



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

December 18, 2012 Government Records Council Meeting

Virginia Culver
Complainant

Complaint No. 2010-15

v.

Borough of Lawnside (Camden)
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 23, 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 this complaint be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law via letter from her legal counsel dated September 17, 2012. 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 18th Day of December, 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: December 19, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

**Virginia Culver¹
Complainant**

GRC Complaint No. 2010-15

v.

**Borough of Lawnside (Camden)²
Custodian of Records**

Records Relevant to Complaint: Any record or set of records which sets forth the following information for each Borough of Lawnside employee employed as of September 30, 2009: name of employee, department within which the employee works, total remuneration as reported to the Internal Revenue Service for the most recent reporting period.³

Request Made: November 5, 2009

Response Made: November 12, 2009

Custodian: Sylvia VanNockay, Borough Clerk

GRC Complaint Filed: January 20, 2010⁴

Background

December 20, 2011

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

1. The Custodian has complied with the Council’s October 25, 2011 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order and proof that a refund check was made payable to the Complainant pursuant to Paragraph 5 of the Order within five (5) business days of receiving said Order.

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

² Represented by Morris G. Smith, Esq., (Collingswood, NJ).

³ The Complainant also includes a notation on her OPRA request which states: “I am interested in learning exactly how many employees as of September 30, 2009, the Borough of Lawnside employs...I am having trouble specifying the exact record to request because I am not aware of how the Borough keeps its records. So if the record I request...does not exist, I ask that you inform me of other records that may exist that will satisfy my needs.”

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

2. The Custodian unlawfully failed to immediately disclose the employees' annual salaries for the 2008 tax year to the Complainant in violation of N.J.S.A. 47:1A-5.e., and failed to grant or deny access to the Borough of Lawnside Employee List, including all part-time employees within seven (7) business days of receiving the request in violation of N.J.S.A. 47:1A-5.i., and assessed the Complainant a special service charge that was unwarranted and unreasonable under OPRA. However, the Custodian certified that she disclosed copies of said records and refunded the Complainant's assessed special service charge in compliance with the Council's October 25, 2011 Interim Order in a timely manner. Further, 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. The Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. 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.

December 21, 2011

Council's Interim Order distributed to the parties.

March 15, 2012

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

September 17, 2012

Letter from Complainant's Counsel to the Administrative Law Judge and the GRC. Counsel states that this matter has been resolved and the Complainant withdraws this complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law via letter from her legal counsel dated September 17, 2012. Therefore, no further adjudication is required.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 23, 2012⁵

⁵ This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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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

Virginia Culver
Complainant

Complaint No. 2010-15

v.

Borough of Lawnside (Camden)
Custodian of Record

At the December 20, 2011 public meeting, the Government Records Council (“Council”) considered the December 13, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council’s October 25, 2011 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order and proof that a refund check was made payable to the Complainant pursuant to Paragraph 5 of the Order within five (5) business days of receiving said Order.
2. The Custodian unlawfully failed to immediately disclose the employees’ annual salaries for the 2008 tax year to the Complainant in violation of N.J.S.A. 47:1A-5.e., and failed to grant or deny access to the Borough of Lawnside Employee List, including all part-time employees within seven (7) business days of receiving the request in violation of N.J.S.A. 47:1A-5.i., and assessed the Complainant a special service charge that was unwarranted and unreasonable under OPRA. However, the Custodian certified that she disclosed copies of said records and refunded the Complainant’s assessed special service charge in compliance with the Council’s October 25, 2011 Interim Order in a timely manner. Further, 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. The Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees. 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 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**

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

**Virginia Culver¹
Complainant**

GRC Complaint No. 2010-15

v.

**Borough of Lawnside (Camden)²
Custodian of Records**

Records Relevant to Complaint: Any record or set of records which sets forth the following information for each Borough of Lawnside employee employed as of September 30, 2009: name of employee, department within which the employee works, total remuneration as reported to the Internal Revenue Service for the most recent reporting period.³

Request Made: November 5, 2009

Response Made: November 12, 2009

Custodian: Sylvia VanNockay, Borough Clerk

GRC Complaint Filed: January 20, 2010⁴

Background

October 25, 2011

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

1. Because the Custodian failed to immediately disclose the employees' annual salaries for the 2008 tax year to the Complainant, the Custodian violated N.J.S.A. 47:1A-5.e.

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

² Represented by Morris G. Smith, Esq., (Collingswood, NJ).

³ The Complainant also includes a notation on her OPRA request which states: "I am interested in learning exactly how many employees as of September 30, 2009, the Borough of Lawnside employs...I am having trouble specifying the exact record to request because I am not aware of how the Borough keeps its records. So if the record I request...does not exist, I ask that you inform me of other records that may exist that will satisfy my needs."

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

2. Because the Custodian failed to grant or deny access to the Borough of Lawnside Employee List within seven (7) business days of receiving the request, the Custodian violated N.J.S.A. 47:1A-5.i.
3. The Custodian shall disclose to the Complainant the records relevant to the complaint for all part-time Borough employees and professionals that were employed by the Borough on September 30, 2009, if any, or shall certify that the record that was disclosed to the Complainant on January 21, 2010 was a complete and accurate record for all employees employed by the Borough on September 30, 2009.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order by either (a) disclosing said records to the Complainant and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director, or (b) providing a certification, in accordance with N.J. Court Rule 1:4-4, to the Executive Director averring that the record that was disclosed to the Complainant on January 21, 2010 was a complete and accurate record for all employees employed by the Borough on September 30, 2009.**
5. Because it was unnecessary for the Custodian to have CASA Payroll Service generate a single record which contained the information requested by the Complainant, given that the Complainant had stated in her OPRA request that any record or set of records would satisfy her request, and because the Custodian did identify existing records that were responsive to the Complainant's request, the \$35.00 special service charge assessed by the Custodian is unwarranted and therefore unreasonable under OPRA.
6. **Because the Council hereby finds that the \$35.00 special service charge assessed by the Custodian is unwarranted and therefore unreasonable under OPRA, the Custodian shall within five (5) business days from receipt of the Council's Interim Order, refund to the Complainant said special service charge and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
7. 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.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

October 28, 2011

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

November 4, 2011

Certification of the Custodian in response to the Council's Interim Order with the following attachments:

- Spreadsheet containing a list of all employees employed by the Borough as of September 2009, the employee's title, department, and total remuneration as reported to the Internal Revenue Service ("IRS")
- Copy of a Borough of Lawnside check in the amount \$35.00 made payable to the Complainant

The Custodian certifies that on October 31, 2011 she disclosed to the Complainant the records that the Council ordered to be disclosed to the Complainant. The Custodian also certifies that on October 31, 2011 she sent the Complainant a refund check in the amount of \$35.00.⁵

Analysis

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

At its October 25, 2011 public meeting, the Council determined that the Custodian must disclose to the Complainant any records relevant to the complaint for part-time Borough employees and professionals employed by the Borough on September 30, 2009, if applicable. The Council also found that the \$35.00 special service charge assessed by the Custodian was unwarranted and therefore unreasonable under OPRA and ordered the Custodian to refund the monies. The Custodian was ordered to comply with the Council's directives within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.

The Custodian provided the GRC with a legal certification, a spreadsheet containing a list of all employees employed by the Borough as of September 2009, including the employee's title, department, and total remuneration as reported to the IRS and a copy of the Borough's check in the amount of \$35.00 made payable to the Complainant on November 4, 2011, which was the fourth (4th) business day following the Custodian's receipt of the Order.⁶ Therefore, the Custodian complied in a timely manner with the Council's October 25, 2011 Interim Order.

Accordingly, the Custodian has complied with the Council's October 25, 2011 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order and proof that a refund check was made payable to the Complainant pursuant to Paragraph 5 of the Order within five (5) business days of receiving said Order.

⁵ This check represents a refund of unwarranted special service charges previously assessed by the Custodian.

⁶ The employee list included twenty-four (24) part-time employees of the Borough.
Virginia Culver v. Borough of Lawnside (Camden), 2010-15 – Supplemental Findings and Recommendations of the Executive Director

Whether the Custodian’s delay in granting 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.

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 unlawfully failed to immediately disclose the employees’ annual salaries for the 2008 tax year to the Complainant in violation of N.J.S.A. 47:1A-5.e., and failed to grant or deny access to the Borough of Lawnside Employee List, including all part-time employees, within seven (7) business days of receiving the request in violation of N.J.S.A. 47:1A-5.i., and assessed the Complainant a special service charge that was unwarranted and unreasonable under OPRA. However, the Custodian certified that she disclosed copies of said records and refunded the Complainant’s assessed special service charge in compliance with the Council’s October 25, 2011 Interim Order in a timely manner. Further, 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)). The court in

Buckhannon stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The court in Mason, *supra*, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).”

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.⁷ Those changes expand counsel fee awards under OPRA.” Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

In the instant complaint, the Complainant filed a Denial of Access Complaint on January 20, 2010 demanding that the Custodian disclose copies of the requested records in the format in which they were requested including part-time Borough employees and professionals and demanding that the Council determine whether the \$35.00 special service charge assessment was reasonable. After the filing of the Denial of Access Complaint and pursuant to its October 25, 2011 Interim Order, the Council ordered the Custodian to disclose to the Complainant any records relevant to the complaint for part-time Borough employees and professionals employed by the Borough on September 30, 2009, if applicable. The Council also determined that the \$35.00 special service charge assessed by the Custodian was unwarranted and therefore unreasonable under OPRA and ordered the Custodian to refund said monies. The Council ordered the Custodian to comply with the terms of its Order within five (5) business days from receipt of the Order. The Custodian complied with the Council’s Interim Order by providing certified confirmation to the GRC on November 4, 2011 averring that on October 31, 2011 she disclosed to the Custodian a spreadsheet containing a list of all employees employed by the Borough as of September 2009, including the employee’s title, department, and total remuneration as reported to the IRS and that she refunded the \$35.00 special service charge for which the Complainant was previously assessed.

Therefore, pursuant to Teeters, *supra*, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Specifically, the Custodian disclosed to the Complainant a spreadsheet containing a list of all employees employed by the Borough as of September 2009, including the employee’s title, department, and total remuneration as reported to the IRS and refunded the Complainant’s \$35.00 special service charge pursuant to the Council’s October 25, 2011 Interim Order. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because the Custodian unlawfully denied access to the list of all employees employed by the Borough as of September 2009, including part-time and professional employees. The list of employees disclosed to the Complainant in response to the Council’s Interim Order contained twenty-four (24) part-time employees. Also, the

⁷ The significance of awarding fees to “requestors” and not “plaintiffs” is less clear because OPRA’s fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC’s more information mediation route; the phrase “requestors” may simply have been used to encompass both groups. Likewise, one cannot obtain an “order” from the GRC, so the absence of that language in OPRA is not necessarily revealing.

Custodian unlawfully charged the Complainant an unwarranted and therefore unreasonable special service charge that the Council ordered the Custodian to refund to the Complainant.

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. The Custodian has complied with the Council's October 25, 2011 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order and proof that a refund check was made payable to the Complainant pursuant to Paragraph 5 of the Order within five (5) business days of receiving said Order.
2. The Custodian unlawfully failed to immediately disclose the employees' annual salaries for the 2008 tax year to the Complainant in violation of N.J.S.A. 47:1A-5.e., and failed to grant or deny access to the Borough of Lawnside Employee List, including all part-time employees within seven (7) business days of receiving the request in violation of N.J.S.A. 47:1A-5.i., and assessed the Complainant a special service charge that was unwarranted and unreasonable under OPRA. However, the Custodian certified that she disclosed copies of said records and refunded the Complainant's assessed special service charge in compliance with the Council's October 25, 2011 Interim Order in a timely manner. Further, 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. The Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable

prevailing party attorney's fees. 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: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

December 13, 2011



State of New Jersey

GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET

PO BOX 819

TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

October 25, 2011 Government Records Council Meeting

Virginia Culver
Complainant

Complaint No. 2010-15

v.

Borough of Lawnside (Camden)
Custodian of Record

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

1. Because the Custodian failed to immediately disclose the employees' annual salaries for the 2008 tax year to the Complainant, the Custodian violated N.J.S.A. 47:1A-5.e.
2. Because the Custodian failed to grant or deny access to the Borough of Lawnside Employee List within seven (7) business days of receiving the request, the Custodian violated N.J.S.A. 47:1A-5.i.
3. The Custodian shall disclose to the Complainant the records relevant to the complaint for all part-time Borough employees and professionals that were employed by the Borough on September 30, 2009, if any, or shall certify that the record that was disclosed to the Complainant on January 21, 2010 was a complete and accurate record for all employees employed by the Borough on September 30, 2009.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order by either (a) disclosing said records to the Complainant and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director,² or (b) providing a certification, in accordance with N.J. Court Rule 1:4-4, to the Executive Director averring that the record that was disclosed to the Complainant on January 21, 2010 was a complete and accurate record for all employees employed by the Borough on September 30, 2009.**

¹ "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."

² 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.

5. Because it was unnecessary for the Custodian to have CASA Payroll Service generate a single record which contained the information requested by the Complainant, given that the Complainant had stated in her OPRA request that any record or set of records would satisfy her request, and because the Custodian did identify existing records that were responsive to the Complainant's request, the \$35.00 special service charge assessed by the Custodian is unwarranted and therefore unreasonable under OPRA.
6. **Because the Council hereby finds that the \$35.00 special service charge assessed by the Custodian is unwarranted and therefore unreasonable under OPRA, the Custodian shall within five (5) business days from receipt of the Council's Interim Order, refund to the Complainant said special service charge and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
7. 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.
8. 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 25th Day of October, 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: October 28, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Virginia Culver¹
Complainant**

GRC Complaint No. 2010-15

v.

**Borough of Lawnside (Camden)²
Custodian of Records**

Records Relevant to Complaint: Any record or set of records which sets forth the following information for each Borough of Lawnside employee employed as of September 30, 2009: name of employee, department within which the employee works, total remuneration as reported to the Internal Revenue Service for the most recent reporting period.³

Request Made: November 5, 2009

Response Made: November 12, 2009

Custodian: Sylvia VanNockay

GRC Complaint Filed: January 20, 2010⁴

Background

November 5, 2009

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

November 12, 2009

Custodian's response to the OPRA request. The Custodian's Counsel responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. Counsel states that because the Complainant did not specify a particular public record, the Custodian will need a thirty (30) day extension of time to investigate which record or records might be responsive to the Complainant's request.

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

² Represented by Morris G. Smith, Esq., (Collingswood, NJ). Previously represented by Dean R. Wittman, Esq., Zeller & Wieliczko, LLP (Cherry Hill, NJ) until February 24, 2010.

³ The Complainant also includes a notation on her OPRA request which provides, "I am interested in learning exactly how many employees as of September 30, 2009, the Borough of Lawnside employs...I am having trouble specifying the exact record to request because I am not aware of how the Borough keeps its records. So if the record I request...does not exist, I ask that you inform me of other records that may exist that will satisfy my needs."

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

November 18, 2009

E-mail from Kelly Bowen of CASA Payroll Service to Dwight Wilson, Borough of Lawnside Administrator. Ms. Bowen informs Mr. Wilson that the price for the records relevant to this complaint is \$35.00. Ms. Bowen also asks for time parameters of the records requested.

November 24, 2009

Letter from the Custodian's Counsel to the Complainant. Counsel informs the Complainant that the Custodian has completed a search of the records and further informs the Complainant that there is a thirty-five dollar (\$35.00) charge for providing the record. Counsel also informs the Complainant that once the \$35.00 charge has been paid, the record will be disclosed to the Complainant.

December 21, 2009

E-mail from Ms. Bowen to Mr. Wilson. Ms. Bowen informs Mr. Wilson that she is busy and will generate the requested records in a couple of weeks.

December 22, 2009

Letter from the Custodian's Counsel to the Complainant. Counsel informs the Complainant that he is confirming a conversation between the Complainant and the Borough Administrator wherein the Borough Administrator informed the Complainant that it would take the Borough a few more weeks to provide the requested records. Counsel asserts that the delay is due in part to the payroll company's failure to promptly supply the records requested by the Complainant.⁵ Counsel states he anticipates that the requested records should be available by January 21, 2010.

January 5, 2010

E-mail from Mr. Wilson to Ms. Bowen. Mr. Wilson asks Ms. Bowen for an update on the status of his request.

January 20, 2010

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

- Complainant's OPRA request dated November 5, 2009
- Custodian's response to the OPRA request dated November 12, 2009
- Letter from the Custodian's Counsel to the Complainant dated November 24, 2009
- Copy of United States Postal Service money order receipt number 17801741632 for a money order made payable to the Borough of Lawnside in the amount of \$35.00 dated December 5, 2009
- Copy of Borough of Lawnside receipt number 3287 made to the Complainant evidencing receipt by the Borough of money order number 17801741632 in the amount of \$35.00 for a "pending OPRA request fee" dated December 9, 2009
- Letter from the Custodian's Counsel to the Complainant dated December 22, 2009

⁵ Counsel does not state any other factors that may also be contributing to the delay.
Virginia Culver v. Borough of Lawnside (Camden), 2010-15 – Findings and Recommendations of the Executive Director

Complainant's Counsel states that the Complainant submitted her OPRA request for the records relevant to this complaint on November 5, 2009. Counsel also states that by letter dated November 12, 2009, the Custodian asked for a thirty (30) day extension of time to respond to the Complainant and by letter dated November 24, 2009, the Custodian requested a fee in the amount of \$35.00; however, Counsel asserts that the Custodian gave no basis for how the fee was calculated. Counsel further states that the Complainant paid the \$35.00 fee to the Custodian on December 9, 2009.

Counsel states that on December 22, 2009, the Custodian asked for another extension of time until January 21, 2010 in order to produce the requested records. Counsel states that the salary and payroll information records requested by the Complainant must be made available immediately and that the Complainant never consented to any extensions of time.

Counsel states that the Custodian had not provided the requested records as of the date of the filing of the Denial of Access Complaint. Counsel asserts that the Custodian's failure to provide the requested records within a reasonable period of time is a "deemed denial" of the Complainant's request and the Custodian's failure to respond to the Complainant's OPRA request within seven (7) business days was a "deemed denial" of the Complainant's OPRA request. Counsel cites N.J.S.A. 47:1A-5.5 and Andrews v. Township of Irvington, GRC Complaint No. 2009-39 (June 2009) in support of his assertions.

The Complainant's Counsel requests the following relief:

- An Order directing the Custodian to disclose copies of the requested records in the format in which they were requested.
- An investigation to determine whether the \$35.00 fee was reasonable.
- A determination that the Complainant is a prevailing party entitled to a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

January 20, 2010

E-mail from Ms. Bowen to Mr. Wilson. Ms. Bowen thanks Mr. Wilson for his patience in awaiting the requested records and informs him that the records are attached. Ms. Bowen also tells Mr. Wilson that she has prepared an invoice in the amount of \$35.00 for generating the requested records and will send the invoice to the Borough with the Borough's next payroll.

January 21, 2010

Letter from the Custodian's Counsel to the Complainant. Counsel informs the Complainant that he has enclosed a spreadsheet which contains the information that is responsive to the Complainant's request.

February 3, 2010

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

February 3, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated November 5, 2009
- Custodian's response to the OPRA request dated November 12, 2009
- E-mail from Ms. Bowen to Mr. Wilson dated November 18, 2009
- Letter from the Custodian's Counsel to the Complainant dated November 24, 2009
- Copy of United States Postal Service money order receipt number 17801741632 for a money order made payable to the Borough of Lawnside in the amount of \$35.00 dated December 5, 2009
- Copy of Borough of Lawnside receipt number 3287 made to the Complainant evidencing receipt by the Borough of money order number 17801741632 in the amount of \$35.00 for a "pending OPRA request fee" dated December 9, 2009
- E-mail from Ms. Bowen to Mr. Wilson dated December 21, 2009
- Letter from the Custodian's Counsel to the Complainant dated December 22, 2009
- E-mail from Mr. Wilson to Ms. Bowen dated January 5, 2010
- E-mail from Ms. Bowen to Mr. Wilson dated January 20, 2010
- Invoice Number 624164 from CASA Payroll Service to the Borough of Lawnside in the amount of \$35.00 for creation of a 2008 Taxable Wages Export File dated January 20, 2010
- Letter from the Custodian's Counsel to the Complainant dated January 21, 2010

The Custodian certifies that her search for the requested records involved contacting CASA Payroll Service and requesting that they generate a record of the 2008 Taxable Wages for Borough employees. The Custodian also certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management, the records responsive to the request must be retained for six (6) years and thereafter may be destroyed.

The Custodian certifies that the Complainant's OPRA request was received on November 5, 2009 and that she responded to the request in writing on November 12, 2009, November 24, 2009, December 22, 2009 and January 21, 2010.⁶ The Custodian certifies that the Complainant's request was "very specific." The Custodian also certifies that the Borough does not maintain a record which contains the very specific information which the Complainant requested. The Custodian did, however, certify that the records responsive to the Complaint consist of a Borough of Lawnside Employee List as of September 30, 2009 with annual salaries for the 2008 tax year.⁷ The Custodian certifies that the Borough had to investigate the most efficient and reasonable method to satisfy the Complainant's request and therefore requested a thirty (30) day extension to conduct

⁶ The Custodian's response to the Complainant's OPRA request was dated November 12, 2009. The other listed correspondence was forwarded to the Complainant to supplement the response.

⁷ The Custodian sets forth this information in the document index appended to the SOI as Item 9. The Custodian capitalized "Borough of Lawnside Employee List" twice in the document index, which indicates this is a title for a document or record maintained by the Borough.

such an investigation. The Custodian certifies that the Complainant never indicated she was opposed to the extension of time.

The Custodian certifies that the Borough Administrator, Dwight Wilson, contacted the Borough's payroll company, CASA Payroll Service, to determine if they could generate a report which included the information requested by the Complainant. The Custodian further certifies that on November 18, 2009, CASA Payroll Service confirmed they could provide the requested report but that said report would cost the Borough \$35.00. The Custodian certifies that in a letter dated November 24, 2009, the Custodian informed the Complainant that the requested record would be made available for her at a cost of \$35.00. The Custodian certifies that the Complainant did not object to paying the fee and subsequently did so on December 9, 2009.

The Custodian certifies that after the Complainant paid the \$35.00, the Borough ordered the requested record from CASA Payroll Service. The Custodian certifies that CASA Payroll Service stated it was their busy season and that Dwight Wilson told the Complainant the circumstances which were causing the delay in disclosing the record and informed the Complainant that the Borough would need another extension of time until January 21, 2010 in order to disclose the requested record. The Custodian certifies that by letter dated December 22, 2009, the Custodian confirmed the conversation between Mr. Wilson and the Complainant. The Custodian also certifies that the Complainant never indicated that she was opposed to the extension of time. The Custodian certifies that Mr. Wilson sent an e-mail to CASA payroll Service to obtain the status of the requested record but that CASA Payroll Service did not reply until January 20, 2010, at which time they forwarded the requested record to the Borough. The Custodian certifies that the requested record was disclosed to the Complainant on January 21, 2010 which was within the time frame that the Borough promised to disclose it pursuant to the Borough's letter to the Complainant dated December 22, 2009.

The Custodian's Counsel asserts that the Custodian responded to the Complainant's OPRA request within seven (7) business days of the request. Counsel further asserts that the Custodian informed the Complainant that the Complainant did not specify a particular public record; therefore the Custodian would need a thirty (30) day extension of time to investigate which record or records might be responsive to the Complainant's request. Counsel states that once the Borough determined how best to accommodate the Complainant's request, the Borough asked the Complainant to pay the payroll company's fee and the Complainant readily did so. Counsel states that for reasons out of the Borough's control there was a delay producing the requested record, and for this reason the Borough requested an extension of time until January 21, 2010 to disclose the record to the Complainant. Counsel argues that based upon the Complainant's lack of objections to the Borough's extensions of time, as well as her premature filing of the Denial of Access Complaint, the Complainant is acting disingenuously.

Counsel asserts that the \$35.00 fee charged to the Borough by the payroll company was properly billed to the Complainant because it represented a reimbursement to the Borough of the amount that the Borough paid to the payroll company for the

requested records. Counsel further adds that the Borough did not charge the Complainant copying fees which they could have done under OPRA.

Counsel argues that attorney fees for Complainant's Counsel may be awarded only when the public entity fails to respond at all within the seven (7) day period to the Complainant's OPRA request and the Complainant can establish a causal nexus between the filing of a complaint and the production of the requested records. Counsel cites Mason v. City of Hoboken, 196 N.J. 51, 76 (2008) in support of his argument. Counsel asserts that the Custodian did respond to the Complainant's OPRA request within the statutorily-mandated seven (7) business day time period and that the records would have been disclosed to the Complainant regardless of the filing of the Complaint. The Custodian's Counsel states that the Complainant should have been more cooperative and tolerant and should not be rewarded for her lack of patience with an award of attorney fees.

February 25, 2010

Letter to the GRC from Morris G. Smith, Esq. Mr. Smith states that he is the newly retained Counsel for the Custodian and was substituted for Dean R. Wittman, Esq., on February 24, 2010.⁸

August 10, 2010

The Complainant's response to the Custodian's SOI. The Complainant's Counsel asserts that the Custodian claims that the sole location of the records requested by the Complainant is at their payroll service. Counsel argues that the Custodian could have gone to one of many different sources to locate the requested records. Counsel further argues that even if the record was being held by a third party, the Custodian had an obligation to retrieve it in a timely manner. Counsel cites Burnett v. County of Gloucester, 409 N.J. Super. 219 (App. Div. 2010) in support of his argument.

The Complainant's Counsel also asserts that because the Custodian could have located the records responsive to the Complainant's request without having to go outside of the Borough offices, the \$35.00 fee incurred by the Complainant was unreasonable.

Finally, Counsel asserts that because the requested records were disclosed to the Complainant the day after the Denial of Access Complaint was filed, there is a clear nexus between the filing of the complaint and the Custodian's response, and therefore attorney fees should be awarded to the Complainant.

March 7, 2011

E-mail from the GRC to the Complainant's Counsel. The GRC asks Counsel if his client has received from the Custodian all of the records responsive to her request.

April 6, 2011

E-mail from the Complainant's Counsel to the GRC. The Complainant's Counsel states that the Complainant told him that part-time employees and professionals may not have been included on the payroll record that the Custodian disclosed to her.⁹

⁸ Mr. Smith did not submit any material to the GRC except for this letter. Several telephone calls from the GRC to his office went unanswered.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA further provides that:

“[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and *public employee salary and overtime information.*” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, *the custodian shall indicate the specific basis therefore* 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 ...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA states 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, provided that the record is currently available and not in storage or archived. 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 ... [i]f the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the

⁹ The GRC subsequently made telephone calls to the Custodian’s Counsel to determine whether all Borough employees were included on the record disclosed to the Complainant but the calls were not returned.

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.

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 further states that:

“ ... the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that *an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received shall be a government record...*” (Emphasis added) N.J.S.A. 47:1A-10.

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

In the instant complaint, it is undisputed that the Complainant provided the Custodian with her OPRA request on November 5, 2009. The evidence of record reveals the Custodian responded in writing to the Complainant’s request on November 12, 2009, which was the fourth (4th) business day following receipt of the request. In the response, the Custodian informed the Complainant that the Complainant did not specify a particular public record and for that reason the Custodian would need a thirty (30) day extension of time to investigate which record or records might be responsive to the Complainant’s request. Contrary to what the Custodian asserted in the response to the Complainant’s OPRA request, in the SOI the Custodian certified that the Complainant made a very specific request. The Custodian went on to certify that the Borough does not maintain *a record* which contains the very specific information that the Complainant requested, and it was for this reason that the Custodian certified the Borough had to investigate the most efficient and reasonable method to satisfy the Complainant’s request and required thirty (30) days to do so.

However, it was unnecessary for the Custodian to generate a record containing the specific information which the Complainant requested when the Custodian could have disclosed *any* record that contained the requested information. In Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2008), the Council determined that if information must be disclosed under OPRA, but there is no record

which contains such information exclusively, then the custodian could look to a more comprehensive record and tailor it by redaction to fulfill the complainant's request. In Morgano, the Council found that when "...specific...information must be disclosed, the Custodian is under no duty to extract and synthesize such information from government records in order to comply with the provisions of OPRA." Rather, the Council directed the custodian to retrieve the most comprehensive record containing the information that was subject to disclosure, and to redact such record so that only the information required to be disclosed was revealed. The same procedure that the Council directed the custodian to follow in Morgano could have been followed by the Custodian in the instant complaint.

In fact, the Complainant's OPRA request made it clear that her request could be fulfilled by providing *any record or set of records* which contained the information she requested. The Complainant requested for each Borough employee employed as of September 30, 2009 (a) the name of the employee, (b) the department within which the employee worked and (c) the total remuneration as reported to the Internal Revenue Service for the most recent reporting period. The Custodian determined that the following records were responsive to the Complainant's OPRA request: (1) a Borough of Lawnside Employee List as of September 30, 2009, and (2) annual salaries for the 2008 tax year. Based on the manner in which the Complainant framed her request, there was no reason for the Custodian to understand the request as being for a single record containing both of these items. The Complainant's request could have been satisfied if the Custodian disclosed to the Complainant a copy of the Borough of Lawnside Employee List and a copy of the salaries for the 2008 tax year.

Further, OPRA indicates that such records may be found in an employee's personnel and/or pension records because OPRA provides that "the personnel or pension records... shall not be considered a government record...except that *an individual's name*, title, *position*, *salary*...shall be a government record..." (Emphasis added) N.J.S.A. 47:1A-10. Clearly then, a likely place to look for an employee's name, position and salary is in the employee's personnel file or pension records. Furthermore, employment contracts and collective negotiation agreements also typically contain salary information. There is no evidence in the record, however, to indicate that the Custodian attempted to satisfy the Complainant's request by locating records existing within the Borough offices.

OPRA provides that immediate access must be granted to employee salary and overtime information. As such, the Custodian had a duty to immediately disclose the records responsive to the request that encompassed the annual salaries for the 2008 tax year, and the Custodian knew or should have known that those records existed within the Borough offices.

Therefore, because the Custodian failed to immediately disclose the employees' annual salaries for the 2008 tax year to the Complainant, the Custodian violated N.J.S.A. 47:1A-5.e.

Other than the records which must be made immediately available, OPRA mandates that a custodian shall either grant or deny access to requested records within

seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. Here, the Custodian determined that the Borough of Lawnside Employee List was also a record responsive to the request but she failed to disclose said list to the Complainant within the statutorily mandated seven (7) business days.

Accordingly, because the Custodian failed to grant or deny access to the Borough of Lawnside Employee List within seven (7) business days of receiving the request, the Custodian violated N.J.S.A. 47:1A-5.i.

Although the Custodian certified that on January 21, 2010, she provided the Complainant with the information that the Complainant requested, the Complainant's Counsel contends that part-time Borough employees and professionals may not have been included on the record that the Custodian disclosed to the Complainant.

Accordingly, the Custodian shall disclose to the Complainant the records relevant to the complaint for all part-time Borough employees and professionals that were employed by the Borough on September 30, 2009, if any, or shall certify that the record that was disclosed to the Complainant on January 21, 2010 was a complete and accurate record for all employees employed by the Borough on September 30, 2009.

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

OPRA provides that:

“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 ...” N.J.S.A. 47:1A-5.c.

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.

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;¹⁰ 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?
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?

¹⁰ 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.

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 instant case, the Complainant sought any record or records which "sets forth the following information for each Borough of Lawnside employee employed as of September 30, 2009: name of employee, department within which the employee works, total remuneration as reported to the Internal Revenue Service for the most recent reporting period." The evidence of record indicates that the Custodian initially requested that CASA Payroll Services produce a record responsive to the Complainant's request; however, after CASA Payroll Services' produced the responsive record, the Custodian discovered that existing Borough records were also responsive to the Complainant's request; to wit, a Borough of Lawnside Employee List and annual salaries for the 2008 tax year.

The evidence of record reveals that on November 18, 2009, the Custodian charged the Complainant a special service charge of \$35.00 for the record that was being prepared by CASA Payroll Service at the behest of the Borough, and on December 9, 2009, the Complainant paid the special service charge.

Accordingly, because it was unnecessary for the Custodian to have CASA Payroll Service generate a single record which contained the information requested by the Complainant, given that the Complainant had stated in her OPRA request that any record or set of records would satisfy her request, and because the Custodian did identify existing records that were responsive to the Complainant's request, the \$35.00 special service charge assessed by the Custodian is unwarranted and therefore unreasonable under OPRA.

Whether the Custodian's delay in, and/or denial of, 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 delayed or denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to immediately disclose the employees' annual salaries for the 2008 tax year to the Complainant, the Custodian violated N.J.S.A. 47:1A-5.e.
2. Because the Custodian failed to grant or deny access to the Borough of Lawnside Employee List within seven (7) business days of receiving the request, the Custodian violated N.J.S.A. 47:1A-5.i.
3. The Custodian shall disclose to the Complainant the records relevant to the complaint for all part-time Borough employees and professionals that were employed by the Borough on September 30, 2009, if any, or shall certify that the record that was disclosed to the Complainant on January 21, 2010 was a complete and accurate record for all employees employed by the Borough on September 30, 2009.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order by either (a) disclosing said records to the Complainant and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹¹, to the Executive Director,¹² or (b) providing a certification, in accordance with N.J. Court Rule 1:4-4, to the Executive Director averring that the record that was disclosed to the Complainant on January 21, 2010 was a complete and accurate record for all employees employed by the Borough on September 30, 2009.**

¹¹ "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."

¹² 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.

5. Because it was unnecessary for the Custodian to have CASA Payroll Service generate a single record which contained the information requested by the Complainant, given that the Complainant had stated in her OPRA request that any record or set of records would satisfy her request, and because the Custodian did identify existing records that were responsive to the Complainant's request, the \$35.00 special service charge assessed by the Custodian is unwarranted and therefore unreasonable under OPRA.
6. **Because the Council hereby finds that the \$35.00 special service charge assessed by the Custodian is unwarranted and therefore unreasonable under OPRA, the Custodian shall within five (5) business days from receipt of the Council's Interim Order, refund to the Complainant said special service charge and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
7. 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.
8. 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: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

October 18, 2011