



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-183

v.

Township of Roxbury (Morris)
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 23, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this Complaint should be dismissed because the Complainant withdrew his complaint via letter to the GRC and the Office of Administrative Law dated September 25, 2012, as the parties have settled on all outstanding issues in this matter. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 18th Day of December, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 19, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-183

v.

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

Records Relevant to Complaint:³

Copies of:

1. Township's approved minutes of its January 2010 executive sessions.
2. Township's approved minutes of its February 2010 executive sessions.
3. Township's approved minutes of its March 2010 executive sessions.
4. Township's approved minutes of its April 2010 executive sessions.
5. The Township's official OPRA request form.

Request Made: June 29, 2010

Response Made: July 12, 2010

Custodian: Amy E. Rhead

GRC Complaint Filed: July 30, 2010⁴

Background

November 29, 2011

At its November 29, 2011 public meeting, the Government Records Council ("Council") considered the November 22, 2011 Executive Director's Findings and Recommendations and all related documents submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the evidence of record indicates that the Custodian provided certified confirmation of compliance with the Council's Interim Order on July 7, 2011, the fifth (5th) business day following the receipt of the Council's Interim Order, certified that she provided the Complainant with the requested minutes with appropriate redactions and certified that the Township amended the official OPRA request form as ordered through its

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

²Represented by James T. Bryce, Esq., of Johnson, Murphy, Hubner, et als (Riverdale, NJ).

³Additional records were requested which are not relevant to the adjudication of this complaint.

⁴The GRC received the Denial of Access Complaint on August 2, 2010.

adoption of the GRC's model OPRA request form and supplied a copy of the applicable Township Resolution confirming such, the Custodian has complied with the Council's June 29, 2011 Interim Order.

2. The Custodian failed to respond in writing to the Complainant's June 29, 2010 OPRA request either granting access with the necessary redactions, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, resulting in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.e., N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010), and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005). Further, the Custodian unlawfully denied access to the requested executive session minutes, with the exception of the revised minutes dated February 9, 2010 and the April 13, 2010 and April 27, 2010 minutes, pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Finally, the Township's OPRA request form was deficient and potentially misleading to requestors pursuant to O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), because it (a) stated that "employee personnel files" were not public records, but does not state OPRA's exceptions to the general rule that personnel files are not public records, (b) stated that "police investigation records" are not public records while ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b., (c) failed to state that requestors may challenge an agency's denial of access by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council, and (d) failed to provide an area where a custodian can provide a legal reason for denying the request in whole or in part. However, the Custodian timely complied with the Council's June 28, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and the Council's June 28, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6,

Teeters and Mason. 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, adjudicated concurrently herewith, an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

December 1, 2012

Council's Interim Order distributed to the parties.

March 8, 2012

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

September 25, 2012

E-mail from Complainant's Counsel to the Honorable Barry E. Moscovitz, A.L.J., with copy to the GRC. Counsel states that the parties have settled all outstanding issues in this matter and pursuant to that settlement; the Complainant withdraws his Denial of Access Complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this Complaint should be dismissed because the Complainant withdrew his complaint via letter to the GRC and the Office of Administrative Law dated September 25, 2012, as the parties have settled on all outstanding issues in this matter. Therefore, no further adjudication is required.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 23, 2012⁵

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



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CHRIS CHRISTIE
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LORI GRIFA
Commissioner

INTERIM ORDER

November 29, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-183

v.

Township of Roxbury (Morris)
Custodian of Record

At the November 29, 2011 public meeting, the Government Records Council ("Council") considered the November 22, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the evidence of record indicates that the Custodian provided certified confirmation of compliance with the Council's Interim Order on July 7, 2011, the fifth (5th) business day following the receipt of the Council's Interim Order, certified that she provided the Complainant with the requested minutes with appropriate redactions and certified that the Township amended the official OPRA request form as ordered through its adoption of the GRC's model OPRA request form and supplied a copy of the applicable Township Resolution confirming such, the Custodian has complied with the Council's June 29, 2011 Interim Order.
2. The Custodian failed to respond in writing to the Complainant's June 29, 2010 OPRA request either granting access with the necessary redactions, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, resulting in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.e., N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010), and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005). Further, the Custodian unlawfully denied access to the requested executive session minutes, with the exception of the revised minutes dated February 9, 2010 and the April 13, 2010 and April 27, 2010 minutes, pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Finally, the Township's OPRA request form was deficient and potentially misleading to requestors pursuant to O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), because it (a) stated that "employee personnel files" were not public records, but does not state OPRA's exceptions to the general rule that personnel files are not public records,



(b) stated that "police investigation records" are not public records while ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b., (c) failed to state that requestors may challenge an agency's denial of access by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council, and (d) failed to provide an area where a custodian can provide a legal reason for denying the request in whole or in part. However, the Custodian timely complied with the Council's June 28, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and the Council's June 28, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters and Mason. 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, adjudicated concurrently herewith, an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 29th Day of November, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-183

v.

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

Records Relevant to Complaint:³

Copies of:

1. Township's approved minutes of its January 2010 executive sessions.
2. Township's approved minutes of its February 2010 executive sessions.
3. Township's approved minutes of its March 2010 executive sessions.
4. Township's approved minutes of its April 2010 executive sessions.
5. The Township's official OPRA request form.

Request Made: June 29, 2010

Response Made: July 12, 2010

Custodian: Amy E. Rhead

GRC Complaint Filed: July 30, 2010⁴

Background

June 28, 2011

At its June 28, 2011 public meeting, the Government Records Council ("Council") considered the June 21, 2011 Executive Director's Findings and Recommendations and all related documents submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access with the necessary redactions, 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.e., N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., Kelley v. Township of Rockaway, GRC

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

²Represented by James T. Bryce, Esq., of Johnson, Murphy, Hubner, et als (Riverdale, NJ).

³Additional records were requested which are not relevant to the adjudication of this complaint.

⁴The GRC received the Denial of Access Complaint on August 2, 2010.

Complaint No. 2007-11 (January 2010), and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005).

2. Because the evidence of record indicates that the Township approved the requested executive session minutes prior to the Complainant's OPRA request dated June 29, 2010, with the exception of the revised minutes dated February 9, 2010 and the April 13, 2010 and April 27, 2010 minutes, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6. **Accordingly, the Custodian shall disclose to the Complainant the requested executive session meeting minutes for the dates identified, with redactions as necessary.**
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.⁶**
4. The Township's OPRA request form is deficient because it (a) states that "employee personnel files" were not public records, but does not state OPRA's exceptions to the general rule that personnel files are not public records, and (b) states that "police investigation records" are not public records while ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b., (c) fails to state that requestors may challenge an agency's denial of access by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council, and (d) fails to provide an area where a custodian can provide a legal reason for denying the request in whole or in part. Accordingly, consistent with O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Township of Roxbury's official OPRA request form is deficient and potentially misleading to requestors. In essence, such a form constitutes a denial of access. As such, the Township of Roxbury shall either adopt the GRC's Model Request Form located at

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

<http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form by:

- **Providing a section that details the exemptions in regards to personnel file requests listed in N.J.S.A. 47:1A-10 or altogether omitting references to personnel file records.**
 - **Providing the details of the circumstances in which police investigation records are disclosable under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.**
 - **Instructing a requestor that an agency's denial of access to government records may be challenged by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council.**
 - **Providing a section on the request form where a custodian can provide a legal reason for denying the request in whole or in part.**
5. **The Custodian shall comply with Item No. 4 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁷, to the Executive Director.**
 6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
 7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

June 29, 2011

Council's Interim Order distributed to the parties.

July 7, 2011

Custodian's certification of compliance. The Custodian certifies that she provided the Complainant with the requested records.⁸ The Custodian certifies that the Township of Roxbury has adopted the Government Record Council's ("GRC") model request form and attaches the OPRA request form and Resolution of the Township Council as evidence.

⁷ "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."

⁸ The Custodian does not specify as to exactly what date the relevant records were provided to the Complainant.

Analysis

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

The Council's June 28, 2011 Interim Order specifically directed the Custodian to disclose to the Complainant the requested executive session meeting minutes for the dates identified, with redactions as necessary. In addition, the Council ordered that the Township of Roxbury amend the official OPRA request form by bringing it into compliance with N.J.S.A. 47:1A-5.f. via the omission or change of the offending material or the adoption of the Government Record Council's model OPRA request form. The Interim Order also directed the Custodian to provide certified confirmation of compliance with the Council's June 28, 2011 Interim Order to the GRC's Executive Director within five (5) business days from receipt of said order. The Council's Order was distributed to the parties on June 29, 2011.

The evidence of record indicates that the Custodian provide certified confirmation of compliance with the Council's Interim Order on July 7, 2011, the fifth (5th) business day following the receipt of the Council's Interim Order. The Custodian certified that she provided the Complainant with the requested minutes with appropriate redactions. The Custodian also certified that the Township amended the official OPRA request form as ordered through its adoption of the GRC's model OPRA request form and supplied a copy of the applicable Township Resolution confirming such. Accordingly, the Custodian has complied with the Council's June 29, 2011 Interim Order.

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?

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much

more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

The Custodian failed to respond in writing to the Complainant's June 29, 2010 OPRA request either granting access with the necessary redactions, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, resulting in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.e., N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010), and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005). Further, the Custodian unlawfully denied access to the requested executive session minutes, with the exception of the revised minutes dated February 9, 2010 and the April 13, 2010 and April 27, 2010 minutes, pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Finally, the Township's OPRA request form was deficient and potentially misleading to requestors pursuant to O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), because it (a) stated that "employee personnel files" were not public records, but does not state OPRA's exceptions to the general rule that personnel files are not public records, (b) stated that "police investigation records" are not public records while ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b., (c) failed to state that requestors may challenge an agency's denial of access by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council, and (d) failed to provide an area where a custodian can provide a legal reason for denying the request in whole or in part. However, the Custodian timely complied with the Council's June 28, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

"[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:
institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or

in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

“New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," Id. at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," Id. at 495. See also North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

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

relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

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

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

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

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

higher, fee award.⁹ Those changes expand counsel fee awards under OPRA.” Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight business days later, or one day beyond the statutory limit. *Id.* at 79. As a result, the Court shifted the burden to Hoboken to prove that the plaintiff’s lawsuit, filed on March 4, was not the catalyst behind the City’s voluntary disclosure. *Id.* Because Hoboken’s February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff’s lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

In the instant matter, the Complainant filed the Denial of Access Complaint on July 30, 2010, asserting that the Custodian failed to timely respond to the OPRA request, unlawfully denied access to the requested executive session minutes, with the exception of the revised minutes dated February 9, 2010 and the April 13, 2010 and April 27, 2010 minutes, and that deficiencies in the OPRA request form constitute a denial of access under OPRA. The Council’s June 28, 2011 Interim Order required the Custodian to disclose to the Complainant the requested executive session minutes from January 2010 to April 2010, except the revised minutes dated February 9, 2010 and the April 13, 2010 and April 27, 2010 minutes which were not approved by the governing body at the time of the Complainant’s OPRA request, and further required the Custodian to revise the Township’s OPRA request form. The Custodian timely complied with the Council’s June 28, 2011 Interim Order on July 7, 2011.

Pursuant to Teeters, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51

⁹ The significance of awarding fees to “requestors” and not “plaintiffs” is less clear because OPRA’s fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC’s more information mediation route; the phrase “requestors” may simply have been used to encompass both groups. Likewise, one cannot obtain an “order” from the GRC, so the absence of that language in OPRA is not necessarily revealing.

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the evidence of record indicates that the Custodian provided certified confirmation of compliance with the Council's Interim Order on July 7, 2011, the fifth (5th) business day following the receipt of the Council's Interim Order, certified that she provided the Complainant with the requested minutes with appropriate redactions and certified that the Township amended the official OPRA request form as ordered through its adoption of the GRC's model OPRA request form and supplied a copy of the applicable Township Resolution confirming such, the Custodian has complied with the Council's June 29, 2011 Interim Order.
2. The Custodian failed to respond in writing to the Complainant's June 29, 2010 OPRA request either granting access with the necessary redactions, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, resulting in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.e., N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010), and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005). Further, the Custodian unlawfully denied access to the requested executive session minutes, with the exception of the revised minutes dated February 9, 2010 and the April 13, 2010 and April 27, 2010 minutes, pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Finally, the Township's OPRA request form was deficient and potentially misleading to requestors pursuant to O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), because it (a) stated that "employee personnel files" were not public records, but does not state OPRA's exceptions to the general rule that personnel files are not public records, (b) stated that "police investigation records" are not public records while ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b., (c) failed to state that requestors may challenge an agency's

denial of access by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council, and (d) failed to provide an area where a custodian can provide a legal reason for denying the request in whole or in part. However, the Custodian timely complied with the Council's June 28, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and the Council's June 28, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters and Mason. 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, adjudicated concurrently herewith, an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill
Executive Director

November 22, 2011



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

June 28, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-183

v.

Township of Roxbury (Morris)
Custodian of Record

At the June 28, 2011 public meeting, the Government Records Council (“Council”) considered the June 21, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access with the necessary redactions, 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.e., N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010), and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005).
2. Because the evidence of record indicates that the Township approved the requested executive session minutes prior to the Complainant’s OPRA request dated June 29, 2010, with the exception of the revised minutes dated February 9, 2010 and the April 13, 2010 and April 27, 2010 minutes, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant’s request and were therefore disclosable pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6. **Accordingly, the Custodian shall disclose to the Complainant the requested executive session meeting minutes for the dates identified, with redactions as necessary.**
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**



redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²

4. The Township's OPRA request form is deficient because it (a) states that "employee personnel files" were not public records, but does not state OPRA's exceptions to the general rule that personnel files are not public records, and (b) states that "police investigation records" are not public records while ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b., (c) fails to state that requestors may challenge an agency's denial of access by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council, and (d) fails to provide an area where a custodian can provide a legal reason for denying the request in whole or in part. Accordingly, consistent with Martin O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Township of Roxbury's official OPRA request form is deficient and potentially misleading to requestors. In essence, such a form constitutes a denial of access. As such, the Township of Roxbury shall either adopt the GRC's Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form by:
 - **Providing a section that details the exemptions in regards to personnel file requests listed in N.J.S.A. 47:1A-10 or altogether omitting references to personnel file records.**
 - **Providing the details of the circumstances in which police investigation records are disclosable under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.**
 - **Instructing a requestor that an agency's denial of access to government records may be challenged by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council.**
 - **Providing a section on the request form where a custodian can provide a legal reason for denying the request in whole or in part.**
5. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4³, to the Executive Director.**

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of June, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: June 29, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-183

v.

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

Records Relevant to Complaint:³

Copies of:

1. Township's approved minutes of its January 2010 executive sessions.
2. Township's approved minutes of its February 2010 executive sessions.
3. Township's approved minutes of its March 2010 executive sessions.
4. Township's approved minutes of its April 2010 executive sessions.
5. The Township's official OPRA request form.

Request Made: June 29, 2010

Response Made: July 12, 2010

Custodian: Amy E. Rhead

GRC Complaint Filed: July 30, 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 12, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the eighth (8th) business day following receipt of such request. The Custodian requests a five (5) business day extension to respond to the OPRA request until July 19, 2010 because the Chief Financial Officer is on vacation and is unable to address certain areas of the requested records.

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

²Represented by James T. Bryce, Esq., of Johnson, Murphy, Hubner, et als (Riverdale, NJ).

³ Additional records were requested which are not relevant to the adjudication of this complaint.

⁴ The GRC received the Denial of Access Complaint on August 2, 2010.

July 12, 2010

E-mail from the Complainant to the Custodian. The Complainant agrees to the Custodian's request for an extension until July 19, 2010.

July 19, 2010

E-mail from the Custodian to the Complainant. The Custodian states that attached to this e-mail is the Township's OPRA request form.

The Custodian also states that the following executive session minutes have been completed and approved, but only certain portions have been approved for public release.

The Custodian states that the January 5, 2010 executive session minutes have been redacted for matters involving attorney client privileged material, litigation and contract negotiations. The Custodian maintains that the January 26, 2010 executive session minutes have been redacted for litigation, land acquisition, and contract negotiations matters. The Custodian states that the February 9, 2010 executive session minutes have been redacted for litigation and land acquisition matters. The Custodian states that the February 23, 2010 executive session minutes have been redacted for land acquisition matters.

July 20, 2010

E-mail from the Complainant to the Custodian. The Complainant inquires as to the status of the requested executive session minutes.

July 21, 2010

E-mail from the Custodian to the Complainant. The Custodian asserts that the executive session minutes have been approved by the Council but the Council has determined that the need for confidentiality continues to justify the redaction of minutes concerning subjects that were discussed at the meetings.

The Custodian states that as of July 21, 2010, the minutes for April 13, 2010 and April 27, 2010 have not been approved. The Custodian states that the only executive session minutes available for January 2010 through March 2010 contain redactions for confidential matters; the Custodian states that she therefore did not provide copies of such minutes. The Custodian asks that if the Complainant requires copies of the minutes, he should so inform her.

July 26, 2010

E-mail from the Complainant to the Custodian. The Complainant states that he would still like copies of the requested executive session minutes.

July 30, 2010

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

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

- E-mail from the Custodian to the Complainant dated July 20, 2010
- E-mail from the Complainant to the Custodian dated July 20, 2010
- E-mail from the Custodian to the Complainant dated July 21, 2010
- E-mail from the Complainant to the Custodian dated July 26, 2010

Complainant's Counsel states that on June 29, 2010, the Complainant faxed his completed OPRA request on the Record Custodian's official form. Counsel asserts the Complainant specified that the medium in which he wanted the minutes provided to him was in electronic format delivered by e-mail.

Counsel states that on July 12, 2010, the Custodian responded to the OPRA request in an e-mail and requested an extension of time in order to properly reply to the Complainant's request. Counsel further states that in this e-mail, the Custodian also acknowledged receiving the Complainant's request on June 29, 2010. Counsel states that on the same day, the Complainant promptly responded to the Clerk's e-mail granting the Custodian her requested extension.

Counsel also states that on July 20, 2010, the Custodian responded to the Complainant's OPRA request via e-mail. Counsel asserts that in regards to the executive session minutes, the Clerk stated that "[t]he following executive session minutes have been completed and approved; however only certain portions of each have been approved for public release."

Counsel states that in said e-mail, the Custodian listed the dates of the approved executive session minutes and the reasons why such minutes were not released. Counsel states that on July 21, 2010, the Complainant inquired as to the status of the requested executive session minutes. Counsel states that the Custodian informed him that the only executive session minutes that are currently available for January through March have all the discussion related to the subject matters redacted. Counsel states that on July 26, 2010, the Complainant informed the Custodian that he would require copies of the requested executive session minutes.

Counsel states that the Complainant made his OPRA request on June 29, 2010 and did not receive a response until nine (9)⁵ business days later on July 12, 2010. Counsel argues that this is in violation of OPRA's requirement of a response within seven (7) business days of receipt of the request and therefore is a "deemed denial" pursuant to N.J.S.A. 47:1A-5.i. Counsel further argues that access should have been provided to the requested records because such records were readily identifiable and should have been easily located as there is no evidence that they were located off-site, consistent with Paff' v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (April 2008).

⁵ The evidence of record indicates that the Custodian responded to the OPRA request on the eighth (8th) business day following receipt thereof due to the state holiday on July 5, 2010.

Counsel argues that the January, February, March, and April 2010 executive session minutes were approved by the governing body and that once these minutes were approved, they became public records and hence are disclosable. Counsel states that records custodians or public agencies cannot create additional barriers to access. *See Dittrich v. City of Hoboken*, GRC Complaint No. 2006-145 (May 2007) (holding that records custodians could not create undue burdens on access, such as forcing requestors to fill out multiple forms). Counsel asserts that here, the Clerk is simply denying access to approved executive session minutes because the Council has determined that there is a need for confidentiality although the minutes have been approved.

Counsel states that in *O'Shea v. Township of West Milford*, GRC Complaint No. 2007-237 (May 2008), the GRC held that if a public agency's OPRA form contained false or misleading information about OPRA, that constituted a denial of access. Counsel argues that the omission of information required by OPRA is also deemed a denial of access. *Wolosky v. Township of Vernon Board of Education*, GRC Complaint 2009-57 (Dec. 2009) (Township's OPRA form that omitted information required by N.J.S.A. 47:1A-5.f. was invalid and constituted a denial of access).

Counsel states that Roxbury Township's OPRA form is defective in four (4) different ways. Counsel maintains that (1) it fails to state that requestors have a right to challenge a denial of access to Superior Court or to the Government Records Council; (2) it does not provide an area where a Clerk can give a reason why a request was denied in whole or part; (3) the form states that employee personnel files are not public records but did not state OPRA's exceptions to that general rule; and (4) the form stated that police investigation records are not public records, ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b. Counsel maintains that these deficiencies in Roxbury Township's OPRA form constitute a denial of access and that pursuant to *O'Shea*, the GRC should order Roxbury Township to revise its form to be in accordance with the law.

Counsel argues that if the GRC finds the Complainant to be a prevailing party, reasonable attorney's fees should be awarded pursuant to N.J.S.A. 47:1A-6. The Complainant declines mediation.

August 13, 2010

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

August 20, 2010

Custodian's SOI with the following attachments: ⁶

- Complainant's OPRA request dated June 29, 2010
- Custodian's response to the OPRA request dated July 12, 2010
- E-mail from the Complainant to the Custodian dated July 12, 2010
- E-mail from the Custodian to the Complainant dated July 19, 2010, with attachments
- E-mail from the Complainant to the Custodian dated July 20, 2010

⁶ Additional documentation not relevant to the adjudication of this complaint was also attached.
Jesse Wolosky v. Township of Roxbury (Morris), 2010-183 – Findings and Recommendations of the Executive Director

- E-mail from the Complainant to the Custodian dated July 21, 2010
- E-mail from the Custodian to the Complainant dated July 21, 2010
- E-mail from the Complainant to the Custodian dated July 26, 2010
- Copy of the Township's OPRA request form
- Copy of the Township's executive minutes for January 5, 2010, redacted
- Copy of the Township's executive minutes for January 26, 2010, redacted
- Copy of the Township's executive minutes for February 9, 2010, redacted
- Copy of the Township's executive minutes for February 23, 2010, redacted
- Copy of the Township's executive minutes for March 9, 2010, redacted
- Copy of the Township's executive minutes for March 23, 2010, redacted
- Copy of the Township's policy concerning the release of minutes

The Custodian certifies that the Complainant was supplied with:

1. Information pertaining to approved minutes of closed or executive session of government bodies during January, February, March, and April 2010, and
2. A copy of the Township's OPRA request form.

The Custodian certifies that there is no applicable retention requirement and disposition schedule for any of the responsive records. The Custodian certifies that all of the records and information requested remain in existence. The Custodian certifies that N.J.S.A. 47:1A-9.a. allows exemptions from disclosure contained in other state statutes to apply to records requested under OPRA and N.J.S.A. 10:4-12 allows governing bodies to exclude the public from discussions of personnel matters. The Custodian certifies that the redactions to the approved executive minutes were made to protect from disclosure matters deemed confidential in accordance with N.J.S.A. 10:4-12.

The Custodian argues that the Complainant is estopped from claiming a denial of access based upon the timing of the Custodian's response because the Complainant voluntarily granted the Custodian additional time to respond. The Custodian maintains that it has long been held that a waiver is "the voluntary relinquishment of a known right evidenced by a clear, unequivocal, and decisive act from which an intention to relinquish the right can be based." Country Chevrolet v. North Brunswick Tp. Planning Bd., 190 N.J.Super. 376, 380 (App.Div. 1983). The Custodian alleges that in Country Chevrolet, it was held that the complainant's acceptance of the custodian's request for an extension was in effect his waiving of his right to later complain that a deemed denial occurred. *Id.* The Custodian argues that Miller v. Miller, 95 N.J. 154 (1984), holds that such actions amount to equably estopping the complainant from claiming that the Custodian violated the law.

The Custodian argues that simply because executive session minutes are approved or adopted does not indicate that the subject matter discussed therein is appropriate for public disclosure, and that accordingly, redactions may need to be made. The Custodian certifies that pursuant to the Open Public Meetings Act, minutes pertaining to sessions from which the public is excluded are to remain confidential until the matters discussed no longer require confidentiality.

The Custodian certifies that the Township uses several forms for OPRA requests. The Custodian argues that the legislative intent of OPRA is not to punish a public agency or its custodian that in good faith attempts to comply with the spirit of the Act. The Custodian argues that complaining that a request form is technically imperfect places form over substance and diminishes the importance and nature of OPRA. The Custodian argues that the technical deficiency of an OPRA request form is not within the purview of N.J.S.A. 47:1A-5 and that N.J.S.A. 47:1A-5.f. provides no such language. The Custodian maintains that a continued holding that such technical non-conformity is a denial of access is improvident in light of potential budgetary impacts.

September 10, 2010

Letter from Complainant's Counsel to the GRC. In response to the Custodian's SOI, Counsel argues the Custodian's argument that the Complainant is "estopped" from asserting a denial of access claim based on time is baseless. Counsel maintains that the Custodian's response to the Complainant's OPRA request occurred after the seven (7) business days prescribed in OPRA and that moreover, such response contained a request for an extension and was not a fulfillment of the request. Counsel maintains that the Complainant's voluntarily acceptance of the Custodian's request for an extension does not defeat what is statutorily mandated and is therefore immaterial to the matter at hand.

Counsel states that the Custodian's assertion that the Complainant is arguing that the approved minutes were released but were simply redacted is false. Counsel states that the Complainant was never provided a copy of the requested executive session minutes and as of the date of this letter has still not received copies of the requested executive session minutes. Counsel states that the Custodian did provide copies of the requested executive session minutes with the SOI, but that these minutes were only provided to the Complainant's Counsel.

Counsel states that executive session minutes that have not been approved are exempt from disclosure under OPRA as advisory, consultative, or deliberative ("ACD") material. Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). Counsel argues that once the executive session minutes are approved, the minutes are no longer ACD and are therefore disclosable pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Twp. Bd. of Educ., GRC Complaint No. 2009-57 (December 2009).

April 5, 2011

Letter from Custodian's Counsel to the GRC, enclosing a legal certification from the Custodian.

The Custodian certifies that she notified the Complainant via e-mail⁷ that all of the approved minutes were fully redacted and not approved for release. The Custodian certifies that she asked the Complainant whether he still wanted copies of the minutes despite their redactions. The Custodian certifies that the Complainant did not respond to this inquiry and accordingly the Custodian did not provide the requested minutes.

⁷ Counsel does not specify the date of this e-mail.

The Custodian includes the following redaction index:

Date of Executive Session	Date of Approval of the Minutes	Basis for redaction
January 5, 2010	February 23, 2010	ACD: Water Ordinance Litigation: County Concrete Contract Negotiations: Property on Hawthorne Drive
January 26, 2010	February 23, 2010	Litigation: County Concrete Litigation: Mt. Arlington Fire Hydrant Land Acquisition: McNear Contract Negotiations: Potential Shared Services
February 9, 2010	February 23, 2010 ⁸	Litigation: Mt. Arlington Fire Hydrant Litigation: Tilcon Land Acquisition: McNear
February 23, 2010	March 9, 2010	Litigation: County Concrete Litigation: Tilcon Contract Negotiations: Union Contracts
March 9, 2010	March 23, 2010	Litigation: County Concrete Litigation: Mt. Arlington Fire Hydrant
March 23, 2010	April 13, 2010	Land Acquisition: McNear
April 13, 2010	September 14, 2010	Litigation: County Concrete ACD: Wellfleet/Villages
April 27, 2010	September 14, 2010	Litigation: County Concrete Litigation: County Railroad Personnel: Clerk's Office Contract Negotiations: Local 102 Contract Negotiations: Local 11

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:

⁸ Revised minutes to correct counsel's name were approved September 14, 2010.
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“... 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.

Furthermore, OPRA provides:

“If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA] as amended and supplemented, the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5.g.

OPRA also provides:

“Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived.” N.J.S.A. 47:1A-5.i.

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

OPRA 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.⁹ 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 (October 2007).

⁹ 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. Jesse Wolosky v. Township of Roxbury (Morris), 2010-183 – Findings and Recommendations of the Executive Director

In the instant case, the Custodian received the Complainant's OPRA request on June 29, 2010 and responded to it in writing on July 12, 2010, the eighth (8th) business day after receipt of such request. Although the Custodian requested an extension of time to respond, such request was not timely under OPRA. Accordingly, the Custodian has failed to respond to the Complainant's OPRA request by either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days. This breach of the law 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 (October 2007).

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access with the necessary redactions, 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.e., N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010), and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005).

In the matter before the Council, the evidence of record indicates that the Custodian responded to the Complainant's OPRA request on July 19, 2010, stating that the January 5, 2010, January 26, 2010, February 9, 2010 and February 23, 2010 executive session minutes were completed and approved by the Township, but only certain portions were approved for public release since they contained privileged and/or confidential material. Additionally, in a certification to the GRC dated April 5, 2011, the Custodian certified that all of the requested executive session minutes were approved prior to the Complainant's OPRA request dated June 29, 2010, with the exception of the revised minutes dated February 9, 2010 and the April 13, 2010 and April 27, 2010 minutes.

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

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

making.” *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

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

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

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

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

As in Wolosky, the Custodian in the instant complaint denied the Complainant access to executive session minutes on the grounds that said minutes had not yet been approved for release by the Township. Moreover, the Custodian in this complaint argued that although the minutes were approved as to accuracy and content, they were not approved for release to the general public. However, the Council has previously found that once the governing body of an agency has approved meeting minutes as to accuracy and content (per the requirement of the Open Public Meetings Act), said minutes are disclosable pursuant to the provision of OPRA. Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December

2009); *see also* Wolosky v. County of Sussex, Board of Chosen Freeholders, GRC Complaint No. 2009-26 (February 2010). Although properly approved executive session minutes are disclosable, pursuant to N.J.S.A. 47:1A-5.g., custodians may redact from the minutes those discussions that require confidentiality because the matters discussed therein are unresolved or still pending.

Therefore, because the evidence of record indicates that the Township approved the requested executive session minutes prior to the Complainant's OPRA request dated June 29, 2010, with the exception of the revised minutes dated February 9, 2010 and the April 13, 2010 and April 27, 2010 minutes, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6. The Council suggests that the Custodian consult the township attorney or some other designated person to determine the resolution of issues discussed in executive session minutes to identify those issues still requiring confidentiality and for which redactions are allowed.

Whether the Custodian violated OPRA and unlawfully denied access by failing to follow the requirements for a lawful OPRA request form pursuant to N.J.S.A. 47:1A-5.f.?

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 OPRA request form, the GRC has mandated that agency's 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 Martin 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 Township of Roxbury's official OPRA request form is deficient and potentially misleading to requestors. The evidence of record in the instant complaint shows that the Township'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 state that requestors have a right to challenge a denial of access to Superior Court or to the Government Records Council.
- The form does not provide an area where a Clerk can give a reason why a request was denied in whole or in part.
- The form states that "employee personnel files" are not public records, but does not state OPRA's exceptions to the general rule that personnel files are not public records.
- The form stated that "police investigation records" are not public records, ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b.

Therefore, the Council orders that the Township of Roxbury amend its official OPRA request form to bring it into compliance with N.J.S.A. 47:1A-5.f. pursuant to O'Shea. As such, Township of Roxbury shall either adopt the GRC's Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form by:

- Providing a section that details the exemptions in regards to personnel file requests listed in N.J.S.A. 47:1A-10 or altogether omitting references to personnel file records.
- Providing the details of the circumstances in which police investigation records are disclosable under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.

- Instructing a requestor that an agency's denial of access to government records may be challenged by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council.
- Providing a section on the request form where a custodian can provide a legal reason for denying the request in whole or in part.

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

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

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access with the necessary redactions, 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.e., N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010), and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005).
2. Because the evidence of record indicates that the Township approved the requested executive session minutes prior to the Complainant's OPRA request dated June 29, 2010, with the exception of the revised minutes dated February 9, 2010 and the April 13, 2010 and April 27, 2010 minutes, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6. **Accordingly, the Custodian shall**

disclose to the Complainant the requested executive session meeting minutes for the dates identified, with redactions as necessary.

3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹⁰, to the Executive Director.¹¹**
4. The Township's OPRA request form is deficient because it (a) states that "employee personnel files" were not public records, but does not state OPRA's exceptions to the general rule that personnel files are not public records, and (b) states that "police investigation records" are not public records while ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b., (c) fails to state that requestors may challenge an agency's denial of access by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council, and (d) fails to provide an area where a custodian can provide a legal reason for denying the request in whole or in part. Accordingly, consistent with Martin O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Township of Roxbury's official OPRA request form is deficient and potentially misleading to requestors. In essence, such a form constitutes a denial of access. As such, the Township of Roxbury shall either adopt the GRC's Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form by:

- **Providing a section that details the exemptions in regards to personnel file requests listed in N.J.S.A. 47:1A-10 or altogether omitting references to personnel file records.**
- **Providing the details of the circumstances in which police investigation records are disclosable under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.**
- **Instructing a requestor that an agency's denial of access to government records may be challenged by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council.**
- **Providing a section on the request form where a custodian can provide a legal reason for denying the request in whole or in part.**

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.
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5. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹², to the Executive Director.**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 21, 2011

¹² "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."
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