



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

August 28, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-161

v.

Township of Mine Hill (Morris)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 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 August 6, 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 28th Day of August, 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: August 30, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-161

v.

**Township of Mine Hill (Morris)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. An audio recording of the most recent public meeting of the governing body that was recorded, preferably in WAV format.
2. Approved closed session meeting minutes held in January, February, March and April 2010 in electronic format.
3. Current OPRA request form in electronic format.
4. Check registry data by check date from January 1, 2008 to the present of the Current/Main or General fund exported in Word, Excel, ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer (“CFO”), accountant or business administrator in electronic format.

Request Made: June 29, 2010

Response Made: June 29, 2010

Custodian: Amanda Macchia³

GRC Complaint Filed: July 21, 2010⁴

Background

February 28, 2012

Government Records Council’s (“Council”) Interim Order. At its February 28, 2012 public meeting, the Council considered the February 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian disclosed the approved executive session minutes to the Complainant with appropriate redactions and provided certified confirmation of compliance to the Executive Director within five (5)

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. of Murphy McKeon, P.C. Counsellors-at-law (Riverdale, NJ).

³ The Custodian at the time of the Council’s Interim Order was Patricia Korpos.

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

business days of the issuance of said Interim Order, the Custodian has complied with the Council's December 20, 2011 Interim Order.

2. The former Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide an anticipated date upon which the records responsive to request Item No. 4 would be provided to the Complainant. The former Custodian further unlawfully denied access to the responsive minutes because same were approved by the Township Council at the time of the Complainant's OPRA request. N.J.S.A. 47:1A-6 and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). The former Custodian also violated N.J.S.A. 47:1A-6. because she did not bear her burden of proof that the \$25.00 deposit was authorized by N.J.S.A. 47:1A-5.f. However, the current Custodian certified that she provided the executive session minutes responsive to request Item No. 2 in accordance with the Council's December 20, 2011 Interim Order in a timely manner. Additionally, the evidence of record does not indicate that the former Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the former Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the Complainant with copies of the January 21, 2010, February 18, 2010, March 18, 2010 and April 15, 2010 executive session minutes to the Complainant with appropriate redactions pursuant to the Council's December 20, 2011 Interim Order. Further, the relief ultimately achieved had a basis in law because the Custodian unlawfully denied access to the requested approved executive session minutes from January through April 2010. Therefore, the Complainant is a prevailing party with regards to the records responsive for request Item No. 2 and entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression

before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

February 29, 2012

Council's Interim Order distributed to the parties.

March 16, 2012

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

August 6, 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 August 6, 2012. Therefore, no further adjudication is required.

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

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
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RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

February 28, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-161

v.

Township of Mine Hill (Morris)
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian disclosed the approved executive session minutes to the Complainant with appropriate redactions and provided certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of said Interim Order, the Custodian has complied with the Council’s December 20, 2011 Interim Order.
2. The former Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide an anticipated date upon which the records responsive to request Item No. 4 would be provided to the Complainant. The former Custodian further unlawfully denied access to the responsive minutes because same were approved by the Township Council at the time of the Complainant’s OPRA request. N.J.S.A. 47:1A-6 and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). The former Custodian also violated N.J.S.A. 47:1A-6. because she did not bear her burden of proof that the \$25.00 deposit was authorized by N.J.S.A. 47:1A-5.f. However, the current Custodian certified that she provided the executive session minutes responsive to request Item No. 2 in accordance with the Council’s December 20, 2011 Interim Order in a timely manner. Additionally, the evidence of record does not indicate that the former Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the former Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a



change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the Complainant with copies of the January 21, 2010, February 18, 2010, March 18, 2010 and April 15, 2010 executive session minutes to the Complainant with appropriate redactions pursuant to the Council's December 20, 2011 Interim Order. Further, the relief ultimately achieved had a basis in law because the Custodian unlawfully denied access to the requested approved executive session minutes from January through April 2010. Therefore, the Complainant is a prevailing party with regards to the records responsive for request Item No. 2 and entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: February 29, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-161

v.

**Township of Mine Hill (Morris)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. An audio recording of the most recent public meeting of the governing body that was recorded, preferably in WAV format.
2. Approved closed session meeting minutes held in January, February, March and April 2010 in electronic format.
3. Current OPRA request form in electronic format.
4. Check registry data by check date from January 1, 2008 to the present of the Current/Main or General fund exported in Word, Excel, ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer (“CFO”), accountant or business administrator in electronic format.

Request Made: June 29, 2010

Response Made: June 29, 2010

Custodian: Amanda Macchia³

GRC Complaint Filed: July 21, 2010⁴

Background

December 20, 2011

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

1. Although the Custodian provided a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to provide an anticipated date upon which the records

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

² Represented by Stephen N. Severud, Esq. (Long Valley, NJ).

³ The Custodian at the time of the Council’s Interim Order was Patricia Korpos.

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

responsive to request Item No. 4 for check registry data would be provided to the Complainant pursuant to N.J.S.A. 47:1A-5.i. and Russomano v. Township of Edison (Middlesex), GRC Complaint No. 2002-86 (July 2003).

2. Because the Custodian's proposed charge of \$2.00 for duplication of the requested audio recording in CD format is less than the "actual cost" of duplicating such recording, the charge is reasonable under OPRA 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).
3. Because the Town Council approved the requested January 21, 2010, February 18, 2010, March 18, 2010 and April 15, 2010 closed session minutes before the filing of the Complainant's OPRA request, such requested closed session minutes were no longer draft minutes that are exempt as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and were therefore disclosable with appropriate redactions for discussions that are exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and Wolosky v. Township of Roxbury (Morris), 2010-183 (June 2011). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the records responsive to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant with appropriate redactions, as necessary.
4. **The Custodian shall comply with item No. 3 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**
5. Because the Custodian did not support her burden of proof that the requested \$25.00 deposit was authorized by N.J.S.A. 47:1A-5.f., such deposit is unlawful pursuant to N.J.S.A. 47:1A-5.f.; N.J.S.A. 47:1A-6.
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the

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 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.

circumstances pending the Custodian's compliance with the Council's Interim Order.

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

December 21, 2011

Council's Interim Order distributed to the parties.

December 23, 2011

Custodian's response to the Council's Interim Order. The Custodian certifies that she was appointed as the Municipal Clerk on December 1, 2011. The Custodian also certifies that she was not the Custodian at the time of the original OPRA request. The Custodian provides the approved executive session minutes responsive to request Item No. 2 to the Complainant with appropriate redactions. The Custodian certifies that the executive session minutes were redacted because such minutes contained references to personnel matters, ongoing litigation matters and the negotiating of the purchase of real estate.⁷

Analysis

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

The Council's December 20, 2011 Interim Order required the Custodian to disclose the approved executive session minutes from the January 21, 2010, February 18, 2010, March 18, 2010, and April 15, 2010 meetings and 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 December 21, 2011. The Custodian provided certified confirmation of compliance with the Council's Interim Order on December 23, 2011, two (2) business days after the issuance of the Council's Interim Order.

Because the Custodian disclosed the approved executive session minutes to the Complainant with appropriate redactions and provided certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of said Interim Order, the Custodian has complied with the Council's December 20, 2011 Interim Order.

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

OPRA states that:

⁷ The Complainant does not dispute the appropriateness of the Custodian's redactions.
Jesse Wolosky v. Township of Mine Hill (Morris), 2010-161 – Supplemental Findings and Recommendations of the Executive Director

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

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

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

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

The former Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide an anticipated date upon which the records responsive to request Item No. 4 would be provided to the Complainant. The former Custodian further unlawfully denied access to the responsive minutes because same were approved by the Township Council at the time of the Complainant’s OPRA request. N.J.S.A. 47:1A-6 and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). The former Custodian also violated N.J.S.A. 47:1A-6. because she did not bear her burden of proof that the \$25.00 deposit was authorized by N.J.S.A. 47:1A-5.f. However, the current Custodian certified that she provided the executive session minutes responsive to request Item No. 2 in accordance with the Council’s December 20, 2011 Interim Order in a timely manner. Additionally, the evidence of record does not indicate that the former Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the former Custodian’s actions did 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. Those changes expand counsel fee awards under OPRA.” (Footnote omitted.) Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

In the instant complaint, the Complainant filed a Denial of Access Complaint on July 21, 2010 alleging that the former Custodian unlawfully denied the Complainant’s OPRA request for approved executive session minutes because such minutes were approved by the governing body for content but not for release at the time of the request. After the filing of the Denial of Access Complaint and pursuant to its December 20, 2011 Interim Order, the Council ordered the Custodian to release the approved executive session minutes with appropriate redactions within five (5) business days from receipt of the Interim Order. As previously stated, the Custodian complied with the Council’s Interim Order by providing certified confirmation of compliance to the Executive Director on December 23, 2011 that the Custodian provided the January 21, 2010, February 18, 2010, March 18, 2010 and April 15, 2010 executive session minutes to the Complainant with appropriate redactions.

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. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the Complainant with copies of the January 21, 2010, February 18, 2010, March 18, 2010 and April 15, 2010 executive session minutes to the Complainant with appropriate redactions pursuant to the Council’s December 20, 2011 Interim Order. Further, the relief ultimately achieved had a basis in law because the Custodian unlawfully denied access to the requested approved executive session minutes from January through April 2010. Therefore, the Complainant is a prevailing party with regards to the records responsive for request Item No. 2 and entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees. Based on the New Jersey Supreme Court’s decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council’s decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of “unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]” this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian disclosed the approved executive session minutes to the Complainant with appropriate redactions and provided certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of said Interim Order, the Custodian has complied with the Council's December 20, 2011 Interim Order.
2. The former Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide an anticipated date upon which the records responsive to request Item No. 4 would be provided to the Complainant. The former Custodian further unlawfully denied access to the responsive minutes because same were approved by the Township Council at the time of the Complainant's OPRA request. N.J.S.A. 47:1A-6 and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). The former Custodian also violated N.J.S.A. 47:1A-6. because she did not bear her burden of proof that the \$25.00 deposit was authorized by N.J.S.A. 47:1A-5.f. However, the current Custodian certified that she provided the executive session minutes responsive to request Item No. 2 in accordance with the Council's December 20, 2011 Interim Order in a timely manner. Additionally, the evidence of record does not indicate that the former Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the former Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the Complainant with copies of the January 21, 2010, February 18, 2010, March 18, 2010 and April 15, 2010 executive session minutes to the Complainant with appropriate redactions pursuant to the Council's December 20, 2011 Interim Order. Further, the relief ultimately achieved had a basis in law because the Custodian unlawfully denied access to the requested approved executive session minutes from January through April 2010. Therefore, the Complainant is a prevailing party with regards to the records responsive for request Item No. 2 and entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty

Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

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

Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

December 20, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-161

v.

Township of Mine Hill (Morris)
Custodian of Record

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

1. Although the Custodian provided a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to provide an anticipated date upon which the records responsive to request Item No. 4 for check registry data would be provided to the Complainant pursuant to N.J.S.A. 47:1A-5.i. and Russomano v. Township of Edison (Middlesex), GRC Complaint No. 2002-86 (July 2003).
2. Because the Custodian’s proposed charge of \$2.00 for duplication of the requested audio recording in CD format is less than the “actual cost” of duplicating such recording, the charge is reasonable under OPRA 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).
3. Because the Town Council approved the requested January 21, 2010, February 18, 2010, March 18, 2010 and April 15, 2010 closed session minutes before the filing of the Complainant’s OPRA request, such requested closed session minutes were no longer draft minutes that are exempt as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and were therefore disclosable with appropriate redactions for discussions that are exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and Wolosky v. Township of Roxbury (Morris), 2010-183 (June 2011). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the records responsive to the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant with appropriate redactions, as necessary.



4. **The Custodian shall comply with item No. 3 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**
5. Because the Custodian did not support her burden of proof that the requested \$25.00 deposit was authorized by N.J.S.A. 47:1A-5.f., such deposit is unlawful pursuant to N.J.S.A. 47:1A-5.f.; N.J.S.A. 47:1A-6.
6. 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 20th Day of December, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 21, 2011

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
December 20, 2011 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-161

v.

**Township of Mine Hill (Morris)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. An audio recording of the most recent public meeting of the governing body that was recorded, preferably in WAV format.
2. Approved closed session meeting minutes held in January, February, March and April 2010 in electronic format.
3. Current OPRA request form in electronic format.
4. Check registry data by check date from January 1, 2008 to the present of the Current/Main or General fund exported in Word, Excel, ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer (“CFO”), accountant or business administrator in electronic format.

Request Made: June 29, 2010

Response Made: June 29, 2010

Custodian: Patricia Korpos

GRC Complaint Filed: July 21, 2010³

Background

June 29, 2010

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant requests that the Custodian advise him in which medium the audio recording responsive to request Item No. 1 will be provided and the cost for such recording.

June 29, 2010

Custodian’s response to the OPRA request. The Custodian responds in writing on the same business day as receipt of such request.

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

² Represented by Stephen N. Severud, Esq. (Long Valley, NJ).

³ The GRC received the Denial of Access Complaint on said date.

The Custodian states that the records responsive to request Item No. 1 are available on a compact disc (“CD”) suitable for a Gramco Custom Engineered Sound and Recording System. The Custodian states that if the Complainant wishes to receive records responsive to request Item No. 1 in a different format, the Complainant will be responsible for all costs incurred to convert the audio recording to such format. The Custodian further states that the cost for the audio recording responsive to request Item No. 1 is \$2.00.⁴

The Custodian also states that records responsive to request Item No. 2, approved closed session minutes, contain matters concerning litigation and contract negotiations and these records will not be released. The Custodian states that she is confused as to what records the Complainant seeks pursuant to request Item No. 3 because the OPRA form the Complainant completed is the Township’s current OPRA form.

The Custodian states that the records responsive to request Item No. 4 consist of a bi-monthly list that does not include payroll. The Custodian also states that the copying cost for records responsive to Item No. 4 would be minimal; however, the Custodian further states that if the Complainant is seeking copies of checks or other records that are in storage the cost would increase.

Lastly, the Custodian requests a \$25.00 deposit in order to begin work on the Complainant’s OPRA request.

July 6, 2010

E-mail from the Complainant to the Custodian. The Complainant inquires to the reason why the Custodian decided to charge \$2.00 for the audio recording responsive to request Item No. 1. The Complainant also asks if the approved closed session minutes responsive to request Item No. 2 were approved by the governing body for content but not yet released to the public. Furthermore, the Complainant requests that the Custodian e-mail a copy of the Township’s current OPRA request form to him as an attached file in response to request Item No. 3. Lastly, the Complainant states that he wants the check registry data responsive to request Item No. 4 e-mailed to him in an attached file.

July 8, 2010

Letter from the Custodian to the Complainant. The Custodian states that the \$2.00 fee for the audio recording responsive to request Item No. 1 was determined to be a reasonable fee based on the cost of the CD and labor.⁵ The Custodian also states that the closed session minutes responsive to request Item No. 2 were approved by the governing body for content but will not be released to the public because of the nature of the items discussed. The Custodian encloses a copy of the Township’s current OPRA request form. The Custodian states that in response to request Item No. 4, the Township can provide the Complainant with monthly bills dating back to January 1, 2008 but this will require the Custodian to go into the safe to retrieve some of the data, which will incur an

⁴ The Custodian states that the cost of the requested recording is \$2.00 per meeting. The evidence of record indicates that the Complainant’s request for an audio recording of the most recent public meeting recorded comprises one (1) meeting, which is being copied onto one (1) CD.

⁵ The Custodian also states that the Township is currently developing a new fee ordinance that could increase the cost of the copies.

additional charge. Lastly, the Custodian requests a \$25.00 deposit in order to begin work on the Complainant's OPRA request.

July 14, 2010

E-mail from the Complainant to the Custodian. The Complainant states that the Custodian should not make a copy of the audio recording responsive to request Item No. 1 until the Complainant decides to purchase such copy. The Complainant also requests that the Custodian send a copy of the current OPRA request form to him electronically and not via certified mail. Lastly, the Complainant states that he only wants the check registry data that is on the Township's computer and that can be e-mailed to the Complainant as an attachment, in regards to request Item No. 4.

July 19, 2010

E-mail from the Custodian to the Complainant. The Custodian attaches a copy of the current OPRA request form responsive to request Items No. 3 and the check registry data responsive to request Item No. 4.

July 21, 2010

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

- Complainant's OPRA request dated June 29, 2010
- Letter from the Custodian to the Complainant dated June 29, 2010
- E-mail from the Complainant to the Custodian dated July 6, 2010
- Letter from the Custodian to the Complainant dated July 8, 2010
- E-mail from the Complainant to the Custodian dated July 14, 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) the audio recording of the last regular public meeting of the governing body; 2) 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; 3) OPRA request form and 4) check registry data from January 2008 through the present in electronic format.

The Complainant asserts that the proposed cost for the audio recording of the most recent public meeting responsive to request Item No. 1 violates OPRA because the charge of \$2.00 most likely exceeds the actual cost of duplicating the records. The Complainant states that the Custodian informed him that the cost for the CD and labor will be \$2.00; however, the Township is developing a new fee ordinance that could increase the cost of the copy. The Complainant asserts that although the Custodian's charge for the records responsive to request Item No. 1 in CD format is relatively low, the Custodian indicates that a charge for "labor" is included in the cost, which is a direct violation of N.J.S.A. 47:1A-5.d. The Complainant argues that the Custodian should charge the actual cost of the CD. The Custodian contends that N.J.S.A. 47:1A-5.d states that an agency may charge a special service charge, provided that charge is reasonable, if three (3) conditions are met, which include: "1) the Complainant must request a record in a medium not routinely used by the agency; 2) not routinely developed or maintained by an agency or 3) require a substantial amount of manipulation or programming of

information technology.” The Complainant argues that the Custodian has not stated that any of these three (3) conditions apply to the request.

The Complainant states that the Custodian responded to the Complainant’s OPRA request on June 29, 2010 stating that approved closed session minutes responsive to request Item No. 2 concern litigation and contract negotiations and will not be made available. The Complainant also states that the Custodian stated in a separate e-mail that the minutes at issue have been approved for content but will not be released to the public due to the nature of the items discussed.

The Complainant argues that the approved closed session minutes responsive to request Item No. 2 are government records pursuant to N.J.S.A. 47:1A-1.1. The Complainant also argues that the records responsive to request Item No. 2 that have not yet been approved are exempt from OPRA as advisory, consultative and deliberative (“ACD”) material pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The Complainant argues that once these records are approved, they are no longer considered ACD and are therefore disclosable pursuant to N.J.S.A. 47:1A-1.1 and Wolosky v. Vernon Township Board of Education, GRC Complaint No. 2009-57 (December 2009). The Complainant further argues that the responsive closed session minutes were approved for content by the governing body as stated in the Custodian’s letter of July 8, 2010. The Complainant asserts that the Custodian is creating an additional barrier to access that the Township is not permitted to create. *See* Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007). The Complainant argues that the Custodian is denying access to the requested approved closed session minutes because she decided they concerned litigation and contract negotiations. 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 argues that no public agency has the power to do this.

The Complainant further asserts that the Custodian stated that a deposit of \$25.00 is necessary in order to begin processing the Complainant’s OPRA request; the Complainant questions whether the Custodian’s request for a \$25.00 deposit to begin processing the Complainant’s request is allowed under OPRA. The Complainant states that pursuant to N.J.S.A. 47:1A-5.d., OPRA provides that “[t]he actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy...” The Complainant also argues that the Custodian did not provide any explanation as to exactly how the requested deposit was calculated. The Complainant asserts that without further explanation as to why the \$25.00 deposit is required, this cost appears to be arbitrary. The Complainant further argues that the arbitrary deposit of \$25.00 sought by the Custodian effectively denies access to public records.

The Complainant states that he did receive a copy of the OPRA request form responsive to request Item No. 3, but it was delivered via certified mail, not in the electronic medium he had requested.

The Complainant also states that he wants the check registry data responsive to request Item No. 4 in electronic format; therefore, there should be no cost associated with

copying these records.⁶ The Complainant further argues that the Custodian is not permitted to charge a “special service charge” pursuant to N.J.S.A. 47:1A-5.c. The Complainant argues that a minimal amount of time and effort is required to actually transfer the data to an electronic format for the records responsive to request Item No. 4. The Complainant states because he is requesting electronic versions of the check registry data responsive to Item No. 4, no costly medium conversion should be involved. The Complainant also states that he has not yet received copies of records responsive to request Items No. 2 and No. 4.

The Complainant requests that the GRC find that the Custodian violated OPRA and denied access to the records responsive to the OPRA request because: 1) the Custodian’s charge of \$2.00 for a CD in response to request Item No. 1 is not the actual cost of said CD; 2) the Custodian did not release records responsive to request Item No. 2 which were approved by the governing body for accuracy of content; and 3) the Custodian improperly requested a \$25.00 deposit to produce all of the records responsive to the OPRA request. The Complainant also requests the GRC to find that the Complainant is the prevailing party and order an award of reasonable attorney’s fees pursuant to N.J.S.A. 47:1A-6.

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:

- Invoice from Gramco Business Communications dated November 11, 2009⁷
- Complainant’s OPRA request dated June 29, 2010
- Letter from the Custodian to the Complainant dated June 29, 2010
- E-mail from the Complainant to the Custodian dated July 6, 2010
- Letter from the Custodian to the Complainant dated July 8, 2010
- E-mail from the Complainant to the Custodian dated July 14, 2010
- E-mail from the Custodian to the Complainant dated July 19, 2010

The Custodian certifies that her search for the requested records included assembling all the records responsive to the Complainant’s OPRA request. The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).

⁶ The Custodian received the records responsive to request Item No. 4 in electronic format on July 19, 2010. However, the Complainant faxed his Denial of Access Complaint to the GRC on July 16, 2010. Therefore, the Complainant did not receive said records at the time he faxed his Denial of Access Complaint.

⁷ The Custodian provided the invoice to show the cost of ten (10) blank CDs is \$17.90, or \$1.79 each. The invoice also indicates that the cost of shipping and handling for ten (10) CDs is \$10.00, or \$1.00 per CD, for a total actual cost of \$2.79 per CD.

The Custodian certifies that the Complainant submitted an OPRA request on the Township's official OPRA request form to the Custodian on June 29, 2010. The Custodian certifies that the Complainant requested: 1) an audio recording of the most recent regular meeting of the Township Council; 2) the approved minutes of each and every closed or executive session of the Township Council from January through April 2010; 3) a copy of the Township's current OPRA request form; and 4) the check registry data by check date from January 1, 2008 to the present of the current/main or general fund exported in Word, Excel, ASCII from Edmunds, MSI or the current software used by the CFO, accountant or business administrator.

The Custodian asserts that she fully complied with the Complainant's OPRA request. The Custodian also asserts that the Complainant filed this Denial of Access complaint only one day after he amended his OPRA request.⁸

Records Responsive to Request Item No. 1 - Audio recording of the most recent public meeting:

The Custodian certifies that she responded to the Complainant's request for Item No. 1 stating that a copy of the CD would cost \$2.00. The Custodian also certifies that the Complainant e-mailed the Custodian the day before he filed his Denial of Access Complaint stating that the Complainant understood that the copying cost for records responsive to request Item No. 1 will be \$2.00 and advising the Custodian not to make a copy of the CD until the Complainant decides to buy it. The Custodian argues that because the Complainant decided not to purchase the CD responsive to request Item No. 1, he was not denied access to the public record pursuant to Burnett v. County of Bergen, 198 N.J. 408, 968 (2009). The Custodian asserts that in Burnett, the New Jersey Supreme Court held that when the Complainant was advised of the cost of the record, the Complainant's decision that he did not want to purchase the record was the final determination on the matter.

The Custodian certifies that the cost of the CD is \$2.00 and there is no charge for labor. The Custodian also certifies that this charge represents the cost of the CD, \$1.79, plus the cost of shipping, for a total cost to the Township of \$2.79 per disc; the cost to the Township therefore exceeds the \$2.00 charge requested by the Custodian. The Custodian asserts that the cost of the CD does not exceed the Township's actual cost of providing the CD to the Complainant.

Records Responsive to Item No. 2 - Approved closed session meeting minutes:

The Custodian certifies that the Township held several closed sessions from January through April 2010. The Custodian asserts that the records responsive to request Item No. 2 were not appropriate for disclosure to the public, as determined by the Open Public Meetings Act ("OPMA"). The Custodian also asserts that consistent with OPMA, the closed session minutes from the relevant Town Council meetings were approved by the governing body as to content but were not available for public distribution. The Custodian argues that N.J.S.A. 10:4-2, et. seq., permits specific governmental actions to be maintained out of the public view due to the nature of the subject matter. The

⁸ The Custodian asserts that the Complainant amended his OPRA request on July 14, 2010.
Jesse Wolosky v. Township of Mine Hill (Morris), 2010-161 – Findings and Recommendations of the Executive Director

Custodian also argues that the Complainant was properly denied access to confidential records in accordance with OPMA.

The Custodian certifies that the governing body discussed litigation matters, potential property acquisitions, employment matters and contract negotiations during these closed sessions. The Custodian asserts that exclusion of the public from these closed sessions is appropriate pursuant to OPMA. The Custodian also certifies that before going into closed session, the Town Council adopts a resolution authorizing the Council to enter into closed session. The Custodian further certifies that the Town Council members determined that the minutes of these meetings will not be disclosed to the public because litigation matters, potential property acquisition, employment matters and contract negotiations were discussed. Lastly, the Custodian asserts that non-disclosure of the requested minutes is appropriate because of the content and is authorized under N.J.S.A. 10:4-14.

The Custodian certifies that union contract negotiations were discussed during one of the closed sessions. The Custodian asserts that the disclosure of these minutes is not appropriate because negotiations will begin again when the current contract expires. The Custodian argues that disclosure of the requested minutes would place the Township at an extreme disadvantage in the next set of negotiations. The Custodian also argues that public release of litigation matters will also constrain the Township in the continuing conduct of litigation. The Custodian certifies that employment matters were also discussed during the closed sessions at issue and argues that disclosure of these minutes is inappropriate because “to do so would circumvent the very purpose for permitting personnel matters to be discussed in closed sessions.” Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64, 71 – 2 (App. Div. 1977). The Custodian also certifies that she based her opinion of whether to disclose the records on advice from the Township’s Counsel and the Town Council.

Records Responsive to Request Item No. 4 - Check registry data by check date from January 1, 2008 to the present:

The Custodian certifies that the Complainant requested the check registry data by check date from January 1, 2008 to the present of the Current/Main or General fund exported in Microsoft Word, Excel, ASCII from Edmunds, MSI or the current software used by the CFO, accountant or business administrator in electronic format. The Custodian asserts that a request for three (3) years of checks and supporting documentation for an entire municipality would generate a significant amount of paper to be supplied to the Complainant. The Custodian argues that she requested a \$25.00 deposit in an effort to ensure that the Complainant wanted the records and that the Township would be paid for the requested copies. The Custodian certifies that the Complainant responded to the request for the \$25.00 deposit stating “do not go into the safe, I only want the data that is on your computer and can be e-mailed as an attached file.” The Custodian argues that the Complainant’s response modified the original OPRA request and in effect, made a new OPRA request on July 14, 2010. The Custodian asserts that at that point, the request for the deposit became moot. The Custodian further asserts that the Complainant did not allow the Custodian the statutorily mandated seven (7) business

days to respond to this new OPRA request because he filed a Denial of Access Complaint before such time expired.

The Custodian argues that the Complainant is making a claim on an issue that no longer exists. The Custodian also argues that the Complainant was not denied access to the responsive records because the Complainant did not pay the proposed \$25.00 deposit. The Custodian further argues that the Complainant submitted a new OPRA request on July 14, 2010 for records in an electronic format that would not generate the cost of copying. The Custodian asserts that the Complainant's request for these records was made for the first time on July 14, 2010 and the Custodian was given one (1) day to respond to this request, at which time the Complainant filed his Denial of Access Complaint. Lastly, the Custodian asserts that the complaint on this issue is premature because the Complainant did not permit the Custodian the statutorily mandated seven (7) business days to respond to this request.

August 26, 2010

E-mail from the Complainant to the GRC. In response to the Custodian's SOI, the Complainant asserts that, regarding approved closed session minutes responsive to request Item No. 2, the Custodian has misinterpreted the law as to what constitutes a public record under OPRA. The Complainant asserts that the Custodian never provided the Complainant with copies of the requested closed session minutes. The Complainant asserts that closed session minutes that have not been approved are considered ACD and are therefore exempt from disclosure under OPRA. The Complainant conversely asserts that once these records responsive to request Item No. 2 are approved for content, they are no longer considered ACD and are therefore disclosable pursuant to N.J.S.A. 47:1A-1.1 and Wolosky v. Vernon Township Board of Education, GRC Complaint 2009-57 (December 2009). The Complainant also asserts that pursuant to N.J.S.A. 47:1A-5, g., the Custodian could redact from the minutes the information that is exempt from disclosure under OPRA. The Complainant asserts that a denial of access to the entire record is prohibited under OPRA.

The Complainant asserts that the Custodian's request for a \$25.00 deposit was clearly a service charge for the check registry data responsive to request Item No. 4 and was in plain violation of OPRA. The Complainant states that he specifically requested the check registry data responsive to request Item No. 4 in electronic format and did not request paper copies. The Complainant asserts that there should not have been any charge for sending the records responsive to request Item No. 4 electronically because no paper or supplies were utilized. The Complainant argues that the requested deposit of \$25.00 is arbitrary and is completely unsupported by the facts of this case or OPRA.

The Complainant argues that the filing of this complaint is not premature under OPRA. The Complainant states that his OPRA request for Item No. 4, check registry data, was made on June 29, 2010. The Complainant asserts that had the Custodian properly understood the Complainant's OPRA request dated June 29, 2010, no clarification would have been needed. The Complainant asserts that his e-mail dated July 14, 2010 was a reiteration of his OPRA request dated June 29, 2010. Lastly, the Complainant asserts that Custodian's argument that the statutorily mandated time frame

for a response to an OPRA request “resets” because of a mere clarification of such request is wholly unsupported by OPRA.

March 31, 2011

E-mail from the GRC to the Custodian. The GRC states that it appears the Custodian sent the Complainant an e-mail on July 19, 2010 to which the Custodian attached two (2) scanned records, but that it is unclear as to which specific records were sent to the Complainant. The GRC requests the Custodian to identify which records were sent electronically to the Complainant on July 19, 2010.

March 31, 2011

E-mail from the Custodian to the GRC. The Custodian states that her records show that she e-mailed the current OPRA request form responsive to request Item No. 3 and the check registry data responsive to request Item No. 4 to the Complainant on July 19, 2010.

June 1, 2011

E-mail from the GRC to the Custodian. The GRC requests a legal certification from the Custodian as to which responsive executive session minutes have been approved for content but not for release at the time of the Complainant’s OPRA request.

June 1, 2011

Facsimile from the Custodian to the GRC. The Custodian attaches a copy of the requested legal certification. The Custodian certifies that the executive session minutes from January 21, 2010, February 18, 2010, March 18, 2010, April 8, 2010 and April 15, 2010 were approved for content but not approved for release to the public.

August 3, 2011

E-mail from the GRC to the Custodian. The Custodian requests a legal certification from the Custodian as to when the executive session minutes from January 21 2010, February 18, 2010, March 18, 2010, April 8, 2010 and April 15, 2010 were approved for content but not for release to the public.

August 3, 2011

Facsimile from the Custodian to the GRC. The Custodian attaches a copy of the requested legal certification. The Custodian certifies that the executive session minutes for the following meetings were approved for content but not for release on the following dates:

Executive Session Meeting Dates	Date of Approval
January 21, 2010	March 18, 2010
February 18, 2010	April 1, 2010
March 18, 2010	May 6, 2010
April 8, 2010	May 20, 2010
April 15, 2010	June 3, 2010

Analysis

Was the Custodian's response to the Complainant's request for check registry data responsive to request Item No. 4 sufficient?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

OPRA provides:

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

The evidence of record indicates that the Custodian responded in writing to the Complainant's OPRA request for Item No. 4 for check registry data on the same business

day as receipt of such request. The evidence of record also indicates that the Custodian stated that the check registry data consists of a bi-monthly list that does not include payroll. The Custodian further stated that the copying cost of the check registry data would be minimal; however, the Custodian also stated that if the Complainant sought copies of checks or other records that are in storage the cost would increase.

In Russomano v. Township of Edison (Middlesex), GRC Complaint No. 2002-86 (July 2003), the Custodian informed the Complainant that the Township Administrator would be providing a response to the Complainant's request. However, the Custodian did not provide a date certain upon which the Township Administrator would respond. The Council held that the Custodian erred in not providing a date certain upon which the Township Administrator will respond to the Complainant's OPRA request.

In the instant Complaint, the Custodian responded within the statutorily mandated seven (7) business day response period stating that the check registry data does not include payroll and the cost would be minimal. The Custodian failed to specify a date certain upon which the Complainant could expect disclosure of the requested records.

Therefore, although the Custodian provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to provide an anticipated date upon which the records responsive to request Item No. 4 for check registry data would be provided to the Complainant pursuant to N.J.S.A. 47:1A-5.i. and Russomano, *supra*.

The GRC notes that the Complainant argues that at the time of his Denial of Access Complaint,⁹ he did not receive the requested check registry data in electronic format. However, the evidence of record indicates that the Custodian e-mailed the Complainant the requested check registry data in electronic format on July 19, 2010. Therefore, the Council declines to address whether the check registry data is disclosable under OPRA. The Council also declines to order disclosure of said records because these records were provided to the Complainant on July 19, 2010.

Did the Custodian's charge of \$2.00 for the audio recording of the most recent public meeting responsive to request Item No. 1 in CD format violate OPRA?

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:

⁹ Signed and faxed to the GRC on July 16, 2010.

- 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.

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 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...[t]he requestor shall have the opportunity to review and object to the charge prior to it being incurred.” (Emphasis added.) N.J.S.A. 47:1A-5.c.

OPRA further provides:

“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.* If a request is for a record...[that] require[s] a substantial amount of manipulation...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...” (Emphasis added.) N.J.S.A. 47:1A-5.d.

The Complainant contends that the Custodian’s charge of \$2.00 for an audio recording is most likely in excess of the actual cost of duplicating the record. However, the Custodian certified in the SOI that the cost of the CD is \$1.79 plus the cost of shipping, which results in a total cost to the Township of \$2.79 per disc, exceeding the \$2.00 charge quoted to the Complainant. The Custodian also certified that labor is not part of the proposed charge.

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. further states 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 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 on this issue previously in O’Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008), 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.

The Custodian also cites to Burnett v. County of Bergen, 198 N.J. 408, 968 (2009) and argues that the Court in Burnett held that when the Complainant was advised the cost of the record, the Complainant’s decision that he did not want to purchase the record was the final determination on the matter.

In Burnett, *supra*, the Court addressed the issue of whether the release of eight million pages of land title records containing social security numbers should be redacted before said records are released and if so whether the Custodian should bear that cost. The Court held that the actual cost of redaction and production of the records responsive was \$460,000 and that the requestor should bear the cost of duplication and redaction. The Court declined to address the issue of removing the watermark on the records, which would have cost an additional \$20,000, because when the trial court asked the plaintiff if he wanted the redacted records, the plaintiff indicated that he did not. Lastly, the Court held that “if the plaintiff changes his mind and decides to pay for redacted records, he can petition the trial court for a ruling on the merits of watermarking.”

The Custodian’s argument that Burnett applies to the instant matter is incorrect. In Burnett, the Court clearly held that if the plaintiff did not want to purchase the records at the time of the request, he could petition the court at a later date to determine the

validity of the cost of the record. Similarly, in the matter herein, the Complainant informed the Custodian that the Custodian should not make a copy of the audio recording of the most recent public meeting until the Complainant decided to purchase the same. The Complainant's decision not to purchase the record at that time was not a final decision on the matter. The Complainant still had the right to file this Denial of Access Complaint with the GRC to determine if the proposed \$2.00 charge for the audio recording of the most recent public meeting was lawful.

In the instant complaint, the evidence of record indicates that the Complainant requested an audio recording of the most recent public meeting. The Custodian responded in writing in a timely manner stating that duplication of the audio recording responsive would cost \$2.00 in CD format. The Complainant subsequently filed a Denial of Access Complaint disputing the proposed charge and arguing that it is unlikely that the Township's proposed fee represents the actual cost of producing the requested CD.

However, the Custodian certified in the SOI that the cost to the Township to duplicate the record responsive to request Item No. 1 in CD format is actually more than \$2.00. The Custodian also certified that the \$2.00 charge represents the actual cost of the CD, \$1.79, plus the cost of shipping, for a total cost to the Township of \$2.79 per CD, exceeding the \$2.00 charge requested by the Custodian. The Custodian further certified in the SOI that there is no charge for labor.

Therefore, because the Custodian's proposed charge of \$2.00 for duplication of the requested audio recording in CD format is less than the "actual cost" of duplicating such recording, the charge is reasonable under OPRA pursuant to N.J.S.A. 47:1A-5.b., Spaulding, *supra*, Libertarian Party of Central New Jersey, *supra*, Moore, *supra*, and Dugan, *supra*.

Did the Custodian unlawfully deny access to the approved closed session minutes responsive to request Item No. 2?

In the instant complaint, the Custodian certified in the SOI that she denied access to the closed session minutes because the Town Council has approved such minutes for content but not for release to the public. The evidence of record indicates that the Town Council held several closed sessions from January through April 2010. The evidence of record further indicates that during these closed sessions, litigation matters, potential property acquisitions, employment matters and contract negotiations were discussed. The evidence of record shows that the Town Council approved all requested executive session minutes before the date of the Complainant's OPRA request.

As a general matter, draft documents are advisory, consultative and deliberative ("ACD") 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 Wolosky v. Township of Roxbury (Morris), 2010-183 (June 2011), the Custodian denied the Complainant access to executive session minutes on the grounds that said minutes had not yet been approved for release by the Township. Moreover, the Custodian argued that although the minutes were approved as to accuracy and content, they were not approved for release to the general public. The Council noted that it has previously found that once the governing body of an agency has approved meeting minutes as to accuracy and content (per the requirement of the Open Public Meetings Act), said minutes are disclosable pursuant to the provision of OPRA. Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009); *see also* Wolosky v. County of Sussex, Board of Chosen Freeholders, GRC Complaint No. 2009-26 (February 2010), stating that “[a]lthough properly approved executive session minutes are disclosable, pursuant to N.J.S.A. 47:1A-5.g., custodians may redact from the minutes those discussions that require confidentiality because the matters discussed therein are unresolved or still pending.”

The Council therefore held that because the evidence of record indicated that the Township approved the requested executive session minutes prior to the Complainant’s OPRA request, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant’s request and were therefore disclosable pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Moreover, the Council suggested 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.

Like the custodian in Wolosky, the Custodian in the instant complaint argued that although the requested closed session minutes were approved for content by the Town Council, the Town Council must thereafter approve the executive session minutes for release.

However, the Council has previously found that once the governing body of an agency approves meeting minutes as to accuracy and content (per the requirement of OPMA), said minutes are subject to disclosure under OPRA. Wolosky v. Township of Roxbury (Morris), 2010-183 (June 2011). 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, still pending pursuant to N.J.S.A. 47:1A-5.g. or are permanently exempt from disclosure pursuant to N.J.S.A. 47:1A-1 et seq.

Therefore, because the Town Council approved the requested January 21, 2010, February 18, 2010, March 18, 2010 and April 15, 2010 closed session minutes before the date of the Complainant’s OPRA request, such closed session minutes were no longer draft minutes that are exempt as ACD material pursuant to N.J.S.A. 47:1A-1.1. and were therefore disclosable with appropriate redactions for discussions that are exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and

Wolosky v. Township of Roxbury (Morris), 2010-183 (June 2011). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the records responsive to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant with appropriate redactions, as necessary.

Was the \$25.00 deposit requested by Custodian for preparation of records responsive to the Complainant's OPRA request lawful under OPRA pursuant to N.J.S.A. 47:1A-5.f.?

OPRA states that:

“[t]he custodian may require a deposit against costs for reproducing documents sought through an anonymous request whenever the custodian anticipates that the information thus requested will cost in excess of \$5 to reproduce.” N.J.S.A. 47:1A-5.f.

The evidence of record indicates that the Custodian responded to the Complainant's OPRA request by requesting a \$25.00 deposit in order to begin work on said request. The Complainant argued that without further explanation as to why the \$25.00 deposit is required, this cost appears to be arbitrary and effectively denies access to public records. However, the Custodian certified in the SOI that the Custodian requested a \$25.00 deposit to ensure that the Complainant wanted the records and that the Township would be paid for the requested copies.

OPRA allows a custodian to require a deposit against costs for reproducing records requested when the requestor is anonymous. N.J.S.A. 47:1A-5.f. In the present complaint, the Custodian requested a \$25.00 deposit from the Complainant to ensure that the Township would be paid its copying costs before the Custodian began work on the Complainant's OPRA request. However, the evidence of record is clear that the Complainant did not file his OPRA request anonymously. Furthermore, the Custodian indicated that the copying charges for records responsive to the request for the audio recording of the most recent public meeting was only \$2.00, and the evidence of record indicates that the Custodian provided the requested OPRA request form and check registry data at no cost to the Complainant. Thus, the Custodian failed to provide competent, credible evidence to establish that the request for a \$25.00 deposit was supported by law.

Therefore, because the Custodian did not bear his burden of proof that the requested \$25.00 deposit was authorized by N.J.S.A. 47:1A-5.f., such deposit is unlawful pursuant to N.J.S.A. 47:1A-5.f.; N.J.S.A. 47:1A-6.

The Council also notes that the Complainant argued that he did not receive the records responsive to request Item No. 3, the Township's OPRA request form, in electronic format at the time of his Denial of Access Complaint. However, the evidence of record indicates that the Custodian e-mailed the Complainant a copy of the Township's OPRA request form on July 19, 2010. Therefore, the GRC declines to order the Custodian to provide an electronic copy of same.

Whether the Custodian's insufficient response, unlawful denial to the approved closed session minutes from January through April 2010 and unlawful request for a \$25.00 deposit rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to provide an anticipated date upon which the records responsive to request Item No. 4 for check registry data would be provided to the Complainant pursuant to N.J.S.A. 47:1A-5.i. and Russomano v. Township of Edison (Middlesex), GRC Complaint No. 2002-86 (July 2003).
2. Because the Custodian's proposed charge of \$2.00 for duplication of the requested audio recording in CD format is less than the "actual cost" of duplicating such recording, the charge is reasonable under OPRA 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).
3. Because the Town Council approved the requested January 21, 2010, February 18, 2010, March 18, 2010 and April 15, 2010 closed session minutes before the filing of the Complainant's OPRA request, such requested closed session minutes were no longer draft minutes that are exempt as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and were therefore disclosable with appropriate redactions for discussions that are exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and Wolosky v. Township of Roxbury (Morris), 2010-183 (June 2011). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the records responsive to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant with appropriate redactions, as necessary.

4. **The Custodian shall comply with item No. 3 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**
5. Because the Custodian did not support her burden of proof that the requested \$25.00 deposit was authorized by N.J.S.A. 47:1A-5.f., such deposit is unlawful pursuant to N.J.S.A. 47:1A-5.f.; N.J.S.A. 47:1A-6.
6. 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.
7. 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

December 13, 2011

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.