



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 23, 2013 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint Nos. 2010-105 and 2010-106

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed because the Complainant (via Counsel) withdrew his complaint in a letter to the Honorable John Schuster, Administrative Law Judge, dated June 10, 2013, because the parties have agreed to settle the matter. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 23rd Day of July, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 26, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting**

Robert A. Verry¹
Complainant

GRC Complaint Nos. 2010-105 and 2010-106²

v.

Borough of South Bound Brook (Somerset)³
Custodian of Records

Records Relevant to Complaint: Copies of the investigation report, including but not limited to the property/evidence report, Miranda warnings, and all supplemental reports associated with Docket No. 09-2178.

Request Made: April 27, 2010 and May 20, 2010

Response Made: May 10, 2010 and May 20, 2010

GRC Complaint Filed: May 20, 2010 and May 21, 2010⁴

Background

January 31, 2012 Council Meeting:

At its January 31, 2012 public meeting, the Council considered the January 24, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian provided the Complainant with a copy of the investigation file as required by the Council's December 20, 2011 Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the five (5) business days required by the Council's Interim Order, the Custodian has complied with the Council's December 23, 2011 Interim Order.
2. The Custodian violated OPRA by failing to respond to the Complainant within the extended time frame thus resulting in a "deemed" denial of the Complainant's OPRA request. N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). The Custodian further violated

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

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Donald E. Kazar, Custodian of Records. Represented by Francesco Taddeo, Esq. (Somerville, NJ).

⁴ The GRC received the Denial of Access Complaint on said date.

N.J.S.A. 47:1A-5(c) because the proposed special service charge of \$375.00 was not warranted. However, the Custodian complied with the Council's December 20, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's December 20, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the Complainant with the responsive investigation file pursuant to the Council's Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Procedural History:

On February 3, 2012, the Council distributed its Interim Order to all parties. On April 24, 2012, this complaint was transmitted to the Office of Administrative Law ("OAL"). On June 10, 2013, the Complainant's Counsel sent a letter to the Honorable John Schuster, Administrative Law Judge ("ALJ"), withdrawing this complaint because the parties agreed to the matter.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant (via Counsel) withdrew his complaint in a letter to the

Honorable John Schuster, Administrative Law Judge, dated June 10, 2013, because the parties have agreed to settle the matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

July 16, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

January 31, 2012 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint Nos. 2010-105 & 2010-106

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian provided the Complainant with a copy of the investigation file as required by the Council’s December 20, 2011 Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the five (5) business days required by the Council’s Interim Order, the Custodian has complied with the Council’s December 23, 2011 Interim Order.
2. The Custodian violated OPRA by failing to respond to the Complainant within the extended time frame thus resulting in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). The Custodian further violated N.J.S.A. 47:1A-5.c. because the proposed special service charge of \$375.00 was not warranted. However, the Custodian complied with the Council’s December 20, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council’s December 20, 2011 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the Complainant with the responsive investigation file pursuant to the Council’s Interim Order.



Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 31st Day of January, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: February 3, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 31, 2012 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2010-105 & 2010-106²

v.

**Borough of South Bound Brook (Somerset)³
Custodian of Records**

Records Relevant to Complaint: Copies of the investigation report, including but not limited to the property/evidence report, Miranda warnings, and all supplemental reports associated with Docket No. 09-2178.

Request Made: April 27, 2010 and May 20, 2010

Response Made: May 10, 2010 and May 20, 2010

Custodian: Donald E. Kazar

GRC Complaint Filed: May 20, 2010 and May 21, 2010⁴

Background

December 20, 2011

Government Records Council's ("Council") Interim Order. At its December 20, 2011 public meeting, the Council considered the December 13, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian timely responded to the Complainant's April 27, 2010 OPRA request in writing requesting an extension of seven (7) days to respond to said request, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009).⁵

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

² Due to the commonality of the parties and the issues herein, the GRC has consolidated these complaints for adjudication.

³ Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previous counsel was William T. Cooper III, Esq. (Somerville, NJ), who advised the GRC on May 6, 2011 that he no longer represented the Borough.

⁴ The GRC received the Denial of Access Complaints on said date.

⁵ Timeliness is not an issue regarding the Complainant's second (2nd) OPRA request because the Custodian's Counsel responded in writing on the same business day as receipt of same.

2. The GRC declines to conduct an *in camera* review of the responsive investigation file to determine the validity of the Custodian's assertions that the file is exempt from disclosure because the Honorable Yolanda Ciccone, A.J.S.C. has already conducted same. As the GRC has taken judicial notice of Paff v. Borough of South Bound Brook, Docket No. SOM L-1212-10, the Custodian must disclose to the Complainant the responsive investigation file in accordance with the same file provided to plaintiff in Paff per Judge Ciccone's February 8, 2011 letter.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁶, to the Executive Director.⁷**
4. Although the Custodian requested assistance from Counsel, the Custodian cannot attempt to pass the cost of Counsel's service onto the Complainant. The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002). Moreover, the Custodian failed to prove that Counsel's expertise was required to review and redact juvenile and personal information from the requested records. Thus, the proposed special service charge of \$375.00 is not warranted pursuant to N.J.S.A. 47:1A-5.c.
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.

December 21, 2011

Council's Interim Order distributed to the parties.

December 23, 2011

Custodian's response to the Council's December 20, 2011 Interim Order. The Custodian certifies that he is in receipt of the Council's Interim Order. The Custodian certifies that said Order required that he disclose to the Complainant the responsive investigation file in accordance with the Honorable Yolanda Ciccone's, A.J.S.C., order in

⁶ "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."

⁷ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the records have been *made available* to the Complainant but the Custodian may withhold delivery of the records until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Paff v. Borough of South Bound Brook, SOM-L-001212-10.⁸ The Custodian certifies that he has transmitted a copy of same to the Complainant on this day and is in full compliance with the Council's Interim Order.

Analysis

Whether the Custodian complied with the Council's December 20, 2011 Interim Order?

The Council's December 20, 2011 Interim Order specifically directed the Custodian to do the following:

"...disclose to the Complainant the responsive investigation file in accordance with the same file provided to plaintiff in Paff per Judge Ciccone's February 8, 2011 letter ... **The Custodian shall comply ... within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁹, to the Executive Director."**

The Custodian's response to the Council's Interim Order was due by close of business on December 29, 2011. The Custodian forwarded the investigation file to the Complainant via e-mail on December 23, 2011 and provided certified confirmation of compliance with the Council's Order to the GRC on the same day.

Therefore, because the Custodian provided the Complainant with a copy of the investigation file as required by the Council's December 20, 2011 Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the five (5) business days required by the Council's Interim Order, the Custodian has complied with the Council's December 23, 2011 Interim Order.

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

OPRA states that:

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

⁸ The Custodian certifies that the investigation file was posted to the internet by plaintiff in March 2011.

⁹ "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."

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

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

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

The Custodian violated OPRA by failing to respond to the Complainant within the extended time frame thus resulting in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5.i. and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). The Custodian further violated N.J.S.A. 47:1A-5.c. because the proposed special service charge of \$375.00 was not warranted. However, the Custodian complied with the Council’s December 20, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (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 Complainant filed this complaint seeking the following relief:

“... the GRC order the Custodian to provide the requested records to the Complainant via facsimile, as requested, without payment of a special service charge. Counsel further requests that the GRC determine that the Complainant is a prevailing party entitled to reasonable attorney’s fees pursuant to N.J.S.A. 47:1A-6.” Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-105, 2010-106 (Interim Order dated December 20, 2011) at pg. 4.

On May 20, 2011, the Complainant’s Counsel notified the GRC that the investigation file was ordered to be disclosed to him pursuant to judicial review in Paff v. Borough of South Bound Brook, SOM-L-001212-10. The GRC thus took judicial notice of Judge Ciccone’s Order in Paff pursuant to *N.J.A.C. 1:1-15.2(a) - (b)* and Sanders v. Division of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974). In its December 20, 2011 Interim Order, the GRC ordered disclosure of the responsive investigation file consistent with Judge Ciccone’s Order. Moreover, the GRC determined that the proposed special service charge was not warranted pursuant to N.J.S.A. 47:1A-5.c. The Custodian complied with the Council’s December 20, 2011 Interim Order on December 23, 2011. Thus, the Complainant is a prevailing party entitled to reasonable attorney’s fees because the complaint brought about a change (voluntary or otherwise) in the Custodian’s conduct.

Pursuant to Teeters, *supra*, and the Council’s December 20, 2011 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the Complainant with the responsive investigation file pursuant to the Council’s Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees. Based on the New Jersey Supreme Court’s decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council’s decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of “unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]” this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided the Complainant with a copy of the investigation file as required by the Council's December 20, 2011 Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the five (5) business days required by the Council's Interim Order, the Custodian has complied with the Council's December 23, 2011 Interim Order.
2. The Custodian violated OPRA by failing to respond to the Complainant within the extended time frame thus resulting in a "deemed" denial of the Complainant's OPRA request. N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). The Custodian further violated N.J.S.A. 47:1A-5.c. because the proposed special service charge of \$375.00 was not warranted. However, the Custodian complied with the Council's December 20, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's December 20, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the Complainant with the responsive investigation file pursuant to the Council's Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 24, 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

December 20, 2011 Government Records Council Meeting

Robert A. Verry

Complainant

v.

Borough of South Bound Brook (Somerset)

Custodian of Record

Complaint No. 2010-105 & 2010-106

At the December 20, 2011 public meeting, the Government Records Council ("Council") considered the December 13, 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. Although the Custodian timely responded to the Complainant's April 27, 2010 OPRA request in writing requesting an extension of seven (7) days to respond to said request, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009).¹
2. The GRC declines to conduct an *in camera* review of the responsive investigation file to determine the validity of the Custodian's assertions that the file is exempt from disclosure because the Honorable Yolanda Ciccone, A.J.S.C. has already conducted same. As the GRC has taken judicial notice of Paff v. Borough of South Bound Brook, Docket No. SOM L-1212-10, the Custodian must disclose to the Complainant the responsive investigation file in accordance with the same file provided to plaintiff in Paff per Judge Ciccone's February 8, 2011 letter.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4², to the Executive Director.³**

¹ Timeliness is not an issue regarding the Complainant's second (2nd) OPRA request because the Custodian's Counsel responded in writing on the same business day as receipt of same.

² "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."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

4. Although the Custodian requested assistance from Counsel, the Custodian cannot attempt to pass the cost of Counsel's service onto the Complainant. The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002). Moreover, the Custodian failed to prove that Counsel's expertise was required to review and redact juvenile and personal information from the requested records. Thus, the proposed special service charge of \$375.00 is not warranted pursuant to N.J.S.A. 47:1A-5.c.
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 20th Day of December, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 21, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 20, 2011 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2010-105 & 2010-106²

v.

**Borough of South Bound Brook (Somerset)³
Custodian of Records**

Records Relevant to Complaint: Copies of the investigation report, including but not limited to the property/evidence report, Miranda warnings, and all supplemental reports associated with Docket No. 09-2178.

Request Made: April 27, 2010 and May 20, 2010

Response Made: May 10, 2010 and May 20, 2010

Custodian: Donald E. Kazar

GRC Complaint Filed: May 20, 2010 and May 21, 2010⁴

Background

April 27, 2010

Complainant's first (1st) 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 indicates that he prefers delivery via facsimile.

April 30, 2010

E-mail from the Complainant to the Custodian. The Complainant confirms that the Custodian's proposed response deadline is May 10, 2010.⁵

May 10, 2010

Custodian's response to the first (1st) OPRA request. The Custodian received the Complainant's first (1st) OPRA request on April 28, 2010. On behalf of the Custodian, the Custodian's Counsel responds in writing to the Complainant's OPRA request on the last day of the extension of time to respond. Counsel requests an extension of seven (7)

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

² Due to the commonality of the parties and the issues herein, the GRC has consolidated these complaints for adjudication.

³ Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previous counsel was William T. Cooper III, Esq. (Somerville, NJ), who advised the GRC on May 6, 2011 that he no longer represented the Borough.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The Complainant noted in the Denial of Access Complaint that he automatically gave the Custodian an extension until May 10, 2010 due to a request for an extension in another matter which is not the subject of this Complaint.

days to respond to the Complainant's OPRA request because the Borough is awaiting clarification from the Somerset County Prosecutor's Office ("SCPO") regarding the release of certain records.

May 20, 2010

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that he prefers delivery via facsimile.

May 20, 2010

Custodian's response to the second (2nd) OPRA request. Custodian's Counsel responds in writing to the Complainant's OPRA request on the same day as receipt of such request. Counsel states that the Custodian is in possession of the complete investigation file responsive to the Complainant's first (1st) and second (2nd) OPRA requests. Counsel states that it appears that the investigation has concluded and that SCPO pursued no criminal charges; thus, the records can be released to the public.

Counsel states that the records have been reviewed and there are numerous references to juveniles and/or personal information of individuals contained in the file. Counsel states that he must thoroughly review and redact the records prior to disclosure of the responsive records. Counsel states that based on the foregoing, a special service charge is warranted pursuant to N.J.S.A. 47:1A-5.c. Counsel states that a review of the records should take no more than 2.5 to 3 hours. Counsel states that the Borough's charge of \$150.00 an hour for the Custodian Counsel's services will apply; therefore, a deposit of \$375.00 (2.5 hours at \$150.00 an hour) is required. Counsel requests that the Complainant forward the deposit amount to the Custodian so that the Counsel can begin the review process.

May 20, 2010

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

- Complainant's first (1st) OPRA request dated April 27, 2010.
- Letter from the Custodian's Counsel to the Complainant dated May 10, 2010.
- Complainant's second (2nd) OPRA request dated May 20, 2010.
- E-mail from the Custodian's Counsel to the Complainant dated May 20, 2010.

Complainant's April 27, 2010 OPRA request⁶

The Complainant states that he submitted an OPRA request to the Custodian on April 27, 2010. The Complainant states that although the Custodian's last day to respond was technically May 6, 2010, the Complainant gave the Custodian an extension until May 10, 2010 due to a request for an extension in another OPRA matter which is not the subject of this Complaint.

⁶ This OPRA request pertains to GRC Complaint No. 2010-105.

The Complainant states that the Custodian responded on May 10, 2010 requesting an extension of seven (7) days to respond to the Complainant's OPRA request. The Complainant states that twenty-three (23) days after the submission of his OPRA request and nine (9) days after the Custodian's request for an extension of time to respond, the Complainant still has not received any records responsive to his OPRA request.

Complainant's May 20, 2010 OPRA request⁷

The Complainant states that he submitted a second (2nd) OPRA request for the records at issue in this complaint on May 20, 2010. The Complainant states that the Custodian's Counsel responded on the same day as receipt of the request demanding a \$375.00 deposit against attorney's fees for review and redaction of the requested information. The Complainant states that the Custodian's Counsel advised that the information to be redacted included "references to juveniles and/or personal information of individuals contained within the file." The Complainant states that he filed this complaint because the proposed special service charge is unreasonable.

The Complainant's Counsel submits a letter brief in support of the Complainant's position. Counsel states that OPRA mandates that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public's right of access." Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006)(citing N.J.S.A. 47:1A-1). Further, Counsel states that "[t]he purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004). Counsel states that in any action under OPRA, the burden of proof rests with the public agency. N.J.S.A. 47:1A-6.

Counsel contends that there is no doubt that the records requested are government records based on the broad definition of a "government record" in OPRA. Counsel argues that the Custodian has admitted this much by stating that the records would be provided with redactions.

Counsel asserts that the only issue for the GRC to consider is whether the proposed special service charge is warranted. Counsel asserts that the Custodian's Counsel appears to argue that an attorney is required to review the requested reports and redact "references to juveniles and/or personal information of individuals contained within the file." *See* Custodian Counsel's e-mail to the Complainant dated May 20, 2010.

Counsel argues that such review does not require an attorney; rather, the Custodian or an administrative staff member can review the file to determine whether juveniles are mentioned in the report or whether personal information must be redacted. Counsel argues that to the extent that the Custodian requires legal advice, the Custodian

⁷ This OPRA request pertains to GRC Complaint No. 2010-106.

must bear the burden of that cost. *See Courier Post v. Lenape Regional High School District*, 360 N.J. Super. 191 (Law Div. 2002)(holding that the responsibility for identifying exempt material and redacting it is “squarely on the custodian of the records sought to be inspected.”).

Counsel requests that the GRC order the Custodian to provide the requested records to the Complainant via facsimile, as requested, without payment of a special service charge. Counsel further requests that the GRC determine that the Complainant is a prevailing party entitled to reasonable attorney’s fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

May 28, 2010

Letter from the Custodian’s Counsel to the Complainant. Counsel states that the Complainant’s two (2) OPRA requests at issue sought copies of an investigation report relating to Docket No. 09-2178. The Custodian’s Counsel states that he responded to these two (2) requests on May 20, 2010 requesting a \$375.00 deposit covering attorney’s fees for review of the records and redaction of certain information.

Counsel states that upon further review of the investigation file, it appears that the records sought are specifically exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

June 7, 2010

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

June 14, 2010

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until June 21, 2010 to submit the requested SOI.

June 14, 2010

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until June 21, 2010 to submit the requested SOI.

June 21, 2010

Custodian’s SOI with the following attachments:

- Complainant’s first (1st) OPRA request dated April 27, 2010.
- Letter from the Custodian’s Counsel to the Complainant dated May 10, 2010.
- Complainant’s second (2nd) OPRA request dated May 20, 2010.
- E-mail from the Custodian’s Counsel to the Complainant dated May 20, 2010.
- Letter from the Custodian’s Counsel to the Complainant dated May 28, 2010.

The Custodian certifies that he received the Complainant’s April 27, 2010 OPRA request on April 28, 2010. The Custodian certifies that the requested records are contained within a criminal investigation file maintained by the South Bound Brook Police Department (“SBBPD”). The Custodian certifies that on April 30, 2010, he

obtained an extension until May 10, 2010 to respond to the Complainant's OPRA request. The Custodian certifies that the Custodian's Counsel responded in writing on May 10, 2010 requesting an additional seven (7) days to respond because the Borough was seeking clarification from the SCPO.

The Custodian certifies that the investigation file was turned over to the Custodian by the SCPO on May 20, 2010 as the investigation was deemed to be complete. The Custodian certifies that he received the Complainant's second (2nd) OPRA request for the same records on the same date.

The Custodian certifies that on May 20, 2010, the Custodian's Counsel responded to the Complainant's second (2nd) OPRA request via e-mail advising that the criminal investigation file was available and that redactions were necessary. The Custodian certifies that the Custodian's Counsel further advised the Complainant that the Borough was imposing a special service charge for the Custodian's Counsel to review the records and make the appropriate redactions; thus, a deposit of \$375.00 (2.5 hours at a rate of \$150.00 per hour) was required.

The Custodian certifies that after the Complainant objected to the special service charge, the Borough conducted an additional review of the responsive records. The Custodian certifies that he subsequently determined that the requested records should not be disclosed. The Custodian certifies that the Custodian's Counsel sent a letter to the Complainant on May 28, 2010 advising the Complainant that access to the records responsive to the Complainant's two (2) OPRA requests was denied pursuant to N.J.S.A. 47:1A-1.1.⁸

The Custodian certifies that the SBBPD criminal investigation file comprises approximately seventy-five (75) pages of records which are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

August 23, 2010

Complainant's legal certification dated August 16, 2010. The Complainant certifies that he is submitting this certification in response to the Custodian's SOI.⁹

The Complainant certifies that he has held every rank including Chief of Police for the SBBPD. The Complainant certifies that criminal investigatory files usually consist of many different documents and reports, each of which can be a few pages long. The Complainant certifies that it is his understanding that the Custodian has denied access to the investigation file in Docket No. 09-2178.

The Complainant argues that at the very least, the Custodian should submit to the GRC a Vaughn Index identifying each individual record contained within the

⁸ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA 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 as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

⁹ The Complainant's legal certification pertains to GRC Complaint No. 2010-105.

investigation file. The Complainant argues that without said index, a member of the public would not be able to accurately determine whether the Custodian's denial of access to each record was lawful. The Complainant further requests that the GRC conduct an *in camera* review of the file to determine whether access to the records was lawfully denied or whether said records should be disclosed subject to redactions where necessary.

August 24, 2010

Letter from the Complainant's Counsel to the GRC attaching the Complainant's legal certification dated August 16, 2010. Counsel states that this letter is in response to the Custodian's SOI.¹⁰

Counsel argues that the principal defect of the Custodian's SOI is that the Custodian did not list each individual record for which access was denied. Counsel asserts that criminal files similar to the file at issue herein consist of many different types of documents, such as reports, photographs, correspondence and other documents. Counsel states he has attached the Complainant's legal certification dated August 16, 2010 in support of this argument.

Counsel asserts that the GRC's analysis in this complaint should consider whether each individual record is exempt from disclosure as opposed to whether the file as a whole is exempt. The Complainant's Counsel requests that based on the foregoing, the GRC order the Custodian to identify each record being withheld as required by section 9(A) of the SOI.

May 11, 2011

Letter from the Complainant's Counsel to the GRC with the following attachments:

- Letter from the Honorable Yolanda Ciccone, A.J.S.C., to the Custodian's Counsel dated February 8, 2011.
- Letter from the Custodian's Counsel to the Complainant's Counsel dated March 29, 2011, attaching a redacted copy of the criminal investigation file for Docket No. 09-2178.

The Complainant's Counsel states that in an unrelated action, Paff v. Borough of South Bound Brook, SOM-L-001212-10, Judge Ciccone conducted an *in camera* review of the same investigation file at issue herein and ordered the Borough to release such file with minimal redactions to the plaintiff. Counsel states that the Borough released the file to the plaintiff, has not sought a stay of disclosure and has allowed the time period for an appeal to expire. Counsel contends that because the Borough has been ordered to release the investigation file in an unrelated matter and because the Borough complied with said order, the Borough can no longer claim that the file is exempt from disclosure.

Counsel requests that the GRC direct the Borough to amend its SOI to reflect that (1) the file sought by the Complainant is now a public record, and (2) the Borough was not required to conduct an attorney review to determine what portions of the documents

¹⁰ The Complainant Counsel's letter pertains to GRC Complaint No. 2010-106.

should have been redacted. Counsel asserts that the Borough's amendment will also give them an opportunity to present any grounds that exist for the continued nondisclosure of the requested file.

May 20, 2011

Letter from the Custodian's Counsel to the GRC.¹¹ Counsel requests that both complaints at issue be withdrawn, or as an alternative, be deemed moot as the documents sought by the Complainant were disclosed to the Complainant's Counsel pursuant to judicial review in Paff.

Counsel states that regarding the Complainant's April 27, 2010 OPRA request, previous Counsel notified the Complainant that a special service charge would be assessed because production of the requested records required review and redaction of certain juvenile and personal information. Counsel states that previous Counsel estimated it would take between two (2) and three (3) hours at \$150.00 an hour to complete the review. Counsel asserts that redaction was required because the investigation file comprised mostly documents from the SCPO and because those documents were not in possession of the Borough, as well as because there was potential liability for breach of privacy.

Counsel notes that the Superior Court in Paff, *supra*, conducted an *in camera* review based on privacy concerns: the *in camera* validates the Borough's response to the Complainant's April 27, 2010 OPRA request.

Regarding the Complainant's May 20, 2010 OPRA request, Counsel asserts that the Borough denied access to the requested file as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. on May 28, 2010. Counsel asserts that this decision came after a discussion with the SCPO regarding applicability of the cited exemption and upon further independent review. Counsel states that subsequent to the Borough's denial of access, the SCPO closed its investigation of Docket No. 09-2178 and the Superior Court has litigated a case involving the same investigation file at issue herein. Counsel reiterates that Judge Ciccone reviewed the investigation file *in camera* and, as confirmed by the Complainant's Counsel letter dated May 11, 2011, released the file at issue here to the Complainant's Counsel with redactions.

Counsel asserts that based on the foregoing, these two (2) complaints are moot and should be withdrawn and/or dismissed accordingly.

May 25, 2011

Letter from the GRC to the Custodian. The GRC states that, in order for the GRC to determine whether a special service charge was warranted in this case, the Custodian must complete the GRC's 14-point analysis for special service charges pursuant to The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002) and N.J.S.A. 47:1A-5.c. The GRC requests that the Custodian provide a legal certification in response to the following questions regarding the special service charged assessed in this matter:

¹¹ Francesco Taddeo, Esq., noted that he recently became the acting Borough attorney.

1. What records are requested?
2. Give a general nature description and number of the government records requested.
3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?
13. What is the availability of information technology and copying capabilities?
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

May 31, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that he is in receipt of the GRC's request for a 14-point analysis. Counsel requests an extension until June 3, 2011 to submit the requested 14-point analysis.

May 31, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension until June 3, 2011 to submit the requested 14-point analysis.

June 2, 2011

Custodian's 14-point analysis and legal certification. The Custodian certifies that he is submitting a 14-point analysis in response to the GRC's request for same on May 25, 2011. The Custodian certifies that the Complainant did not pay the proposed charge and received the records at issue in this complaint through the Complainant's Counsel, who obtained said records in a separate court action.

The Custodian further responds to the GRC's request for a completed special service charge analysis as follows:

Questions	Custodian's Response
1. What records are requested?	1. Criminal investigation file for Docket No. 09-2178.

2. Give a general nature description and number of the government records requested.	2. Approximately eighty (80) pages.
3. What is the period of time over which the records extend?	3. The length of time is from the commencement of the investigation until its completion.
4. Are some or all of the records sought archived or in storage?	4. No.
5. What is the size of the agency?	5. 26 total employees: 13 in the South Bound Brook Police Department; 2 in the administration to include a part-time Clerk and full time Administration assistant; 6 full time in Public Works; 2 full time at the Municipal Court; 1 full time Construction Officer; 1 full time Deputy Tax Collector; and 1 full time Finance/Construction official
6. What is the number of employees available to accommodate the records request?	6. One, the part-time Custodian, who deals with an excessive amount of OPRA requests from the Complainant on a weekly basis.
7. To what extent do the requested records have to be redacted?	7. The entire file requires review by Counsel to ensure that the Borough is not liable for production of said file. Subsequent to this complaint, the records were the subject of a Superior Court action by a requestor who retained the Complainant's Counsel. The judge in that case ordered the records to be disclosed with redactions. It should be noted that the order was entered a significant amount of time after the date of the requestor's OPRA request.
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve, and assemble the records for copying?	8. None, only for review and redaction of the file at issue.
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspector or examination of the records requested?	9. None.
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records	10. None.

to their original storage place?	
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	11. Previous Counsel was requested to respond to the Complainant’s OPRA requests based on the sensitive and ongoing nature of the criminal investigation that was performed by the SCPO, an autonomous agency. The Custodian desired to avoid potential liability and negative results that may have occurred following disclosure of the requested investigation file.
12. Who in the agency will perform the work associated with the records request and that person’s hourly rate?	12. Previous Counsel performed the review at the stated Borough rate of \$150.00 an hour.
13. What is the availability of information technology and copying capabilities?	13. N/A.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	14. As set forth by previous Counsel in his response to the Complainant’s April 27, 2010 written response, review and redaction will take 1.5 to 3 hours. ¹²

Analysis

Whether the Custodian timely responded to the Complainant’s OPRA request?

OPRA 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 thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but not later than seven business days after receiving the request ... In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request ... If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.” (Emphasis added.) N.J.S.A. 47:1A-5.i.

¹² Previous Counsel’s response actually indicates that an estimated 2.5 to 3 hours will be needed
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OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

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

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

OPRA provides that a custodian may request an extension of time to respond to the Complainant’s OPRA request, but that a specific date for when the Custodian will respond must be provided. N.J.S.A. 47:1A-5.i. OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5.i.

In Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant’s March 19, 2007, OPRA request, seeking an extension of time until April 20, 2007 to fulfill the complainant’s OPRA request. However, the custodian responded on April 20, 2007, stating that the requested records would be provided later in the week, and the evidence of record showed that no records were provided until May 31, 2007. The Council held that:

“[t]he Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i...however...[b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial of access to the records.” *Id.*

In the matter before the Council, as in Kohn, supra, Custodian’s Counsel responded in writing to the Complainant’s April 27, 2010 OPRA request on behalf of the Custodian in a timely manner requesting seven (7) additional days to respond; thus, the Custodian’s written response granting or denying access to the requested investigation file was due by May 17, 2010. However, the Custodian failed to respond in writing to the Complainant until May 20, 2010, three (3) days after the expiration of the extended deadline to respond.

Therefore, although the Custodian timely responded to the Complainant’s April 27, 2010 OPRA request in writing requesting an extension of seven (7) days to respond to said request, the Custodian’s failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A.

47:1A-5.i., and Kohn, *supra*. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).¹³

Whether the Custodian unlawfully denied access to the requested investigation file?

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 ... *A government record shall not include the following information which is deemed to be confidential ... criminal investigatory records ...* ‘Criminal investigatory record’ means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding. ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides:

“[i]f an arrest has been made ... [the following information shall be made available to the public] ... the defendant’s name, age, residence, occupation, marital status and similar background information and the identity of the complaining party...the text of any charges ... the identity of the investigating and arresting personnel and agency ... the time and place of arrest ... and information as to circumstances surrounding bail, whether it was posted and the amount thereof.” N.J.S.A. 47:1A-3.b.

The Custodian’s Counsel initially granted access to the requested records on May 20, 2010 if the Complainant submitted a deposit of \$375.00 to the cost of Counsel’s review and redaction of the investigation file. Counsel subsequently responded again on May 28, 2010 stating that after further review of the investigation file, the Borough has decided to deny access to said file pursuant to N.J.S.A. 47:1A-1.1.¹⁴ The Custodian certified in the SOI that the records sought were part of an investigation file that was

¹³ Timeliness is not an issue regarding the Complainant’s second (2nd) OPRA request because the Custodian’s Counsel responded in writing on the same business day as receipt of same.

¹⁴ The Custodian Counsel’s second response to the Complainant denying access to the requested records was within the statutorily mandated seven (7) business day response period for the second (2nd) OPRA request.

returned to the Borough from the SCPO when the investigation was deemed to be complete.

Pursuant to *N.J.A.C.* 1:1-15.2(a) and (b), official notice may be taken of judicially noticeable facts (as explained in *N.J.R.E.* 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant's record of convictions, because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. See *Sanders v. Division of Motor Vehicles*, 131 *N.J. Super.* 95 (App. Div. 1974).

Thus, the Council takes judicial notice of the fact that, in *Paff v. Borough of South Bound Brook*, Docket No. SOM L-1212-10, the Honorable Yolanda Ciccone, A.J.S.C., ordered the Borough to provide a copy of the investigation file at issue herein for an *in camera* review and determined that the file should be disclosed to plaintiff with redactions for juvenile and other personal information.¹⁵

Therefore, the GRC declines to conduct an *in camera* review of the responsive investigation file to determine the validity of the Custodian's assertions that the file is exempt from disclosure because Judge Ciccone has already conducted same. As the GRC has taken judicial notice of *Paff*, the Custodian must disclose to the Complainant the responsive investigation file in accordance with the same file provided to plaintiff in *Paff* per Judge Ciccone's February 8, 2011 letter.

Whether the special service charge assessed by the Custodian is warranted and reasonable pursuant to OPRA?

The GRC must address whether the special service charge proposed by the Borough was warranted in this matter.

Whenever a records custodian asserts that fulfilling an OPRA records request requires an "extraordinary" expenditure of time and effort, a special service charge may be warranted pursuant to *N.J.S.A.* 47:1A-5.c. In this regard, OPRA provides:

"Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*" (Emphasis added.) *N.J.S.A.* 47:1A-5.c.

¹⁵ The Complainant's Counsel in this complaint also represented plaintiff in that matter.

The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of a variety of factors. These factors were discussed in The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. *Id.* at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. *Id.*

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the Court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5.c. *Id.* at 202. The Court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA:

- The volume of government records involved;
- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying;
- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination;¹⁶ and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

The Court determined that in the context of OPRA, the term “extraordinary” will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. *Id.* at 202. “[W]hat may appear to be extraordinary to one school district might be routine to another.” *Id.*

Recognizing that many different variables may affect a determination of whether a special service charge is reasonable and warranted, the GRC established an analytical framework for situations which may warrant an assessment of a special service charge. This framework incorporates the factors identified in the Courier Post case, as well as additional relevant factors. For the GRC to determine when and whether a special service charge is reasonable and warranted, a Custodian must provide a response to the following questions:

1. What records are requested?

¹⁶ With regard to this factor, the court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

2. Give a general nature description and number of the government records requested.
3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?
13. What is the availability of information technology and copying capabilities?
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

In the complaint now before the Council, the Custodian responded to the above questions as follows:

Questions	Custodian's Response
1. What records are requested?	1. Criminal investigation file for Docket No. 09-2178.
2. Give a general nature description and number of the government records requested.	2. Approximately eighty (80) pages.
3. What is the period of time over which the records extend?	3. The length of time would be from the commencement of the investigation until its completion.
4. Are some or all of the records sought archived or in storage?	4. No.
5. What is the size of the agency?	5. 26 total employees: 13 in the South Bound Brook Police Department; 2 in the administration to include a part-time Clerk and full time Administration assistant; 6 full time in Public Works; 2 full time at the Municipal Court; 1 full time Construction Officer; 1 full time Deputy Tax Collector; and

	1 full time Finance/Construction official
6. What is the number of employees available to accommodate the records request?	6. One, the part-time Custodian, who deals with an excessive amount of OPRA requests from the Complainant on a weekly basis.
7. To what extent do the requested records have to be redacted?	7. The entire file requires review by Counsel to ensure that the Borough is not liable for production of said file. Subsequent to this complaint, the records were the subject of a Superior Court action by a requestor who retained the Complainant's Counsel. The judge in that case ordered the records to be disclosed with redactions. It should be noted that the order was entered a significant amount of time after the date of the requestor's OPRA request.
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve, and assemble the records for copying?	8. None, only for review and redaction of the file at issue.
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspector or examination of the records requested?	9. None.
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?	10. None.
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	11. Previous Counsel was requested to respond to the Complainant's OPRA requests based on the sensitive and ongoing nature of the criminal investigation that was performed by the SCPO, an autonomous agency. The Custodian desired to avoid potential liability and negative results that may have occurred following disclosure of the requested investigation file.
12. Who in the agency will perform the work associated with the records request and that person's hourly rate?	12. Previous Counsel performed the review at the stated Borough rate of \$150.00 an hour.
13. What is the availability of information technology and copying capabilities?	13. N/A.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the	14. As set forth by previous Counsel in his response to the Complainant's April 27, 2010 written response, review and redaction

requested documents.	will take 1.5 to 3 hours. ¹⁷
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In this matter, the Custodian's Council proposed a special service charge of \$375.00 (\$150.00 an hour for 2.5 hours) to provide access to the requested records. The Complainant disputed the proposed special service charge and subsequently filed this complaint arguing that said charge was unreasonable. The Complainant's Counsel, who submitted a letter brief as part of the Denial of Access Complaint, further argued that pursuant to Courier Post, *supra*, the Custodian must bear the cost of legal advice.

In determining whether the Borough's proposed special service charge was warranted, the GRC must determine whether the Borough could rely on Counsel to review and redact the responsive records and then pass the cost of Counsel onto the Complainant.

OPRA provides that a custodian "... asserts that part of a particular record is exempt from public access ... 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 Court in Courier Post, *supra*, further agreed with the rationale that OPRA provided:

"for the 'custodian' to redact, excise or delete the exempt information. The Legislature could have enacted an attorney review clause, but it did not. Neither did it create a special subclass for attorney bills and accord to them any kind of special treatment. It appears rather conclusively that the *custodian* is responsible for asserting the privilege and making the redaction." (Emphasis added.) *Id.* at 203-204.

As pointed out by the Complainant's Counsel in the Denial of Access Complaint, the Court in Courier Post, *supra*, ultimately held that "[a]ttorneys' fees will not be allowed to be charged to the Post or to any other requestor of documents for review and redaction of exempt material." *Id.* at 207.

The Custodian's responses in the 14-point analysis reveal that only 80 pages of records required review and redaction. Based on the investigation file provided to the GRC, the investigation file contains 74 pages of which 26 pages are photographs. The Custodian certified that he was the only employee available to fulfill the Complainant's OPRA request within the 26-employee Borough; however, the Custodian is only part-time and deals with excessive amounts of OPRA requests on a weekly basis. The Custodian certified that according to Counsel, review and redaction would only take 1.5 to 3 hours.¹⁸ Further, the Custodian certified that he requested that Counsel review and redact the responsive records to avoid potential liability for disclosure of the records.

However, the Court's holding in Courier Post, *supra*, is clear: the Custodian is specifically required to review and redact records. Further, the Custodian failed to adequately prove that Counsel was the only person with the expertise to locate and redact

¹⁷ Previous Counsel's response actually indicates that an estimated 2.5 to 3 hours will be needed

¹⁸ See FN. No. 16.

juvenile and personal information. Finally, the Custodian failed to prove that even if he did conduct the review and redaction of the requested records, said process would rise to an “extraordinary expenditure of time and effort...” N.J.S.A. 47:1A-5.c.

Therefore, although the Custodian requested assistance from Counsel, the Custodian cannot attempt to pass the cost of Counsel’s service onto the Complainant. Courier Post, supra. Moreover, the Custodian failed to prove that Counsel’s expertise was required to review and redact juvenile and personal information from the requested records. Thus, the proposed special service charge of \$375.00 is not warranted pursuant to N.J.S.A. 47:1A-5.c.

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

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

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian timely responded to the Complainant’s April 27, 2010 OPRA request in writing requesting an extension of seven (7) days to respond to said request, the Custodian’s failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009).¹⁹
2. The GRC declines to conduct an *in camera* review of the responsive investigation file to determine the validity of the Custodian’s assertions that the file is exempt from disclosure because the Honorable Yolanda Ciccone, A.J.S.C. has already conducted same. As the GRC has taken judicial notice of Paff v. Borough of South Bound Brook, Docket No. SOM L-1212-10, the Custodian must disclose to the Complainant the responsive investigation file

¹⁹ Timeliness is not an issue regarding the Complainant’s second (2nd) OPRA request because the Custodian’s Counsel responded in writing on the same business day as receipt of same.
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in accordance with the same file provided to plaintiff in Paff per Judge Ciccone's February 8, 2011 letter.

3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4²⁰, to the Executive Director.²¹**
4. Although the Custodian requested assistance from Counsel, the Custodian cannot attempt to pass the cost of Counsel's service onto the Complainant. The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002). Moreover, the Custodian failed to prove that Counsel's expertise was required to review and redact juvenile and personal information from the requested records. Thus, the proposed special service charge of \$375.00 is not warranted pursuant to N.J.S.A. 47:1A-5.c.
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

December 13, 2011

²⁰ "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."

²¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.