



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

May 29, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-165

v.

Borough of Morris Plains (Morris)
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 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 April 23, 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 29th Day of May, 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: June 4, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 29, 2012 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-165

v.

**Borough of Morris Plains (Morris)²
Custodian of Records**

Records Relevant to Complaint:³ Copies of:

1. Check registry data by check date from January 1, 2008 to the present of the Current/Main or General fund exported in Word, Excel, Access, comma delimited or fixed-field ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer (CFO) or business administrator, in electronic format.
2. Official OPRA request form.

Request Made: June 29, 2010

Response Made: July 9, 2010

Custodian: June R. Uhrin

GRC Complaint Filed: July 23, 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. The evidence of record therefore indicates that the Custodian informed the Complainant of the actual cost to convert the records responsive to request Item No. 1 within five (5) days of receipt of the Council's Interim Order, and further indicates that the Custodian also provided certified confirmation of compliance to the Executive Director within seven (7) business days of the issuance of said Interim Order. Therefore, the Custodian has complied with the Council's September 27, 2011 Interim Order.

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

² Represented by Gail H. Fraser, Esq., of Gail H. Fraser, LLC (Randolph, NJ).

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

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

2. The Custodian violated N.J.S.A. 47:1A-5.b. by not offering the Complainant an opportunity to review and object to the actual cost to convert the records responsive to request Item No. 1 in a medium specified by the Complainant. In addition, Mr. Banks violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not responding in writing within the July 12, 2010 extended time period. However, the Custodian certified that she e-mailed the Complainant the statement of charges in accordance with the Council's September 27, 2011 Interim Order in a timely manner. Furthermore, the Custodian provided the Complainant with a copy of the record responsive to request Item No. 2 and adopted the GRC's model request form. Additionally, the evidence of record does not indicate that the Custodian's and Mr. Banks's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions nor Mr. Banks's 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. Specifically, the Council ordered the Custodian to deliver a statement of the actual cost to convert the records responsive to request Item No. 1 in its September 27, 2011 Interim Order. Additionally, the Custodian provided the Complainant with the records responsive to request Item No. 2 along with her SOI. Furthermore, the Borough adopted the GRC's model request form on January 1, 2011. Thus, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief achieved ultimately had a basis in law because the Borough violated N.J.S.A. 47:1A-5.f. by not having a sufficient OPRA request form and the Custodian violated N.J.S.A. 47:1A-6 by not providing a lawful basis for a denial for the record responsive to request Item No. 2 at the time of the Custodian's response. Therefore, the Complainant is a prevailing party with regards to the records responsive for request Item No. 1 and 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.

December 21, 2011

Council’s Interim Order distributed to the parties.

March 19, 2012

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

April 23, 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 April 23, 2012. Therefore, no further adjudication is required.

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

Approved By: Catherine Starghill, Esq.
Executive Director

May 22, 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. 2010-165

v.

Borough of Morris Plains (Morris)
Custodian of Record

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

1. The evidence of record therefore indicates that the Custodian informed the Complainant of the actual cost to convert the records responsive to request Item No. 1 within five (5) days of receipt of the Council’s Interim Order, and further indicates that the Custodian also provided certified confirmation of compliance to the Executive Director within seven (7) business days of the issuance of said Interim Order. Therefore, the Custodian has complied with the Council’s September 27, 2011 Interim Order.
2. The Custodian violated N.J.S.A. 47:1A-5.b. by not offering the Complainant an opportunity to review and object to the actual cost to convert the records responsive to request Item No. 1 in a medium specified by the Complainant. In addition, Mr. Banks violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not responding in writing within the July 12, 2010 extended time period. However, the Custodian certified that she e-mailed the Complainant the statement of charges in accordance with the Council’s September 27, 2011 Interim Order in a timely manner. Furthermore, the Custodian provided the Complainant with a copy of the record responsive to request Item No. 2 and adopted the GRC’s model request form. Additionally, the evidence of record does not indicate that the Custodian’s and Mr. Banks’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions nor Mr. Banks’s 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. Specifically, the Council ordered the Custodian to deliver a statement of the actual cost to convert the records responsive to request Item No. 1 in its September 27, 2011 Interim Order. Additionally, the Custodian provided the Complainant with the records responsive to request Item No. 2 along with her SOI. Furthermore, the Borough adopted the GRC's model request form on January 1, 2011. Thus, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief achieved ultimately had a basis in law because the Borough violated N.J.S.A. 47:1A-5.f. by not having an sufficient OPRA request form and the Custodian violated N.J.S.A. 47:1A-6 by not providing a lawful basis for a denial for the record responsive to request Item No. 2 at the time of the Custodian's response. Therefore, the Complainant is a prevailing party with regards to the records responsive for request Item No. 1 and 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 20th Day of December, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 21, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-165

v.

**Borough of Morris Plains (Morris)²
Custodian of Records**

Records Relevant to Complaint:³ Copies of:

1. Check registry data by check date from January 1, 2008 to the present of the Current/Main or General fund exported in Word, Excel, Access, comma delimited or fixed-field ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer (CFO) or business administrator, in electronic format.
2. Official OPRA request form.

Request Made: June 29, 2010

Response Made: July 9, 2010

Custodian: June R. Uhrin

GRC Complaint Filed: July 23, 2010⁴

Background

September 27, 2011

Government Records Council's ("Council") Interim Order. At its September 27, 2011 public meeting, the Council considered the September 20, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Mr. Banks's failure to respond in writing to request Item No. 1 of the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the July 12, 2010 extended time period results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).

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

² Represented by Gail H. Fraser, Esq., of Gail H. Fraser, LLC (Randolph, NJ).

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

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

2. The Custodian shall calculate the appropriate charges associated with the conversion of the requested financial data into one of the formats sought by the Complainant and shall make the amount of the charge available to the Complainant; the Custodian shall disclose to the Complainant the requested records upon the Complainant's payment of such charges. N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. See Wolosky v. Twp. of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009).
3. **The Custodian shall comply with paragraph No. 2 above within five (5) business days from receipt of the Council's Interim Order by delivering to the Complainant a statement of the actual cost of converting the requested records into one of the formats sought. Within two (2) business days of receipt of such statement, the Complainant shall deliver to the Custodian (a) payment of the actual cost of converting the requested records or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the two (2) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within seven (7) business days from receipt of the Council's Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.⁵**
4. Because N.J.S.A. 47:1A-5.f. requires that specific elements be contained in an official OPRA request form including providing specific directions and procedures for requesting a record, the time period by which the record must be available, a statement regarding the requestor's right to challenge a denial of access before Superior Court or the GRC and a space for the Custodian to list why access to records was denied in whole or in part, the Borough's OPRA request form at the time of the Complainant's Denial of Access Complaint was deficient. However, the GRC declines to order the Custodian to amend the Borough's OPRA request form because the Custodian certified that the Borough has been using the GRC's model request form since January 1, 2011.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
Jesse Wolosky v. Borough of Morris Plains (Morris), 2010-165 – Supplemental Findings and Recommendations of the Executive Director

October 3, 2011

Council's Interim Order distributed to the parties.

October 5, 2011

Custodian's response to the Council's Interim Order. The Custodian states that she e-mailed the Complainant a statement informing the Complainant that conversion of the records responsive to request Item No. 1 would be \$100.00.⁶ The Custodian states that the Borough does not maintain the records responsive to request Item No. 1 in a format specified by the Complainant in his OPRA request.

October 12, 2011

E-mail from the Custodian to the GRC. The Custodian attaches a legal certification pursuant to the Council's Interim Order. The Custodian certifies that on October 5, 2011 she e-mailed the Complainant a statement of the \$100.00 conversion charge applicable to the records responsive to request Item No. 1. The Custodian also certifies that the Complainant was directed to respond to the Custodian's statement of conversion charges within two (2) business days of receipt of the Custodian's correspondence by either delivering a payment for the actual cost of the requested records or delivering a statement declining to purchase the requested records. The Custodian further certifies that since she e-mailed the Complainant at the close of business on October 5, 2011, she considered the e-mail delivered to the Complainant on October 6, 2011. The Custodian certifies that she spoke with Complainant's Counsel on October 7, 2011 who confirmed that Counsel had received the e-mail and would be following up with the Complainant. In addition, the Custodian certifies that because October 10, 2011 was a holiday, she believed that the Complainant had to respond by the close of business on October 12, 2011. The Custodian also certifies that as of the date of this legal certification, the Complainant has not responded to the Custodian's e-mail dated October 5, 2011. Lastly, the Custodian certifies that pursuant to the GRC's Interim Order the Complainant's failure to take any action within the two (2) business day time period is deemed to be a statement declining to purchase the records responsive to request Item No. 1 and the Borough shall no longer be required to disclose such records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield (Union), GRC Complaint No. 2006-54 (July 2006).

Analysis**Whether the Custodian complied with the Council's September 27, 2011 Interim Order?**

The Council's September 27, 2011 Interim Order required the Custodian to deliver to the Complainant a statement of the actual cost of converting the records responsive to request Item No. 1 into one of the formats specified by the Complainant within five (5) business days from receipt of such order. The Council's Interim Order also required the Complainant to deliver to the Custodian within two (2) business days of

⁶ The Custodian included a copy of an invoice from Vital Communications stating that the cost to convert the requested records is \$100.00.

receipt of such statement: (a) payment of the actual cost of converting the requested records or (b) a statement declining to purchase these records. The Council's Interim Order further stated that the Complainant's failure to take any action within the two (2) business day period shall be construed as declination to purchase these records and the Custodian shall no longer be required to disclose the records responsive to request Item No. 1.

The Custodian legally certified that she e-mailed the statement of charges for the actual cost of conversion of the records responsive to request Item No. 1 to the Complainant on October 5, 2011. The Custodian also certified that as of October 12, 2011, the Complainant did not contact the Custodian informing her if he wanted to purchase said records.

The evidence of record therefore indicates that the Custodian informed the Complainant of the actual cost to convert the records responsive to request Item No. 1 within five (5) days of receipt of the Council's Interim Order and further indicates that the Custodian also provided certified confirmation of compliance to the Executive Director within seven (7) business days of the issuance of said Interim Order. Therefore, the Custodian has complied with the Council's September 27, 2011 Interim Order.

Whether the Custodian's and Chief Financial Officer ("CFO") David Banks's ("Mr. Banks") actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Felder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive

element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996)).

The Custodian violated N.J.S.A. 47:1A-5.b. by not offering the Complainant an opportunity to review and object to the actual cost to convert the records responsive to request Item No. 1 in a medium specified by the Complainant. In addition, Mr. Banks violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not responding in writing within the extended time period to do so. However, the Custodian certified that she e-mailed the Complainant the statement of charges in accordance with the Council's September 27, 2011 Interim Order in a timely manner. Furthermore, the Custodian provided the Complainant with a copy of the record responsive to request Item No. 2 and adopted the GRC's model request form on January 1, 2011. Additionally, the evidence of record does not indicate that the Custodian's and Mr. Banks's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that neither the Custodian's actions nor Mr. Banks'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.

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

OPRA provides that:

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

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

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

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

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to

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

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, supra, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The court in Mason, supra, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, cert denied (1984).”

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

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

“New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term “prevailing party” within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at

the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); *see also* Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

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

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.⁷ Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

After the filing of this Denial of Access Complaint and the issuance of the Council's September 27, 2011 Interim Order, the Council ordered the Custodian to deliver a statement of the actual cost to convert the records responsive to request Item No. 1 within five (5) business days from receipt of the Interim Order. In addition, the evidence of record indicates that the Custodian provided the Complainant copies of the record responsive to request Item No. 2 as part of the SOI, after the filing of the Denial of Access Complaint on July 23, 2010. The evidence of record also indicates that the Borough adopted the GRC's model request form on January 1, 2011.

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

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

conduct.” *Id.* at 432. Specifically, the Council ordered the Custodian to deliver a statement of the actual cost to convert the records responsive to request Item No. 1 in its September 27, 2011 Interim Order. Additionally, the Custodian provided the Complainant with the records responsive to request Item No. 2 with her SOI. Furthermore, the Borough adopted the GRC’s model request form on January 1, 2011. Thus, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief achieved ultimately had a basis in law because the Borough violated N.J.S.A. 47:1A-5.f. by not having an sufficient OPRA request form and the Custodian violated N.J.S.A. 47:1A-6 by not providing a lawful basis for a denial for the record responsive to request Item No. 2 at the time of the Custodian’s response. Therefore, the Complainant is a prevailing party with regards to the records responsive for request Item No. 1 and 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. The evidence of record therefore indicates that the Custodian informed the Complainant of the actual cost to convert the records responsive to request Item No. 1 within five (5) days of receipt of the Council’s Interim Order, and further indicates that the Custodian also provided certified confirmation of compliance to the Executive Director within seven (7) business days of the issuance of said Interim Order. Therefore, the Custodian has complied with the Council’s September 27, 2011 Interim Order.
2. The Custodian violated N.J.S.A. 47:1A-5.b. by not offering the Complainant an opportunity to review and object to the actual cost to convert the records responsive to request Item No. 1 in a medium specified by the Complainant. In addition, Mr. Banks violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not responding in writing within the July 12, 2010 extended time period. However, the Custodian certified that she e-mailed the Complainant the statement of charges in accordance with the Council’s September 27, 2011 Interim Order in a timely manner.

Furthermore, the Custodian provided the Complainant with a copy of the record responsive to request Item No. 2 and adopted the GRC's model request form. Additionally, the evidence of record does not indicate that the Custodian's and Mr. Banks's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions nor Mr. Banks's 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. Specifically, the Council ordered the Custodian to deliver a statement of the actual cost to convert the records responsive to request Item No. 1 in its September 27, 2011 Interim Order. Additionally, the Custodian provided the Complainant with the records responsive to request Item No. 2 along with her SOI. Furthermore, the Borough adopted the GRC's model request form on January 1, 2011. Thus, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief achieved ultimately had a basis in law because the Borough violated N.J.S.A. 47:1A-5.f. by not having an sufficient OPRA request form and the Custodian violated N.J.S.A. 47:1A-6 by not providing a lawful basis for a denial for the record responsive to request Item No. 2 at the time of the Custodian's response. Therefore, the Complainant is a prevailing party with regards to the records responsive for request Item No. 1 and 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

December 13, 2011



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

September 27, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-165

v.

Borough of Morris Plains (Morris)
Custodian of Record

At the September 27, 2011 public meeting, the Government Records Council (“Council”) considered the August 23, 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. Mr. Banks’s failure to respond in writing to request Item No. 1 of the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the July 12, 2010 extended time period results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).
2. The Custodian shall calculate the appropriate charges associated with the conversion of the requested financial data into one of the formats sought by the Complainant and shall make the amount of the charge available to the Complainant; the Custodian shall disclose to the Complainant the requested records upon the Complainant’s payment of such charges. N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. See Wolosky v. Twp. of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009).
3. **The Custodian shall comply with paragraph No. 2 above within five (5) business days from receipt of the Council’s Interim Order by delivering to the Complainant a statement of the actual cost of converting the requested records into one of the formats sought. Within two (2) business days of receipt of such statement, the Complainant shall deliver to the Custodian (a) payment of the actual cost of converting the requested records or (b) a statement declining to purchase these records. The Complainant’s failure to take any action within the two (2) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within seven (7) business days from receipt of the Council’s Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant’s willingness or refusal to purchase the**



requested records. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.¹

4. Because N.J.S.A. 47:1A-5.f. requires that specific elements be contained in an official OPRA request form including providing specific directions and procedures for requesting a record, the time period by which the record must be available, a statement regarding the requestor's right to challenge a denial of access before Superior Court or the GRC and a space for the Custodian to list why access to records was denied in whole or in part, the Borough's OPRA request form at the time of the Complainant's Denial of Access Complaint was deficient. However, the GRC declines to order the Custodian to amend the Borough's OPRA request form because the Custodian certified that the Borough has been using the GRC's model request form since January 1, 2011.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 27th Day of September, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: October 3, 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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 27, 2011 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-165

v.

**Borough of Morris Plains (Morris)²
Custodian of Records**

Records Relevant to Complaint:³ Copies of:

1. Check registry data by check date from January 1, 2008 to the present of the Current/Main or General fund exported in Word, Excel, Access, comma delimited or fixed-field ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer (CFO) or business administrator, in electronic format.
2. Official OPRA request form.

Request Made: June 29, 2010

Response Made: July 9, 2010

Custodian: June R. Uhrin

GRC Complaint Filed: July 23, 2010⁴

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.

July 9, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request.⁵ The Custodian states that the Complainant's request for Item No. 1 has been forwarded to the Finance Office and the Finance Office will reply under a separate cover on July 12, 2010. The Custodian also states that any questions the Complainant may have regarding his request for records responsive to Item No. 1 may be discussed with the Chief Financial Officer, ("CFO") David Banks ("Mr. Banks"). The

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

² Represented by Gail H. Fraser, Esq., of Gail H. Fraser, LLC (Randolph, NJ).

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

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

⁵ The Custodian certifies in the Statement of Information that the Borough offices were closed on July 2, 2010 and July 5, 2010.

Custodian further states that the record responsive to Item No. 2 is already in the Complainant's possession because it was the same form the Complainant submitted in connection with this OPRA request.

July 12, 2010

E-mail from the Complainant to the Custodian. The Complainant states that he is still waiting for the records responsive to request Items No. 1 and No. 2.

July 23, 2010

E-mail from Mr. Banks to the Complainant. Mr. Banks states that he has received the Complainant's OPRA request for the records responsive to request Item No. 1. Mr. Banks also states that he has contacted the Borough's vendor, Vital Communications, which advised that the records responsive to request Item No. 1 can be converted to the requested Excel format. Mr. Banks further states that Vital Communications will be unable to convert the requested records until after the end of month reports, therefore it will be early August before Mr. Banks can provide the records responsive. Lastly, Mr. Banks inquires if this is satisfactory; if not, he can photocopy the records responsive and such paper copies will be available for pick up by July 27, 2010.

July 23, 2010

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

- Complainant's OPRA request dated June 29, 2010
- E-mail from the Custodian to the Complainant dated July 9, 2010
- E-mail from the Complainant to the Custodian dated July 12, 2010

Complainant's Counsel states that the Complainant filed an OPRA request on June 29, 2010 for: 1) check registry data for the Borough from January 1, 2008 to the present; and 2) a copy of the Borough's OPRA request form.

Request Item No. 1:

Counsel states that the Complainant requested financial data on June 29, 2010. Counsel states that the Custodian responded to said request on July 12, 2010 stating that this information would be sent to the Complainant under a separate cover. Counsel further states that as of the date of this Denial of Access Complaint, the Complainant has not yet received the records responsive. Counsel asserts that the Custodian's failure to provide these records responsive constitutes a deemed denial pursuant to N.J.S.A. 47:1A-5.i.

Request Item No. 2:

Counsel states that the Custodian's denial of access to the record responsive to request Item No. 2 because the Complainant had already used the same form when he made his OPRA request is nonsensical. Counsel also asserts that, short of harassment, the Complainant can request the same records multiple times; this is especially true of an OPRA request form, so that the Complainant has a blank request form for future requests.

See William Langford v. City of Perth Amboy (Middlesex), GRC Complaint No. 2005-181 (May 2007) and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006).

Counsel asserts that the Borough's OPRA request form is deficient. Counsel states that in O'Shea v. Township of West Milford, GRC Complaint No. 2007-327 (May 2008), the GRC held that if a public agency's OPRA request form contained false or misleading information about OPRA, that constituted a denial of access. Counsel also states that omission of information required by OPRA constitutes a denial of access pursuant to Wolosky v. Township of Vernon (Sussex), GRC Complaint No. 2009-57 (December 2009). Counsel argues that the Borough's OPRA request form: 1) does not provide specific directions and procedures for requesting a record; 2) does not provide the time period by which the record must be available; 3) does not provide a statement regarding the requestor's right to challenge a denial of access before Superior Court or the GRC; and 4) does not provide a space for the Custodian to list why access to records was denied in whole or in part. Counsel further argues that these elements are required by N.J.S.A. 47:1A-5.f. and since these elements are not included on the Borough's OPRA request form, the GRC should order the Borough to revise its OPRA request form.

Counsel requests that the GRC: 1) order the Custodian to provide a copy of the Borough's OPRA request form to the Complainant; 2) order the Custodian to either adopt the GRC's model request form or amend the Borough's OPRA request form to include the information required by N.J.S.A. 47:1A-5.f.; 3) order the Custodian to disclose the financial information via e-mail; and 4) find that the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-11 and award him a reasonable attorney's fee.

The Complainant does not agree to mediate this complaint.

July 23, 2010

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

July 30, 2010

Custodian's SOI with the following attachments:⁶

- Complainant's OPRA request dated June 29, 2010
- E-mail from the Custodian to the Complainant dated July 9, 2010
- E-mail from Mr. Banks to the Complainant dated July 23, 2010
- Certification from Mr. Banks dated July 30, 2010⁷

The Custodian certifies that none of the records responsive to the Complainant's OPRA request have been destroyed in accordance with the New Jersey Department of State, Division of Archives and Records Management ("DARM").

⁶ The Custodian does not certify as to the search undertaken to satisfy the Complainant's records request.

⁷ The Custodian includes items not relevant to the adjudication of this Denial of Access Complaint.
Jesse Wolosky v. Borough of Morris Plains (Morris), 2010-165 – Findings and Recommendations of the Executive Director

The Custodian certifies that she received the Complainant's OPRA request on June 29, 2010. The Custodian also certifies that the Complainant sought the following records:

- 1) financial data consisting of 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) or business administrator, in electronic format; and
- 2) a copy of the Borough's current OPRA request form.

The Custodian certifies that upon receipt of the Complainant's request, copies of the request were distributed to the Custodian and the Finance Office. The Custodian also certifies that she instructed the Deputy Clerk to prepare a response to the Complainant regarding Item No. 2 and to follow up with the Finance Office regarding a response concerning records responsive to request Item No. 1. The Custodian further certifies that she responded to the Complainant's OPRA request on the sixth (6th) business day after receipt because the Borough offices were closed on July 2, 2010 and July 5, 2010.

The Custodian certifies that the Finance Office is comprised of only the Borough Treasurer/CFO and his assistant. The Custodian also certifies that the Deputy Clerk advised her on July 8, 2010 that the Finance Office was in the process of completing payroll and June's end of month reports and would address the Complainant's request for records responsive to Item No. 1 on July 12, 2010. The Custodian additionally certifies that she authorized the Deputy Clerk to prepare a response to the Complainant's OPRA request on her behalf on July 8, 2010. The Custodian further certifies that the Deputy Clerk informed the Complainant that the Finance Office would respond to request Item No. 1 under separate cover on July 12, 2010 and that regarding request Item No. 2, the Complainant was already in possession of this records responsive because he used the Borough's OPRA request form to submit the instant request.

The Custodian also certifies that the Complainant sent a follow-up e-mail to the Deputy Clerk on July 12, 2010 stating that he was still waiting for the records responsive to request Items No. 1 and 2. The Custodian certifies that from July 12, 2010 through July 14, 2010 she was preparing the necessary records for the conference and regular meeting of the governing body on July 15, 2010. The Custodian also certifies that she was on vacation from July 15, 2010 through July 25, 2010.

Records Responsive to Request Item No. 1:

The Custodian certifies that the Borough offices were closed on July 2, 2010 and July 5, 2010 in observance of the Fourth of July. The Custodian also certifies that after the holiday, the Finance Office was occupied processing payroll and vouchers in preparation for approval at the July 15, 2010 meeting of the governing body.

The Custodian certifies that she mistakenly assumed that the Complainant received a written response from the Finance Office on July 12, 2010. The Custodian also certifies that because of the competing demands on her time in the days before she

left on vacation and ongoing computer problems, she neglected to follow up with the Finance Office or to confirm that a written response had been sent to the Complainant.

The Custodian certifies that after returning from vacation she learned that the Borough does not maintain the financial data requested by the Complainant in any of the formats the Complainant requested. The Custodian also certifies that she would have to consult with the Borough's outside vendor of financial services to determine whether the data could be converted to one of the formats requested by the Complainant. The Custodian certifies that while she was away on vacation during the week of July 19, 2010, the Finance Office communicated with the outside vendor that provides financial services to the Borough regarding the conversion of the records responsive.

The Custodian also certifies that she was advised that the requested check registry data was and has been in use by the Finance Office and the outside vendor for various purposes in preparing payroll, other vouchers and end of month reports, and the outside vendor would be unable to guarantee completion of the data conversion to the requested format until after the end of month reports for July are completed in early August. The Custodian certifies that the Finance Office informed the Complainant via e-mail that the reports would not be ready until August and offered paper copies as an alternative.

The Custodian certifies that under these circumstances the Borough would have required an extension of time to respond to the Complainant's request. The Custodian also certifies that the Custodian would have been unable to provide the records responsive to the Complainant until early August. The Custodian further certifies that the need for an extension of time to provide the records responsive to the Complainant's request was not communicated to the Complainant in a timely manner because she was on vacation from July 15, 2010 through July 25, 2010.

The Custodian certifies that the Finance Office did not realize that the Borough sought an extension until July 12, 2010 for the Finance Office to respond to the Complainant's OPRA request. The Custodian also certifies that the Finance Office was unaware that it had to respond to the Complainant's OPRA request by July 12, 2010. The Custodian further certifies that the Finance Office was unaware that it should have requested an extension if the Finance Office could not respond by July 12, 2010. Additionally, the Custodian certifies that the failure to respond to the Complainant's e-mail dated July 12, 2010 was an inadvertent oversight, which is again the result of competing demands on the Custodian's time leading up to her vacation.

Mr. Banks, the Borough CFO, certifies that the Complainant's request sought financial data in electronic format via e-mail in one of five (5) formats.⁸ Mr. Banks also certifies that the Complainant did not want images, PDF files or paper copies of the requested financial data. Mr. Banks further certifies that the Finance Office does not maintain the records responsive in any of the electronic formats specified by the Complainant. Mr. Banks additionally certifies that the Borough's Finance Office is limited to the CFO and one assistant. Mr. Banks also certifies that shortly after receipt of the Complainant's OPRA request, the Borough offices were closed on July 2, 2010 and

⁸ These formats included Word, Excel, ASCII from Edmunds, MSI or the current software used by the CFO.

July 5, 2010. Mr. Banks certifies that after July 4, 2010, the check registers were used by the Finance Office to process payroll and other vouchers in preparation for approval at the July 15, 2010 meeting of the governing body. Mr. Banks further certifies that he was unaware that the Custodian's original response to the Complainant identified July 12, 2010 as the date the Finance Office would respond to the Complainant's OPRA request. Mr. Banks further certifies that he was unaware that if additional time was necessary to comply with the Complainant's OPRA request, a written response requesting additional time should have been communicated to the Complainant on or before July 12, 2010.

Mr. Banks certifies that during the week following the July 15, 2010 meeting of the governing body, he communicated with the outside vendor that provides financial services to the Borough regarding the conversion of the check registry data to one of the formats specified by the Complainant. Mr. Banks also certifies that the outside vendor initially confirmed that it would be feasible to convert the check registry data to one of the formats specified by the Complainant on July 23, 2010. Mr. Banks further certifies that the outside vendor later advised him that it would be unable to promise completion of the conversion of the records responsive until early August. Mr. Banks certifies that he e-mailed the Complainant on July 23, 2010 to convey this information. Mr. Banks also certifies that he offered to provide the Complainant with paper copies of the records responsive as an alternative to providing the requested financial data in digital format. Mr. Banks further certifies that as of July 30, 2010 there has been no response from the Complainant.

Mr. Banks certifies that based on the timing of the Complainant's OPRA request, as well as the Finance Office's schedule for processing end of month reports, payroll, and other vouchers for approval at the governing body's July 15, 2010 meeting, he would not have been able to provide the records responsive any sooner than early August.

Records Responsive to Request Item No. 2:

The Custodian certifies that she believed that when the Complainant requested a copy of the Borough's OPRA request form that the Complainant was merely seeking confirmation of the format of the Borough's current form. The Custodian further certifies that she responded to the Complainant on July 8, 2010 stating that the form in the Complainant's possession was indeed the Borough's current OPRA form.

The Custodian certifies that the Borough's current OPRA request form has not changed since 2003. The Custodian also states that the OPRA request form consists of five (5) pages and includes all the information required by N.J.S.A. 47:1A-5.f. The Custodian also certifies that certain pages of the Borough's OPRA request form are not maintained in electronic format. The Custodian further certifies that had she realized that the Complainant wanted more than a confirmation of the format of the Borough's form, the Custodian would have directed the Deputy Clerk to inquire whether the Complainant would accept a facsimile copy of the record responsive. The Custodian also certifies that her failure to provide the record responsive was the result of her initial misunderstanding, as well as an inadvertent oversight due to the various demands on the Custodian's time between July 12, 2010 and July 14, 2010.

The Custodian certifies that she was having computer problems for almost two (2) months and as a result she could not scan the instructional pages of the OPRA request form. The Custodian also certifies that as of the date of the SOI, she has obtained a scanned copy of the Borough's current OPRA request form and has forwarded such OPRA request form to the Complainant.

The Custodian also certifies that although the Borough maintains the official OPRA request form as required by N.J.S.A. 47:1A-5.f., the Borough routinely accepts OPRA requests which are not submitted on the official form. The Custodian further certifies that the Complainant filed a subsequent OPRA request on July 26, 2010 which was not on the Borough's official OPRA request form.

August 23, 2010

Complainant Counsel's response to the Custodian's SOI. Counsel states that although the Custodian's SOI contains numerous excuses why the Borough could not follow the law, OPRA is a law of strict liability. Counsel also argues that OPRA sets forth deadlines by which Custodians must comply with OPRA requests. Counsel further argues that in instances where custodians need more time, custodians are permitted to ask for an extension of time. Counsel argues that the Custodian knew that the Borough needed more time to respond to the Complainant's OPRA request but did not request sufficient time to prepare the records responsive to request Item No. 1.

Counsel argues that regarding the request for a record responsive to Item No. 2, the Custodian's claim that she misunderstood the Complainant's request is unreasonable. Counsel states that the Complainant's OPRA request sought "a copy of your current OPRA request form." Counsel argues that no reasonable person could interpret this as a request for confirmation that the Complainant was using the correct form. Counsel also states that even if this request could be construed in that manner, the Complainant reiterated his request for a copy of the Borough's OPRA request form when he sent the Custodian an e-mail stating that he was still waiting for a copy of the OPRA request form on July 12, 2010.

Counsel states that the Custodian's claim that the Borough's current OPRA request form complies with OPRA cannot be evaluated because neither the Custodian nor Custodian's Counsel have provided the GRC with a copy of the Borough's OPRA request form. Counsel argues that without supplying a copy of the OPRA request form, the Borough cannot carry its burden of proof to show that the OPRA request form does not violate OPRA.

August 26, 2010

E-mail from Custodian's Counsel to the GRC. Counsel states she is replying to the Complainant Counsel's e-mail dated August 23, 2010. Counsel includes a separate legal certification from the Custodian dated August 26, 2010. The Custodian certifies that the Borough's current OPRA request form has been unchanged since 2003, consists of five (5) pages and includes all the information required by N.J.S.A. 47:1A-5.f. The Custodian also certifies that the Complainant already had a copy of the record responsive to request Item No. 2 with which he submitted his June 29, 2010 OPRA request. The Custodian further certifies that despite ongoing computer problems, her office researched

methods of scanning the record responsive to request Item No. 2 into electronic format. Lastly, the Custodian certifies that she e-mailed the requested OPRA request form to the Complainant on July 30, 2010. Counsel argues that the Custodian's timely confirmation in response to the Complainant's request advising the Complainant that he had the correct form in his possession cannot be construed as a denial of access because the Complainant was already in possession of that record responsive pursuant to Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609, 618 (App. Div. 2008). Counsel argues that pursuant to Bart, supra, because the Complainant already had a copy of the Borough's official request form, the Custodian had no obligation to convert the OPRA request form into electronic format to send the Complainant a duplicate copy.

Counsel argues that while OPRA's purpose is to "maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process," Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (App. Div. 2004), the statute is also designed to "foster cooperation among requestors and agencies and reasonably accommodate their interests." Mason v. City of Hoboken, 196 N.J. 51, 66 (2008). Counsel also argues that the Custodian had no obligation to provide the Complainant with a copy of the record responsive to request Item No. 2 because the Complainant already had a copy of that record. Counsel further argues that the Custodian reasonably accommodated the Complainant's interest and did so as expeditiously as possible under the circumstances.

Counsel asserts that under the totality of the circumstances, the Custodian's actions in responding to the Complainant's request do not meet the legal standard of a knowing and willful violation of OPRA and an unreasonable denial of access pursuant to N.J.S.A. 47:1A-11.a. Counsel also asserts that there is no element of conscious wrongdoing herein nor were the Custodian's actions intentional or deliberate with knowledge of their wrongfulness. Counsel states that the Custodian accommodated the Complainant's OPRA request for Item No. 2, even though the Complainant was already in possession of the record responsive to request Item No. 2, by virtue of the Complainant's use of the Borough's OPRA request form to submit his OPRA request. Lastly, Counsel respectfully requests that the GRC issue a Final Decision rejecting the Complainant's complaint and rejecting the request for attorney's fees because the Complainant is not a prevailing party pursuant to N.J.S.A. 47:1A-11 and Mason v. City of Hoboken, 196 N.J. 51, 79-80 (2009).

September 3, 2010

E-mail from the Complainant's Counsel to the GRC. Counsel states that Custodian Counsel's citation to Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609, 618 (App. Div. 2008) is not applicable herein. Complainant's Counsel states that the Complainant did not have a clean copy of the Borough's OPRA request form after he used one to make his OPRA request on June 29, 2010. Counsel also states that this fact becomes even more important because the Borough does not post an electronic copy of its OPRA request form on its website. Counsel asserts that Bart is inapplicable and the GRC should hold that the Custodian violated OPRA when she refused to provide the Complainant with a copy of the record responsive to request Item No. 2.

June 22, 2011

E-mail from the GRC to Mr. Banks. The GRC requests a legal certification from the Custodian's vendor, Vital Communications, certifying to the cost associated with conversion of the records responsive to request Item No. 1 to the format specified by the Complainant.

June 28, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel encloses a legal certification from the Borough's Vendor, Vital Communications. Rob Letts, ("Mr. Letts"), an employee of Vital Communications, certifies that he is aware that the Borough received the Complainant's OPRA request seeking the records responsive to request Item No. 1 in electronic format such as Word, Excel, Access, comma delimited or fixed-field ASCII from Edmunds, MSI or the current software used by the CFO. Mr. Letts also certifies that the Borough does not maintain the records responsive to request Item No. 1 in any of the electronic formats specified by the Complainant. Mr. Letts further certifies that at the time of the Complainant's OPRA request, the conversion of the records responsive to request Item No. 1 would have cost \$100.00 for each year of data requested, for a total of \$300.00. In addition, Mr. Letts certifies that currently, the conversion of the records responsive to request Item No.1 into one of the requested formats would cost \$100.00 per OPRA request.

June 30, 2011

E-mail from the GRC to the Custodian. The GRC requests a legal certification from the Custodian as to whether and when the Borough adopted the GRC model request form.

July 5, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel encloses a legal certification from the Custodian. The Custodian certifies that since 2002, the Borough adopted a five (5) page OPRA request form which incorporated all of the information required by N.J.S.A. 47:1A-5.f. The Custodian also certifies that sometime in July 2010, the Borough Clerk's Office became aware that the GRC had a model request form available for use by local governments. The Custodian further certifies that the Borough Clerk's Office adopted the GRC's model OPRA request form on January 1, 2011.⁹

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

⁹ Custodian's Counsel encloses a copy of the Borough's old OPRA request form and a copy of the GRC's model request form adopted by the Borough.

“... 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 also provides that:

“A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record:

1. in a medium not routinely used by the agency;
2. not routinely developed or maintained by an agency; or
3. 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.

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.

The Council will first address the issue of whether Mr. Banks’s response to the Complainant’s OPRA request was timely pursuant to N.J.S.A. 47:1A-5.i.

In the matter before the Council, the evidence of record indicates that the Custodian responded the Complainant’s OPRA request on July 9, 2010, six (6) business days following receipt of such request, stating that the Complainant’s request Item No. 1 was forwarded to the Finance Office and the Finance Office would reply under separate

cover on July 12, 2010. The evidence of record further indicates that Mr. Banks, the Borough CFO, responded to the Complainant's OPRA request on July 23, 2010, nine (9) business days after the extended date to do so. The evidence of record shows that Mr. Banks informed the Complainant that Vital Communications can convert the records responsive to request Item No. 1 into an Excel format and that Vital Communications would be unable to convert the requested records until after the end of month reports were completed; it would be early August before Mr. Banks could provide the records responsive to the Complainant.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁰ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).

Although Mr. Banks failed to respond within the July 12, 2010 extended time period, it was not unreasonable for Mr. Banks to wait to respond to the Complainant's request for records responsive to Item No. 1 until after the end of month reports were completed. However, Mr. Banks should have notified the Complainant of this and requested an additional extension of time in writing.

Therefore, Mr. Banks's failure to respond in writing to request Item No. 1 of the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the July 12, 2010 extended time period results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).

The Council will next address the issue of whether the Custodian unlawfully denied the Complainant access to the records requested pursuant to Item No. 1 of the Complainant's OPRA request.

In the matter before the Council, the Custodian certified in the SOI that the Borough does not maintain the financial data requested by the Complainant in any of the formats the Complainant requested. As part of the SOI, Mr. Banks, the Borough CFO, certified that during the week following July 15, 2010, he communicated with the outside vendor that provides financial services to the Borough regarding the conversion of the check registry data to one of the formats specified by the Complainant and confirmed on

¹⁰ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

July 23, 2010 that it would be feasible to convert the check registry data to one of the formats specified by the Complainant. However, Mr. Banks further certified that the outside vendor advised him that it would be unable to promise completion of the conversion of the records responsive until early August. Mr. Banks certified that he therefore offered to provide the Complainant with paper copies of the records responsive.

Additionally, Rob Letts, an employee of the Borough's vendor, Vital Communications, certified that the Borough does not maintain the records responsive to request Item No. 1 in any of the electronic formats specified by the Complainant. Mr. Letts further certified that at the time of the Complainant's OPRA request, the conversion of the records responsive to request Item No. 1 would have cost \$100.00 for each year of data requested, for a total of \$300.00; however, Mr. Letts also certified that as of June 28, 2011, the conversion of the records responsive to request Item No. 1 into one of the requested formats would only cost \$100.00 per OPRA request.

Pursuant to N.J.S.A. 47:1A-5.d., a Custodian has an affirmative duty to provide a copy of a record in the medium requested unless the agency does not maintain the record in such a medium, in which case the Custodian is required to either convert the record to the requested medium or provide a copy in another meaningful medium. Furthermore, OPRA provides that if the records requested require a substantial amount of manipulation, the Custodian may charge pursuant to N.J.S.A. 47:1A-5.d., "...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..." Further, in accord with N.J.S.A. 47:1A-5.c. "...[t]he requestor shall have the opportunity to review and object to the charge prior to it being incurred."

In Wolosky v. Twp. of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009), the complainant requested delivery of certain records via fax or e-mail and the custodian stated that she did not maintain the records in a format that was conducive to such delivery, the Council decided:

"...in this complaint, if the custodian does not maintain any of the records responsive in an electronic medium, she is required to convert the records in order to provide them electronically via e-mail."

The Council therefore ordered the Custodian to disclose to the Complainant the enumerated records responsive to the Complainant's OPRA request by the method of delivery requested by the Complainant, upon the Complainant's payment of the actual cost of duplicating the records pursuant to N.J.S.A. 47:1A-5.b., if any.

In the matter before the Council, the certification of Mr. Letts indicates that the actual cost to convert the requested financial data into one of the formats sought by the Complainant is \$100.00 for each year of data requested, for a total of \$300.00. However, there is no evidence in the record that the Custodian provided the Complainant with the opportunity to review and object to such charge prior to it being incurred.

Therefore, the Custodian shall calculate the appropriate charges associated with the conversion of the requested financial data into one of the formats sought by the Complainant and shall make the amount of the charge available to the Complainant; the Custodian shall disclose to the Complainant the requested records upon the Complainant's payment of such charges. N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. See Wolosky v. Twp. of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009).

The Council next addresses the issue of whether the Township's OPRA request form is valid pursuant to N.J.S.A. 47:1A-5.f.

The Complainant argued that the Borough's OPRA request form is invalid under OPRA because it does not provide specific directions and procedures for requesting a record, does not provide the time period by which the record must be available, does not provide a statement regarding the requestor's right to challenge a denial of access before Superior Court or the GRC and does not provide a space for the Custodian to list why access to records was denied in whole or in part. The Complainant certified that the Borough's OPRA request form at the time of the Complainant's OPRA request met all of the requirements of N.J.S.A. 47:1A-5.f. The Custodian further certified that the Borough has used the GRC's model request form since January 1, 2011.

OPRA provides that:

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

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

N.J.S.A. 47:1A-5.f. mandates that public agencies adopt an official OPRA request form. While OPRA does not mandate that agencies adopt the GRC's model OPRA request form, the GRC has mandated that agencies alter those forms which are

inconsistent with the requirements of N.J.S.A. 47:1A-5.f. or are potentially misleading to requestors.

In O’Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Township’s official OPRA request form stated that employee personnel files are not considered public records under OPRA but failed to list the exemptions to this provision as outlined in N.J.S.A. 47:1A-10. The Council held that this omission could result in a requestor being deterred from submitting an OPRA request for certain personnel records because the Township’s form provided misinformation regarding the accessibility of said records. The Council held that such deterrence due to the ambiguity of the Township’s official OPRA request form constitutes a denial of access to the requested records. Holding the exclusion of the necessary information unlawful, the Council ordered the Custodian to either delete the portion of the Township’s OPRA request form referencing personnel records (as it was not required by N.J.S.A. 47:1A-5.f.) or include the exemption to the personnel records provision in its entirety.

In the instant matter, as in O’Shea, supra, the Borough’s official OPRA request form at the time of the Complainant’s OPRA request is deficient and potentially misleading to requestors. The evidence of record shows that the Borough’s official OPRA request form lacks some of the elements required to be contained within an agency’s official OPRA request form; specifically:

- The form fails to provide specific directions and procedures for requesting a record.
- The form fails to provide the time period by which the records must be available.
- The form fails to provide a statement regarding the requestor’s right to challenge a denial of access before the New Jersey Superior Court or the GRC.
- The form fails to provide a space for the Custodian to list why access to records was denied in whole or in part.

Therefore, because N.J.S.A. 47:1A-5.f. requires that specific elements be contained in an official OPRA request form including providing specific directions and procedures for requesting a record, the time period by which the record must be available, a statement regarding the requestor’s right to challenge a denial of access before Superior Court or the GRC and a space for the Custodian to list why access to records was denied in whole or in part, the Borough’s OPRA request form at the time of the Complainant’s Denial of Access Complaint was deficient. However, the GRC declines to order the Custodian to amend the Borough’s OPRA request form because the Custodian certified that the Borough has been using the GRC’s model request form since January 1, 2011.

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

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. Mr. Banks’s failure to respond in writing to request Item No. 1 of the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the July 12, 2010 extended time period results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).
2. The Custodian shall calculate the appropriate charges associated with the conversion of the requested financial data into one of the formats sought by the Complainant and shall make the amount of the charge available to the Complainant; the Custodian shall disclose to the Complainant the requested records upon the Complainant’s payment of such charges. N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. See Wolosky v. Twp. of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009).
3. **The Custodian shall comply with paragraph No. 2 above within five (5) business days from receipt of the Council’s Interim Order by delivering to the Complainant a statement of the actual cost of converting the requested records into one of the formats sought. Within two (2) business days of receipt of such statement, the Complainant shall deliver to the Custodian (a) payment of the actual cost of converting the requested records or (b) a statement declining to purchase these records. The Complainant’s failure to take any action within the two (2) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within seven (7) business days from receipt of the Council’s Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant’s willingness or refusal to purchase the requested records. The Custodian’s statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.¹¹**

¹¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
Jesse Wolosky v. Borough of Morris Plains (Morris), 2010-165 – Findings and Recommendations of the Executive Director

4. Because N.J.S.A. 47:1A-5.f. requires that specific elements be contained in an official OPRA request form including providing specific directions and procedures for requesting a record, the time period by which the record must be available, a statement regarding the requestor's right to challenge a denial of access before Superior Court or the GRC and a space for the Custodian to list why access to records was denied in whole or in part, the Borough's OPRA request form at the time of the Complainant's Denial of Access Complaint was deficient. However, the GRC declines to order the Custodian to amend the Borough's OPRA request form because the Custodian certified that the Borough has been using the GRC's model request form since January 1, 2011.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

Approved By: Catherine Starghill, Esq.
Executive Director

August 23, 2011