records responsive to the Complainant's OPRA request is \$.75 x 8, or \$6.00, plus the costs of postage and the Custodian must therefore refund the amount overcharged, \$4.00, to the Complainant.

#### **Whether the Complainant's Denial of Access Complaint was timely filed?**

The Custodian asserts that the instant Denial of Access Complaint is barred because it was not filed within 45 days of the alleged denial of access as required by the holding of Mason v. City of Hoboken, 196 N.J. 51, 69 (2008). The Custodian asserts that, although the Court did not specifically address the limitations period applicable to actions filed with the GRC, that the reasoning of its decision is equally applicable to the within matter. The Custodian observed that the Mason court noted that the mediation process before the GRC is not governed by a statute of limitations, but notes that the Complainant did not seek mediation herein. The Custodian asserts that principles of fundamental fairness dictate that a requester who is time barred from filing a complaint in Superior Court should also be prevented from submitting the same allegations before the GRC. The Custodian states that because the Monroe Township Police Department is entitled to have the within dispute brought and addressed in a rapid manner, the GRC should dismiss the complaint.

Complainant's Counsel observes that there is no statute of limitations to file a Denial of Access Complaint before the GRC, either in OPRA itself or in the regulations that implement OPRA and contends that the Complainant's complaint was therefore timely filed.

In Mason, the Supreme Court determined that the appropriate statute of limitations for filing a denial of access complaint *in Superior Court* was 45 days from the date of the Custodian's denial of access. 196 N.J. 51, 68. The Court noted that this statute of limitations was consistent with the limitations period in actions in lieu of prerogative

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<sup>9</sup> The GRC notes that the Custodian has certified that the cost of postage was \$.76 and that the Complainant has not disputed this amount.

writs. *Id.* The Court noted that “the former Right to Know Law specifically directed that litigants headed to Superior Court should proceed via an action in lieu of prerogative writs. *N.J.S.A. 47:1A-4* (repealed 2002). That language does not appear in OPRA. *See N.J.S.A. 47:1A-6.*” *Id.*

The Court further noted that

“The Legislature plainly stated that requestors denied access to public records may file an action in Superior Court or a complaint before the GRC. *N.J.S.A. 47:1A-6*. Those matters “shall proceed in a summary or expedited manner.” *Ibid.* Beyond that, the Legislature specifically deferred to the Supreme Court to adopt court rules “necessary to effectuate the purposes of this act.” *N.J.S.A. 47:1A-12*. The Legislature’s action was consistent with our Constitution, which vests this Court with the authority to create procedural rules *for court practices*. *See* N.J. Const. art. VI, § 2, P 3; *Winberry v. Salisbury*, 5 *N.J.* 240, 255, 74 *A.2d* 406 (1950).” 196 *N.J.* 68 [Emphasis added].

The Court therefore held that:

“requestors who choose to file an action in Superior Court to challenge the decision of an OPRA custodian must do so within 45 days. For like reasons, we adopt the same approach for common law actions. Our holding is limited to the proper statute of limitations...” *Id.* at 70.

Thus, the holding of *Mason* is limited to denial of access complaints filed in the Superior Court.

The New Jersey Legislature is empowered to delegate to an administrative agency the authority to promulgate rules and regulations interpreting and implementing a statute. An appellate court will defer to an agency’s interpretation of a statute unless it is plainly unreasonable. The presumption of validity, however, is not without limits. If an agency’s statutory interpretation is contrary to the statutory language, or if the agency’s interpretation undermines the Legislature’s intent, no deference is required. An appellate court’s deference does not go so far as to permit an administrative agency under the guise of an administrative interpretation to give a statute any greater effect than is permitted by the statutory language. *See, Reilly v. AAA Mid-Atlantic Ins. Co. of New Jersey*, 194 *N.J.* 474 (2008).

*N.J.S.A. 47:1A-1 et seq.* contains no specific statute of limitations on denial of access complaints filed with the GRC. The GRC is therefore without authority to impose a statute of limitations where one does not exist. Thus, no statute of limitations in OPRA bars the GRC’s adjudication of the Complainant’s denial of access complaint in the instant matter.

Because *N.J.S.A. 47:1A-1 et seq.* contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of

limitations in OPRA bars the GRC's adjudication of the Complainant's Denial of Access Complaint in the instant matter.

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

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

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

The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian's charge pursuant to N.J.S.A. 39:4-131 of \$10.76 for copying and mailing eight (8) pages of records in response to the Complainant's OPRA request violated N.J.S.A. 47:1A-5.b. and created an unreasonable burden upon the Complainant's right of access, and because the correct amount of the copying fees under N.J.S.A. 47:1A-5.b. for copying eight (8) pages of records responsive to the Complainant's OPRA request is \$.75 x 8, or \$6.00, plus the costs of postage, the Custodian must therefore refund the amount overcharged, \$4.00, to the Complainant.
2. **The Custodian shall refund to the Complainant \$4.00, representing the amount overcharged for copying costs of records responsive to the Complainant's OPRA request, and shall simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 (2005) to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**
3. Because N.J.S.A. 47:1A-1 et seq. contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of limitations in OPRA bars the GRC's adjudication of the Complainant's Denial of Access Complaint in the instant matter.
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 pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

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In House Counsel

Approved By: Catherine Starghill, Esq.  
Executive Director

January 18, 2011