



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

Jesse Wolosky
Complainant

Complaint No. 2010-160

v.

Township of Montville (Morris)
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 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 his legal counsel dated November 5, 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 20, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-160

v.

**Township of Montville (Morris)²
Custodian of Records**

Records Relevant to Complaint: Copies of the following:

1. An audio recording of the most recent public meeting of the governing body that was recorded, preferably in WAV format.
2. Approved minutes of each and every closed executive session held by the governing body during January, February, March and April 2010.
3. Current Open Public Records Act (“OPRA”) request form.³

Request Made: June 29, 2010

Response Made: July 7, 2010

Custodian: Gertrude H. Atkinson

GRC Complaint Filed: July 20, 2010⁴

Background

November 29, 2011

Government Records Council’s (“Council”) Interim Order. At its November 29, 2011 public meeting, the Council considered the November 22, 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. Initially the Custodian failed to properly redact the requested records provided to the Complainant because the method used was not “a visually obvious method that shows ... the specific location of any redacted material in the record” and is thus not appropriate under OPRA. However, the Custodian did provide properly redacted records to the Complainant within two (2) business days as requested by the GRC, and the Custodian timely provided certified confirmation of compliance

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

² Represented by Robert H. Oostdyk, Jr. Esq., of Johnson, Murphy, Hubner, McKeon, Wubbenhorst, Bucco and Appelt (Riverdale, NJ).

³ The Complainant requested additional records which are not relevant to the adjudication of this complaint.

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

- to the GRC. Therefore, the Custodian did eventually properly redact the requested executive session minutes from January 2010 to April 2010.
2. The Custodian made the record responsive to request Item No. 1 available to the Complainant at the actual cost of \$1.79. The Custodian provided the approved executive session minutes with redactions and stated a specific lawful basis for each redaction for the records responsive to request Item No. 2, *i.e.*, the Custodian certified that the executive session meeting minutes from January 12, 2010 were redacted because there were matters related to ongoing litigation, potential litigation, acquisition of real property, and contract negotiations, certified that the executive session meeting minutes from January 26, 2010 were redacted to reflect matters related to contract negotiations, collective bargaining agreements, acquisition of real property, and ongoing litigation, and further certified that the executive session meeting minutes from February 9, 2010 were redacted to reflect matters related the acquisition of real property, ongoing litigation, attorney-client privilege, and collective bargaining; the Custodian argued that all these matters are permitted to be redacted pursuant to N.J.S.A. 10:4-12. However, the Custodian initially improperly redacted the requested executive session minutes. Therefore, the Custodian did not fully comply with the Council's June 28, 2011 Interim Order within the time period required.
 3. The Custodian did not fully comply with the Council's June 28, 2011 Interim Order within the required time period by failing to properly redact the records responsive to request Item No. 2, executive session minutes from January 2010 through April 2010. However, the Custodian made available to the Complainant the audio recording responsive to request Item No. 1 at the actual cost of \$1.79 and eventually provided the Complainant with said executive session minutes responsive to request Item No. 2 with appropriate redactions. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Thus, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
 4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has 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 made the record responsive to request Item No. 1 available to the Complainant at the actual cost of \$1.79 and provided the Complainant copies of the requested executive session minutes, with appropriate redactions, pursuant to the Council's June 28, 2011 Interim Order. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because the Custodian unlawfully charged the Complainant \$10.00 for the record responsive to request Item No. 1 and unlawfully denied access to the records responsive to request Item No. 2, approved executive session minutes from January 2010 through April 2010.

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 a 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, adjudicated concurrently herewith, 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.

November 30, 2011

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

March 9, 2012

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

November 5, 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 his legal counsel dated November 5, 2012. Therefore, no further adjudication is required.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2012⁵

⁵ This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to a lack of a quorum.
Jesse Wolosky v. Township of Montville (Morris), 2010-160 – Supplemental Findings and Recommendations of the Executive Director 3



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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

November 29, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-160

v.

Township of Montville (Morris)
Custodian of Record

At the November 29, 2011 public meeting, the Government Records Council (“Council”) considered the November 22, 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. Initially the Custodian failed to properly redact the requested records provided to the Complainant because the method used was not “a visually obvious method that shows ... the specific location of any redacted material in the record” and is thus not appropriate under OPRA. However, the Custodian did provide properly redacted records to the Complainant within two (2) business days as requested by the GRC, and the Custodian timely provided certified confirmation of compliance to the GRC. Therefore, the Custodian did eventually properly redact the requested executive session minutes from January 2010 to April 2010.
2. The Custodian made the record responsive to request Item No. 1 available to the Complainant at the actual cost of \$1.79. The Custodian provided the approved executive session minutes with redactions and stated a specific lawful basis for each redaction for the records responsive to request Item No. 2, *i.e.*, the Custodian certified that the executive session meeting minutes from January 12, 2010 were redacted because there were matters related to ongoing litigation, potential litigation, acquisition of real property, and contract negotiations, certified that the executive session meeting minutes from January 26, 2010 were redacted to reflect matters related to contract negotiations, collective bargaining agreements, acquisition of real property, and ongoing litigation, and further certified that the executive session meeting minutes from February 9, 2010 were redacted to reflect matters related the acquisition of real property, ongoing litigation, attorney-client privilege, and collective bargaining; the Custodian argued that all these matters are permitted to be redacted pursuant to N.J.S.A. 10:4-12. However, the Custodian initially improperly redacted the requested executive session minutes. Therefore, the Custodian did not fully comply with the Council’s June 28, 2011 Interim Order within the time period required.



3. The Custodian did not fully comply with the Council's June 28, 2011 Interim Order within the required time period by failing to properly redact the records responsive to request Item No. 2, executive session minutes from January 2010 through April 2010. However, the Custodian made available to the Complainant the audio recording responsive to request Item No. 1 at the actual cost of \$1.79 and eventually provided the Complainant with said executive session minutes responsive to request Item No. 2 with appropriate redactions. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Thus, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has 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 made the record responsive to request Item No. 1 available to the Complainant at the actual cost of \$1.79 and provided the Complainant copies of the requested executive session minutes, with appropriate redactions, pursuant to the Council's June 28, 2011 Interim Order. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because the Custodian unlawfully charged the Complainant \$10.00 for the record responsive to request Item No. 1 and unlawfully denied access to the records responsive to request Item No. 2, approved executive session minutes from January 2010 through April 2010. 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 a 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, adjudicated concurrently herewith, 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 29th Day of November, 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: November 30, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 29, 2011 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-160

v.

**Township of Montville (Morris)²
Custodian of Records**

Records Relevant to Complaint: Copies of the following:

1. An audio recording of the most recent public meeting of the governing body that was recorded, preferably in WAV format.
2. Approved minutes of each and every closed executive session held by the governing body during January, February, March and April 2010.
3. Current Open Public Records Act (“OPRA”) request form.³

Request Made: June 29, 2010

Response Made: July 7, 2010

Custodian: Gertrude H. Atkinson

GRC Complaint Filed: July 20, 2010⁴

Background

June 28, 2011

Government Records Council’s (“Council”) Interim Order. At its June 28, 2011 public meeting, the Council considered the June 21, 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. Pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J.Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962) and Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the “actual cost” of duplicating the requested records. As such, the Custodian’s charge of \$10.00 for an audio recording in CD format is unreasonable and in

¹ Represented by Jonathan E. McMeen, Esq., of Law Office of Jonathan E. McMeen, Esq. (Sparta, NJ).

² Represented by Robert H. Oostdyk, Jr. Esq., of Johnson, Murphy, Hubner, McKeon, Wubbenhorst, Bucco and Appelt (Riverdale, NJ).

³ The Complainant requested additional records which are not relevant to the adjudication of this complaint.

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

violation of N.J.S.A. 47:1A-5.b. The Custodian must charge the Complainant the actual charge of \$1.79 to duplicate the record responsive to request Item No. 1.

2. Because the Township Committee approved the January 12, 2010, January 26, 2010 and February 9, 2010 executive session minutes, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable with appropriate redactions for discussions exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the records responsive to request Item No. 2 pursuant to N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant with appropriate redactions and the lawful basis for such redactions, if any.
3. **The Custodian shall comply with items No. 1 and 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 1:4-4⁵, to the Executive Director.⁶**
4. Because N.J.S.A. 47:1A-5.f. requires that specific elements be contained in an official OPRA request including the right of requestors to challenge a denial of access to Superior Court or to the GRC, the Township's OPRA request form at the time of the Complainant's Denial of Access Complaint was deficient. However, the GRC declines to order the Custodian to amend the Township's OPRA request form because the Custodian certified that the Township has been using the GRC's model request form since August 23, 2010.
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.

⁵ "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."

⁶ 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 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.

June 29, 2011

Council's Interim Order distributed to the parties.

July 5, 2011

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that a copy of the record responsive to request Item No. 1 is available for pickup for a cost of \$1.79. The Custodian also states that she has attached two (2) copies of the executive session minutes for the January 12, 2010, January 26, 2010 and February 9, 2010 meetings. The Custodian further states that she redacted the subject matter from the first set of the executive session minutes because there was still a need for confidentiality as of the date of the Complainant's OPRA request. Lastly, the Custodian states that she redacted the subject matter from the second set of the executive session minutes because there was still a need for confidentiality as of July 5, 2011.

July 5, 2011

Custodian's response to the Council's Interim Order.⁷ The Custodian certifies that an e-mail was sent to the Complainant on July 5, 2011 with copies to all parties involved stating that the record responsive to request Item No. 1, an audio recording of the most recent public meeting at the time of the OPRA request, is available for pick up for a cost of \$1.79. The Custodian also certifies that two (2) sets of the records responsive to request Item No. 2, executive session minutes from January through April 2010, were sent to the Complainant. The Custodian further certifies that she redacted the subject matter of the first set of executive session minutes because there was still a need for confidentiality at the date of the OPRA request and further certifies that she redacted the subject matter from the second set of executive session minutes because there is still a need for confidentiality as of the current date.

The Custodian certifies that the executive session meeting minutes from January 12, 2010 were redacted because there were matters related to ongoing litigation, potential litigation, acquisition of real property, and contract negotiations. The Custodian also certifies that the executive session meeting minutes from January 26, 2010 were redacted to reflect matters related to contract negotiations, collective bargaining agreements, acquisition of real property, and ongoing litigation. The Custodian further certifies that the executive session meeting minutes from February 9, 2010 were redacted to reflect matters related the acquisition of real property, ongoing litigation, attorney-client privilege, and collective bargaining. The Custodian argues that all these matters are permitted to be redacted pursuant to N.J.S.A. 10:4-12.

July 14, 2011

E-mail from the Complainant to the GRC. The Complainant states that the Custodian did not comply with the Council's Interim Order. The Complainant also states that the Custodian improperly redacted the executive session minutes from January 2010 through April 2010. The Complainant further states that the Custodian should have manually "blacked out" the subject matter that should have been redacted. The

⁷ The Custodian encloses copies of the executive session minutes from the January 12, 2010, January 26, 2010 and February 9, 2010 council meetings.

Complainant states that he would like to see how many lines or paragraphs were in the actual minutes.

September 16, 2011

E-mail from the GRC to the Custodian. The GRC states that the executive session minutes provided to the Complainant do not comply with the recommended method of redactions set forth in the Custodian's Handbook. The GRC also states that pursuant to the Custodian's Handbook, all redactions "must be accomplished by using a visually obvious method that shows the requestor the specific location of any redacted material to the record." (page 17). The GRC further states that redactions can be completed in one (1) of two (2) ways:

1. Make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requestor.
2. If an electronic document is subject to redaction, custodians should be sure to delete the redacted material and insert in place of the redacted material asterisks to obviously indicate the redactions. Techniques such as "hiding" text or changing its color so it is invisible should not be used as sophisticated users can detect the changes and potentially undo the "hiding" functions. (page 17-18)

The GRC requests the Custodian to review the Custodian's Handbook and to make all redactions to the requested records at issue from the date of the Complainant's OPRA request consistent with the recommended method of redaction set forth in the Custodian's Handbook. The GRC also requests the Custodian to resubmit such redacted records to the Complainant within three (3) business days of receipt of the GRC's e-mail. Lastly, the GRC requests the Custodian to provide certified confirmation of compliance to the GRC within three (3) business days.

September 20, 2011

E-mail from the Custodian to the Complainant. The Custodian attaches the requested executive session minutes from January 12, 2010, January 26, 2010 and February 9, 2010 with redactions as recommended pursuant to the Custodian's Handbook.

The Custodian certifies that the executive session meeting minutes from January 12, 2010 were redacted because there were matters related to ongoing litigation, potential litigation, acquisition of real property, and contract negotiations. The Custodian also certifies that the executive session meeting minutes from January 26, 2010 were redacted to reflect matters related to contract negotiations, collective bargaining agreements, acquisition of real property, and ongoing litigation. The Custodian further certifies that the executive session meeting minutes from February 9, 2010 were redacted to reflect matters related the acquisition of real property, ongoing litigation, attorney-client privilege, and collective bargaining. The Custodian argues that all these matters are permitted to be redacted pursuant to N.J.S.A. 10:4-12.

September 20, 2011

E-mail from the Custodian to the GRC. The Custodian attaches the requested certification of compliance. The Custodian also certifies that two (2) sets of the records responsive to request Item No. 2, executive session minutes from January through April 2010, were sent to the Complainant. The Custodian further certifies that she redacted the subject matter of the first set of executive session minutes because there was still a need for confidentiality at the date of the OPRA request, and additionally certifies that she redacted the subject matter from the second set of executive session minutes because there is still a need for confidentiality as of the date of the Interim Order.

September 23, 2011

E-mail from the Complainant to the GRC. The Complainant argues that the Custodian's revised submission of the records responsive to request Item No. 2 do not comply with the GRC's recommended method of redactions. The Complainant also argues that the Custodian revised the existing minutes rather than providing genuinely redacted copies. The Complainant requests that the GRC refuse to accept the Custodian's submission.

Analysis

Whether the Custodian properly redacted the executive session minutes from January 2010 through April 2010?

OPRA states that:

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

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

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

Make a paper copy of the original record and manually ‘black out’ the information on the copy with a dark colored marker. Then provide a copy of the blacked-out record to the requestor.’ (Emphasis added.) [Handbook for Records Custodians] at page 14.⁸

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

The Handbook for Records Custodians states:

“If an electronic document is subject to redaction custodians should be sure to *delete the material being redacted and insert in place of the redacted material asterisks to obviously indicate the redaction.* Techniques such as hiding text or changing its color so it is invisible should not be used as sophisticated users can detect the changes and potentially undo the hiding functions.” (emphasis added) at page 17-18.

In the instant complaint, the Custodian initially used a method of redaction in which the Custodian electronically deleted the subject matter of the topics discussed and inserted the words “SUBJECT MATTER REDACTED.” The Custodian also indicated a lawful basis for each redaction, *i.e.*, the Custodian certified that the executive session meeting minutes from January 12, 2010 were redacted because there were matters related to ongoing litigation, potential litigation, acquisition of real property, and contract negotiations, certified that the executive session meeting minutes from January 26, 2010 were redacted to reflect matters related to contract negotiations, collective bargaining agreements, acquisition of real property, and ongoing litigation, and further certified that the executive session meeting minutes from February 9, 2010 were redacted to reflect matters related the acquisition of real property, ongoing litigation, attorney-client privilege, and collective bargaining; the Custodian argued that all these matters are

⁸ The Handbook for Records Custodians has been updated since the adjudication of Wolosky v. Andover Regional School District (Sussex), GRC Complaint No. 2009-94 (April 2010). This information is now located on page 17.

permitted to be redacted pursuant to N.J.S.A. 10:4-12. However, the method of electronically deleting and inserting the words “SUBJECT MATTER REDACTED” does not show the Complainant the specific location of the redacted material or the volume of material redacted; thus, the specific location of the material underlying the redactions made was not visually obvious to the Complainant.

Although the Custodian initially incorrectly redacted the executive session minutes, the GRC afforded the Custodian an opportunity to provide properly redacted records consistent with the Custodian’s Handbook to the Complainant within three (3) business days. The Custodian provided the Complainant with copies of the executive session minutes with appropriate redactions and indicated a specific lawful basis for each denial within the time period specified by the GRC, deleting the subject matter of the topics and any discussions that occurred and inserted asterisks to indicate the volume of material redacted. The Complainant asserts that the Custodian revised the executive session minutes are revised and are improperly redacted. However, the Custodian’s corrected submission of executive session minutes that uses asterisks to hide redacted text does comply with the GRC’s recommended method of redactions because such redactions are visible, show the specific location of the redacted material and the volume of material redacted. Furthermore, the Custodian’s use of asterisks does not alter or revise said executive session minutes.

Initially the Custodian failed to properly redact the requested records provided to the Complainant because the method used was not “a visually obvious method that shows ... the specific location of any redacted material in the record” and is thus not appropriate under OPRA. However, the Custodian did provide properly redacted records to the Complainant within two (2) business days as requested by the GRC, and the Custodian timely provided certified confirmation of compliance to the GRC. Therefore, the Custodian did eventually properly redact the requested executive session minutes from January 2010 to April 2010.

Whether the Custodian complied with the Council’s June 28, 2011 Interim Order?

The Council’s June 28, 2011 Interim Order required the Custodian: 1) to charge the Complainant the “actual cost” of \$1.79 to duplicate the records responsive to request Item No. 1; 2) to disclose the records responsive to request Item No. 2, approved executive session minutes from January through April 2010 with appropriate redactions, if necessary; 3) to provide certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of the Council’s Interim Order. The Council issued its Interim Order on June 29, 2011.

The Custodian made the record responsive to request Item No. 1 available to the Complainant at the actual cost of \$1.79. The Custodian provided the approved executive session minutes with redactions and stated a specific lawful basis for each redaction for the records responsive to request Item No. 2. The Custodian certified that the executive session meeting minutes from January 12, 2010 were redacted because there were matters related to ongoing litigation, potential litigation, acquisition of real property, and contract negotiations. The Custodian also certified that the executive session meeting minutes from January 26, 2010 were redacted to reflect matters related to contract negotiations,

collective bargaining agreements, acquisition of real property, and ongoing litigation. The Custodian further certified that the executive session meeting minutes from February 9, 2010 were redacted to reflect matters related the acquisition of real property, ongoing litigation, attorney-client privilege, and collective bargaining. The Custodian argued that all these matters are permitted to be redacted pursuant to N.J.S.A. 10:4-12.

However, the Custodian initially improperly redacted the requested executive session minutes. Therefore, the Custodian did not fully comply with the Council's June 28, 2011 Interim Order within the time period required.

Whether the Custodian's delay in access to the requested records and improper redactions to the records responsive to request Item No. 2 rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

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

In the instant complaint, the Custodian unlawfully charged the Complainant \$10.00 for the record responsive to request Item No. 1 and denied the Complainant's

request for records responsive to request Item No. 2, approved executive session minutes from January through April 2010, because said executive session minutes were not approved for release. After the Council's June 28, 2011 Interim Order, the Council ordered the Custodian to charge the Complainant the "actual cost" of \$1.79 for the record responsive to request Item No. 1 and to release the records responsive to request Item No. 2 with appropriate redactions within five (5) business days from receipt of the Interim Order. The Custodian made available to the Complainant the audio recording responsive to request Item No. 1 at the actual cost. Although the Custodian initially failed to provide the Complainant the executive session minutes responsive to request Item No. 2 with appropriate redactions, the Custodian eventually provided the Complainant with said executive session minutes with appropriate redactions on September 20, 2011.

Therefore, the Custodian did not fully comply with the Council's June 28, 2011 Interim Order within the required time period by failing to properly redact the records responsive to request Item No. 2, executive session minutes from January 2010 through April 2010. However, the Custodian made available to the Complainant the audio recording responsive to request Item No. 1 at the actual cost of \$1.79 and eventually provided the Complainant with said executive session minutes responsive to request Item No. 2 with appropriate redactions. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Thus, 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.⁹ 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 July 20, 2010 alleging that the Custodian unlawfully denied the Complainant's OPRA request for the audio recording responsive to request Item No. 1 by charging the Complainant \$10.00 for the CD and further unlawfully denied access to the approved executive session minutes responsive to request Item No. 2. After the filing of the Denial of Access Complaint, the Council ordered the Custodian to charge the Complainant the actual charge of \$1.79 for the audio recording responsive to request Item No. 1 and to release the approved executive session minutes responsive to request Item No. 2 with appropriate redactions within five (5) business days from receipt of the Interim Order.

⁹ 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.

As previously stated, the Custodian did not fully comply with the Council's Interim Order within the required time period to do so because she initially provided said executive session minutes with improper redactions. However, the Custodian provided the Complainant with said executive session minutes with appropriate redactions on September 20, 2011.

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 made the record responsive to request Item No. 1 available to the Complainant at the actual cost of \$1.79 and provided the Complainant copies of the requested executive session minutes, with appropriate redactions, pursuant to the Council's June 28, 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 charged the Complainant \$10.00 for the record responsive to request Item No. 1 and unlawfully denied access to the records responsive to request Item No. 2, approved executive session minutes from January 2010 through April 2010. 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 a 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, adjudicated concurrently herewith, 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. Initially the Custodian failed to properly redact the requested records provided to the Complainant because the method used was not "a visually obvious method that shows ... the specific location of any redacted material in the record" and is thus not appropriate under OPRA. However, the Custodian did provide properly redacted records to the Complainant within two (2) business days as requested by the GRC, and the Custodian timely provided certified confirmation of compliance to the GRC. Therefore, the Custodian did eventually properly redact the requested executive session minutes from January 2010 to April 2010.
2. The Custodian made the record responsive to request Item No. 1 available to the Complainant at the actual cost of \$1.79. The Custodian provided the approved executive session minutes with redactions and stated a specific lawful basis for each redaction for the records responsive to request Item No. 2, *i.e.*, the Custodian

certified that the executive session meeting minutes from January 12, 2010 were redacted because there were matters related to ongoing litigation, potential litigation, acquisition of real property, and contract negotiations, certified that the executive session meeting minutes from January 26, 2010 were redacted to reflect matters related to contract negotiations, collective bargaining agreements, acquisition of real property, and ongoing litigation, and further certified that the executive session meeting minutes from February 9, 2010 were redacted to reflect matters related the acquisition of real property, ongoing litigation, attorney-client privilege, and collective bargaining; the Custodian argued that all these matters are permitted to be redacted pursuant to N.J.S.A. 10:4-12. However, the Custodian initially improperly redacted the requested executive session minutes. Therefore, the Custodian did not fully comply with the Council's June 28, 2011 Interim Order within the time period required.

3. The Custodian did not fully comply with the Council's June 28, 2011 Interim Order within the required time period by failing to properly redact the records responsive to request Item No. 2, executive session minutes from January 2010 through April 2010. However, the Custodian made available to the Complainant the audio recording responsive to request Item No. 1 at the actual cost of \$1.79 and eventually provided the Complainant with said executive session minutes responsive to request Item No. 2 with appropriate redactions. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Thus, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has 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 made the record responsive to request Item No. 1 available to the Complainant at the actual cost of \$1.79 and provided the Complainant copies of the requested executive session minutes, with appropriate redactions, pursuant to the Council's June 28, 2011 Interim Order. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because the Custodian unlawfully charged the Complainant \$10.00 for the record responsive to request Item No. 1 and unlawfully denied access to the records responsive to request Item No. 2, approved executive session minutes from January 2010 through April 2010. 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 a 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, adjudicated concurrently herewith, 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 22, 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

June 28, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-160

v.

Township of Montville (Morris)
Custodian of Record

At the June 28, 2011 public meeting, the Government Records Council (“Council”) considered the June 21, 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. Pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J.Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962) and Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the “actual cost” of duplicating the requested records. As such, the Custodian’s charge of \$10.00 for an audio recording in CD format is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must charge the Complainant the actual charge of \$1.79 to duplicate the record responsive to request Item No. 1.
2. Because the Township Committee approved the January 12, 2010, January 26, 2010 and February 9, 2010 executive session minutes, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant’s request and were therefore disclosable with appropriate redactions for discussions exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the records responsive to request Item No. 2 pursuant to N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant with appropriate redactions and the lawful basis for such redactions, if any.
3. **The Custodian shall comply with items No. 1 and 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 1:4-4¹, to the Executive Director.²

4. Because N.J.S.A. 47:1A-5.f. requires that specific elements be contained in an official OPRA request including the a right for requestors to challenge a denial of access to Superior Court or to the GRC, the Township's OPRA request form at the time of the Complainant's Denial of Access Complaint was deficient. However, the GRC declines to order the Custodian to amend the Township's OPRA request form because the Custodian certified that the Township has been using the GRC's model request form since August 23, 2010.
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 28th Day of June, 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: June 29, 2011

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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 28, 2011 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-160

v.

**Township of Montville (Morris)²
Custodian of Records**

Records Relevant to Complaint: Copies of the following:

1. An audio recording of the most recent public meeting of the governing body that was recorded, preferably in WAV format.
2. Approved minutes of each and every closed executive session held by the governing body during January, February, March and April 2010.
3. Current Open Public Records Act (“OPRA”) request form.³

Request Made: June 29, 2010

Response Made: July 7, 2010

Custodian: Gertrude H. Atkinson

GRC Complaint Filed: July 20, 2010⁴

Background

June 29, 2010

Complainant’s OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant requests that Custodian advise him in which medium records responsive to request Item No. 1 will be recorded and the cost for those records. Furthermore, the Complainant states that he wants records responsive to Item No. 2 and Item No. 3 to be provided in electronic format.

July 7, 2010

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that the cost for records responsive to Item No. 1 is \$10.00 and the recording will be in a compact disc (CD) format. The Custodian also states that in response to request Item. No. 2, no executive session minutes for 2010 have been

¹ Represented by Jonathan E. McMeen, Esq. of Law Office of Jonathan E. McMeen, Esq. (Sparta, NJ).

² Represented by Robert H. Oostdyk, Jr. Esq. of Johnson, Murphy, Hubner, McKeon, Wubbenhorst, Bucco and Appelt (Riverdale, NJ).

³ The Complainant requested additional records which are not relevant to the adjudication of this complaint.

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

approved for release as of July 7, 2010. The Custodian also attaches a copy of the Township's OPRA request form.

July 12, 2010

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian not to make a copy of the records responsive to request Item No. 1 until the Complainant decides to purchase such records. In addition, regarding request Item No. 2, the Complainant inquires when the last closed session minutes of the governing body were approved.

July 15, 2010

E-mail from the Custodian to the Complainant. In response to request Item No. 2, the Custodian states that the last closed session minutes approved were the meeting minutes from February 9, 2010.

July 20, 2010

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

- Complainant's OPRA request dated June 29, 2010
- Custodian's response to the OPRA request dated July 7, 2010
- E-mail from the Complainant to the Custodian dated July 12, 2010
- E-mail from the Custodian to the Complainant dated July 15, 2010

The Complainant states that he faxed the Custodian his OPRA request on June 29, 2010. The Complainant also states that the records in dispute are 1) minutes of each and every closed or executive session held by the governing body during January, February, March and April 2010 that have been approved; and 2) the audio recording of the last regular public meeting of the governing body.

The Complainant states that the Custodian responded to his OPRA request on July 7, 2010 stating that the cost for records responsive to Item No. 1 is \$10.00 and the records responsive to request Item No. 2 have not yet been approved for release. The Complainant also states that he responded to the Custodian's e-mail dated July 7, 2010 on July 12, 2010, inquiring when the last closed session minutes of the governing body were approved. The Complainant further states that the Custodian responded stating that the last closed session minutes approved were the February 9, 2010 meeting minutes.

The Complainant argues that the Custodian's charge of \$10.00 for records responsive to request Item No. 1 violates OPRA because the charge is most likely in excess of the actual cost of duplicating records. The Complainant argues that pursuant to N.J.S.A. 47:1A-5.d., "[t]he actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy..." The Complainant also argues that the GRC has invalidated charges that were above the actual cost of duplicating records in numerous complaints.

The Complainant also argues that the records responsive to Item No. 2 are public records pursuant to OPRA. The Complainant further argues that executive session minutes that have not been approved are exempt from OPRA pursuant to the advisory, consultative or deliberative (ACD) privilege. The Complainant asserts, however, that once these minutes are approved, they are no longer considered ACD. The Complainant states that the only records responsive to request Item No. 2 are minutes from February 9, 2010 that were approved. The Complainant argues that because these executive session minutes have been approved and are not being released, the Custodian is creating an additional barrier to access. The Complainant argues that the Custodian cannot create additional barriers to access pursuant to Dittrich v. City of Hoboken, GRC Complaint 2006-145 (May 2007). The Complainant argues that the Custodian is denying access to records responsive because they have not yet been approved for *release* (emphasis added). Therefore, the Complainant argues that the Custodian is creating an additional barrier to access to matters in the public record. The Complainant states that the Township has turned itself into a mini-court that has jurisdiction to review and grant or deny OPRA requests. The Complainant states that no public agency has the power to do this.

The Complainant does not agree to mediate this complaint.

July 23, 2010

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

July 29, 2010

Custodian’s SOI with the following attachments:⁵

- Complainant’s OPRA request dated June 29, 2010
- Custodian’s response to the OPRA request dated July 7, 2010
- E-mail from the Complainant to the Custodian dated July 12, 2010
- E-mail from the Custodian to the Complainant dated July 15, 2010

The Custodian certifies that the Complainant sought the “minutes of each and every closed or executive session held by the governing body during January, February, March and April 2010 that have been approved.” The Custodian certifies that she timely responded to the Complainant’s OPRA request stating that there had been no approved executive session minutes approved during the time period requested.

The Custodian argues that there is some confusion surrounding the term “approved.” The Custodian argues that the Complainant used the word approved to mean executive session minutes that the governing body has reviewed and voted to accept at a Council meeting. The Custodian argues that the term “approved” means the executive session minutes are approved for release and are no longer confidential. The Custodian

⁵ The Custodian does not address the request for Item No. 1 in her SOI. Furthermore, the Custodian does not certify as to the search undertaken to locate the responsive records. Moreover, the Custodian does not certify as to when the records responsive to the Complainant’s OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by the New Jersey Department of State, Division of Archives and Records Management.

certifies that the Township Committee votes to accept the prepared closed session minutes once they have been prepared and presented to the Township Committee. The Custodian also certifies that the Township Committee also votes to approve the release of these closed session minutes once the need for confidentiality of the matters discussed therein has ended. The Custodian further certifies that the Township Committee has received and approved closed session minutes from the January 12, 2010, January 26, 2010 and February 9, 2010 meetings. The Custodian certifies that these minutes have not yet been approved for release because the Township Committee believes that these minutes concern matters that are confidential from which the public must be excluded pursuant to N.J.S.A. 10:4-12.

The Custodian certifies that when an OPRA request is made for minutes which have not been approved for release, she asks the Township Committee to review those requested records to see if they can be disclosed. The Custodian also certifies that the records responsive to the Complainant's OPRA request for Item No. 2 were approved because the Committee accepted the minutes, but the Committee had not approved for their release.

August 18, 2010

Letter from the Complainant to the GRC. The Complainant amends his Denial of Access Complaint. The Complainant states that the Township of Montville's OPRA form is deficient in two (2) ways. The Complainant argues that if an agency's form contains false or misleading information about OPRA, it constitutes a denial of access. The Complainant also argues that the omission of information required by OPRA is a deemed denial of access. *See Wolosky v. Township of Vernon Board of Education*, GRC Complaint 2009-57 (December 2009). The Complainant argues that the Township's OPRA request form is deficient because 1) it fails to state that requestors have the right to challenge a denial of access in Superior Court or to the GRC and 2) it fails to provide an area where the Custodian can give a reason why a request was denied in whole or in part. The Complainant argues that the deficiencies in this request form constitute a denial of access. The Complainant also argues that the GRC should order the Township to revise its forms to be in accordance with the law.

The Complainant requests that the GRC: 1) accept this amendment to his Denial of Access Complaint; 2) find that the Township's OPRA form violates OPRA because it is false and misleading; 3) order the Township to adopt the GRC's model request form and 4) find the Complainant is the prevailing party and order an award of reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.⁶

March 22, 2011

E-mail from the GRC to the Custodian. The GRC states that it needs more information to properly adjudicate this Denial of Access Complaint. The GRC states that the Complainant states in his Denial of Access Complaint that the records responsive to request Item No. 1 on a CD would be \$10.00. The GRC informs the Custodian that this issue was not addressed in her SOI. The GRC requests the Custodian to provide a response to this issue and also to certify as to the actual cost of duplicating that record.

⁶ The Custodian did not respond to the Complainant's amended Denial of Access Complaint.
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March 23, 2011

E-mail from the Custodian to the GRC. The Custodian certifies that she responded to the Complainant's request for Item No. 1 stating that the cost would be \$10.00 for a readable CD. The Custodian also certifies that the Complainant informed her not to make a copy of the CD unless he decided to purchase it. The Custodian certifies that the fee of \$10.00 was quoted because that was the fee stipulated in the Township's fee ordinance in effect at the time of the request.⁷ The Custodian also certifies that she does not have an actual cost figure for duplicating the record because the Complainant decided not to purchase such record; therefore, it was never duplicated. The Custodian further certifies that the Township's fee ordinance has since been amended to reflect a fee of \$2.00 for an audio recording of a meeting on a readable CD.⁸ Lastly, the Custodian certifies that the fee includes the actual cost of \$1.79 for the CD, which is the cost of the CD from their vendor.

May 25, 2011

E-mail from the GRC to the Custodian. The GRC requests a legal certification from the Custodian as to whether the Township adopted the GRC model request form. The GRC also requests the Custodian to certify, if the Township did adopt the GRC's model request form, when the form was adopted.

May 26, 2011

E-mail from the Custodian to the GRC. The Custodian attaches the requested legal certification. The Custodian certifies that the Township has been using the GRC's model OPRA request form since August 23, 2010.

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*

⁷ The Custodian attaches a copy of the Township Ordinance 2009-32 which states "[t]here are hereby established the following fees to be administered by the Township Clerk...2. CD Recording of meeting (each CD)...\$10.00." Adopted November 24, 2009.

⁸ The Custodian attaches a copy of the Township Ordinance 2010-40 which states "Chapter 169, Section 169-2 entitled Clerk Fees shall be revised by amendment to the following subsections: (C) Copy Fees: (2) CD recording of meeting (each CD)...\$2.00." Adopted December 14, 2010.

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 also provides:

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

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

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

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

In the instant complaint, the Complainant argues that the Custodian’s charge of \$10.00 for a CD in response to request Item No. 1 is unlawful because it is not the actual cost pursuant to N.J.S.A. 47:1A-5.b. The Complainant also argues that the Custodian should disclose the records responsive to request Item No. 2, approved executive session minutes, with redactions. The Complainant further asserts that the Township’s OPRA request form is false and misleading.

Conversely, the Custodian argues that she charged the Complainant \$10.00 for the requested CD pursuant to the Township’s ordinance. The Custodian certified that the records responsive to request Item No. 2 have been approved as to content, but not approved to be released to the public.

The Council first turns to the issue of whether the Custodian violated OPRA by quoting the Complainant \$10.00 for a CD in response to request Item No. 1.

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

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

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

- First page to tenth page, \$0.75 per page;
- Eleventh page to twentieth page, \$0.50 per page;
- All pages over twenty, \$0.25 per page.⁹

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

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.

OPRA also states that:

“[a] custodian shall permit access to a government record and *provide a copy thereof in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium...” (Emphasis added.) N.J.S.A. 47:1A-5.d.

The Complainant contends that the Custodian’s charge of \$10.00 per CD of the Township’s most recent public meeting violates OPRA because said charge is in excess of the actual cost of duplicating the records. In a separate certification, the Custodian certifies that the Custodian quoted the Complainant \$10.00 for the CD because that was the fee stipulated in the Township’s fee ordinance in effect at the time of the request. The Custodian further certifies that this fee was amended on December 14, 2010 to reflect a fee of \$2.00 for an audio recording on a CD. The Custodian certifies that the \$2.00 fee includes the actual cost of \$1.79 for the CD.

⁹ These rates changed effective November 9, 2010. However, the rates set forth herein were in effect at the time of the Complainant’s OPRA request.

While OPRA provides that paper copies of government records may be obtained upon payment of the actual cost of duplication not to exceed the enumerated rates of \$0.75/0.50/0.25 per page (N.J.S.A. 47:1A-5.b.), the Act does not provide explicit copy rates for any other medium. N.J.S.A. 47:1A-5.b. goes on to state that the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy. However, OPRA does provide that whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter cannot be reproduced by ordinary document copying equipment in ordinary business size, 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 copies. N.J.S.A. 47:1A-5.c. Additionally, OPRA provides that when a request for a record in a medium not routinely used by an agency, not routinely developed or maintained by an agency, or requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the *actual cost of duplication*, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both. N.J.S.A. 47:1A-5.d.

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

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

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

The court also stated that "...although plaintiffs have obtained access to the actual records requested, the legal question remains viable, because it is clearly capable of repetition. See New Jersey Div. of Youth & Family Servs. v. J.B., 120 N.J. 112, 118-19, 576 A.2d 261 (1990)." Further, the court stated that "...the fee imposed by the Township of Jesse Wolosky v. Township of Montville (Morris), 2010-160 – Findings and Recommendations of the Executive Director

Edison creates an unreasonable burden upon plaintiff's right of access and is not rationally related to the actual cost of reproducing the records."

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

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

Moreover, the GRC has decided this issue previously in O'Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008). In that complaint, the custodian responded to the complainant's OPRA request for an audio recording of the Council's May 14, 2007 public and executive session in a timely manner stating that the cost for a meeting disc would be \$35.00. The custodian also requested that the complainant indicate whether he would like the custodian to prepare the record. Subsequently, the complainant filed a Denial of Access Complaint arguing that the proposed fee did not represent the "actual cost," and that copying fees prescribed in a Township ordinance, Chapter 250, Article II § 250.9(E), appear to violate OPRA.

In O'Shea, the custodian argued in the SOI that she did not deny access because she provided the complainant with the cost to produce the requested record and never received a response. The complainant's counsel advised the GRC on December 5, 2009 that the Township amended its ordinance to reflect copying of audio and video tapes and photographs to actual cost. Counsel argued that the amended ordinance amounted to the Township's admission that the prior charges violated OPRA.

Based on the evidence in that complaint, the Council was tasked with deciding on whether the custodian violated OPRA by charging the fee enumerated in the Township's ordinance rather than the actual cost of duplication of the requested record. The Council held that:

"... pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962) and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the actual cost of duplicating the requested records. As such, the Custodian's charge of \$35.00 for an audio recording of the requested meeting minutes is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must provide the requested records to the Complainant and charge the actual cost of the audiotape and shall not include

the cost of labor or other overhead expenses associated with making the copy.”

The facts of the matter currently before the Council are similar to the facts in O’Shea. Specifically, the Complainant herein requested an audio recording of meeting minutes. The Custodian responded in writing in a timely manner stating that duplication of the audio recording responsive would cost \$10.00 per CD. The Custodian later certified that this \$10.00 charge was pursuant to a Township ordinance. The Complainant subsequently filed a Denial of Access Complaint disputing the proposed charge and arguing that it is extremely unlikely that the Township’s proposed fee represents the actual cost of producing the requested CD.

Because the Custodian did not address this duplication cost issue in the SOI, the GRC requested that the Custodian provide a response on this issue and also certify as to the actual cost of duplicating the record. Pursuant to such request, the Custodian certified that at the time of the Complainant’s OPRA request, the fee of \$10.00 was stipulated per the Township’s ordinance. The Custodian also certified that the Township’s fee ordinance has since been amended to reflect a fee of \$2.00 for an audio recording of a meeting on a CD. The Custodian further certified that this ordinance was adopted on December 14, 2010. Lastly, the Custodian certified that the fee includes the actual cost of \$1.79 for the CD.

Therefore, pursuant to N.J.S.A. 47:1A-5.b., Spaulding, supra, Libertarian Party of Central New Jersey, supra, Moore, supra, and Dugan, supra, the Custodian must charge the “actual cost” of duplicating the requested records. As such, the Custodian’s charge of \$10.00 for an audio recording in CD format is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must charge the Complainant only the actual charge of \$1.79 to duplicate the record responsive to request Item No. 1.

The Council next addresses the issue of whether the Custodian unlawfully denied access to records responsive to request Item No. 2.

In the instant complaint, the Custodian certified in the SOI that access to records responsive to request Item No. 2 was denied because the executive session minutes from meetings dated January 12, 2010, January 26, 2010 and February 9, 2010 had been approved for content, but not for release to the public. However, the Custodian also certifies that these minutes have not been approved for release to the public because they contain confidential information.

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

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

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

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

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

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

In the instant complaint, the Custodian certified in the SOI that the requested executive session minutes had not been approved by the Township Committee for

disclosure to the public, although they had been approved by the governing body for content. Furthermore, the Custodian certified that the Custodian has made a practice of asking the Township Committee to review the executive session minutes for release in response to OPRA requests and informally when requested. The Custodian certified that these minutes responsive to the Complainant's OPRA request have been accepted by the Township Committee, but had not been approved for release. Therefore, the approved executive session minutes for meetings dated January 12, 2010, January 26, 2010 and February 9, 2010 no longer constitute draft documents.

In Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009), the custodian denied the complainant access to executive session minutes on the basis that the requested minutes were not approved for release to the public. The custodian argued that the sole issue was the complainant's misconception that the BOE's approval as to accuracy and content signified that the minutes were for release to the general public. The Council ultimately found that because the BOE had already approved the requested executive session minutes as to accuracy and content, said minutes no longer constituted ACD material pursuant to N.J.S.A. 47:1A-1.1., and were therefore disclosable pursuant to the provisions of OPRA.

Like the custodian in Wolosky, the Custodian in the instant complaint argued that although the requested executive session minutes were approved for content by the Township Committee, the Township Committee also votes to approve the executive session minutes for release once the need for confidentiality has ended.

However, the Council has previously found that once the governing body of an agency has approved meeting minutes as to accuracy and content (per the requirement of OPMA), said minutes are subject to disclosure under OPRA. Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Although properly approved executive session minutes are disclosable, custodians may redact from the minutes those discussions that require confidentiality because the matters discussed therein are unresolved or still pending pursuant to N.J.S.A. 47:1A-5.g.

Therefore, because the Township Committee approved the January 12, 2010, January 26, 2010 and February 9, 2010 executive session minutes, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable with appropriate redactions for discussions exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the records responsive to request Item No. 2 pursuant to N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant with appropriate redactions and the lawful basis for such redactions, if any.

The Council suggests that the Custodian consult the township attorney or some other designated person to determine the resolution of issues discussed in executive session minutes to identify those issues still requiring confidentiality and for which redactions are allowed.

The Council next addresses the issue of whether the Township's OPRA request form is valid under OPRA.

The Complainant argues that the Township's OPRA request form is invalid under OPRA because it fails to state that requestors have a right to challenge a denial of access to Superior Court or to the GRC. The Complainant also argues that the OPRA request form is deficient because it does not provide an area where the Custodian can give a reason why a request was denied in whole or part. The Custodian certified that the Township has been using the GRC's model request form since August 23, 2010.

OPRA provides that:

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

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

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

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

"...all requests for OPRA records must be in writing; that such requests shall utilize the forms provided by the custodian of records; however, no custodian shall withhold such records if the written request for such

records, not presented on the official form, contains the requisite information prescribed in N.J.S.A. 47:1A-5.f. Where the requestor fails to produce an equivalent writing that raises issues as to the nature or substance of the requested records, the custodian may require that the requestor complete the form generated by the custodian pursuant to N.J.S.A. 47:1A-5.g.”

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

OPRA requires that an agency’s request form contain all of the elements set forth in N.J.S.A. 47:1A-5.f. The evidence of record in the instant complaint shows that the Township’s official OPRA request lacks some of the elements required to be contained within an agency’s official OPRA request form; specifically, the OPRA request form does not contain a statement of the requestor’s right to challenge a decision by the public agency to deny access, the procedure for filing an appeal or a space for the custodian to list reasons if request is denied in whole or in part.

Therefore, because N.J.S.A. 47:1A-5.f requires that specific elements be contained in an official OPRA request including the a right for requestors to challenge a denial of access to Superior Court or to the GRC, the Township’s OPRA request form at the time of the Complainant’s Denial of Access Complaint was deficient. However, the GRC declines to order the Custodian to amend the Township’s OPRA request form because the Custodian certified that the Township has been using the GRC’s model request form since August 23, 2010.

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. Pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J.Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962) and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the "actual cost" of duplicating the requested records. As such, the Custodian's charge of \$10.00 for an audio recording in CD format is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must charge the Complainant the actual charge of \$1.79 to duplicate the record responsive to request Item No. 1.
2. Because the Township Committee approved the January 12, 2010, January 26, 2010 and February 9, 2010 executive session minutes, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable with appropriate redactions for discussions exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the records responsive to request Item No. 2 pursuant to N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant with appropriate redactions and the lawful basis for such redactions, if any.
3. **The Custodian shall comply with items No. 1 and 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 1:4-4¹⁰, to the Executive Director.¹¹**
4. Because N.J.S.A. 47:1A-5.f. requires that specific elements be contained in an official OPRA request including the a right for requestors to challenge a denial of access to Superior Court or to the GRC, the Township's OPRA request form at the time of the Complainant's Denial of Access Complaint was deficient. However, the GRC declines to order the Custodian to amend the Township's OPRA request form because the Custodian certified that the Township has been using the GRC's model request form since August 23, 2010.

¹⁰ "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."

¹¹ 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. 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 21, 2011