



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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Commissioner*

**FINAL DECISION**

**February 24, 2011 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2009-57

v.

Vernon Township Board of Education (Sussex)  
Custodian of Record

At the February 24, 2011 public meeting, the Government Records Council ("Council") considered the February 15, 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, accepts the Administrative Law Judge's Initial Decision dated January 18, 2011, in which the Judge ordered that the parties comply with the settlement terms and that these proceedings be concluded.

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 24<sup>th</sup> Day of February, 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 28, 2011**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2009-57**

v.

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

**Records Relevant to Complaint:** Copies of the Vernon Township Board of Education (“BOE”) executive session minutes for every executive session meeting held from September to December 2008.

**Request Made:** February 4, 2009

**Response Made:** February 9, 2009

**Custodian:** Steven Kepnes

**GRC Complaint Filed:** February 25, 2009<sup>3</sup>

**Background**

**February 23, 2010**

Government Records Council’s (“Council”) Interim Order. At its February 23, 2010 public meeting, the Council considered the February 16, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian amended the Vernon Township Board of Education’s official OPRA request form to meet the requirements of N.J.S.A. 47:1A-5.f., and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council’s Interim Order, the Custodian has complied with the Council’s December 22, 2009 Interim Order.
2. Although the Custodian failed to bear his burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6, because the Custodian provided access to

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<sup>1</sup> Represented by Jonathan E. McMeen, Esq. (Sparta, NJ).

<sup>2</sup> Represented by Gary Kraemer, Esq. (Sparta, NJ).

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

the requested meeting minutes on February 26, 2009 and complied with the Council's December 22, 2009 Interim Order, 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 December 22, 2009 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 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.

#### **March 1, 2010**

Council's Interim Order distributed to the parties.

#### **June 24, 2010**

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

#### **January 18, 2011**

Initial decision of Administrative Law Judge ("ALJ") Evelyn J. Marose ratifying the parties' settlement agreement as follows:

1. "The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives."
2. "The settlement fully disposes of all issues in controversy and is consistent with law."

"I **CONCLUDE** that the agreement meets the safeguard requirements of *N.J.A.C. 1:1-19.1* and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**."

#### **Analysis**

No analysis required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Council accept the Administrative Law Judge's Initial Decision dated January 18, 2011, in which the Judge ordered that the parties comply with the settlement terms and that these proceedings be concluded.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

February 15, 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  
Acting Commissioner

**INTERIM ORDER**

**February 23, 2010 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2009-57

v.

Vernon Township Board of Education (Sussex)  
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 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:

1. Because the Custodian amended the Vernon Township Board of Education’s official OPRA request form to meet the requirements of N.J.S.A. 47:1A-5.f., and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council’s Interim Order, the Custodian has complied with the Council’s December 22, 2009 Interim Order.
2. Although the Custodian failed to bear his burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6, because the Custodian provided access to the requested meeting minutes on February 26, 2009 and complied with the Council’s December 22, 2009 Interim Order, 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 December 22, 2009 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 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 23<sup>rd</sup> Day of February, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: March 1, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
February 23, 2010 Council Meeting**

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

**GRC Complaint No. 2009-57**

v.

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

**Records Relevant to Complaint:** Copies of the Vernon Township Board of Education (“BOE”) executive session minutes for every executive session meeting held from September to December 2008.

**Request Made:** February 4, 2009

**Response Made:** February 9, 2009

**Custodian:** Steven Kepnes

**GRC Complaint Filed:** February 25, 2009<sup>3</sup>

**Background**

**December 22, 2009**

Government Records Council’s (“Council”) Interim Order. At its December 22, 2009 public meeting, the Council considered the December 9, 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. Because the requested executive session meeting minutes were approved by the Vernon Township Board of Education and no longer constitute advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., the Custodian failed to bear his burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.
2. Because N.J.S.A. 47:1A-5.f. requires that specific elements be contained in an official OPRA request, the Custodian shall amend the Board of Education’s official OPRA request form to include the following requirements set forth in N.J.S.A. 47:1A-5.f., which are currently absent on the Vernon Township Board of Education’s official OPRA request form:

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<sup>1</sup> Represented by Jonathan E. McMeen, Esq. (Sparta, NJ).

<sup>2</sup> Represented by Gary Kraemer, Esq. (Sparta, NJ).

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

- specific directions and procedures for requesting a record;
  - the time period within which the public agency is required by [OPRA], to make the record available;
  - 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;
  - space for the custodian to list reasons if a request is denied in whole or in part.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order and provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>4</sup>, to the Executive Director.**
  4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
  5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

**December 29, 2009**

Council's Interim Order distributed to the parties.

**December 31, 2009**

Custodian's response to the Council's Interim Order attaching the Vernon Township Board of Education's ("BOE") official OPRA request form. The Custodian provides certified confirmation of his compliance with the Council's December 22, 2009 Interim Order. The Custodian certifies that subsequent to the Complainant's request on February 4, 2009 and many months before the Council's Interim Order, the BOE revised its official OPRA request form to include all of the information that the BOE was ordered to include in said request form.

The Custodian certifies that a true copy of the BOE's official OPRA request form is attached.

**January 5, 2010**

E-mail from the GRC to the Custodian. The GRC states that it is in receipt of the Custodian's response to the Council's December 22, 2009 Interim Order. The GRC states that the Custodian certifies that the BOE has been using the official OPRA request form attached to the Custodian's certification for almost a year. The GRC requests that the Custodian certify to the following:

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<sup>4</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."  
 Jesse Wolosky v. Vernon Township Board of Education (Sussex), 2009-57 – Supplemental Findings and Recommendations of the Executive Director 2



1. What was the exact date that the BOE began using the OPRA request form provided to the GRC as part of the BOE's compliance with the Council's December 22, 2009 Interim Order?

Additionally, the GRC advises that the contact information for filing a complaint with the GRC contained on the information page is incorrect. The GRC provides the current contact information for filing a complaint via mail, facsimile or e-mail and requests that the Custodian certify to amending the contact information. The GRC states that the requested legal certification is due by January 8, 2010.

### **January 6, 2010**

Custodian's legal certification attaching the Vernon Township Board of Education's ("BOE") official OPRA request form. The Custodian certifies that he does not know the exact date that the revised OPRA request was initially used, but it was within several days after being served with the instant complaint on February 25, 2009. The Custodian certifies that the cover page providing all information concerning OPRA procedures, right of appeal and GRC contact information has been part of the BOE's OPRA request form since the end of February, 2009 or the beginning of March, 2009. The Custodian certifies that the only changes made to the form since that point were changing the copy fee to \$0.10 per copy during Fall of 2009 and the line regarding the reason for denying access to a records request pursuant to the Council's December 22, 2009 Interim Order.<sup>5</sup>

### **Analysis**

#### **Whether the Custodian complied with the Council's December 22, 2009 Interim Order?**

The Council's December 22, 2009 Interim Order specifically directed the Custodian to "amend the Board of Education's official OPRA request form to include the following requirements set forth in N.J.S.A. 47:1A-5.f., which are currently absent on the Vernon Township Board of Education's official OPRA request form:

- specific directions and procedures for requesting a record;
- the time period within which the public agency is required by [OPRA], to make the record available;
- 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;
- space for the custodian to list reasons if a request is denied in whole or in part."

Said Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of said Order.

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<sup>5</sup> The evidence of record shows that the Custodian also amended the GRC's contact information contained on the first page of the BOE's official OPRA request form to conform with the information provided in the GRC's e-mail dated January 5, 2010.

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On December 31, 2009, the Custodian responded in writing to the Council's Interim Order certifying that subsequent to the Complainant's OPRA request on February 4, 2009 and many months before the Council's Interim Order, the BOE revised its official OPRA request form to include all of the information that the BOE was ordered to include in said request form.

The GRC then requested that the Custodian certify as to the specific date that the BOE's amended OPRA request form was initially used. The Custodian responded certifying that he did not know the exact date, but that the BOE's form was put in use sometime near the end of February 2009 or the beginning of March 2009. Additionally, the Custodian certified that he amended the form to include a space regarding the reason for denying access to a records request pursuant to the GRC's Interim Order.

Therefore, because the Custodian amended the BOE's official OPRA request form to meet the requirements of N.J.S.A. 47:1A-5.f., and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's December 22, 2009 Interim Order.

**Whether the Custodian's unlawful denial of access to the requested meeting minutes 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)).

In the instant complaint, although the Custodian failed to bear his burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6, because the Custodian provided access to the requested meeting minutes on February 26, 2009 and complied with the Council's December 22, 2009 Interim Order, 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>6</sup> Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

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

The Custodian in the instant complaint initially denied access to the requested minutes on February 9, 2009 stating that they were not open to the public. The Complainant filed a complaint with the GRC on February 25, 2009, in which the Complainant's Counsel requested that the GRC order disclosure of the requested records, recommend that the BOE adopt the GRC's model request form and find that the Complainant is a prevailing party entitled to reasonable prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6.

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<sup>6</sup> The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

Subsequent to the filing of this complaint, on February 26, 2009, the Custodian provided access to the meeting minutes responsive with redactions. Moreover, the GRC noted in its analysis of this complaint that although the court's holding in Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009) does not allow a custodian of record to deny access to a request for records that is not on an official OPRA request form, the evidence of record did show that the BOE's OPRA request form did not meet the specific requirements of N.J.S.A. 47:1A-5.f. Accordingly, the GRC ordered that the Custodian amend the BOE's official OPRA request form to conform to the requirements set forth under OPRA.

The Custodian subsequently provided certified confirmation to the GRC on December 31, 2009 that the BOE had been using an updated request form since the end of February, 2009 or beginning of March, 2009. The Custodian submitted a second certification on January 6, 2010 at the request of the GRC certifying that the only change made pursuant to the Council's December 22, 2009 Interim Order was the inclusion of a space regarding the reason for denying access to a records request.

Therefore, pursuant to Teeters, *supra*, and the Council's December 22, 2009 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian amended the Vernon Township Board of Education's official OPRA request form to meet the requirements of N.J.S.A. 47:1A-5.f., and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's December 22, 2009 Interim Order.
2. Although the Custodian failed to bear his burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6, because the Custodian provided access to the requested meeting minutes on February 26, 2009 and complied with the Council's December 22, 2009 Interim Order, 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 December 22, 2009 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 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

February 16, 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

December 22, 2009 Government Records Council Meeting

Jesse Wolosky  
Complainant

Complaint No. 2009-57

v.

Vernon Township Board of Education (Sussex)  
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council ("Council") considered the December 9, 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, finds that:

1. Because the requested executive session meeting minutes were approved by the Vernon Township Board of Education and no longer constitute advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., the Custodian failed to bear his burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.
2. Because N.J.S.A. 47:1A-5.f. requires that specific elements be contained in an official OPRA request, the Custodian shall amend the Board of Education's official OPRA request form to include the following requirements set forth in N.J.S.A. 47:1A-5.f., which are currently absent on the Vernon Township Board of Education's official OPRA request form:
  - specific directions and procedures for requesting a record;
  - the time period within which the public agency is required by [OPRA], to make the record available;
  - 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;
  - space for the custodian to list reasons if a request is denied in whole or in part.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order and provide**



**certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>1</sup>, to the Executive Director.**

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

Interim Order Rendered by the  
Government Records Council  
On The 22<sup>nd</sup> Day of December, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: December 29, 2009**

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<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 22, 2009 Council Meeting**

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

**GRC Complaint No. 2009-57**

v.

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

**Records Relevant to Complaint:** Copies of the Vernon Township Board of Education (“BOE”) executive session minutes for every executive session meeting held from September to December 2008.

**Request Made:** February 4, 2009

**Response Made:** February 9, 2009

**Custodian:** Steven Kepnes

**GRC Complaint Filed:** February 25, 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 the records responsive be provided in order of the following preferences: (a) via e-mail and (b) via facsimile.

**February 9, 2009**

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the third (3<sup>rd</sup>) business day following receipt of such request. The Custodian states that access to the requested records is denied because the BOE has not made the requested executive session minutes open to the public.

**February 12, 2009**

E-mail from the Complainant to the Custodian. The Complainant states that the Complainant’s denial of access to the requested executive session minutes is not clear. The Complainant requests that the Custodian advise whether the requested minutes were prepared and approved by the BOE.

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<sup>1</sup> Represented by Jonathan E. McMeen, Esq. (Sparta, NJ).

<sup>2</sup> Represented by Gary Kraemer, Esq. (Sparta, NJ).

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

**February 19, 2009**

E-mail from the Custodian to the Complainant. The Custodian states that the BOE has not authorized the release of matters discussed in executive session to the public.

**February 19, 2009**

E-mail from the Complainant to the Custodian. The Complainant asks the Custodian if the requested minutes were approved by the BOE but have not been released to the public.

**February 19, 2009**

E-mail from the Custodian to the Complainant. The Custodian states that the Complainant is correct: the minutes have been approved by the BOE but have not been released to the public.

**February 25, 2009**

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

- Complainant’s OPRA request dated February 4, 2009.
- E-mail from the Custodian to the Complainant dated February 9, 2009.
- E-mail from the Complainant to the Custodian dated February 12, 2009.
- E-mail from the Custodian to the Complainant dated February 19, 2009.
- E-mail from the Complainant to the Custodian dated February 19, 2009.
- E-mail from the Custodian to the Complainant dated February 19, 2009.

The Complainant’s Counsel states that this complaint is being filed because the Complainant was denied access to the requested executive session meeting minutes.

Counsel states that the Complainant submitted his OPRA request to the BOE via facsimile on February 4, 2009. Counsel states that the Custodian responded in writing on February 9, 2009 denying access to the requested records because the BOE had not yet made the minutes open to the public. Counsel states that the Complainant requested confirmation of whether the minutes were prepared and approved by the BOE in an e-mail dated February 12, 2009. Counsel states that the Custodian responded on February 19, 2009 re-iterating that the BOE has not authorized the release of the minutes requested. Counsel states that the Complainant again requested confirmation of whether the minutes were approved. Counsel states that the Custodian promptly confirmed that the requested minutes were approved but not authorized for release to the public.

Counsel avers that executive session meeting minutes are public records under OPRA. McClain v. College Hospital, 99 N.J. 346, 354 (1985). Counsel argues that although unapproved executive session meeting minutes are exempt under OPRA as advisory, consultative or deliberative (“ACD”) material pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), once those minutes are approved, they are public records. Paff v. Borough of Roselle (Morris), GRC Complaint No. 2007-255 (June 2008).

Counsel contends that the Custodian confirmed that the meeting minutes responsive were approved by the BOE in an e-mail to the Complainant dated February 19, 2009 and should have been provided to the Complainant.

Counsel argues that custodians cannot create additional barriers to access. Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007)(holding that the Custodian could not create an undue burden on access, such as forcing requestors to fill out multiple request forms). Counsel argues that the Custodian created an additional barrier in the instant complaint because he denied access to approved executive session meeting minutes. Further, Counsel contends that the BOE has essentially turned itself into a mini-court that has jurisdiction to review and grant or deny access to records requested under OPRA, which no public agency has the power to do.

Counsel requests the following relief:

1. A determination finding that the Custodian violated OPRA and unlawfully denied access to approved executive session meeting minutes;
2. A determination recommending that the BOE adopt the GRC's model request form; and
3. A determination finding 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.

### **February 26, 2009**

Facsimile from the Custodian to the Complainant attaching the executive session meeting minutes responsive with redactions. The Custodian states that the BOE confirmed at their February 19, 2009 BOE meeting which issues related to confidentiality no longer exist. Additionally, the Custodian notes the specific basis for each redaction contained within the meeting minutes thereon.

### **March 12, 2009**

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

### **March 13, 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 9, 2009.
- E-mail from the Complainant to the Custodian dated February 12, 2009.
- E-mail from the Custodian to the Complainant dated February 19, 2009.
- E-mail from the Complainant to the Custodian dated February 19, 2009.
- E-mail from the Custodian to the Complainant dated February 19, 2009.
- Facsimile from the Custodian to the Complainant dated February 26, 2009 attaching the executive session meeting minutes responsive with redactions.

The Custodian certifies that no records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).<sup>4</sup>

The Custodian certifies that he received the Complainant’s OPRA request on February 4, 2009. The Custodian certifies that he responded to the Complainant on February 9, 2009 stating that access to the requested records is denied because the BOE has not made the requested records open to the public.

The Custodian disputes the Complainant’s Counsel portrayal of the facts in the instant complaint. The Custodian argues that the instant complaint was filed based on the Complainant and Counsel’s misunderstanding of the concept of executive session meeting minutes having been approved by the BOE. The Custodian argues that the BOE approved the meeting minutes responsive to the Complainant’s OPRA request in terms of accuracy and content, but has not approved the release of the minutes in their totality because of the nature of matters considered by the BOE during the executive sessions at issue.

The Custodian asserts that at the time of the Complainant’s OPRA request, the BOE had not yet determined that the reasons for conducting such matters in executive session had been resolved. Specifically, the Custodian points out that the November 20, 2008 executive session minutes concerned an issue of significant pupil discipline, which is specifically exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Further, the Custodian asserts that the October 16, 2008 and November 13, 2008 executive sessions addressed a grievance against an employee and discussion of possible consequences including tenure ramifications and anticipated litigation, which remains pending as an ongoing investigation. The Custodian asserts that this matter is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-3 and N.J.S.A. 10:4-12(b)(7).

The Custodian contends that during the exchange of e-mails between February 9, 2009 and February 19, 2009, the BOE was actually planning to meet to determine whether the matters conducted in executive session can be released to the public. The Custodian states that the BOE determined at this meeting that the pending matters required continued confidentiality pursuant to specific exemptions set forth in OPRA.

The Custodian certifies that he forwarded the Complainant copies of the approved executive session minutes responsive with redactions of the matters and BOE’s lawful basis for such redactions, as authorized under N.J.S.A. 47:1A-5.g.

Additionally, the Custodian argues that the Complainant has mischaracterized the Custodian’s response as a denial of access. The Custodian contends that it is unfortunate that the Complainant declined to mediate the instant complaint, which bespeaks frivolous and arbitrary action by the Complainant. The Custodian argues that the sole issue in this complaint appears to be the Complainant’s misconception that the BOE’s approval of the requested executive session meeting minutes signifies that the same is available in full and as approved to the general public. The Custodian asserts that this position is contrary

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<sup>4</sup> The Custodian did certify to the search undertaken.  
Jesse Wolosky v. Vernon Township Board of Education (Sussex), 2009-57 – Findings and Recommendations of the Executive Director

to the redaction process pursuant to N.J.S.A. 47:1A-5.g. for matters which are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1., matters involving on-going investigations pursuant to N.J.S.A. 47:1A-3, and anticipated litigation pursuant to N.J.S.A. 10:4-12(b)(7).

The Custodian asserts that he provided the requested minutes to the Complainant within seven (7) business days after the BOE determined that the redacted matters continued to be exempt from disclosure pursuant to OPRA; therefore, the Custodian has complied with OPRA.

### **March 20, 2009**

The Complainant Counsel's response to the Custodian's SOI. Counsel contends that the Custodian demonstrated a clear misunderstanding of OPRA in his SOI. Counsel asserts that the Custodian's February 9, 2009 response and subsequent communications were insufficient, forcing the Complainant to make an educated guess as to why approved executive session meeting minutes were not provided. Counsel asserts that the Custodian provided several reasons why the minutes were not provided to the Complainant but failed to cite to any such exemptions when initially responding to the Complainant on February 9, 2009 or in any subsequent correspondence preceding the Complainant's filing of this complaint.

Further, Counsel argues that only after the filing of this complaint did the Custodian undertake to clarify the specific lawful basis for denial of the requested minutes. Counsel also disputes the Custodian's assertion that this complaint is frivolous because clearly the Complainant would not have received the records without the filing of this complaint.

Counsel asserts that the Custodian's assertion that BOE's procedure of approving executive session minutes for accuracy and content, but not releasing same to the public due to student discipline, a grievance against an employee, an on-going investigation and pending litigation provides an additional barrier to access. Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007).

Finally, Counsel notes that it is firmly understood that when executive session meeting minutes have not yet been approved, the minutes are considered ACD pursuant to the GRC's holding in Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006); however, the Custodian's rationale that the minutes were approved by the governing body but not "approved" for the public is inconsistent with OPRA.

### **March 23, 2009**

Letter from the Custodian's Counsel to the GRC. Counsel contends that the minutes at issue in Parave-Fogg, *supra*, were actually public session minutes. Counsel asserts that because of the nature of the subject matters authorized for discussion in executive session pursuant to the Open Public Meetings Act ("OPMA"), the dual step process of approving minutes for release to the public involves an approval for form and content and a determination of whether the contents are appropriate for disclosure to the public. Counsel asserts that the formal act of approving minutes denotes acceptance of

the minutes in terms of form and content as accurately recording what transpired at an official meeting and has nothing to do with a public agency authorizing the full disclosure of said minutes, particularly when such meetings have addressed matters which always remain confidential pursuant to OPRA.

Counsel contends that the Custodian responded promptly and reasonably following the BOE's determination of which matters could be released to the public and which matters must remain confidential at a meeting on February 19, 2009. Nevertheless, Counsel notes that the Complainant's Counsel acknowledges receipt of the requested records.

### **Analysis**

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

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 ...The terms *shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

Further, OPRA provides that:

"[i]f the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian *shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.*" (Emphasis added.) N.J.S.A. 47:1A-5.g.

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

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

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



The Custodian argues that the instant complaint was filed based on the Complainant and Counsel's misunderstanding of the concept of approved executive session meeting minutes. The Custodian argues that the BOE approved the meeting minutes responsive in terms of accuracy and content but has not approved the release of the minutes in their totality because of the nature of certain matters considered by the BOE during the executive sessions at issue. Additionally, the Custodian certified in the SOI that the requested executive session meeting minutes were provided to the Complainant with redactions on February 26, 2009 following the BOE's meeting on February 19, 2009 confirming which matters were to remain confidential.

The Complainant's Counsel argues that the Custodian created an additional barrier to access in the instant complaint because he denied access to approved executive session meeting minutes. Counsel subsequently responded to the SOI asserting that the Custodian provided several additional reasons why access to the requested records was denied which the Custodian failed to provide to the Complainant in the Custodian's initial response via e-mail February 9, 2009 and subsequent e-mails dated February 19, 2009. Further, Counsel asserts that the Custodian unlawfully turned himself into a mini-court that has jurisdiction to review and grant or deny access to records requested under OPRA, which no public agency has the power to do.

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

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

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

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

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

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

In the instant complaint, the Custodian initially denied access to the requested executive session meeting minutes stating that said minutes had not been made available to the public. In response to the Complainant’s request for clarification of the Custodian’s denial of access, the Custodian acknowledged that the minutes were approved by the BOE but have not been released to the public.

The Custodian subsequently contended in the SOI that the instant complaint was filed based on the Complainant and Complainant Counsel’s misunderstanding of the concept of executive session meeting minutes being approved by the BOE. The Custodian contended that although the accuracy and content of the minutes were approved by the BOE, issues contained in the minutes that are otherwise exempt under OPRA were not approved. Additionally, the Custodian argued that the sole issue in this complaint appears to be the Complainant’s misconception that the BOE’s approval of the requested executive session meeting minutes signifies that the same is available in full and as approved to the general public. The Custodian asserts that this position is contrary to the redaction process pursuant to N.J.S.A. 47:1A-5.g. for matters which are exempted under OPRA pursuant to N.J.S.A. 47:1A-1.1., matters involving on-going investigations pursuant to N.J.S.A. 47:1A-3, and anticipated litigation pursuant to N.J.S.A. 10:4-12(b)(7).

Contrary to the Custodian's assertions, the Council's holding in Parave-Fogg, *supra*, specifically states that "minutes ... not approved by the governing body ... constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1." Additionally, the Custodian rightly points out that N.J.S.A. 47:1A-5.g. allows for the redaction of information that is exempt under OPRA. In fact, OPRA requires the disclosure of a record with redactions of only the information which is asserted to be exempt from disclosure. A denial of access to the entire record is therefore unlawful under OPRA.

Therefore, because the requested executive session meeting minutes were approved by the BOE and no longer constitute ACD material pursuant to N.J.S.A. 47:1A-1.1., the Custodian failed to bear his burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.

Additionally, the Custodian's Counsel notes that the facts in the instant complaint are different from Parave-Fogg, *supra*, because the records at issue in that complaint were public session meeting minutes and not executive session meeting minutes. However, the GRC has previously upheld a custodian's denial of access to unapproved executive session meeting minutes. See Johnston v. Township of Hillside, GRC Complaint No. 2006-202 (March 2008). Further, in Kohn v. Township of Livingston (Essex), GRC Complaint No. 2007-319 (July 2008), the Council was tasked with deciding whether the Custodian lawfully denied access to unapproved site and floor plans. The Council held that:

"... the requested plans ... were approved by the Township Council on December 17, 2007, fourteen (14) days after the Complainant's OPRA request. Accordingly, the requested plans should be held in the same regard as unapproved draft meeting minutes because the requested plans were still ACD material until the time that the Township Council officially approved the plans." *Ibid.* at page 9.

Therefore, the application of unapproved documents being exempt from disclosure as ACD material extends beyond the public meeting minutes requested in Parave-Fogg, *supra*.

Finally, the GRC notes that the Complainant Counsel's asserts that the Custodian unlawfully turned himself into a mini-court that has the jurisdiction to review and grant or deny access to records requested under OPRA.

However, OPRA defines a custodian as "the municipal clerk and in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be." N.J.S.A. 47:1A-1.1. Additionally, N.J.S.A. 47:1A-5 sets forth the duties of a custodian, which include responding to a request, redacting information which may be exempt from OPRA and providing the specific basis thereof. OPRA also provides that a public agency bears the burden of proving that a denial of access is lawful. N.J.S.A. 47:1A-6. Ultimately, because a

custodian is vested with the legal responsibility of granting and denying access in accordance with the law, Counsel's assertion is in error.

**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 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 adopt an official OPRA request form, a custodian of record cannot deny access to an OPRA request if such request does not utilize said form. Therefore this language requires written non-form records requests to clearly state that the request is a records request made under the provisions of OPRA. Any mention of OPRA in the written non-form records request is sufficient. This is the only requirement of a written non-form OPRA records request.

OPRA requires that an agency’s request form contain all of the elements set forth in N.J.S.A. 47:1A-5.f. The evidence of record in the instant complaint shows that the BOE’s official OPRA request lacks some of the elements required to be contained within an agency’s official OPRA request form; specifically, the OPRA request form does not contain a specific directions and procedures for requesting a record, the time period within which the public agency is required by [OPRA], to make the record available, 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 or a space for the custodian to list reasons if a request is denied in whole or in part.

Therefore, because N.J.S.A. 47:1A-5.f. requires that specific elements be contained in an official OPRA request, the Custodian shall amend the BOE’s official OPRA request form to include the following requirements set forth in N.J.S.A. 47:1A-5.f., which are currently absent on the Vernon Township Board of Education’s official OPRA request form:

- specific directions and procedures for requesting a record;
- the time period within which the public agency is required by [OPRA], to make the record available;
- 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;
- space for the custodian to list reasons if a request is denied in whole or in part.

**Whether the Custodian’s unlawful denial of access to the requested meeting minutes rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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

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

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

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the requested executive session meeting minutes were approved by the Vernon Township Board of Education and no longer constitute advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., the Custodian failed to bear his burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.
2. Because N.J.S.A. 47:1A-5.f. requires that specific elements be contained in an official OPRA request, the Custodian shall amend the Board of Education's official OPRA request form to include the following requirements set forth in N.J.S.A. 47:1A-5.f., which are currently absent on the Vernon Township Board of Education's official OPRA request form:
  - specific directions and procedures for requesting a record;
  - the time period within which the public agency is required by [OPRA], to make the record available;
  - 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;
  - space for the custodian to list reasons if a request is denied in whole or in part.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order and provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>5</sup>, to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

December 9, 2009

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<sup>5</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."