



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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Acting Commissioner*

**FINAL DECISION**

**April 28, 2010 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2009-56

v.

Sparta Board of Education (Sussex)  
Custodian of Record

At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 21, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint should be dismissed because the Complainant voluntarily withdrew his complaint from the Office of Administrative Law via letter to the GRC dated March 15, 2010. 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 28<sup>th</sup> Day of April, 2010

Robin Berg Tabakin, Chair  
Government Records Council



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

Janice L. Kovach, Secretary  
Government Records Council

**Decision Distribution Date: April 30, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 28, 2010 Council Meeting**

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

**GRC Complaint No. 2009-56**

v.

**Sparta Board of Education (Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** An audiotape copy of the most recent public meeting of the Sparta Board of Education (“BOE”).

**Request Made:** February 4, 2009

**Response Made:** February 5, 2009

**Custodian:** Warren Ceurvles

**GRC Complaint Filed:** March 2, 2009<sup>3</sup>

**Background**

**November 4, 2009**

Government Records Council’s (“Council”) Interim Order. At its November 4, 2009 public meeting, the Council considered the October 21, 2009 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. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian’s proposed charge of \$5.00 per audiotape recording of the requested meeting is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. See also O’Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). See also O’Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). Further, the Custodian failed to bear his burden of proving that the proposed charge was reasonable pursuant to N.J.S.A. 47:1A-6.

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

<sup>2</sup> Represented by Rodney T. Hara, Esq., of Fogarty and Hara (Fair Lawn, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

2. Although the Board of Education's official OPRA request form does not contain a space for the maximum cost authorized and details about the actual costs of photocopying, the request form is not in violation of OPRA pursuant to N.J.S.A. 47:1A-5.f. because these two (2) items are not required to be on an official request form pursuant to OPRA. Additionally, the omission of said items does not create a barrier to public records.
3. Although the Custodian failed to bear his burden of proving that the proposed fee of \$5.00 per audiotape represented the actual cost under N.J.S.A. 47:1A-5.b., because the Custodian initially provided access to the two (2) audiotapes responsive pending payment of the proposed duplication fee and subsequently advised the Complainant in writing of the amended proposed duplication fee of \$0.68 (representing the actual cost to reproduce said records), 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. However, the Custodian's failure to bear his burden of proving that the proposed charge was reasonable under OPRA of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

**November 6, 2009**

Council's Interim Order distributed to the parties.

**December 30, 2009**

Complaint transmitted to the Office of Administrative Law.

**March 15, 2009**

Letter from Complainant's Counsel to GRC. The Complainant's Counsel states that because the parties have settled the issue to be decided by the court (the amount of reasonable attorney's fees to be paid to the Complainant), the Complainant voluntarily withdraws this complaint from the Office of Administrative Law.

### Analysis

No analysis is required.

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant voluntarily withdrew his complaint from the Office of Administrative Law via letter to the GRC dated March 15, 2010. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 21, 2010



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

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

**INTERIM ORDER**

**November 4, 2009 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2009-56

v.

Sparta Board of Education (Sussex)  
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian’s proposed charge of \$5.00 per audiotape recording of the requested meeting is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. *See also* O’Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). *See also* O’Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). Further, the Custodian failed to bear his burden of proving that the proposed charge was reasonable pursuant to N.J.S.A. 47:1A-6.
2. Although the Board of Education’s official OPRA request form does not contain a space for the maximum cost authorized and details about the actual costs of photocopying, the request form is not in violation of OPRA pursuant to N.J.S.A. 47:1A-5.f. because these two (2) items are not required to be on an official request form pursuant to OPRA. Additionally, the omission of said items does not create a barrier to public records.
3. Although the Custodian failed to bear his burden of proving that the proposed fee of \$5.00 per audiotape represented the actual cost under N.J.S.A. 47:1A-5.b., because the Custodian initially provided access to the two (2) audiotapes



responsive pending payment of the proposed duplication fee and subsequently advised the Complainant in writing of the amended proposed duplication fee of \$0.68 (representing the actual cost to reproduce said records), 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. However, the Custodian's failure to bear his burden of proving that the proposed charge was reasonable under OPRA of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Interim Order Rendered by the  
Government Records Council  
On The 4<sup>th</sup> Day of November, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach, Secretary  
Government Records Council

**Decision Distribution Date: November 6, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 4, 2009 Council Meeting**

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

**GRC Complaint No. 2009-56**

v.

**Sparta Board of Education (Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** An audiotape copy of the most recent public meeting of the Sparta Board of Education (“BOE”).

**Request Made:** February 4, 2009

**Response Made:** February 5, 2009

**Custodian:** Warren Ceurvles

**GRC Complaint Filed:** March 2, 2009<sup>3</sup>

**Background**

**February 4, 2009**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant requests that prior to producing a copy of the audiotape, the Custodian advise as to the medium in which the audio recording is currently stored, the cost to produce a copy and whether the audio recording of the meeting can be converted into a computer audio file.

**February 5, 2009**

Custodian’s response to the OPRA request. The Custodian responds to the Complainant’s OPRA request in writing on the first (1<sup>st</sup>) business day following receipt of such request. The Custodian states that audio recordings of the BOE’s public meetings are made on audiotapes and are currently stored in that medium. The Custodian states that the BOE charges \$5.00 per audiotape and that there are two (2) audiotapes for the most recent meeting held on January 26, 2009. The Custodian requests that the Complainant advise if he wishes the copies to be prepared.

**March 2, 2009**

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

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

<sup>2</sup> Represented by Rodney T. Hara, Esq., of Fogarty and Hara (Fair Lawn, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.



- Complainant’s OPRA request dated February 4, 2009.
- E-mail from the Custodian to the Complainant dated February 5, 2009.

The Complainant’s Counsel states that the Complainant submitted his OPRA request to the BOE via facsimile on February 4, 2009. Counsel states that the Complainant requested that the Custodian advise him of the cost in advance. Counsel states that the Custodian responded in writing on February 5, 2009, stating that an audiotape copy of the most recent meeting held on January 26, 2009 would cost \$5.00 and that the audio recording spanned two (2) audiotapes, for a total of \$10.00.

Counsel contends that this complaint was filed based on the following issues:

“Actual cost” of an audiotape:

Counsel argues that it is extremely unlikely that the Custodian’s charge of \$5.00 per audiotape accurately reflects the BOE’s actual cost. Counsel cites that the GRC recently stated in Renna v. Township of Warren (Somerset), GRC Complaint No. 2008-40 (April 2009), a \$5.00 charge for a compact disc (“CD”) is “likely not” the “actual cost” pursuant to N.J.S.A. 47:1A-5.b.

Counsel argues that the GRC should follow well-established New Jersey cases and the GRC’s holdings that public agencies charge only the actual cost of producing a material in the medium in which the record is stored. Counsel asserts that, absent extraordinary circumstances, “actual cost” is the material cost of providing the public with a copy of a record excluding labor and overhead costs and cites to Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26, 31 (1962), Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271, 280 (App. Div. 2005), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), O’Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008) and O’Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008).

Counsel states that OPRA limits the cost of a record to “the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy” pursuant to N.J.S.A. 47:1A-5.b. Further, Counsel asserts that the Custodian may argue that the \$5.00 charge reflects a special service charge; however, the Custodian will have to prove that such special service charge is warranted under OPRA pursuant to N.J.S.A. 47:1A-5.d. Counsel avers that this provision in OPRA authorizes a special service charge only if the:

“a request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) requiring a substantial amount of manipulation or programming of information technology...” N.J.S.A. 47:1A-5.d.

Inaccurate OPRA request form:

Counsel states that in O’Shea v. Township of Milford (Passaic), GRC Complaint No. 2007-237 (December 2008), the GRC held that if a public agency’s OPRA request form contained false or misleading information about OPRA, that constituted a denial of access under OPRA. Counsel contends that the BOE’s OPRA request form does not include a space for a requestor to input the maximum authorized cost or details about the actual costs of photocopying. Counsel asserts that the GRC should order the BOE to adopt the GRC’s model request form pursuant to O’Shea, supra.

Counsel requests the following relief:

1. A determination that the BOE violated OPRA by charging more than the “actual cost” for copies of the two (2) audiotapes responsive;
2. A determination ordering the Custodian to certify to the GRC the “actual cost” for copies of audiotapes;
3. A determination ordering the Custodian to make available the requested audiotapes to the Complainant at their “actual cost;”
4. A determination that the BOE’s OPRA request form violates OPRA because it is misleading;
5. A determination ordering the BOE to adopt the GRC’s model request form;
6. A determination that the Complainant is a prevailing party in this matter and is entitled to prevailing party attorney’s fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

**March 11, 2009**

Letter from the Complainant’s Counsel to the GRC attaching an undated letter from the Custodian to the Complainant. Counsel states that the Complainant received a letter from the Custodian on March 10, 2009.<sup>4</sup> Counsel states that in the letter, the Custodian reduced the charge from \$5.00 per audiotape to \$0.68, which Counsel suspects more accurately reflects the “actual cost” of each audiotape.

**March 12, 2009**

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

**March 19, 2009**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated February 4, 2009.
- E-mail from the Custodian to the Complainant dated February 5, 2009.
- Letter from the Custodian to the Complainant undated.

The Custodian certifies that his search for the requested records involved gathering the records responsive that were within the BOE’s possession. Additionally, the Custodian also certifies that no records responsive to the request were destroyed in

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<sup>4</sup> Counsel notes that the envelope was postmarked March 9, 2009. Because the letter was undated, it is unclear as to the actual date the letter was prepared.

accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).

The Custodian certifies that he received the Complainant’s OPRA request on February 4, 2009. The Custodian certifies that he responded in writing on February 5, 2009 stating that an audiotape copy of the most recent meeting held on January 26, 2009 would cost \$5.00 per audiotape and that the audio recording spanned two (2) audiotapes, for a total of \$10.00. The Custodian avers that the Complainant did not respond to the Custodian’s offer to produce the two (2) audiotapes responsive for a fee of \$10.00.

The Custodian acknowledges that the Complainant filed a Denial of Access Complaint on February 27, 2009 contending that the proposed fee of \$10.00 was greater than the actual cost of producing the audiotapes responsive. Additionally, the Custodian further acknowledges that the Complainant alleges that the request form adopted by the BOE does not contain information required by law.

“Actual cost” of an audiotape:

The Custodian acknowledges that subsequent to receiving the instant complaint, the BOE discovered that the “actual cost” of one (1) audiotape, which is purchased in bulk, is \$0.68. The Custodian certifies that he sent a letter to the Complainant on March 11, 2009<sup>5</sup> advising that \$0.68 represents the “actual cost” per audiotape and requesting that the Complainant contact the BOE if he still wanted to obtain the (2) two audiotapes responsive.

The Custodian argues that the Complainant has yet to contact the BOE as of the filing of the SOI. The Custodian asserts that the BOE has made the requested records available to the Complainant and has not denied access to said records.

Inaccurate OPRA request form:

The Custodian states that the Complainant alleges that the BOE’s OPRA request form does not include a space for a requestor to input the maximum authorized cost or details about the actual costs of photocopying. The Custodian states that OPRA requires that “[t]he form shall ... include the following:

- (1) specific directions and procedures for requesting a record;
- (2) a statement as to whether prepayment of fees or a deposit is required;
- (3) the time period within which the public agency is required by [OPRA] to make the record available;
- (4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (5) space for the custodian to list reasons if a request is denied in whole or in part;

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<sup>5</sup> This certification is contrary to the Custodian Counsel’s assertion that the undated letter to the Complainant was postmarked on March 10, 2009.

- (6) space for the requestor to sign and date the form;
- (7) space for the custodian to sign and date the form if the request is fulfilled or denied.” N.J.S.A. 47:1A-5.f.

The Custodian contends that a review of the BOE’s OPRA request form reveals that the form complies with all of the statutory requirements.

The Custodian disputes the Complainant’s allegation that O’Shea v. Township of Milford (Passaic), GRC Complaint No. 2007-237 (December 2008), requires that the BOE adopt the GRC’s model request form; the Custodian contends that the GRC concluded that OPRA does not impose such a requirement. The Custodian contends that in that complaint, the Township of West Milford’s request form contained language indicating that certain types of records would not be produced. The Custodian states that the GRC found that this preemptory limiting language was inappropriate by itself.

Further, the Custodian states that the GRC further indicated in O’Shea, supra, that any form that provides no more or no less information than required by N.J.S.A. 47:1A-5.f. is acceptable. The Custodian argues that because the BOE’s OPRA request form satisfies the criteria set forth in N.J.S.A. 47:1A-5.f., the Complainant’s allegation is meritless and should be dismissed.

### Analysis

#### **Whether the Custodian violated OPRA by charging \$5.00 per audiotape instead of the actual cost of duplicating the requested records?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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.

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

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

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

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

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

The Complainant contends that the Custodian’s charge of \$5.00 per audiotape recording of the BOE’s meeting dated January 26, 2009 violates OPRA because said charge is greater than the actual cost of duplicating the records.

While OPRA provides that paper copies of government records may be obtained upon payment of the actual cost of duplication not to exceed the enumerated rates of \$0.75/0.50/0.25 per page (N.J.S.A. 47:1A-5.b.), the Act does not provide explicit copy rates for any other medium. N.J.S.A. 47:1A-5.b. goes on to state that the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy.

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

In Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Township of Edison charged \$55.00 for a computer diskette containing Township Council meeting minutes. The plaintiff asserted that the fee was excessive and not related to the actual cost of duplicating the record. The defendant argued that the plaintiff's assertion is moot because the fee was never imposed and the requested records were available on the Township's website free of charge. The court held that "...the appeal is not moot, and the \$55 fee established by the Township of Edison for duplicating the minutes of the Township Council meeting onto a computer diskette is unreasonable and unsanctioned by explicit provisions of OPRA." The court stated that:

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

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

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

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

In this complaint, the Complainant requested an audiotape recording of the BOE's most recent public session meeting. The Custodian responded, stating that two (2) audiotapes exist at a proposed fee of \$5.00 per audiotape. However, as provided in N.J.S.A. 47:1A-6, the Custodian ultimately bears the burden of proving whether a

proposed fee represents the actual cost pursuant to OPRA. Here, the Custodian failed to provide any evidence showing that the initial proposed fee of \$5.00 per audiotape represents the actual cost of one (1) audiotape. The Custodian later certified in the SOI that after receiving the Denial of Access Complaint, the BOE discovered the “actual cost” of each audiotape to be \$0.68.

Therefore, pursuant to Spaulding, supra, Libertarian Party of Central New Jersey, supra, Moore, supra, and Dugan, supra, the Custodian’s proposed charge of \$5.00 per audiotape recording of the requested meeting is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. See also O’Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). Further, the Custodian failed to bear his burden of proving that the proposed charge was reasonable pursuant to N.J.S.A. 47:1A-6.

Additionally, because the Custodian offered the requested audiotapes to the Complainant at the actual cost of \$0.68 per audiotape in an undated letter received by the Complainant on March 10, 2009, the GRC declines to order disclosure of the audiotapes responsive. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006) (holding that the Custodian did not unlawfully deny access to the requested records because she responded stating that the requested records would be produced upon payment of the copying cost).

**Whether the Custodian violated OPRA and unlawfully denied access by not utilizing the GRC’s model request form?**

OPRA provides that:

“[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

- (1) specific directions and procedures for requesting a record;
- (2) a statement as to whether prepayment of fees or a deposit is required;
- (3) the time period within which the public agency is required by [OPRA], to make the record available;
- (4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (5) space for the custodian to list reasons if a request is denied in whole or in part;
- (6) space for the requestor to sign and date the form;
- (7) space for the custodian to sign and date the form if the request is fulfilled or denied.” N.J.S.A. 47:1A-5.f.

The Complainant's Counsel contends that the BOE's OPRA request form does not include a space for a requestor to note the maximum authorized cost or details about the actual costs of photocopying. Counsel asserts that the GRC should order the BOE to adopt the GRC's model request form pursuant to O'Shea v. Township of Milford (Passaic), GRC Complaint No. 2007-237 (December 2008).

The Custodian asserts that the form adopted by the Township complies with all of the requirements set forth in N.J.S.A. 47:1A-5.f. Additionally, the Custodian contends that the GRC found in O'Shea, supra, that any form that provides no more or no less information than required by N.J.S.A. 47:1A-5.f is acceptable.

The GRC's Advisory Opinion No. 2006-01 provides that a valid OPRA request is one that is submitted on the agency's official OPRA request form. N.J.S.A. 47:1A-5.f mandates that public agencies adopt an official OPRA request form. However, the GRC's Advisory Opinion No. 2006-01 also provides that "[w]hen an agency has not adopted its own official OPRA records request form, requestors may submit their records request on the Model Request Form located on the Government Records Council website ([www.nj.gov/grc/](http://www.nj.gov/grc/) )."

However, the Appellate Division's recent decision in Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009) held that:

"...all requests for OPRA records must be in writing; that such requests shall utilize the forms provided by the custodian of records; however, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in N.J.S.A. 47:1A-5.f. Where the requestor fails to produce an equivalent writing that raises issues as to the nature or substance of the requested records, the custodian may require that the requestor complete the form generated by the custodian pursuant to N.J.S.A. 47:1A-5.g."

Based on this holding, although a public agency should have adopted an official OPRA request form, a custodian of record cannot deny access to an OPRA request if such request does not utilize said form.

Further, the crux of the argument in O'Shea, supra, was based on language included on the Township of West Milford's official OPRA request form. This language, which asserted that personnel records would not be provided as part of an OPRA request, failed to include said exceptions to N.J.S.A. 47:1A-10. The Complainant argued that the language created a barrier to public records. The Council held that the Township of West Milford had to either delete the language or include the exceptions to personnel records afforded in N.J.S.A. 47:1A-10.

In the instant complaint, which can be easily distinguished from the facts in O'Shea, supra, the Complainant's Counsel requested that the GRC determine that the BOE's OPRA request violates OPRA because it is misleading inasmuch as it does not contain a space to note the maximum cost authorized and details about the actual costs of



photocopying. However, N.J.S.A. 47:1A-5.f. sets forth the required information to be included on a public agency's official OPRA request form: the requirements do not include a space for the maximum cost authorized and details about the actual costs of photocopying is included in those requirements. Clearly, the omission of these items from the statute which sets forth the required contents of an official OPRA request form shows that the Legislature did not intend to include such items and that their omission does not create a barrier to access to public records.

Therefore, although the BOE's official OPRA request form does not contain a space to note the maximum cost authorized and details about the actual costs of photocopying, the request form is not in violation of OPRA pursuant to N.J.S.A. 47:1A-5.f. because these two (2) items are not specifically required to be on an official request form pursuant to OPRA. Additionally, the omission of said items does not create a barrier to access to public records.

**Whether the Custodian's proposed copy cost of one (1) CD exceeding actual cost in violation of OPRA 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).

Although the Custodian failed to bear his burden of proving that the proposed fee of \$5.00 per audiotape represented the actual cost under N.J.S.A. 47:1A-5.b., because the Custodian initially provided access to the two (2) audiotapes responsive pending payment of the proposed duplication fee and subsequently advised the Complainant in writing of the amended proposed duplication fee of \$0.68 (representing the actual cost to reproduce said records), 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. However, the Custodian's failure to bear his burden of proving that the proposed charge was reasonable under OPRA of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

**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)."

In the instant complaint, the Custodian initially responded in writing providing access to two (2) audiotapes responsive for a fee of \$5.00 each. After the filing of this complaint, the Custodian sent a letter to the Complainant stating that the "actual cost" of duplicating the requested record was \$0.68 per audiotape.

Additionally, the Complainant's Counsel requested that the GRC make a determination that the Custodian violated OPRA for initially failing to charge the "actual cost" of the audiotapes responsive. The GRC has found herein that the Custodian's initial proposed duplication fee of \$5.00 per audiotape violated N.J.S.A. 47:1A-5.b. and that the Custodian failed to bear his burden of proving that the proposed fee was reasonable under OPRA.

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384

N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian's proposed charge of \$5.00 per audiotape recording of the requested meeting is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. *See also* O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). *See also* O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). Further, the Custodian failed to bear his burden of proving that the proposed charge was reasonable pursuant to N.J.S.A. 47:1A-6.

2. Although the Board of Education's official OPRA request form does not contain a space for the maximum cost authorized and details about the actual costs of photocopying, the request form is not in violation of OPRA pursuant to N.J.S.A. 47:1A-5.f. because these two (2) items are not required to be on an official request form pursuant to OPRA. Additionally, the omission of said items does not create a barrier to public records.
3. Although the Custodian failed to bear his burden of proving that the proposed fee of \$5.00 per audiotape represented the actual cost under N.J.S.A. 47:1A-5.b., because the Custodian initially provided access to the two (2) audiotapes responsive pending payment of the proposed duplication fee and subsequently advised the Complainant in writing of the amended proposed duplication fee of \$0.68 (representing the actual cost to reproduce said records), 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. However, the Custodian's failure to bear his burden of proving that the proposed charge was reasonable under OPRA of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

October 21, 2009