



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2010-09

v.

Township of Teaneck (Bergen)
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian timely complied with the Council’s May 24, 2011 Interim Order by providing the record for an *in camera* review and Custodian’s certified confirmation of compliance to the Executive Director within the deadline to comply with said Order.
2. The Custodian has borne her burden of proof under N.J.S.A. 47:1A-6 of a lawful denial of access to the requested record pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12 and N.J.S.A. 47:1A- 9.a.
3. Although the Custodian provided an insufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g., because the Custodian had to make copies to redact the requested minutes prior to providing same electronically, the Custodian’s charge of \$6.00 represents the actual cost to provide the record to the Complainant pursuant to N.J.S.A. 47:1A-5.b. Moreover, the Custodian lawfully denied the Complainant access to the redacted portions of the executive session minutes of October 28, 2008. Additionally, the evidence of record does not indicate that the Custodian’s technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51



(2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Council has determined that the Custodian lawfully denied access to the redacted portions of the Township's October 28, 2008 executive session minutes pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra.

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

Final Decision Rendered by the
Government Records Council
On The 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: March 2, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
February 28, 2012 Council Meeting**

John Paff¹
Complainant

GRC Complaint No. 2010-09

v.

Township of Teaneck (Bergen)²
Custodian of Records

Records Relevant to Complaint: Copy of minutes from the Township of Teaneck's ("Township") October 28, 2008 executive session.³

Request Made: January 6, 2009

Response Made: January 12, 2009

Custodian: Jamie Evelina⁴

GRC Complaint Filed: January 11, 2010⁵

Background

May 24, 2011

Government Records Council's Interim Order. At the May 24, 2011 public meeting, the Government Records Council ("Council") considered the April 20, 2011 Executive Director's Findings and Recommendations 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 initially failed to provide a specific lawful basis for the redactions to the requested executive session minutes, the Custodian's response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008). *See also* Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (May 2010)(noting that N.J.S.A. 47:1A-5.g. requires a custodian of record to indicate the specific basis for noncompliance), O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009) *and* Frost v. North Hudson Regional Fire & Rescue (Hudson), GRC Complaint No. 2008-198 (December 2009).

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

² Represented by William F. Rupp, Esq., of Ferrara, Turitz, Harraka & Goldberg, P.C. (Hackensack, NJ).

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

⁴ The original custodian of record was Lissette Aportela-Hernandez.

⁵ The GRC received the Denial of Access Complaint on said date.

2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the Township's October 28, 2008 executive session minutes to determine the validity of the Custodian's assertion that the records contain information which is exempt from disclosure pursuant to N.J.S.A. 10:4-12.b(4), N.J.S.A. 10:4-12.b(6) and N.J.S.A. 10:4-12.b(7) of the Open Public Meetings Act.
3. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 2 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁸, that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. Although the actual cost of providing records electronically is likely \$0.00 pursuant to Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010), because the Custodian had to make copies to redact the requested minutes prior to providing same electronically, the Custodian's charge of \$6.00 represents the actual cost to provide the records to the Complainant pursuant to N.J.S.A. 47:1A-5.b.
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

May 25, 2011

Council's Interim Order ("Order") distributed to the parties.

May 26, 2011

Letter from Custodian's Counsel to the GRC, attaching nine (9) copies of the Custodian's Certification and the unredacted minutes for the executive session of the Township of Teaneck dated October 28, 2008 and a redaction index.

⁶ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁷ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁸ "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."

Analysis

Whether the Custodian complied with the Council's May 24, 2011 Interim Order?

At its May 24, 2011 public meeting, the Council determined that because the Custodian asserted that the requested record was lawfully denied because the record contain information which is exempt from disclosure pursuant to N.J.S.A. 10:4-12.b(4), N.J.S.A. 10:4-12.b(6) and N.J.S.A. 10:4-12.b(7) of the Open Public Meetings Act, the Council must determine whether the legal conclusions asserted by the Custodian is properly applied to the record at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested record to determine the validity of the Custodian's assertion that the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted record, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on June 1, 2011.

The Custodian's Counsel subsequently provided the record for an *in camera* review and the Custodian's certified confirmation of compliance to the Executive Director on May 26, 2011.

Therefore, the Custodian timely complied with the Council's May 24, 2011 Interim Order by providing the record for an *in camera* review and Custodian's certified confirmation of compliance to the Executive Director within the deadline to comply with said Order.

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* ..." (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.

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

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination⁹
Executive Session Minutes	October 28, 2008	From “1. Update on FMBA 42 and 242 Negotiations” to “The arbitration for the police unions is scheduled in January.”	Redacted material is exempt from disclosure pursuant to <u>N.J.S.A.</u> 10:4-12(b)(4) as pending collective bargaining negotiations and proposals.	The redacted material contains a description of pending collective bargaining negotiations and proposals; this material is therefore exempt from disclosure under OPRA pursuant to <u>N.J.S.A.</u> 10:4-12(b)(4); <u>N.J.S.A.</u> 47:1A-9.a.
		From “2. Red Light Camera Request – Response From Bergen County” to	Redacted material represents ongoing contract negotiations with the County of Bergen and privileged attorney-client	The redacted material contains a description of ongoing contract

⁹ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

		“Township Attorney’s Report”	communications in connection therewith exempt from disclosure pursuant to <u>N.J.S.A. 10:4-12(b)(7)</u> . Also, the use and location of red light cameras relate directly to issues of traffic safety and enforcement, which constitutes tactics and techniques utilized in protecting the safety and property of the public. <u>N.J.S.A. 10:4-12(b)(6)</u> .	negotiations and attorney-client privileged communications which is exempt from disclosure pursuant to <u>N.J.S.A. 10:4-12(b)(7)</u> .
		From “Township Attorney’s Report 1. Vacate Portion of E. Oakdene Ave – Glenpointe Associates” to “2. Cedar Lane Streetscape – Update on Report from G. Onorato”	Contract negotiations and attorney client privileged material exempt from disclosure pursuant to <u>N.J.S.A. 10:4-12(b)(7)</u> .	The redacted material contains a description of ongoing contract negotiations and attorney-client privileged communications which is exempt from disclosure pursuant to <u>N.J.S.A. 10:4-12(b)(7)</u> .
		From “2. Cedar Lane Streetscape – Update on Report from G. Onorato” to “Mr. Turitz advised that Mr. Onorato has received the report...” ¹⁰	Concerns potential litigation between the Township and the contractor on the Cedar Lane Project, and attorney-client privileged communications with special Counsel, Gerald Onorato which is exempt from disclosure pursuant to	Because the material was not redacted from the copy provided to the Complainant on February 17, 2009, any privileges which may have attached to this information

¹⁰ Although the Custodian asserted in the redaction index accompanying the records provided for the *in camera* review that this material was exempt from disclosure, such material was not redacted from the copy provided to the Complainant on February 17, 2009.

			<u>N.J.S.A.</u> 10:4-12(b)(7).	have been waived.
		From “3. Cable TV Negotiations Update” to “4. Schmitt Litigation Mediation”	Concerns ongoing contract negotiations and strategy between the Township and Cablevision and attorney-client privileged communications in connection therewith which is exempt from disclosure pursuant to <u>N.J.S.A.</u> 10:4-12(b)(7).	The redacted material contains a description of ongoing contract negotiations and attorney-client privileged communications which is exempt from disclosure pursuant to <u>N.J.S.A.</u> 10:4-12(b)(7).
		From “4. Schmitt Litigation Mediation” to “5. Website Contract Renewal; Potential Liabilities”	None. ¹¹	The redacted material contains a description of pending litigation to which the Township is a party and attorney-client privileged communications which is exempt from disclosure pursuant to <u>N.J.S.A.</u> 10:4-12(b)(7) and personnel matters which are exempt from disclosure pursuant to <u>N.J.S.A.</u> 10:4-12(b)(8).
		From “5. Website	Concerns contract negotiations with the	The redacted material

¹¹ The Custodian did not provide any legal explanation for the redactions made to this section in the redaction index provided to the GRC. However, in the redacted records provided to the Complainant on February 17, 2009, the Custodian asserted that this information was exempt from disclosure pursuant to N.J.S.A. 10:4-12(b)(7).

		Contract Renewal: Potential Liabilities” to “6. MOST/Cultural Arts Legal Opinion”	Township’s existing website provider, potential litigation and attorney client privileged communications in connection therewith which is exempt from disclosure pursuant to <u>N.J.S.A. 10:4-12(b)(7)</u> .	contains a description of ongoing contract negotiations and attorney-client privileged communications which is exempt from disclosure pursuant to <u>N.J.S.A. 10:4-12(b)(7)</u> .
		From “7. Compliance with the Manual on Uniform Traffic Control Devices.” to “On a motion made, seconded and unanimously agreed upon...”	Concerns potential litigation and liability regarding the installation of certain traffic control devices and attorney client communications in connection therewith, which is exempt from disclosure pursuant to <u>N.J.S.A. 10:4-12(b)(7)</u> .	The redacted material contains a description of potential litigation to which the Township could be a party and attorney-client privileged communications which is exempt from disclosure pursuant to <u>N.J.S.A. 10:4-12(b)(7)</u> .
		From “9. Gourrier.” to “Adjournment”	Concerns pending personnel proceedings, potential litigation and attorney client privileged communications in connection therewith, which is exempt from disclosure pursuant to <u>N.J.S.A. 10:4-12(b)(7)</u> .	The redacted material contains a description of personnel proceedings, potential litigation and attorney client privileged communications which is exempt from disclosure pursuant to <u>N.J.S.A. 10:4-12(b)(7)</u> and (8).

Thus, the Custodian has borne her burden of proof under N.J.S.A. 47:1A-6 of a lawful denial of access to the requested record pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12 and N.J.S.A. 47:1A-9.a.

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

OPRA states that:

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

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

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

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 provided an insufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g., because the Custodian had to make copies to redact the requested minutes prior to providing same electronically, the Custodian’s charge of \$6.00 represents the actual cost to provide the record to the Complainant pursuant to N.J.S.A. 47:1A-5.b. Moreover, the Custodian lawfully denied the Complainant access to the redacted portions of the executive session minutes of October 28, 2008. Additionally, the evidence of record does not indicate that the Custodian’s technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not

rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought

about a voluntary change in the defendant's conduct." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); *see also* Szczepanski v. Newcomb Med.

Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

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

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A.

47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

The Council's *in camera* examination of the subject record disclosed that the Custodian lawfully denied access to such record under OPRA pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12. Moreover, the filing of this complaint did not bring about a change in the Custodian's conduct. Thus, the Complainant is not a prevailing party.

Therefore, pursuant to Teeters, *supra*, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason, *supra*, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Council has determined that the Custodian lawfully denied access to the redacted portions of the Township's October 28, 2008 executive session minutes pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian timely complied with the Council's May 24, 2011 Interim Order by providing the record for an *in camera* review and Custodian's certified confirmation of compliance to the Executive Director within the deadline to comply with said Order.
2. The Custodian has borne her burden of proof under N.J.S.A. 47:1A-6 of a lawful denial of access to the requested record pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12 and N.J.S.A. 47:1A- 9.a.
3. Although the Custodian provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., because the Custodian

had to make copies to redact the requested minutes prior to providing same electronically, the Custodian's charge of \$6.00 represents the actual cost to provide the record to the Complainant pursuant to N.J.S.A. 47:1A-5.b. Moreover, the Custodian lawfully denied the Complainant access to the redacted portions of the executive session minutes of October 28, 2008. Additionally, the evidence of record does not indicate that the Custodian's technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Council has determined that the Custodian lawfully denied access to the redacted portions of the Township's October 28, 2008 executive session minutes pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

May 24, 2011 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2010-09

v.

Township of Teaneck (Bergen)
Custodian of Record

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

1. Because the Custodian initially failed to provide a specific lawful basis for the redactions to the requested executive session minutes, the Custodian’s response to the Complainant’s OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008). *See also* Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (May 2010)(noting that N.J.S.A. 47:1A-5.g. requires a custodian of record to indicate the specific basis for noncompliance), O’Shea v. Township of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009) *and* Frost v. North Hudson Regional Fire & Rescue (Hudson), GRC Complaint No. 2008-198 (December 2009).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the Township’s October 28, 2008 executive session minutes to determine the validity of the Custodian’s assertion that the records contain information which is exempt from disclosure pursuant to N.J.S.A. 10:4-12.b(4), N.J.S.A. 10:4-12.b(6) and N.J.S.A. 10:4-12.b(7) of the Open Public Meetings Act.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with**

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

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



N.J. Court Rule 1:4-4³, that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

4. Although the actual cost of providing records electronically is likely \$0.00 pursuant to Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010), because the Custodian had to make copies to redact the requested minutes prior to providing same electronically, the Custodian's charge of \$6.00 represents the actual cost to provide the records to the Complainant pursuant to N.J.S.A. 47:1A-5.b.
5. 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.
6. 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 24th Day of May, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: May 25, 2011

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

John Paff¹
Complainant

GRC Complaint No. 2010-09

v.

Township of Teaneck (Bergen)²
Custodian of Records

Records Relevant to Complaint: Copy of minutes from the Township of Teaneck's ("Township") October 28, 2008 executive session.³

Request Made: January 6, 2009

Response Made: January 12, 2009

Custodian: Jamie Evelina⁴

GRC Complaint Filed: January 11, 2010⁵

Background

January 6, 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 his preference for method of delivery is a) via e-mail, b) via facsimile, and c) via regular mail.

January 12, 2009

Custodian's response to the OPRA request. The Custodian responds to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that access to the requested minutes is granted. The Custodian states that copies of the requested minutes will cost \$6.00.⁶ The Custodian states that upon receipt of payment, the records will be forwarded via e-mail and via facsimile as noted on the Complainant's OPRA request.

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

² Represented by William F. Rupp, Esq., of Ferrara, Turitz, Harraka & Goldberg, P.C. (Hackensack, NJ).

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

⁴ The original custodian of record was Lissette Aportela-Hernandez.

⁵ The GRC received the Denial of Access Complaint on said date.

⁶ The Custodian charged \$0.75 per page for eight (8) pages of records. The GRC notes although the Custodian's per page charge was consistent with OPRA and case law at the time, the Appellate Division subsequently ordered in Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010) all public agencies to calculate and charge the "actual cost" for providing paper copies. The Legislature subsequently amended OPRA to provide that a public agency charge \$0.05 per copy for letter size paper and \$0.07 for legal size paper. This amendment took effect on November 9, 2010.

January 15, 2009

E-mail from the Custodian to the Complainant. The Custodian states that she is in receipt of the Complainant's payment of \$6.00. The Custodian states that attached are the requested minutes.⁷ The Custodian states that the requested minutes were also sent via facsimile under cover of letter.

January 16, 2009

Letter from the Complainant to the Custodian. The Complainant states that he takes issue with the apparent redactions contained within the requested minutes. The Complainant states that for example, there is a large white gap under item No. 7 on page 000006. The Complainant states that the exact extent of the redactions is difficult to determine because the minutes were whited out instead of blacked out. The Complainant states that based on the foregoing, he cannot tell whether the white sections represent text or blank page.

The Complainant states that the GRC directs all custodians not to use the method of whiting out redactions because it does not "... show the requestor the specific location of any redacted material in the record." (Citation omitted.) The Complainant states that according to the GRC, a custodian should blackout the redactions or "some visual symbol should be placed in the space formerly occupied by the redacted material to show the location of redacted material." (Citation omitted.) The Complainant requests that the Custodian provide another copy of the requested minutes with visually obvious redactions.

Additionally, the Complainant states that the Custodian failed to provide any explanation of the redactions. The Complainant notes that the GRC's website at <http://www.state.nj.us/grc/custodians/redacting/> states that:

"[w]hen redactions are made to a record, the custodian can use either the request form to explain why those elements of a record are redacted, or use a separate document, depending on the circumstances, but also referring to the OPRA exception being claimed. This principle also applies if pages of information are redacted. Sometimes it is clear from inspection (an entry called "Social Security Number" has a black out over where the number would appear). The bottom line is that the requester has a right to know the reason for the redaction, and the custodian has the responsibility to provide a reasonable explanation." *Id.*

The Complainant states that he does not consider his OPRA request to be fulfilled unless and until the Custodian provides access to a copy of the requested minutes with redactions that are properly identified and explained.

January 23, 2009

Letter from the Custodian's Counsel to the Complainant. The Custodian's Counsel states that the Complainant's January 16, 2009 letter has been forwarded to him

⁷ The minutes provided contained what appeared to be redactions but the Custodian did not provide a redaction index.

for review and reply. The Custodian's Counsel states that he was advised by the Custodian that the Township's word processing program does not have a function for blacking out portions of a document. The Custodian's Counsel states that because the Complainant requested that the minutes be provided electronically, the redacted portions were deleted within the word processing program.

The Custodian's Counsel states that he has requested that the Custodian black out those exempt portions of the requested minutes and identify the subject matter and reason for redaction to include a reference to the OPRA exemptions that apply. The Custodian's Counsel states that his associate, who will assist the Custodian in redacting the requested minutes, will be away on vacation for the next one (1) to two (2) weeks and will meet with the Custodian upon his return. The Custodian's Counsel states that upon completion of the redactions, the Custodian will provide the requested minutes to the Complainant via either facsimile or e-mail.

February 17, 2009

E-mail from the Custodian's Counsel to the Complainant attaching the requested executive session minutes dated October 28, 2008 (with redactions). The Custodian's Counsel states that attached are the requested minutes containing blacked out redactions and an explanation as to the subject matter and statutory exemption for each redaction.

January 11, 2010

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

- Complainant's OPRA request dated January 6, 2009.
- Letter from the Custodian to the Complainant dated January 12, 2009.
- Executive session minutes dated October 28, 2008 (with whited out redactions).
- Letter from the Complainant to the Custodian dated January 16, 2009.
- Letter from the Custodian's Counsel to the Complainant dated January 23, 2009.
- E-mail from the Custodian's Counsel to the Complainant dated February 17, 2009.
- Executive session minutes dated October 28, 2008 (with blacked out redactions).

The Complainant's Counsel states that this action is being brought against the Township because the Custodian redacted executive session minutes without sufficiently identifying the reasons for the redactions. The Complainant's Counsel states that the redactions also appear to be overly broad.

The Complainant's Counsel states that the Complainant submitted an OPRA request to the Custodian on January 6, 2009 seeking minutes of the Township's October 28, 2008 executive session. The Complainant's Counsel states that the Custodian responded in writing on January 12, 2009 granting access to the requested minutes, which were received on January 15, 2009 and appeared to be heavily redacted without any explanation. The Complainant's Counsel further states that the redactions were apparently whited out, thus appearing as blank spaces.

The Complainant's Counsel states that the Complainant wrote to the Custodian on January 16, 2009 objecting to the method of redaction and requesting an explanation for the redactions. The Complainant's Counsel states that the Complainant directed the Custodian to the GRC's website at <http://www.state.nj.us/grc/custodians/redacting/>, which provides suggestions for properly redacting government records. The Complainant's Counsel states that the Custodian's Counsel wrote to the Complainant on January 23, 2009 agreeing to provide a copy of the requested minutes with visually obvious redactions and specific exemptions. The Complainant's Counsel states that the Complainant received the minutes on February 17, 2009.

The Complainant's Counsel states that when requested, minutes of public agencies that have been approved must be disclosed. The Complainant's Counsel states that if the requested minutes contain information that is exempt pursuant to OPRA, a custodian should provide copies of same with appropriate redactions. See O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008) and Paff v. City of Plainfield, GRC Complaint No. 2006-103 (February 2007).

The Complainant's Counsel states that the minutes relevant to this complaint were approved and are thus subject to disclosure with appropriate redactions. The Complainant's Counsel asserts that the second (2nd) set of minutes provided to the Complainant contain insufficient reasons for redactions: the reasons are only citations to sections of the Open Public Meetings Act ("OPMA"). The Complainant's Counsel argues that simple citations to OPMA are insufficient reasons for redactions. Moreover, the Complainant's Counsel argues that general descriptions of the reasons for redactions, without specific descriptions are insufficient pursuant to Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003) and Paff v. New Jersey Department of Labor, Board of Review, 379 N.J. Super. 346, 354-55 (2005)(citing R. 4:10-2(e)).

The Complainant's Counsel states that all redactions were made under the sections of minutes entitled "Township Manager's Report" or "Township Attorney's Report," and the cited OPMA exemptions appear to apply to either pending or anticipated litigation or contractual negotiations. The Complainant's Counsel asserts that although these matters may be exempt from discussion in a public meeting, the exemptions alone do not necessarily provide sufficient information supporting proper redactions.

The Complainant's Counsel states that the court in Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 556-57 (1997) stated that:

"[i]n other words, if a public body legitimately conducts a meeting in closed session under any of the exceptions enumerated in N.J.S.A. 10:4-12(b), it nevertheless must make the minutes of that meeting 'promptly available to the public' unless full disclosure would subvert the purpose of the particular exception. If disclosure would subvert the purpose of an exception, then the subversion must be balanced against the applicant's interest in disclosure. We believe that only the unusual case will justify total suppression of the minutes of a closed session; such a case would

require great harm to the public interest underlying the exception from even minimal disclosure as well as a negligible interest in disclosure.

In the vast majority of cases in which full disclosure would have an adverse impact on the purpose of the particular exception, other methods of maintaining confidentiality can be achieved, such as redacting the specific information that would undermine the exception. We stress, however, that, given the Legislature's strongly stated intent to effectuate broad public participation in the affairs of governmental bodies, few cases will require even partial nondisclosure." (Emphasis added.) *Id.*

The Complainant's Counsel states that the section of the requested minutes entitled "Red Light Camera Request – Response from Bergen County" was redacted on the basis of N.J.S.A. 10:4-12(b)(6) and (7), which exempts information relating to "tactics and techniques utilized in protecting the safety and property of the public" and "pending or anticipated litigation or contract negotiations" respectively. The Complainant's Counsel asserts that it is not clear how a response from Bergen County regarding red light cameras would fall under either exemption. The Complainant's Counsel next states that regarding the sections entitled "Vacate Portion of E. Oakdene Ave. – Glenpointe Associates" and "Cable TV Negotiation Update," it is unclear whether this section refers to pending litigation, anticipated litigation, contract negotiations, or something else. The Complainant's Counsel asserts that regarding the section entitled "Cedar Lane Streetscape," it is not clear whether the section was even redacted because a citation is noted with the heading but no text is blacked out.

The Complainant's Counsel asserts that regarding the section entitled "Schmitt Litigation Mediation," this redaction would appear to be based on pending litigation, but certain information regarding the case should not have been redacted, such as the court in which the case is pending or the docket number. The Complainant's Counsel argues that this information would allow the public to look up the case if they wanted to learn more about it.

The Complainant's Counsel further asserts that regarding the section entitled "Website Contract Renewal; Potential Liabilities," insufficient information is given regarding the parties to the contract and whether the Township is discussing potential litigation or contractual negotiation. Finally, the Complainant's Counsel asserts that the section entitled "Compliance with the Manual on Uniform Traffic Control Devices" was redacted pursuant to N.J.S.A. 10:4-12(b)(7): it is not clear how a discussion regarding compliance with such a manual would qualify as a contractual negotiation or potential litigation.

The Complainant's Counsel requests the following relief:

1. [a] determination that the Custodian violated OPRA by not identifying the specific reasons for redacting the requested minutes;
2. [a] determination that the GRC must conduct an *in camera* review of the meeting minutes responsive to determine whether the Custodian's redactions were

- appropriate and order disclosure of information to which no exemption applies;
and
3. [a] determination that the Complainant is a prevailing party entitled to a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

January 29, 2010

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

February 3, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated January 6, 2009.
- Letter from the Custodian to the Complainant dated January 12, 2009.
- E-mail from the Custodian to the Complainant dated January 15, 2009.
- Letter from the Custodian to the Complainant dated January 15, 2009.
- Executive session minutes dated October 28, 2008 (with whited out redactions).
- Letter from the Complainant to the Custodian dated January 16, 2009.
- E-mail from the Complainant to the Custodian dated January 16, 2009 attaching a letter from the Complainant to the Custodian dated January 16, 2009.
- E-mail from the Custodian's Counsel to the Complainant dated January 23, 2009 attaching a letter from the Custodian's Counsel to the Complainant dated January 23, 2009.
- Executive session minutes dated October 28, 2008 (with blacked out redactions).

The Custodian certifies that her search for the requested records involved examining the minutes of the Township Council and locating the requested minutes.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

The Custodian certifies that the Complainant submitted an OPRA request to the Township on January 6, 2009. The Custodian certifies that she responded in writing on January 12, 2009 granting access to the requested minutes and advising that same would be provided via e-mail and facsimile upon receipt of payment of \$6.00. The Custodian certifies that she provided the requested minutes to the Complainant on January 15, 2009 upon receipt of payment.

The Custodian certifies that she redacted portions of the requested minutes pertaining to closed session discussions by deleting same on the electronic copy and leaving a blank space equal to the size of each redaction. The Custodian certifies that the Complainant wrote to the Custodian on January 16, 2009 objecting to both the method of redactions and the Custodian's failure to provide specific reasons for the redactions.

The Custodian certifies that she forwarded the Complainant's January 16, 2009 letter to the Custodian's Counsel for a response. The Custodian states that the Custodian's Counsel wrote to the Complainant on January 23, 2009 stating that the Custodian deleted the sections subject to redaction on the computer because the Complainant preferred the records be delivered electronically and because the Township's word processing program contained no function for blacking out portions of a document. The Custodian states that the Custodian's Counsel further advised that once his associate returned from vacation, the associate and the Custodian would redact the minutes, note the reference to a statutory reason for the redactions on the minutes and provide a copy of same to the Complainant. The Custodian certifies that a second (2nd) copy of the requested minutes was forwarded to the Complainant on February 17, 2009.

The Custodian states that no further correspondence was received from the Complainant until the filing of this complaint on January 11, 2010. The Custodian asserts that despite including the statutory citation for redactions made to the requested minutes, the Complainant argues that the reasons given were insufficient. The Custodian contends that the Township fully complied with the requirements of OPRA.

The Custodian states that OPRA contains several exemptions from the definition of a government record. N.J.S.A. 47:1A-1.1. The Custodian states that these exemptions include "attorney-client privilege," and information "in connection with collective negotiations." *Id.* The Custodian states that OPRA also provides that it "shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to ... any other statute." N.J.S.A. 47:1A-9.a. The Custodian states that pursuant to the Open Public Meetings Act ("OPMA"), the public may be excluded from any portion of a meeting in which the public body discusses certain subject matters. The Custodian states that such matters include:

"(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body ...

(6) Any tactics and techniques utilized in protecting the safety and property of the public, provided that their disclosure could impair such protection. Any investigations of violations or possible violations of the law.

(7) Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.

Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer." N.J.S.A. 10:4-12.b(4)-(7).

The Custodian contends that the portions of the minutes that were redacted relate to one or more of the foregoing exemptions:

Subject Heading	Subject Description	Legal Explanation
“Update on FMBA 42 and 242 Negotiations”	N/A.	Pending collective bargaining negotiations and proposals. <u>N.J.S.A. 10:4-12.b(4)</u>
“Red Light Camera Request – Response from Bergen County”	On-going contract negotiations with the County of Bergen and privileged attorney-client communications in connection therewith. Use and location of red light cameras relate directly to issues of traffic safety and enforcement.	Any tactics and techniques utilized in protecting the safety and property of the public. <u>N.J.S.A. 10:4-12.b(6)</u> . Contract negotiations and attorney-client privilege. <u>N.J.S.A. 10:4-12.b(7)</u> .
“Vacation of a Portion of E. Oakdene Ave. – Glenpointe Associates”	Contract negotiations with Glenpointe Associates and attorney-client communications in connection therewith.	Contract negotiations and attorney-client privilege. <u>N.J.S.A. 10:4-12.b(7)</u> .
“Cedar Lane Streetscape – Update on Report from G. Onorato”	Potential litigation between the Township and the contractor on the Cedar Lane project and attorney-client communications with Special Counsel, Gerald Onorato.	Contract negotiations and attorney-client privilege. <u>N.J.S.A. 10:4-12.b(7)</u> .
“Cable TV Negotiations Update”	On-going contract negotiations and strategy between the Township and Cablevision and attorney-client communications in connection therewith.	Contract negotiations and attorney-client privilege. <u>N.J.S.A. 10:4-12.b(7)</u> .
“Schmitt Litigation Mediation”	Pending personnel proceedings and potential litigation and attorney-client communications in connection therewith.	Anticipated litigation and attorney-client privilege. <u>N.J.S.A. 10:4-12.b(7)</u> .
“Website Contract Renewal; Potential Liabilities”	Contract negotiations with the Township’s existing website provider, potential litigation and attorney-client communications in	Contract negotiations and attorney-client privilege. <u>N.J.S.A. 10:4-12.b(7)</u> .

	connection therewith.	
“Compliance with the Manual of Uniform Traffic Control Devices”	Potential litigation and liability regarding the installation of certain traffic control devices and attorney-client communications in connection therewith.	Attorney-client privilege. <u>N.J.S.A. 10:4-12.b(7)</u> .
“Gourrier”	Pending personnel proceedings, potential litigation and attorney-client communications in connection therewith.	Anticipated litigation and attorney-client privilege. <u>N.J.S.A. 10:4-12.b(7)</u> .

The Custodian certifies that the specific statutory citation was noted above each corresponding redaction in the minutes provided to the Complainant on February 17, 2009.

The Custodian states that OPRA provides that the form adopted by a public agency “a space for the custodian to list reasons if a request is denied in whole or in part.” N.J.S.A. 47:1A-5.f. Moreover, the Custodian states that OPRA provides that “if a custodian ... 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.” N.J.S.A. 47:1A-5.g. The Custodian argues that based on the foregoing, she has sufficiently met her obligation under OPRA. The Custodian asserts that the minutes provided to the Complainant meet the requirements of OPRA.

The Custodian states that even the guidelines for redacting records on the GRC’s website at <http://www.state.nj.us/grc/custodians/redacting/> are only guidelines. The Custodian states that while these guidelines are useful in interpreting statutory provisions, said guidelines are not the “law” and thus cannot form the basis for a violation of OPRA. The Custodian notes that the GRC’s “Handbook for Records Custodians” states that “Custodians must identify the legal basis for *each* redaction!!” *See* Third Edition – October 2009, at page 15.⁸ The Custodian argues that to this end, the specific statutory citation for each redaction was noted in the minutes provided to the Complainant.

The Custodian states that in Paff v. New Jersey Department of Labor, Board of Review, 379 N.J. Super. 346, 354-55 (2005), on appeal in 392 N.J. Super. 334 (App. Div. 2007), the court noted that:

“[i]n preparing an explanation of its reasons for denying a request for a government record, an agency need not reveal the contents and should be guided by the standard included in documents ... not produced or disclosed in a manner that, *without revealing information itself privileged*

⁸ The GRC notes that the “Handbook for Records Custodians,” now in its fourth (4th) edition, was updated in September 2010.

or protected, will enable other parties to assess the applicability of the privilege or protection.” *Id.* at 354.

The Custodian argues that in this complaint, in addition to the citations noted with each redaction, the minutes contained headings reflecting the subject matters discussed in executive session. The Custodian asserts that it should be noted that the Complainant did not request any further explanation of the redacted material following receipt of the second (2nd) set of minutes on February 17, 2009. The Custodian asserts that the correspondence between the Complainant and the Township indicates that the Township attempted to accommodate the Complainant’s OPRA request. Moreover, the Custodian asserts that until receipt of the instant complaint, the Township believed that it had lawfully complied with the provisions of OPRA.

In closing, the Custodian notes that the SOI request letter received from the GRC indicates that an offer to mediate this complaint has been denied by one or more parties, or mediation has not resolved the complaint. The Custodian states that it has no record of receiving an offer to mediate this complaint as required by N.J.S.A. 47:1A-7.d.⁹ The Custodian states that the Township believes this matter could have been resolved through the mediation process.

February 3, 2010

E-mail from the GRC to the Custodian’s Counsel. The GRC states that it is in receipt of the SOI. The GRC states that in the SOI cover letter, the Custodian’s Counsel requests an offer to mediate this complaint in accordance with N.J.S.A. 47:1A-7.d.

The GRC advises that the Complainant declined the offer of mediation when he filed his Denial of Access Complaint. The GRC states that based on the foregoing, there was no need to extend the offer to mediate this complaint to the Custodian; thus, the GRC sent the SOI request indicating that the offer to mediate this complaint has been declined by one or more parties.

The GRC notes that if the Complainant decides to rescind his denial of the mediation offer, the GRC will extend a mediation offer to the Custodian.

March 9, 2010

Letter from the Complainant’s Counsel to the GRC. The Complainant’s Counsel questions the veracity of the Custodian’s certified statements in the SOI.

March 31, 2011

E-mail from the GRC to the Custodian. The GRC states that it is in need of additional information. The GRC states that the original Custodian initially provided access to redacted copies of meeting minutes to the Complainant; however, these minutes contained blank spaces which suggest that the original Custodian whited out those portions of the minutes which the original Custodian considered exempt from disclosure.

⁹ The GRC notes that the Complainant declined to mediate this complaint in the Denial of Access Complaint.

The GRC states that subsequent to objections raised by the Complainant, the Custodian's Counsel wrote to the Complainant on January 23, 2009 stating that the original Custodian deleted the sections subject to redaction on the computer because the Complainant preferred the records be delivered electronically and because the Township's word processing program contained no function for blacking out portions of a document. The GRC states that on February 17, 2009, the original Custodian provided redacted copies of the same minutes but this time manually blacked out those portions of the minutes which are considered exempt from disclosure.

The GRC requests that the current Custodian legally certify to the following:

1. The type of computer program used to create the Township's meeting minutes.
2. Whether this program has a redaction feature giving a user the ability to electronically redact documents?
3. If so, whether the current Custodian has been trained as to how the redaction feature works?

The GRC requests that the current Custodian provide the requested legal certification by close of business on April 4, 2011.

April 4, 2011

Legal Certification of the current Custodian. The current Custodian certifies that she has held the position of Custodian of Record for the Township since February 1, 2011. The Custodian certifies that the word processing program used by the Township to create meeting minutes is Lotus Word Pro. The Custodian certifies that she is very familiar with Lotus Word Pro and has used the same program since starting with the Township on January 2, 2004.

The Custodian certifies that she is unaware of any feature of Lotus Word Pro by which redactions may be made by blacking out text. The Custodian certifies that she has manually redacted documents created by Lotus Word Pro.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or*

kept on file ... or that has been received in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA provides that:

“[t]he 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...” N.J.S.A. 47:1A-5.b.

OPRA further provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the *specific basis therefor* on the request form and *promptly return it to the requestor*. The custodian shall sign and date the form and provide the requestor with a copy therefore. If the custodian of a government record *asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise* from a copy of the record that portion *which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.*” (Emphasis added.) N.J.S.A. 47:1A- 5.g.

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

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

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

In the instant complaint, the Custodian responded in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business day time frame granting access the requested minutes pending remittance of \$6.00 in copying costs. The Custodian provided access to minutes with whited out redactions on January 15, 2009 after receiving the Complainant’s payment; however, the Custodian did not provide any explanation of the whited out redactions. The Complainant subsequently wrote to the Custodian on January 16, 2009 objecting to the Custodian’s method of redaction and failure to provide explanations for the redactions. In response to the Complainant’s objections, the Custodian provided on February 17, 2009 a second (2nd) copy of the requested minutes with blacked out redactions and specific citations to OPMA exemptions above each redaction.

The Complainant filed this complaint on January 11, 2010. In said complaint, the Complainant's Counsel argued that redacting information from a government record without providing a specific lawful basis therefor is a violation of N.J.S.A. 47:1A-5.g. The Complainant's Counsel cited to O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008) and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005).

The GRC first addresses whether the Custodian's initial response to the Complainant's OPRA request was sufficient under OPRA.

The issue of providing a specific lawful basis for redactions at the time of a denial of access to portions of a record has been ruled on previously by the Council. In Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's OPRA request providing access to the requested executive session minutes with redactions. The complainant filed a Denial of Access Complaint arguing that the custodian has violated OPRA by failing to provide a specific lawful basis for the redactions made to the responsive meeting minutes. The Council held that:

“[a]lthough the Custodian responded to the Complainant's July 31, 2007 OPRA request by providing the redacted executive session minutes within the statutorily mandated seven (7) business day time frame required by N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction. *See Paff v. Township of Plainsboro*, GRC Complaint No. 2005-29, (July 2005)(ordering the custodian to provide redacted executive session minutes with a detailed and lawful basis for each redacted part.). *See also Barbara Schwarz v. NJ Department of Human Services*, GRC Complaint No. 2004-60, (February, 2005)(setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial.). Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A- 5.g.”

The facts of this complaint are similar to Paff, *supra*, in that the Custodian in this matter initially responded in a timely manner providing access to the requested executive session minutes with whited out redactions, however, the Custodian herein failed to provide a specific lawful basis for said redactions.

Therefore, because the Custodian initially failed to provide a specific lawful basis for the redactions to the requested executive session minutes, the Custodian's response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff, *supra*. *See also Renna v. Union County Improvement Authority*, GRC Complaint No. 2008-86 (May 2010)(noting that N.J.S.A. 47:1A-5.g. requires a custodian of record to indicate the specific basis for noncompliance), O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009) and Frost v. North Hudson Regional Fire & Rescue (Hudson), GRC Complaint No. 2008-198 (December 2009).

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

“[i]f a record contains material that must be redacted, such as a social security number or unlisted phone number, *redaction must be accomplished by using a visually obvious method that shows the requestor the specific location of any redacted material in the record.* For example, if redacting a social security number or similar type of small-scale redaction, custodians should:

Make a paper copy of the original record and manually ‘black out’ the information on the copy with a dark colored marker. Then provide a copy of the blacked-out record to the requestor.’ (Emphasis added.) [Handbook for Records Custodians] at page 14.

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

The Custodian here used a method of redaction in which she electronically deleted portions of the minutes prior to providing them to the Complainant via e-mail, thus “whiting out” the sections asserted to be exempt from disclosure under OPRA. This method does not show a requestor the specific location of the redacted material or the volume of material redacted; thus, the specific location of the material underlying the redactions made was not visually obvious to the Complainant.

The method of “whiting out” sections of the executive session minutes provided did not allow the Complainant to clearly identify the specific location. Therefore, the Custodian’s method of “whiting out” the requested minutes is not “a visually obvious method that shows ... the specific location of any redacted material in the record” and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5.g.

The GRC further notes that the Custodian stated in the SOI that even the guidelines for redacting records on the GRC’s website at <http://www.state.nj.us/grc/custodians/redacting/> are only guidelines and cannot constitute

violations of OPRA. Although the Custodian may be correct in this statement, the GRC has an obligation under OPRA to "... prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records [and] operate an informational website..." N.J.S.A. 47:1A-7.b. The guidelines for redactions posted on the GRC's website, though only guidelines, represent the correct way to redact a record which visually identifies the information being withheld.

The GRC next turns to whether the Custodian unlawfully denied access to the redacted portions of the responsive executive session minutes provided to the Complainant on February 17, 2009.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC¹⁰ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

"OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers."

The court also stated that:

"[t]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review."

Further, the court stated that:

"[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption."

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the Township's October 28, 2008 executive session minutes to determine the validity of

¹⁰ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
John Paff v. Township of Teaneck (Bergen), 2010-09 – Findings and Recommendations of the Executive Director

the Custodian's assertion that the records contain information which is exempt from disclosure pursuant to N.J.S.A. 10:4-12.b(4), N.J.S.A. 10:4-12.b(6) and N.J.S.A. 10:4-12.b(7).

The GRC notes that although the Complainant does not dispute the \$6.00 copy cost charged by the Custodian to electronically provide the redacted minutes, the GRC is compelled to address this issue.

The Custodian here initially charged a copying cost of \$6.00 to provide a copy of the requested minutes to the Complainant electronically. The Custodian provided the requested minutes with whited out redactions via e-mail and facsimile on February 15, 2009 after the Complainant remitted the \$6.00 fee. The Complainant subsequently wrote to the Custodian disputing the method of redaction and requesting that the Custodian redact the records using a visually obvious method and provide an explanation for each redaction. Based on the Complainant's request, the Custodian redacted the records by blacking out the portions of the minutes asserted to be exempt from disclosure, noted the legal citation for each redaction, and provided the second (2nd) set of minutes to the Complainant via e-mail and facsimile on February 17, 2009.

Based on the foregoing, there is some question as to whether the Custodian's charge of \$6.00 to provide the requested minutes electronically is lawful. At the onset of the instant complaint, OPRA provided that "... 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 ..." (Emphasis added.) N.J.S.A. 47:1A-5.b.¹¹ Additionally, OPRA provides that a custodian shall charge "[t]he actual cost of duplicating the record ..." to include 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..." *Id.*

The GRC has previously held that the actual cost of providing records electronically is likely \$0.00. In Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010), the custodian assessed a charge of \$7.50 to provide the complainant with minutes via e-mail. The complainant filed a Denial of Access Complaint objecting to the charge and arguing that the enumerated copy costs in OPRA only apply to paper copies. The complainant argued that the court in Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) held that public agencies shall not charge for the transmission of electronic data. The complainant further argued that because he requested copies of e-mails in electronic format, no physical copying of the records was required. The Council held that:

"the Custodian stated that the \$7.50 fee relates to the scanning of the records to provide an electronic version to be forwarded by e-mail. The

¹¹ The GRC notes that although the Custodian's per page charge was consistent with OPRA and case law at the time, in Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010), the Appellate Division ordered all public agencies to calculate and charge the "actual cost" of providing paper copies. The Legislature subsequently amended OPRA to provide that a public agency charge \$0.05 per copy for letter size paper and \$0.07 for legal size paper. This amendment took effect on November 9, 2010. John Paff v. Township of Teaneck (Bergen), 2010-09 – Findings and Recommendations of the Executive Director

Custodian does not provide any evidence to support his assertion that \$7.50 is the actual cost of scanning and e-mailing records.

Therefore, the Custodian's charge of \$7.50 to scan and e-mail records to the Complainant is a violation of N.J.S.A. 47:1A-5.b. because said fee does not reflect the actual cost of providing the copies, which is likely zero. See Libertarian Party of Central New Jersey, supra, Moore, supra, and Dugan, supra. Thus, the Complainant is not required to pay the Custodian's \$7.50 charge." *Id.* at page 11.

This complaint is not exactly on point with Paff, supra. The Custodian here initially electronically redacted the minutes prior to providing them via e-mail and facsimile; therefore, there was no need to make paper copies of the requested minutes. However, the Custodian subsequently made a copy of the minutes in order to black out the portions asserted to be exempt from disclosure and to note the lawful basis for each redaction. In this case, the Custodian had to make paper copies in order to redact the requested minutes: the copying cost to perform the redactions and provide the minutes to the Complainant amounts to the assessed charge of \$6.00, or \$0.75 per page for eight (8) pages of records.¹²

Therefore, although the actual cost of providing records electronically is likely \$0.00 pursuant to Paff, supra, because the Custodian had to make paper copies of the requested records in order to redact the requested minutes prior to providing same electronically, the Custodian's charge of \$6.00 for the cost of copying the records to perform redactions prior to providing the records to the Complainant electronically is warranted pursuant to N.J.S.A. 47:1A-5.b.

The GRC notes that the Custodian's Counsel here stated in the SOI that the Custodian did not have the ability to make visually obvious redactions electronically, thus the Custodian had to print out the minutes to redact them. The current Custodian subsequently confirmed this fact by certifying that the Township's word processing program, Lotus Word Pro, does not contain a redaction tool. However, in instances where a custodian has the capability to electronically redact in a visually obvious manner a record requested to be provided electronically, a custodian shall not charge for electronic delivery of those electronically redacted records, as is consistent with the Council's holding in Paff, supra.

Finally, the GRC notes that the Complainant's Counsel argued in the Denial of Access Complaint that the second (2nd) set of minutes contained an insufficient lawful basis for redactions, *i.e.*, the Custodian only noted the specific legal citations from of the Open Public Meetings Act ("OPMA") and did not include an explanation of each citation. The Complainant's Counsel cited to Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003) and Paff v. New Jersey Department of Labor, Board of Review, 379 N.J. Super. 346, 354-55 (2005)(citing R. 4:10-2(e)).

¹² See FN No. 10.

OPRA requires that a custodian provide the specific lawful basis for denying access to records in part or whole. N.J.S.A. 47:1A-5.g. To that end, the evidence of record indicates the Custodian noted the specific citation that she asserted authorized each redaction. However, the Custodian did not include the language of each citation.

OPRA provides that, “...any limitations on the right of access accorded by [OPRA] shall be construed in favor of the public's right of access ...” (Emphasis added.) N.J.S.A. 47:1A-1. In this complaint, the Custodian’s failure to include the language of each citation for which she asserted the redacted information was exempt does not conform with N.J.S.A. 47:1A-1. Specifically, simply citing to a specific provision of a law would force a requestor to search out the law and identify those provisions that may apply. It is often possible that members of the New Jersey citizenry would have no knowledge of where to find a particular statute or be able to single out the exemption within the statute that authorizes a redaction. To this end, the Custodian should have included an explanation of each legal citation similar to how the Custodian set forth same in the document index submitted as part of the SOI.

Whether the Custodian’s denial of access to the redacted portions of the requested 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 Custodian initially failed to provide a specific lawful basis for the redactions to the requested executive session minutes, the Custodian’s response to the Complainant’s OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008). *See also* Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (May 2010)(noting that N.J.S.A. 47:1A-5.g. requires a custodian of record to indicate the specific basis for noncompliance), O’Shea v. Township of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009) *and* Frost v. North Hudson Regional Fire & Rescue (Hudson), GRC Complaint No. 2008-198 (December 2009).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the Township’s October 28, 2008 executive session minutes to determine the

validity of the Custodian's assertion that the records contain information which is exempt from disclosure pursuant to N.J.S.A. 10:4-12.b(4), N.J.S.A. 10:4-12.b(6) and N.J.S.A. 10:4-12.b(7) of the Open Public Meetings Act.

3. **The Custodian must deliver¹³ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 2 above), a document or redaction index¹⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁵, that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. Although the actual cost of providing records electronically is likely \$0.00 pursuant to Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010), because the Custodian had to make copies to redact the requested minutes prior to providing same electronically, the Custodian's charge of \$6.00 represents the actual cost to provide the records to the Complainant pursuant to N.J.S.A. 47:1A-5.b.
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011

¹³ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

¹⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."