



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

June 24, 2014 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-185

v.

Township of East Hanover (Morris)
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council (“Council”) considered the June 17, 2014 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 based on the March 19, 2014 Stipulation of Dismissal in which the parties agreed to an award of prevailing party attorney’s fees and to dismiss this complaint. 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 24th Day of June, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council



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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 24, 2014 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-185

v.

**Township of East Hanover (Morris)²
Custodial Agency**

Records Relevant to Complaint:

1. Audio recording of the most recently recorded regular public meeting of the governing body.
2. Approved minutes of each and every closed or executive session held by the governing body during January, February, March, and April 2010.
3. Current OPRA request form.
4. Check registry data by check date from January 1, 2008 to present of the current/ main or general fund exported in Word, Excel, Access, comma delimited or fixed-field ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer that is readable as a .TXT file, accountant or business administrator. (Specifically data tables that show all the checks, drafts, or other forms of disbursement approved or not approved by the governing body from January 1, 2008 to the present.)³

Custodian of Record: Paula A. Massaro

Request Received by Custodian: July 1, 2010

Response Made by Custodian: July 1, 2010

GRC Complaint Received: July 27, 2010

Background

March 27, 2012 Council Meeting:

At its March 27, 2012 public meeting, the Council considered the March 20, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

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

² Represented by Levi Kool, Esq., of O'Donnell McCord, PC (Morristown, NJ).

³ The Complainant notes the data must include the check number, amount, date of the check, vendor ID, vendor name, purchase order number, and a description of what the check was written for.

1. The evidence of record indicates that the Custodian provided the Council with a certification of compliance on February 8, 2012, four (4) business days following the receipt of the Council's Interim Order. The Custodian certified that the Township amended the official OPRA request form by adopting the GRC's model OPRA request form and provided the Complainant with the actual costs associated with the reproduction of the requested audio recording. Accordingly, the Custodian has complied with the Council's January 31, 2012 Interim Order.
2. The evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Id. at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. 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 Dep't of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Twp. of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances . . . justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Procedural History:

On March 29, 2012, the Council distributed its Interim Order to all parties. On April 24, 2012, the complaint was transmitted to the Office of Administrative Law ("OAL").

On March 19, 2014, the Custodian's Counsel submitted a Stipulation of Dismissal signed by himself and Complainant's Counsel agreeing to an award of prevailing party attorney's fees and dismissal of this complaint. On April 4, 2014, the GRC requested that OAL refer this complaint for adjudication because the parties agreed to settle the matter. On April 23, 2014, OAL returned this complaint to the GRC for adjudication.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed based on the March 19, 2014 Stipulation of Dismissal in which the parties agreed to an award of prevailing party attorney's fees and to dismiss this complaint. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

June 17, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

March 27, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-185

v.

Township of East Hanover (Morris)
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The evidence of record indicates that the Custodian provided the Council with a certification of compliance on February 8, 2012, four (4) business days following the receipt of the Council’s Interim Order. The Custodian certified that the Township amended the official OPRA request form by adopting the GRC’s model OPRA request form and provided the Complainant with the actual costs associated with the reproduction of the requested audio recording. Accordingly, the Custodian has complied with the Council’s January 31, 2012 Interim Order.
2. The evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. 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 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 27th Day of March, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: March 29, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 27, 2012 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-185

v.

**Township of East Hanover (Morris)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Audio recording of the most recently recorded regular public meeting of the governing body.
2. Approved minutes of each and every closed or executive session held by the governing body during January, February, March, and April 2010.
3. Current OPRA request form.
4. Check registry data by check date from January 1, 2008 to present of the current/main or general fund exported in Word, Excel, Access, comma delimited or fixed-field ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer that is readable as a .TXT file, accountant or business administrator. (Specifically data tables that show all the checks, drafts, or other forms of disbursement approved or not approved by the governing body from January 1, 2008 to the present.)³

Request Made: June 29, 2010

Response Made: July 1, 2010

Custodian: Paula A. Massaro

GRC Complaint Filed: July 27, 2010⁴

Background

January 31, 2012

At its January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 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 Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers (Clinton, NJ).

² Represented by Elizabeth Valandingham, Esq., of O’Donnell McCord, PC (Morristown, NJ).

³ The Complainant notes the data must include the check number, amount, date of the check, vendor ID, vendor name, purchase order number, and a description of what the check was written for.

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

1. Because the Custodian's response to the OPRA request failed to provide the Complainant with a date certain upon which to expect disclosure of the requested check registry data, the Custodian's written response to the Complainant's OPRA request is insufficient under OPRA and in violation of N.J.S.A. 47:1A-5.i. pursuant to Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003).
2. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), and Wolosky v. Sparta Board of Education (Sussex), 2009-56 (October 2009), the Custodian's proposed charge of \$5.00 for the CD recording of the requested meeting is not the actual cost and is in violation of N.J.S.A. 47:1A-5.b. *See also* O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). Further, the Custodian failed to bear his burden of proving that the proposed charge was reasonable pursuant to N.J.S.A. 47:1A-6.
3. The Custodian must compute the actual cost for the duplication of the requested audio recording of the most recent regular public meeting of the governing body and provide the Complainant with said record upon the Complainant's acceptance of the applicable charge pursuant to N.J.S.A. 47:1A-5.b.
4. The evidence of record indicates that the Custodian provided the records responsive to request Item No. 4, check registry data and tables, in the format requested and evidence in the record indicates that the Complainant attempted to open the check registry files provided by the Custodian with a computer program other than the one designed to open the files. Accordingly, the Council finds that the Custodian has not unlawfully denied access to the requested check registry data and tables. N.J.S.A. 47:1A-5.d.; N.J.S.A. 47:1A-6. Wolosky v. Twp. of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009), and Smela v. County of Essex, GRC Complaint No. 2009-255 (Interim Order May 2010).
5. Because the executive session minutes responsive to the Complainant's OPRA request had not been approved by the governing body at the time of the Complainant's OPRA request, the unapproved, draft executive session minutes dated January, February, March, and April 2010 responsive to the Complainant's request constitute advisory, consultative, or deliberative material and thus are exempt from the definition of a government record at pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to draft minutes pursuant to N.J.S.A. 47:1A-6.

6. The Township's official OPRA request form is deficient because (a) the form 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) the form states that "police investigation records" were not public records, ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b. Accordingly, consistent with O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Township of East Hanover's official OPRA request form is deficient and potentially misleading to requestors. In essence, such a form constitutes a denial of access. *Id.* As such, the Township of East Hanover 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.
- Providing the details of the circumstances in which police investigation records can be requested under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.

7. The Custodian shall comply with Items No. 3 and 6 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 1:4-4⁵, to the Executive Director. If the Complainant fails to accept the proposed charge for duplication of the requested audio recording within five (5) days of notification of same, the Custodian shall so certify to the Council.

8. 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.

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

February 2, 2012

Council's Interim Order distributed to the parties.

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."

February 8, 2012

E-mail from the Custodian to the Complainant. The Custodian states that in accordance with the Council's Interim Order, the actual cost for a CD containing the requested audio recording of the June 7, 2010 Township Council meeting is \$0.25. The Custodian asserts that the Township has adopted the Government Records Council's ("GRC") model OPRA request form. The Custodian further states that the newly adopted OPRA request form is attached.

February 8, 2012

Custodian's certification of compliance with the following attachments:

- E-mail from the Complainant to the Custodian dated February 8, 2012
- A copy of the Township of East Hanover's official OPRA request form

The Custodian certifies that she received the Council's Interim Order on February 2, 2012. The Custodian certifies that she complied with the Council's Interim Order by advising the Complainant of the actual cost of duplication for the requested audio recording and providing the Complainant a copy of a revised Township OPRA request form on February 8, 2012.

Analysis

Whether the Custodian complied with the Council's January 31, 2012 Interim Order?

The Council's January 31, 2012 Interim Order specifically directed the Township to 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 GRC's model OPRA request form. Furthermore, the Interim Order also required the Custodian to provide the Complainant with the actual costs associated with the Complainant's request for an audio recording of the most recent Township council meeting. The Interim Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within ten (10) business days from receipt of said order. The Council distributed the Order on February 2, 2012.

The evidence of record indicates that the Custodian provided the Council with a certification of compliance on February 8, 2012, four (4) business days following the receipt of the Council's Interim Order. The Custodian certified that the Township amended the official OPRA request form by adopting the GRC's model OPRA request form and provided the Complainant with the actual costs associated with the reproduction of the requested audio recording. Accordingly, the Custodian has complied with the Council's January 31, 2012 Interim Order.

Whether the Custodian's delay in access to the requested records and deficient 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?

OPRA states that:

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

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

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

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

In the instant matter, the Custodian, upon receipt of the Complainant's request, failed to provide the Complainant a date certain in which to expect the requested records. Regardless of this deficiency in response, the Custodian provided the Complainant with a written response to his request in the statutorily mandated seven (7) business days. In addition the Township's OPRA request form did not comport with OPRA. However, the Custodian provided certified confirmation of compliance with the Council's Order on February 8, 2012 that the Township adopted the GRC's Model OPRA request form as the Township's official OPRA request form. Furthermore, although the Custodian proposed an invalid fee for the requested audio recording of the most recent Township Council meeting in violation of N.J.S.A. 47:1A-5.b., the Custodian complied with the Council's Interim Order by providing the Complainant with an estimate of the actual cost associated with the reproduction of the audio recordings. Finally, the Custodian lawfully

denied the Complainant access to meeting minutes for January, February, March, and April 2010 because same had not been approved by the Township Council. See Parave-Fogg, supra. Moreover, the Custodian also lawfully provided the Complainant with access to the requested check registry data.

Accordingly, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. 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.⁶ 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 27, 2010, alleging that the Township's OPRA form was deficient as it pertains to the requirements of N.J.S.A. 47:1A-5.f. The Council's January 31, 2012 Interim Order

⁶ 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.

required the Custodian to either adopt the GRC's model request form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form by (1) providing the details of the circumstances in which police investigation records can be requested under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records, and (2) properly stating the OPRA's exceptions to the general rule that "employee personnel files" are not public records. The Custodian provided a certification on February 8, 2012 to the GRC's Executive Director that the Township adopted the GRC's model OPRA request form.

Furthermore, the initial cost the Custodian provided to the Complainant for the reproduction of the requested audio recordings was not the actual cost as mandated by N.J.S.A. 47:1A-5.b. Accordingly, the Council issued its January 31, 2012 Interim Order requiring the Custodian to provide the Complainant with the actual cost of reproducing said record. In compliance with the Council's Interim Order, the Custodian provided the Council with a certification on February 8, 2012 attesting that she provided the Complainant with the lawful costs of duplication pursuant to N.J.S.A. 47:1A-5.b. See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006); Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006); Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005).

Therefore, 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, 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 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The evidence of record indicates that the Custodian provided the Council with a certification of compliance on February 8, 2012, four (4) business days following the receipt of the Council's Interim Order. The Custodian certified that the Township amended the official OPRA request form by

adopting the GRC's model OPRA request form and provided the Complainant with the actual costs associated with the reproduction of the requested audio recording. Accordingly, the Custodian has complied with the Council's January 31, 2012 Interim Order.

2. The evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill
Executive Director

March 20, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

January 31, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-185

v.

Township of East Hanover (Morris)
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian’s response to the OPRA request failed to provide the Complainant with a date certain upon which to expect disclosure of the requested check registry data, the Custodian’s written response to the Complainant’s OPRA request is insufficient under OPRA and in violation of N.J.S.A. 47:1A-5.i. pursuant to Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003).
2. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), and Wolosky v. Sparta Board of Education (Sussex), 2009-56 (October 2009), the Custodian’s proposed charge of \$5.00 for the CD recording of the requested meeting is not the actual cost and is in violation of N.J.S.A. 47:1A-5.b. See also O’Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). Further, the Custodian failed to bear his burden of proving that the proposed charge was reasonable pursuant to N.J.S.A. 47:1A-6.
3. The Custodian must compute the actual cost for the duplication of the requested audio recording of the most recent regular public meeting of the governing body and provide the Complainant with said record upon the Complainant’s acceptance of the applicable charge pursuant to N.J.S.A. 47:1A-5.b.
4. The evidence of record indicates that the Custodian provided the records responsive to request Item No. 4, check registry data and tables, in the format requested and evidence in the record indicates that the Complainant attempted to open the check registry files provided by the Custodian with a computer program other than the one designed to open the files. Accordingly, the Council finds that the Custodian has not unlawfully denied access to the requested check registry data and tables. N.J.S.A. 47:1A-5.d.; N.J.S.A. 47:1A-6. Wolosky v. Twp. of Frankford (Sussex), GRC Complaint No. 2008-254

(November 2009), and Smela v. County of Essex, GRC Complaint No. 2009-255 (Interim Order May 2010).

5. Because the executive session minutes responsive to the Complainant's OPRA request had not been approved by the governing body at the time of the Complainant's OPRA request, the unapproved, draft executive session minutes dated January, February, March, and April 2010 responsive to the Complainant's request constitute advisory, consultative, or deliberative material and thus are exempt from the definition of a government record at pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to draft minutes pursuant to N.J.S.A. 47:1A-6.
6. The Township's official OPRA request form is deficient because (a) the form 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) the form states that "police investigation records" were not public records, ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b. Accordingly, consistent with O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Township of East Hanover's official OPRA request form is deficient and potentially misleading to requestors. In essence, such a form constitutes a denial of access. *Id.* As such, the Township of East Hanover 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.
 - Providing the details of the circumstances in which police investigation records can be requested under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
7. **The Custodian shall comply with Items No. 3 and 6 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 1:4-4¹, to the Executive Director. If the Complainant fails to accept the proposed charge for duplication of the requested audio recording within five (5) days of notification of same, the Custodian shall so certify to the Council.**
8. 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.
9. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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."

Interim Order Rendered by the
Government Records Council
On The 31st Day of January, 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: February 2, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2012 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-185

v.

**Township of East Hanover (Morris)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Audio recording of the most recently recorded regular public meeting of the governing body.
2. Approved minutes of each and every closed or executive session held by the governing body during January, February, March, and April 2010.
3. Current OPRA request form.
4. Check registry data by check date from January 1, 2008 to present of the current/main or general fund exported in Word, Excel, Access, comma delimited or fixed-field ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer that is readable as a .TXT file, accountant or business administrator. (Specifically data tables that show all the checks, drafts, or other forms of disbursement approved or not approved by the governing body from January 1, 2008 to the present.)³

Request Made: June 29, 2010

Response Made: July 1, 2010

Custodian: Paula A. Massaro

GRC Complaint Filed: July 27, 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. The Complainant requests that the Custodian respond to request Items No. 2, 3, and 4 electronically via e-mail. Regarding request Item No. 1, the Complainant further asks that the Custodian advise the Complainant via e-mail of the cost of reproduction of the audio recording and of the medium in which the recording will be reproduced prior to making any copies.

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

² Represented by Elizabeth Valandingham, Esq., of O'Donnell McCord, PC (Morristown, NJ).

³ The Complainant notes the data must include the check number, amount, date of the check, vendor ID, vendor name, purchase order number, and a description of what the check was written for.

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

July 1, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the same business day as receipt of such request.⁵ The Custodian states that a CD-ROM recording of the June 7, 2010 Township Council meeting is available for approximately \$5.00 and informs the Complainant that he may send a check for the CD-ROM if he so chooses. The Custodian also states that the closed session minutes from January 2010 to April 2010 have not been approved due to pending litigation matters. The Custodian further states that she has attached a copy of the current OPRA request form. The Custodian states that the request for check registry data has been forwarded to the Chief Financial Officer ("CFO").

July 6, 2010

E-mail from the Complainant to the Custodian. The Complainant states that he understands that the cost of the audio recording is \$5.00 and instructs the Custodian not to produce a copy until he decides if he is going to pay for such recording. The Complainant inquires when the last executive session minutes of the governing body were approved. The Complainant acknowledges that he has received the requested OPRA request form. The Complainant inquires whether there will be a charge for the requested check registry and data table information.

July 6, 2010

E-mail from the Custodian to the Complainant. The Custodian states that closed session minutes are not released to the public until the issues discussed therein are resolved. The Custodian states that the two (2) closed session minutes from 2009 concern litigation matters that are still pending in 2010. The Custodian states that she checked with the CFO and the Complainant should receive an electronic copy of the requested data tables and check registries by the end of the week at no charge.

July 7, 2010

E-mail from the Complainant to the Custodian. The Complainant asks when the last executive session minutes of the governing body were approved. The Complainant states that he will wait for the CFO's e-mail regarding the requested check registries.

July 12, 2010

E-mail from the Complainant to the Custodian. The Complainant asks the Custodian if the last executive session minutes of the governing body that were approved were dated November 12, 2008.

July 12, 2010

E-mail from the CFO to the Complainant. The CFO attaches a copy of the requested check registries in the Edmunds accounting software format.

July 12, 2010

E-mail from the Custodian to the Complainant. The Custodian states that she already informed the Complainant that the requested closed session minutes for January, February, March, and April 2010 have not been approved due to pending litigation. The

⁵ The Custodian certifies in the Statement of Information that she received the Complainant's OPRA request on July 1, 2010.

Custodian confirms that the November 12, 2008 meeting was the last meeting wherein the matters under discussion have been resolved.

July 13, 2010

E-mail from the Complainant to the Custodian. The Complainant acknowledges receipt of the approved November 12, 2008 executive minutes. The Complainant asks if the CFO is able to send the check registries in TXT format because the received format was not readable.

July 13, 2010

E-mail from the CFO to the Complainant. The CFO states that the Township has no other format in which to send the requested check registries and that he has supplied such records in the requested Edmunds format.

July 14, 2010

E-mail from the Complainant to the Custodian. The Complainant attaches an electronic file of the check registries received from the CFO. The Complainant states that he cannot read the received check registries and asks the Custodian to open and check the attached file.

July 24, 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 1, 2010
- E-mail from the Complainant to the Custodian dated July 6, 2010
- E-mail from the Custodian to the Complainant dated July 6, 2010
- E-mail from the Complainant to the Custodian dated July 7, 2010
- E-mail from the Custodian to the Complainant dated July 12, 2010
- E-mail from the Complainant to the Custodian dated July 12, 2010
- E-mail from the CFO to the Complainant dated July 12, 2010
- E-mail from the Custodian to the Complainant dated July 12, 2010
- E-mail from the Complainant to the Custodian dated July 13, 2010
- E-mail from the CFO to the Complainant dated July 13, 2010
- E-mail from the Complainant to the Custodian dated July 14, 2010

The Complainant's Counsel argues that there is no doubt that the documents requested are "public records" pursuant to N.J.S.A. 47:1A-1.1. Counsel states that it is extremely unlikely that the \$5.00 proposed charge for the requested CD-ROM reflects the Township of East Hanover's actual cost of the CD-ROM. Counsel maintains that the GRC observed in Renna v. Township of Warren, GRC Complaint No. 2008-40 (November 2008) that a \$5.00 charge for a CD is "likely not" the "actual cost" pursuant to N.J.S.A. 47:1A-5.b. Counsel argues that the GRC should follow New Jersey cases and the GRC's line of decisions that state that when a public agency copies documents or things in the medium in which those documents or things exist, the public agency must charge "actual cost." N.J.S.A. 47:1A-5.b. Counsel maintains that absent extraordinary circumstances, "actual cost" is the material cost of providing the public with a copy, Jesse Wolosky v. Township of East Hanover (Morris), 2010-185 – Findings and Recommendations of the Executive Director

excluding labor and overhead. Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26, 31 (1962) (labor not included in "actual cost" under New Jersey common law); Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271, 280 (App. Div. 2005) (fees allowed under OPRA "consistent" with fees allowed under the Common Law Right of Access); Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 141 n.1, 894 A.2d 72, 75 n.1 (App. Div. 2006) ("direct" cost of copying not appropriate standard); O'Shea v. Madison Public School District, GRC Complaint No. 2007-185 (April 2008); O'Shea v. Township of Vernon, GRC Complaint No. 2007-207 (April 2008).

Counsel argues that the type of medium furnished in response to the request does not matter and in any case, N.J.S.A. 47:1A-5.b. limits the cost of a record to "the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy" unless a special service charge is warranted.

Counsel states that the Custodian may argue that the \$5.00 reflects a special service charge, but for non-paper records such as the CD-ROM here, the public agency shall not charge a special service charge unless the conditions of N.J.S.A. 47:1A-5.d. are met. Counsel maintains that in the instant case, the records custodian is copying an audio recording and that no special service charge is appropriate.

Additionally, 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 in the instant case, as in the O'Shea case, the Township's OPRA request form states that "employee personnel files" are not public records, but did not state OPRA's exceptions to the general rule that personnel files are not public records. Counsel also argues that the Township's OPRA request form stated that "police investigation records" are not public records, ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b., and that based on the O'Shea decision, the GRC should order East Hanover to revise its OPRA request form. *See also* O'Shea v. Township of Stillwater, GRC Complaint No. 2007-253 (November 2008) (holding that several portions of Stillwater's OPRA request form were incomplete or misleading and ordering Stillwater to correct the deficiencies).

Further, Counsel states that the Complainant requested financial data, and that although the Custodian provided what she claims is financial data, those files are unreadable and are not in the format that the Complainant requested. Counsel maintains that the Complainant requested the information in "comma delimited or fixed field" format. Counsel maintains that East Hanover, like many other public agencies, uses Edmunds finance software, and that software is more than capable of producing readable text files, as shown by the Complainant's experience with other public agencies, especially in Morris County. Counsel argues that the Custodian's failure to provide these documents in a readable version constitutes a "deemed denial" pursuant to N.J.S.A. 47:1A-5.i.

Counsel maintains that the Complainant is the prevailing party pursuant to N.J.S.A. 47:1A-11 and should be awarded a reasonable attorneys' fee.

The Complainant does not agree to mediate this complaint.

August 16, 2010

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

September 8, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated June 29, 2010
- Custodian’s response to the OPRA request dated July 1, 2010
- E-mail from the Custodian to the Complainant dated July 6, 2010
- E-mail from the Complainant to the Custodian dated July 6, 2010
- E-mail from the Complainant to the Custodian dated July 7, 2010
- E-mail from the Complainant to the Custodian dated July 12, 2010
- E-mail from the Custodian to the Complainant dated July 12, 2010
- E-mail from the CFO, to the Complainant dated July 12, 2010
- E-mail from the Custodian to the Complainant dated July 12, 2010
- E-mail from the Complainant to the Custodian dated July 13, 2010
- E-mail from the CFO to the Complainant dated July 13, 2010
- E-mail from the Complainant to the Custodian dated July 14, 2010
- Copy of the Complainant’s Denial of Access Complaint dated July 24, 2010
- Copy of the Township’s OPRA request form

The Custodian certifies that the requested closed session minutes are permanent records and destruction is not permitted. In addition, the Custodian certifies that recordings on cassette tapes and CDs can be destroyed eighty (80) days after the adoption of meeting minutes. The Custodian certifies that the requested financial check registry data can be destroyed after six (6) years.⁶

The Custodian certifies that the requested OPRA request form was provided to the Complainant on July 1, 2010. The Custodian also certifies that closed session minutes for November 8, 2008 were provided to the Complainant on July 12, 2010. The Custodian further certifies that the CFO provided the requested check registries and data tables to the Complainant on July 12, 2010.

The Custodian certifies that the Complainant was never denied access to any government records. The Custodian certifies that all of the information and records requested were made readily available to the Complainant and any computer conversion formats were provided as requested within a reasonable time.

The Custodian argues that this complaint should be dismissed with prejudice for the following reasons: (1) the Complainant was not denied access to any government records; (2) the Complainant received all of the information requested; and (3) the Custodian complied with the OPRA requirements and provided an appropriate proposed fee and an appropriate OPRA request form.

⁶ The Custodian did not certify to the search undertaken to locate the records responsive as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).
Jesse Wolosky v. Township of East Hanover (Morris), 2010-185 – Findings and Recommendations of the Executive Director

The Custodian argues that pursuant to N.J.S.A. 47:1A-1, OPRA plainly states that its purpose is to ensure that government records, unless exempt from disclosure, are readily accessible to citizens of New Jersey for the protection of the public interest. The Custodian further asserts that OPRA declares that government records shall be readily accessible for copying or examination. The Custodian maintains that certain records, such as budgets, should be provided immediately on request and requests for other records must be granted or denied within seven (7) business days. The Custodian also argues that a failure to timely respond to an OPRA request is deemed a denial; further, if a request would substantially disrupt agency operations, a records custodian may deny it after attempting to reach a reasonable solution with the requestor. Finally, the Custodian further argues that OPRA also establishes an informal mediation program to resolve disputes before the GRC.

The Custodian certifies that in accordance with N.J.S.A. 47:1A-5.i., on July 1, 2010, the Custodian provided a response to the Complainant's OPRA request within the statutorily mandated seven (7) business days. The Custodian also certifies that she advised the Complainant that the minutes of each and every closed or executive session held by the governing body during January, February, March and April, 2010 had not been approved at the time of the OPRA request due to pending litigation matters. The Custodian further certifies that she provided a copy of the Township's OPRA request form and advised the Complainant that the CFO would provide the requested check registry data.

In further support of her arguments, the Custodian certifies that on July 6, 2010, the Complainant acknowledged to her that he received the Custodian's response to the OPRA request and advised that he no longer wanted the audio recording of the most recently recorded regular public meeting of the governing body⁷, submitted an additional request for information requesting the date of the last executive session minutes of the governing body, acknowledged receipt of the requested OPRA request form and requested the fee for the check registry data.

The Custodian certifies that it is the Township's standard procedure to charge requestors the actual cost of duplicating records. The Custodian certifies that in most instances, the Township customarily waives the charges completely, especially if the requested records are sent in an electronic format. The Custodian points out that the instant matter is such a case. The Custodian certifies that this practice is confirmed on page two, item four of the Township's OPRA form which states "[w]hen a request is for a copy in a format other than a photocopy, reasonable efforts will be made to provide the information in the format requested. The cost will be based on the costs of producing the format requested."

The Custodian certifies that the Complainant requested a fee for the audio recording of the June 7, 2010 council meeting and the Custodian estimated a \$5.00 cost in the event that duplication took five (5) CDs to hold the entire meeting, as well as the prospective special equipment for conversion or if an expert needed to be utilized. The Custodian argues that this is in accordance with N.J.S.A. 47:1A-5.c.

⁷ This is inconsistent with the evidence in the record.

In addition, the Custodian certifies that the Complainant on several occasions advised the Custodian that he did not want a copy of the meeting as originally requested, did not send a check for the proposed copying fee and that consequently, no further work was done to determine what the actual cost would have been and the Custodian never had the opportunity to amend the price quote. The Custodian certifies that if the actual cost of the copy was less than \$5.00, a refund would have been issued to the Complainant and therefore under the totality of circumstances, at no time did the Custodian knowingly or willfully violate OPRA.

The Custodian asserts that the Township's OPRA request form mirrors the statute and does not contain false or misleading information about OPRA. The Custodian further asserts that the Complainant was not in any way misled by the form and, after the initial request the Complainant disregarded the OPRA request form entirely. The Custodian disputes the Complainant's allegation that the Township's request form is misleading and argues that such an allegation is completely erroneous because the form provides that "employee personnel files" are an exception to disclosure on the second page in paragraph two.

The Custodian also disputes the Complainant's allegation that the Township's OPRA request form is misleading because it does not list the specific criminal investigatory information that is public under N.J.S.A. 47:1A-3.b. and states that the form is not misleading regarding exceptions thereto. The Custodian states that page two, item five of the Township's OPRA request form indicates that "where a legal determination must be made as to whether records are 'public records' as provided by law, the request will be reviewed by the Municipal Attorney."

Additionally, the Custodian states that the first paragraph, fourth sentence on page two of the OPRA request form states that "[i]f any document or copy that has been requested is not a public record..., you will be provided with a response with that information within the seven (7) business days." The Custodian argues that this clearly shows the intention to alert requestors to any exceptions to the "public records" term as described in the statute. The Custodian asserts that the intent and spirit of the Township coincides with that of the New Jersey Open Public Records Act Handbook for Records Custodians, Third (3rd) Edition, page seven (7), which states,

"[a]ll government records are subject to public access unless specifically exempt under OPRA or any other law. As a custodian, your default mindset should be — yes, this record is subject to public access!! Exceptions to this default mindset are the 24 specific exemptions contained in OPRA which are listed below."

The Custodian certifies that the form adopted by the Township complies with all of the requirements set forth in N.J.S.A. 47:1A-5.f. The Custodian states that in O'Shea v. Township of Milford (Passaic), GRC Complaint No. 2007-237 (December 2008), the GRC held that any form that provides no more or no less information than required by N.J.S.A. 47:1A-5.f. is acceptable.

Further, the Custodian certifies that the Complainant requested "check registry data by check from January 1, 2008 to present of the Current/Main or General fund exported in Word, Excel, ASCII from Edmunds, MSI or the current software used by the CFO, accountant or business administrator." The Custodian certifies that the Township CFO sent the data as requested and when the Complainant requested it in a different format, the CFO attempted to convert the records into the format requested by the Complainant. Moreover, the Custodian certifies that the initial request for such check registry records was satisfied and access to such records was not denied. The Custodian certifies that the CFO sent the records to the Complainant several times in an effort to assist the Complainant, called the computer software company, Edmunds, for assistance regarding further conversion and had a telephone conversation with the Complainant regarding the issues of compatibility and formatting.⁸

Regarding the requested check registries and data tables, the Custodian cites N.J.S.A. 47:1A-5.d., stating that:

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

The Custodian argues that the issue of readability may not even be incumbent upon the Township to resolve. In support of her arguments, the Custodian asserts that the copy of the data which the Complainant attached to his Complaint demonstrates that he attempted to open the file with a computer program other than the one designed to open the attachment. The Custodian certifies that instead of working with the Township to receive the desired information or merely visiting Township Hall to review the data or receiving it in a different format (the Complainant's initial request specifically states "I do not want images or PDF files. I also do not want paper copies"), the Complainant merely filed this Complaint. The Custodian certifies that the Complainant e-mailed his attorney on July 22, 2010 prior to attempting to resolve the computer issues the Township was having in conversion, displaying the Complainant's obvious litigious desire.⁹

In addition, the Custodian maintains that the Complainant is not entitled to attorney's fees. The Custodian states that requestors are only entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they demonstrate a factual causal nexus between their litigation and the relief ultimately achieved, and that the relief they obtained had a basis in law.

Furthermore, the Custodian maintains that OPRA is designed to promote prompt access and to encourage requestors and agencies to work together. The Custodian certifies that not only was she responsive to the Complainant's request, she went above and beyond her duty in attempting to comply with the Complainant's demands. The Custodian argues that the Complainant is not entitled to attorney's fees. The

⁸ The Custodian did not certify as to the date of such telephone conversation.

⁹ The Custodian provides no additional information regarding such an e-mail.

Custodian certifies that she responded to the Complainant in two (2) business days after receipt of the request and continued conversations to assist in the providing of information. The Custodian maintains that this Complaint was not the catalyst for the release of records, responsive answers and the requested records were provided in the normal course of business and at no charge to the Complainant, and that she and the CFO continued to work through computer conversion issues before and while he filed his Complaint. The Custodian asserts that nothing in the record suggest that the final product sought would not have occurred absent the filing of the instant complaint.

The Custodian proclaims that pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because this complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. The Custodian maintains that pursuant to Mason v. City Clerk of the City of Hoboken, 196 N.J. 51, 77 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the facts present at hand. The Custodian argues that in the matter before the Council, the records requestor is a self-proclaimed activist who has a passion to submit OPRA requests for the sole purpose of hopefully finding flaws with records custodians' procedures. The Custodian maintains that the Complainant should not be deemed a prevailing party and accordingly should not be entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra.

May 11, 2011

E-mail from the GRC to the Custodian. The GRC requests that the Custodian legally certify as to when the requested closed and executive session minutes were approved.

May 16, 2011

Custodian's legal certification. The Custodian certifies that the requested closed session and executive session minutes responsive to the Complainant's request have not yet been approved by the Township Council.

November 29, 2011

E-mail from the GRC to the Custodian. The GRC requests that the Custodian more specifically characterize the approval status of the requested executive minutes at the time of the Complainant's OPRA request.

November 29, 2011

Custodian's legal certification. The Custodian certifies that the requested executive minutes had not undergone any sort of approval. In addition, the Custodian certifies that all of the matters discussed in the January, February, March, and April 2010 executive session meetings pertained to ongoing litigation. The Custodian asserts that those matters concerning litigation were exempt from public disclosure pursuant to N.J.S.A. 10:4-12.b(7).

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁰ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, while the Custodian's response was within the statutorily mandated seven (7) business days, the Custodian's response deferred disclosure of the requested check registry data until an unspecified future date and merely informed the Complainant that she would forward the request for the check registries to the Chief Financial Officer of the Township. The GRC has deemed a Custodian's response which does not provide a definite date on which access to records will be granted or denied as insufficient under OPRA.

In Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003) while responding to the complainant's OPRA request, the custodian provided an initial

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

response by telephone and letter indicating that the Township Administrator would be responding to the request at a later (unspecified) date. It was not until well after the filing of a Denial of Access Complaint that the requestor received a written response from the Custodian advising that the Township would not be responding because the "request" sought information and not government records. The GRC held that the custodian was obligated to respond to the complainant's request in seven (7) business days, either rejecting the request as defective under OPRA or advising the requestor of the specific date by which a response would be provided. Having chosen to defer a response to the request to the Township Administrator with an open-ended response timeframe, the Council found that the Custodian erred by failing to advise the requestor of the date by which the Administrator would respond, effectively violating N.J.S.A. 47:1A-5.i.

As in Russomano, the Custodian's response to the OPRA request herein failed to provide the Complainant with a date certain upon which to expect disclosure of the requested records. While the Custodian informed the Complainant that the request for check registry data would be forwarded to the Township's Chief Financial Officer, the lack of a specific date upon which the Complainant could expect a response to the OPRA request renders the response insufficient under OPRA and violates N.J.S.A. 47:1A-5.i.

Therefore, because the Custodian's response to the OPRA request failed to provide the Complainant with a date certain upon which to expect disclosure of the requested check registry data, the Custodian's written response to the Complainant's OPRA request is insufficient under OPRA and in violation of N.J.S.A. 47:1A-5.i pursuant to Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003).

Whether the \$5.00 cost proposed by the Custodian for the duplication of the requested audio recording violates OPRA?

OPRA provides that

"[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. ... The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record." N.J.S.A. 47:1A-5.b.

OPRA also states that:

"[w]henver the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot

be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, *a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies*; provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance. The requestor shall have the opportunity to review and object to the charge prior to it being incurred.” (Emphasis added). N.J.S.A. 47:1A-5.c.

Furthermore, OPRA provides that:

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

1. in a medium not routinely used by the agency;
2. not routinely developed or maintained by an agency; or
3. requiring a substantial amount of manipulation or
4. programming of information technology,

the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.” N.J.S.A. 47:1A-5.d.

In the instant matter, the Complainant challenged the \$5.00 charge proposed by the Custodian for the reproduction of the requested audio recording of the most recent regular public meeting of the governing body onto a CD-ROM. The Complainant’s Counsel maintains that the GRC observed that a \$5.00 charge for a CD is "likely not" the "actual cost" pursuant to N.J.S.A. 47:1A-5.b. and Renna v. Township of Warren, GRC Complaint No. 2008-40 (November 2008).

While OPRA provides that paper copies of government records may be obtained upon payment of the actual cost of duplication not to exceed the enumerated rates of \$0.75/0.50/0.25 per page (N.J.S.A. 47:1A-5.b.), the Act does not provide explicit copy rates for any other medium. N.J.S.A. 47:1A-5.b. goes on to state that the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of

the record, but shall not include the cost of labor or other overhead expenses associated with making the copy.¹¹

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

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

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

The Court also stated that "...although plaintiffs have obtained access to the actual records requested, the legal question remains viable, because it is clearly capable of repetition. *See New Jersey Div. of Youth & Family Servs. v. J.B.*, 120 N.J. 112, 118-19, 576 A.2d 261 (1990)." Further, the court stated that "...the fee imposed by the Township of Edison creates an unreasonable burden upon plaintiff's right of access and is not rationally related to the actual cost of reproducing the records."

In *Wolosky v. Sparta Board of Education (Sussex)*, 2009-56 (October 2009), the complainant requested an audiotape recording of the Board of Education's most recent public session meeting. The custodian responded, stating that two (2) audiotapes exist at a proposed fee of \$5.00 per audiotape. The Council determined that the custodian failed to provide any evidence showing that the initial proposed fee of \$5.00 per audiotape represents the actual cost of one (1) audiotape. The custodian later certified in the SOI that after receiving the Denial of Access Complaint, the Board of Education discovered the "actual cost" of each audiotape to be \$0.68. The Council therefore concluded that

¹¹ As of November 9, 2010, N.J.S.A. 47:1A-5.b. the enumerated rates for the duplication of pages are \$0.05 and \$0.07 cents per page, while the cost for the duplication of other mediums is the *actual* cost such duplication demands.

pursuant to Spaulding, supra, and Libertarian Party of Central New Jersey, supra, the custodian's proposed charge of \$5.00 per audiotape recording of the requested meeting was not the actual cost and in violation of N.J.S.A. 47:1A-5.b. See also O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). Further, the Council determined that the custodian failed to bear his burden of proving that the proposed charge was reasonable pursuant to N.J.S.A. 47:1A-6.

In defending the proposed \$5.00 charge, the Custodian herein certified that she estimated a \$5.00 charge assuming that duplication would take five (5) CDs to hold the entire meeting, as well as the utilization of any special equipment for conversion or an expert. The Custodian certified that the Complainant repeatedly advised the records custodian that he did not want a copy of the meeting as originally requested, did not send a check for the proposed copying fee and that consequently, no further work was done to determine what the actual cost would have been and the Custodian therefore never had the opportunity to amend the proposed charge. The Custodian certified that if the actual amount of the reproduction charges would have been less than \$5.00, a refund would have been issued to the Complainant and therefore under the totality of circumstances, at no time did the Custodian knowingly or willfully violate OPRA.

The evidence of record discloses that the Custodian's proposed charge of \$5.00 to reproduce the requested recording does not represent the actual cost of reproduction. The Custodian certified in the SOI that no work was done to determine the *actual cost* associated with the duplication of the requested audio recording. Accordingly, the Complainant's estimate of a \$5.00 charge for the duplication of the requested audio recording constitutes a violation of OPRA pursuant to N.J.S.A. 47:1A-5.b.

Therefore, pursuant to Spaulding, supra, Libertarian Party of Central New Jersey, supra, and Wolosky, supra, the Custodian's proposed charge of \$5.00 for reproduction of the requested CD recording is not the actual cost and is in violation of N.J.S.A. 47:1A-5.b. See also O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). Further, the Custodian failed to bear his burden of proving that the proposed charge was reasonable pursuant to N.J.S.A. 47:1A-6.

Moreover, the Custodian must compute the actual cost for the duplication of the requested audio recording of the most recent regular public meeting of the governing body and provide the Complainant with said record upon the Complainant's acceptance of the applicable charge pursuant to N.J.S.A. 47:1A-5.b.

Whether the Custodian lawfully provided access to the requested check registry data and tables?

OPRA provides that:

"A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the

record to the medium requested or provide a copy in some other meaningful medium ..." N.J.S.A. 47:1A-5.d.

The Complainant argues that the electronic files of the requested check registry data and tables which the Custodian provided to him with are unreadable and are not in the format requested. The Complainant specifically requested "check registry data by check date from January 1, 2008 to present of the current, main, or general fund exported in Word, Excel, Access, comma delimited or fixed-field ASCII from Edmunds, MSI or the current software used by the CFO that is readable as a .TXT file, accountant or business administrator."

Pursuant to N.J.S.A. 47:1A-5.d., the Custodian has an affirmative duty to provide a copy of a record in the medium requested unless the agency does not maintain the record in such a medium, in which case the Custodian is required to either convert the record to the requested medium or provide a copy in another meaningful medium.

In Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009), where the complainant requested delivery of certain records via fax or e-mail and the custodian stated that she did not maintain the records in a format that was conducive to such delivery, the Council decided: "...in this complaint, if the custodian does not maintain any of the records responsive in an electronic medium, she is required to convert the records in order to provide them electronically via e-mail."

Additionally in Smela v. County of Essex, GRC Complaint No. 2009-255 (Interim Order May 2010), the Council determined that the custodian made no attempt to satisfy the complainant's OPRA request by converting the record to the medium requested or providing a copy in some other *meaningful* medium when he simply certified that Essex County did not maintain tax maps in an electronic format. In adjudicating the facts, the Council required the custodian to obtain an estimate of the special service charge attendant upon conversion of the requested tax maps to a digital format and provide such estimate to the Complainant pursuant to N.J.S.A. 47:1A-5.d.

Evidence in the record illustrates that the Custodian's initial disclosure of the responsive check registries complied with the Complainant's stated desire to have the check registries supplied in the format outputted by the Edmunds financial software. Furthermore, the Custodian certified in the SOI that she attempted to convert the requested check registry data to a different format. Finally, the evidence of record shows that the Complainant attempted to open the check registry files provided by the Custodian with a computer program other than the one designed to open the files.

Therefore, because the evidence of record indicates that the Custodian provided the requested check registry data and tables in the format requested and further indicates that the Complainant attempted to open the check registry files provided by the Custodian with a computer program other than the one designed to open the files, the Custodian has complied with the format requirements of the Complainant's OPRA request. Accordingly, the Council finds that the Custodian has not unlawfully denied access to the requested check registry data and tables. N.J.S.A. 47:1A-5.d.; N.J.S.A. 47:1A-6. Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (November

2009), and Smela v. County of Essex, GRC Complaint No. 2009-255 (Interim Order May 2010).

Whether the Custodian lawfully denied access to the requested executive session minutes?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

In the instant matter the Complainant also seeks access to the “minutes of each and every closed or executive session held by the governing body during January, February, March, and April 2010 that have been approved.” The Custodian certified that none of the requested minutes had been approved by the governing body at the time of the Complainant’s request.¹²

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. *Id. 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

¹² Nor were such minutes approved as of May 16, 2011.

advisory, consultative, or deliberative material” is not included within the definition of a government record. N.J.S.A. 47: 1A-1.1.

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

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

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

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

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

In the matter before the Council, the Custodian certified to the GRC on May 16, 2011 and November 29, 2011 attesting that the executive session minutes responsive to the Complainant's OPRA request had not yet been approved by the governing body at the time of the Complainant's OPRA request. Thus, such records constitute advisory, consultative, or deliberative material and thus are exempt from the definition of a government record at pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to Parave-Fogg, *supra*.

Therefore, because the executive session minutes responsive to the Complainant's OPRA request had not been approved by the governing body at the time of the Complainant's OPRA request, the unapproved, draft executive session minutes dated January, February, March, and April 2010 responsive to the Complainant's request constitute advisory, consultative, or deliberative material and thus are exempt from the definition of a government record at pursuant to N.J.S.A. 47:1A-1.1 and exempt from disclosure pursuant to Parave-Fogg, *supra*. Accordingly, the Custodian has borne her burden of proving a lawful denial of access to draft minutes pursuant to N.J.S.A. 47:1A-6.

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 O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Township's official OPRA request form listed 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 provides 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 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, the Township of East Hanover'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 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 East Hanover 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 East Hanover 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.
- Providing the details of the circumstances in which police investigation records can be requested under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.

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. Because the Custodian’s response to the OPRA request failed to provide the Complainant with a date certain upon which to expect disclosure of the requested check registry data, the Custodian’s written response to the Complainant’s OPRA request is insufficient under OPRA and in violation of N.J.S.A. 47:1A-5.i pursuant to Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003).
2. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), and Wolosky v. Sparta Board of Education (Sussex), 2009-56 (October 2009), the Custodian’s proposed charge of \$5.00 for the CD recording of the requested meeting is not the actual cost and is in violation of N.J.S.A. 47:1A-5.b. *See also* O’Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). Further, the Custodian failed to bear his burden of proving that the proposed charge was reasonable pursuant to N.J.S.A. 47:1A-6.
3. The Custodian must compute the actual cost for the duplication of the requested audio recording of the most recent regular public meeting of the governing body and provide the Complainant with said record upon the Complainant’s acceptance of the applicable charge pursuant to N.J.S.A. 47:1A-5.b.
4. The evidence of record indicates that the Custodian provided the records responsive to request Item No. 4, check registry data and tables, in the format requested and evidence in the record indicates that the Complainant attempted to open the check registry files provided by the Custodian with a computer program other than the one designed to open the files. Accordingly, the Council finds that the Custodian has not unlawfully denied access to the requested check registry data and tables. N.J.S.A. 47:1A-5.d; N.J.S.A. 47:1A-6. Wolosky v. Twp. of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009), and Smela v. County of Essex, GRC Complaint No. 2009-255 (Interim Order May 2010).
5. Because the executive session minutes responsive to the Complainant’s OPRA request had not been approved by the governing body at the time of the Complainant’s OPRA request, the unapproved, draft executive session minutes dated January, February, March, and April 2010 responsive to the Complainant’s

request constitute advisory, consultative, or deliberative material and thus are exempt from the definition of a government record at pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to draft minutes pursuant to N.J.S.A. 47:1A-6.

6. The Township's official OPRA request form is deficient because (a) the form 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) the form states that "police investigation records" were not public records, ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b. Accordingly, consistent with O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Township of East Hanover's official OPRA request form is deficient and potentially misleading to requestors. In essence, such a form constitutes a denial of access. *Id.* As such, the Township of East Hanover 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.
 - Providing the details of the circumstances in which police investigation records can be requested under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
7. **The Custodian shall comply with Items No. 3 and 6 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 1:4-4¹³, to the Executive Director. If the Complainant fails to accept the proposed charge for duplication of the requested audio recording within five (5) days of notification of same, the Custodian shall so certify to the Council.**
8. 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.
9. 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.

¹³ "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."

Executive Director

January 24, 2011