



**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**

**September 25, 2012 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2010-186

v.

Township of Randolph (Morris)  
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this Complaint should be dismissed because the Complainant withdrew his complaint via letter to the GRC and the Office of Administrative Law dated September 4, 2012, as the parties have settled on all outstanding issues in this matter. Therefore, no further adjudication is required.

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

Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of September, 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: September 27, 2012**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 25, 2012 Council Meeting**

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-186**

v.

**Township of Randolph (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:<sup>3</sup> Copies of:**

1. Approved minutes of each and every closed or executive session held by the governing body during January, February, March, and April 2010.
2. A copy of the Township's current OPRA request form.
3. Check registry data by check date 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. (Specifically, the data table should show all the checks, drafts, or other forms of disbursement approved or not approved by the governing body from January 1, 2008 to present.)

**Request Made:** June 29, 2010

**Response Made:** July 6, 2010

**Custodian:** Donna M. Brady, Deputy Clerk<sup>4</sup>

**GRC Complaint Filed:** July 27, 2010<sup>5</sup>

**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. The evidence of record indicates that the Custodian provided the Council with a certification of compliance on December 27, 2011, three (3)

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<sup>1</sup> Represented by Jonathan E. McMeen, Esq. (Sparta, NJ).

<sup>2</sup> Represented by Tiena M. Cofoni, Esq., of The Buzak Law Group, LLC (Montville, NJ).

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

<sup>4</sup> Ms. Brady responded to the instant OPRA request on behalf of Donna Luciani, Township Clerk and Head Custodian.

<sup>5</sup> The GRC received the Denial of Access Complaint on this date.

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 requested check registry data as ordered. Accordingly, the Custodian has complied with the Council's December 20, 2011 Interim Order.

2. Although the Township's OPRA request form did not comport with OPRA because it (a) fails to state that requestors have a right to challenge a denial of access to Superior Court or to the Government Records Council, and (b) does not provide an area where a Clerk can give a reason why a request was denied in whole or in part, the Custodian provided certified confirmation of compliance with the Council's Order on December 27, 2011 that the Township adopted the GRC's Model OPRA request form as the Township's official OPRA request form. Furthermore, while the Custodian proposed an invalid fee for the requested check registry data in violation of N.J.S.A. 47:1A-5.b., the Custodian complied with the Council's Interim Order by supplying the Complainant with the requested records via e-mail at no charge as requested. The Council also notes that the Custodian also legally 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 v. Lower Alloways Creek Township*, GRC Complaint No. 2006-51 (August 2006). 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.
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.

**February 3, 2012**

Council’s Interim Order distributed to the parties.

**April 24, 2012**

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

**September 4, 2012**

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

**Analysis**

No analysis required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this Complaint should be dismissed because the Complainant withdrew his complaint via letter to the GRC and the Office of Administrative Law dated September 4, 2012, as the parties have settled on all outstanding issues in this matter. Therefore, no further adjudication is required.

Prepared By: Darryl C. Rhone  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

September 18, 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. 2010-186

v.

Township of Randolph (Morris)  
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 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 December 27, 2011, three (3) 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 requested check registry data as ordered. Accordingly, the Custodian has complied with the Council’s December 20, 2011 Interim Order.
2. Although the Township’s OPRA request form did not comport with OPRA because it (a) fails to state that requestors have a right to challenge a denial of access to Superior Court or to the Government Records Council, and (b) does not provide an area where a Clerk can give a reason why a request was denied in whole or in part, the Custodian provided certified confirmation of compliance with the Council’s Order on December 27, 2011 that the Township adopted the GRC’s Model OPRA request form as the Township’s official OPRA request form. Furthermore, while the Custodian proposed an invalid fee for the requested check registry data in violation of N.J.S.A. 47:1A-5.b., the Custodian complied with the Council’s Interim Order by supplying the Complainant with the requested records via e-mail at no charge as requested. The Council also notes that the Custodian also legally 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 v. Lower Alloways Creek Township*, GRC Complaint No. 2006-51 (August 2006). 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.



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 31<sup>st</sup> 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 3, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-186**

v.

**Township of Randolph (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:<sup>3</sup> Copies of:**

1. Approved minutes of each and every closed or executive session held by the governing body during January, February, March, and April 2010.
2. A copy of the Township's current OPRA request form.
3. Check registry data by check date 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. (Specifically, the data table should show all the checks, drafts, or other forms of disbursement approved or not approved by the governing body from January 1, 2008 to present.)

**Request Made:** June 29, 2010

**Response Made:** July 6, 2010

**Custodian:** Donna M. Brady, Deputy Clerk<sup>4</sup>

**GRC Complaint Filed:** July 27, 2010<sup>5</sup>

**Background**

**December 20, 2011**

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

1. Because the requested executive session minutes were not approved by the Township Council in any capacity at the time of the Complainant's OPRA

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<sup>1</sup> Represented by Jonathan E. McMeen, Esq. (Sparta, NJ).

<sup>2</sup> Represented by Tiena M. Cofoni, Esq., of The Buzak Law Group, LLC (Montville, NJ).

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

<sup>4</sup> Ms. Brady responded to the instant OPRA request on behalf of Donna Luciani, Township Clerk and Head Custodian.

<sup>5</sup> The GRC received the Denial of Access Complaint on this date.

request, such executive session minutes are draft documents that constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and 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 the requested executive session minutes pursuant to N.J.S.A. 47:1A-6.

2. The Custodian's \$50.00 charge for the disclosure of electronic records already maintained in the requested electronic format constitutes an invalid charge that the Council and courts of New Jersey have held to be an "unreasonable burden" to access under OPRA and accordingly is a violation of N.J.S.A. 47:1A-5.b. See Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006); Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005); and Wolosky v. Sparta Board of Education (Sussex), 2009-56 (October 2009). However, because the evidence of record indicates that the Complainant did not pay said charge and because the Custodian certified in the Statement of Information that she provided the requested records at no charge, it is not necessary for the Council to order a refund in this matter.
3. The Township's OPRA request form is deficient because it (a) fails to state that requestors may challenge an agency's denial of access by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council, and (b) fails to provide an area where a custodian can provide a legal reason for denying the request in whole or in part. Accordingly, consistent with O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Township of Randolph's official OPRA request form is deficient and violates OPRA. As such, the Township of Randolph shall either adopt the GRC's model OPRA request form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form by:
  - Instructing a requestor that an agency's denial of access to government records may be challenged by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council.
  - Providing a section on the request form where a custodian can provide a legal reason for denying the request in whole or in part.
4. **The Custodian shall provide the requestor with the requested check registry data within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed**



**document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>6</sup>, to the Executive Director.<sup>7</sup> Any applicable charges associated with the electronic transmission of the requested check registry data shall adhere to the guidelines regarding “actual costs” consistent with Item No. 2 of the Interim Order above and as discussed herein.**

5. **The Custodian shall comply with Item No. 3 of the Interim Order 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 1:4-4<sup>8</sup>, to the Executive Director.**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

**December 21, 2011**

Council’s Interim Order distributed to the parties.

**December 27, 2011**

E-mail from the Custodian to the Complainant.<sup>9</sup> The Custodian states that pursuant to the Council’s December 20, 2011 Interim Order, attached is the requested check registry data.

**December 27, 2011**

Custodian’s certification of compliance attaching a copy of the Township of Randolph’s official OPRA request form. The Custodian certifies that the Township of Randolph has adopted the GRC’s model OPRA request form.<sup>10</sup> The Custodian also certifies that she provided the Complainant and his attorney with the requested check registry data on December 27, 2011 as required by the Council’s Interim Order.

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<sup>6</sup> "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."

<sup>7</sup> Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

<sup>8</sup> "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."

<sup>9</sup> The Complainant’s Counsel is also listed as a recipient of this e-mail.

<sup>10</sup> The Custodian does not specify the exact date upon which the model form was adopted.

## Analysis

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

The Council's December 20, 2011 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 check registry data sought in the Complainant's June 29, 2010 OPRA request. The Interim Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of said order. The Order was distributed by the Council on December 21, 2011.

The evidence of record indicates that the Custodian provided the Council with a certification of compliance on December 27, 2011, three (3) 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 requested check registry data as ordered. Accordingly, the Custodian has complied with the Council's December 20, 2011 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)).

Although the Township's OPRA request form did not comport with OPRA because it (a) failed to state that requestors have a right to challenge a denial of access to Superior Court or to the Government Records Council, and (b) does not provide an area where a custodian can give a reason why a request was denied in whole or in part, the Custodian provided certified confirmation of compliance with the Council's Order on December 27, 2011 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 check registry data in violation of N.J.S.A. 47:1A-5.b., the Custodian complied with the Council's Interim Order by supplying the Complainant with the requested records via e-mail at no charge as requested. The Council also notes that the Custodian also legally 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*. 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 when the Complainant is an attorney?**

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 (7<sup>th</sup> 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.<sup>11</sup> 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

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<sup>11</sup> 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.

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 June 29, 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 December 20, 2011 Interim Order 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 including (1) instructions informing a requestor that an agency’s denial of access to government records may be challenged by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council, and (2) a section on the request form where a custodian can provide a legal reason for denying the request in whole or in part. The Council’s Interim Order also required the Custodian to provide the requested check registry data to the Complainant. The Custodian provided a certification on December 27, 2011 informing the GRC’s Executive Director that the Township adopted the GRC’s model OPRA request form and provided the Complainant with the requested check registry data.

Furthermore, the Council found that the initially proposed cost to reproduce the requested check registries was not the actual cost as mandated by N.J.S.A. 47:1A-5.b. Pursuant to the Council’s Interim Order, the Custodian certified on December 27, 2011 that the Complainant was provided with the requested electronic versions of the check registry data via e-mail at no cost on December 27, 2011. (In conformance with Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010); Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (April 2010); Wolosky v. Township of Green (Sussex), GRC Complaint No. 2009-15 (February 2010); McBride v. Borough of Mantoloking (Bergen), GRC Complaint No. 2009-158 (May 2010)).

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 December 27, 2011, three (3) 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 requested check registry data as ordered. Accordingly, the Custodian has complied with the Council's December 20, 2011 Interim Order.
2. Although the Township's OPRA request form did not comport with OPRA because it (a) fails to state that requestors have a right to challenge a denial of access to Superior Court or to the Government Records Council, and (b) does not provide an area where a Clerk can give a reason why a request was denied in whole or in part, the Custodian provided certified confirmation of compliance with the Council's Order on December 27, 2011 that the Township adopted the GRC's Model OPRA request form as the Township's official OPRA request form. Furthermore, while the Custodian proposed an invalid fee for the requested check registry data in violation of N.J.S.A. 47:1A-5.b., the Custodian complied with the Council's Interim Order by supplying the Complainant with the requested records via e-mail at no charge as requested. The Council also notes that the Custodian also legally 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 v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). 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.
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

January 24, 2012



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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Commissioner*

**INTERIM ORDER**

**December 20, 2011 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2010-186

v.

Township of Randolph (Morris)  
Custodian of Record

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

1. Because the requested executive session minutes were not approved by the Township Council in any capacity at the time of the Complainant’s OPRA request, such executive session minutes are draft documents that constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and 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 the requested executive session minutes pursuant to N.J.S.A. 47:1A-6.
2. The Custodian’s \$50.00 charge for the disclosure of electronic records already maintained in the requested electronic format constitutes an invalid charge that the Council and courts of New Jersey have held to be an “unreasonable burden” to access under OPRA and accordingly is a violation of N.J.S.A. 47:1A-5.b. See Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006); Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005); and Wolosky v. Sparta Board of Education (Sussex), 2009-56 (October 2009). However, because the evidence of record indicates that the Complainant did not pay said charge and because the Custodian certified in the Statement of Information that she provided the requested records at no charge, it is not necessary for the Council to order a refund in this matter.
3. The Township’s OPRA request form is deficient because it (a) fails to state that requestors may challenge an agency’s denial of access by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council, and (b) fails to provide an area where a custodian can provide a legal reason for denying the request in whole or in part. Accordingly,



consistent with O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Township of Randolph's official OPRA request form is deficient and violates OPRA. As such, the Township of Randolph shall either adopt the GRC's model OPRA request form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form by:

- Instructing a requestor that an agency's denial of access to government records may be challenged by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council.
  - Providing a section on the request form where a custodian can provide a legal reason for denying the request in whole or in part.
4. **The Custodian shall provide the requestor with the requested check registry data within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>1</sup>, to the Executive Director.<sup>2</sup> Any applicable charges associated with the electronic transmission of the requested check registry data shall adhere to the guidelines regarding "actual costs" consistent with Item No. 2 of the Interim Order above and as discussed herein.**
  5. **The Custodian shall comply with Item No. 3 of the Interim Order 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 1:4-4<sup>3</sup>, to the Executive Director.**
  6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
  7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

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<sup>1</sup> "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."

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

<sup>3</sup> "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."

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: December 21, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-186**

v.

**Township of Randolph (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:<sup>3</sup>**

Copies of:

1. Approved minutes of each and every closed or executive session held by the governing body during January, February, March, and April 2010.
2. A copy of the Township's current OPRA request form.
3. Check registry data by check date 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. (Specifically, the data table should show all the checks, drafts, or other forms of disbursement approved or not approved by the governing body from January 1, 2008 to present.)

**Request Made:** June 29, 2010

**Response Made:** July 6, 2010

**Custodian:** Donna M. Brady, Deputy Clerk<sup>4</sup>

**GRC Complaint Filed:** July 27, 2010<sup>5</sup>

**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 the request electronically via e-mail.

**July 6, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4<sup>th</sup>) business day following receipt of

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<sup>1</sup> Represented by Jonathan E. McMeen, Esq. (Sparta, NJ).

<sup>2</sup> Represented by Tiena M. Cofoni, Esq., of The Buzak Law Group, LLC (Montville, NJ).

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

<sup>4</sup> Ms. Brady responded to the instant OPRA request on behalf of Donna Luciani, Township Clerk and Head Custodian.

<sup>5</sup> The GRC received the Denial of Access Complaint on this date.

such request. The Custodian requests a two (2) week extension until July 20, 2010 to gather the requested information.

**July 6, 2010**

E-mail from the Complainant to the Custodian. The Complainant agrees to grant the Custodian the requested extension until July 20, 2010 and asks what the associated copying charges are for the requested records.

**July 6, 2010**

E-mail from the Custodian to the Complainant. The Custodian states that she will inform the Complainant of the associated copying charges as soon as she can.

**July 6, 2010**

E-mail from the Custodian to the Complainant. The Custodian forwards an e-mail from Mike Soccio, the Township Finance Director, asking whether it is acceptable to produce the 2010 check registries in Excel format. Mr. Soccio notes that the 2008 and 2009 check registries are hard copies and that he can scan such registries in PDF format if that is acceptable.

**July 9, 2010**

E-mail from the Custodian to the Complainant. The Custodian states that Mr. Soccio has informed her that it will cost \$50.00 to scan the 2008 and 2009 check registries in order to convert the hard copies into a PDF format for e-mailing.

**July 12, 2010**

E-mail from the Complainant to the Custodian. The Complainant states that he does not want to pay \$50.00 for the requested check registries.

**July 20, 2010**

Letter from the Custodian to the Complainant. The Custodian states that the most recent council meeting that is on CD is dated June 3, 2010. The Custodian asserts that as of the time of this letter, there are no executive meeting minutes approved for release this year (2010). The Custodian states that the CFO will e-mail the requested check registry data and data tables to the Complainant.

**July 20, 2010**

Letter from the Custodian to the Complainant. The Custodian provides a copy of the Township's current OPRA request form.

**July 20, 2010**

E-mail from the Custodian to the Complainant. The Custodian states that the requested check registries and data tables are attached.<sup>6</sup>

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<sup>6</sup> The Custodian has not indicated for which years the attached records are responsive. The Custodian has not included a copy of the records that were attached to the original e-mail.

**July 20, 2010**

E-mail from the Custodian to the Complainant. The Custodian states that attached are check registries from January 2008 through June 2010 in response to the Complainant's OPRA request.

**July 21, 2010**

E-mail from the Custodian to the Complainant. The Custodian re-sends the requested check registry and data tables. The Custodian states that she received an error message regarding her attempt to send them in her July 20, 2010 e-mail.

**July 21, 2010**

E-mail from the Complainant to the Custodian. The Complainant asks the dates that the Township held executive session meetings from January 1, 2010 to April 20, 2010.

**July 21, 2010**

E-mail from the Custodian to the Complainant. The Custodian states that the meeting dates of the Executive Sessions are January 14, 2010, January 28, 2010, February 4, 2010, February 20, 2010, March 4, 2010, March 25, 2010, April 6, 2010, and April 29, 2010. The Custodian states that the minutes have been approved for content, but have not been approved for release to the public. The Custodian states that she mailed the Complainant a copy of the Township's OPRA request form on July 20, 2010. The Custodian asserts that there will be no cost for the requested check registries.

**July 23, 2010**

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

- Complainant's OPRA request dated June 29, 2010
- Custodian's response to the OPRA request dated July 6, 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 Custodian to the Complainant dated July 6, 2010
- E-mail from the Custodian to the Complainant dated July 9, 2010
- E-mail from the Complainant to the Custodian dated July 12, 2010
- Letter from the Custodian to the Complainant dated July 20, 2010
- Letter from the Custodian to the Complainant dated July 20, 2010
- E-mail from the Custodian to the Complainant dated July 21, 2010
- E-mail from the Complainant to the Custodian dated July 21, 2010
- E-mail from the Custodian to the Complainant dated July 21, 2010

The Complainant's Counsel argues that the executive session minutes are public records within the meaning of OPRA. (N.J.S.A. 47:1A-1.1 (defining public records broadly as "any paper" "made, maintained or kept on file" in the course of a public agency's business); McClain v. College Hosp., 99 N.J. 346, 354, 492 A.2d 991, 995 (1985) (defining, in the context of the common law right of access, a public record as a written memorial made by a public officer that he or she is required by law to make).

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

Counsel contends that the January 14, January 28, February 4, February 20, March 4, March 25, April 6, and April 29, 2010 executive session minutes were "approved" according to the Clerk's affirmative response on July 21, 2010 to the Complainant's OPRA request. Counsel argues that because the executive session minutes have been approved and are not being released for reasons unknown, the Clerk and/or the governing body is creating an additional barrier to access. Counsel maintains that custodians and public agencies cannot create additional barriers to access. *See* Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007) (holding that Custodians could not create undue burdens on access such as forcing requestors to fill out multiple forms).

Counsel states that the second issue is whether a demand for \$50.00 to convert the check registry data to the requested format was a denial of access to public records under OPRA pursuant to N.J.S.A. 47:1 A-5.d. which states that "[t]he actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy. . ." Counsel states that while it is plausible that the Clerk will argue that this \$50.00 dollar fee is a "special service charge" pursuant to N.J.S.A. 47:1A-5.c., the Complainant is simply asking for the requested records to be provided in the format in which this data is currently being used by the CFO. Counsel alleges that the CFO's statement that these records are hard copies and must be scanned into PDF format at a cost of \$50.00 creates an unreasonable barrier to public records. Counsel argues that the Complainant's request does not involve an extraordinary expenditure of time and effort to complete and that the Custodian's proposed charge of \$50.00 to fulfill the Complainant's request serves to effectively deny access to public records under OPRA.

Counsel states that as of the date of this letter, the Complainant still has not received the check registry data that he requested on June 29, 2010 when he initially submitted his OPRA request to the Township. Counsel states that the Custodian's failure to provide these records constitutes a deemed denial. N.J.S.A. 47:1A-5.i.

Counsel argues that the Township's OPRA request form is false and misleading. 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 states that the omission of information required by OPRA is also deemed a denial of access. Wolosky v. Township of Vernon Board of Education, GRC Complaint 2009-57 (December 2009) (Township's OPRA request form that omitted information required by N.J.S.A. 47:1A-5.f. was invalid and constituted a denial of access). Counsel argues that the Township's OPRA request form is incomplete because it fails to state that



requestors have a right to challenge a denial of access to Superior Court or to the Government Records Council; moreover, such form does not provide an area where a Clerk can give a reason why a request was denied in whole or in part. Counsel argues that these two elements are required by N.J.S.A. 47:1A-5.f. and that based on O’Shea, the GRC should order the Township to revise its form to accord with the law.

Counsel requests that the Council find that the Complainant is the prevailing party and order an award of reasonable attorney’s fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

**August 16, 2010**

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

**August 23, 2010**

Township Clerk and Head Custodian, Donna Luciani,<sup>7</sup> responds to the request for the SOI with the following attachments<sup>8</sup>:

- Complainant’s OPRA request dated June 29, 2010
- Custodian’s response to the OPRA request dated July 6, 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 Custodian to the Complainant dated July 6, 2010
- E-mail from the Custodian to the Complainant dated July 9, 2010
- E-mail from the Complainant to the Custodian dated July 12, 2010
- Letter from the Custodian to the Complainant dated July 20, 2010
- Letter from the Custodian to the Complainant dated July 20, 2010
- E-mail from the Custodian to the Complainant dated July 20, 2010
- E-mail from the Custodian to the Complainant dated July 20, 2010
- E-mail from the Custodian to the Complainant dated July 21, 2010
- E-mail from the Complainant to the Custodian dated July 21, 2010
- E-mail from the Custodian to the Complainant dated July 21, 2010

The Clerk certifies that her search yielded the Township’s OPRA request form and that such form has no retention schedule. The Clerk certifies that her search also yielded check registry data from January 1, 2009 through June 30, 2010 which consisted of 900 pages. The Clerk also certifies that the check registry data must be retained by the Township for seven (7) years. In addition, the Clerk certifies that the OPRA request form was provided to the Complainant on July 20, 2010. The Clerk certifies that the requested check registries were provided to the Complainant on July 20, 2010 in their entirety and that the check registry records were sent to the Complainant again on July 21, 2010 at no charge.

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<sup>7</sup> Responding for Deputy Clerk and named Custodian, Donna Brady. Ms. Brady was copied on all correspondence regarding this case.

<sup>8</sup> Additional correspondence was submitted by the Custodian. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

The Clerk states that the Complainant's OPRA request sought approved minutes of each and every closed or executive session held by the governing body during January, February, March and April 2010. The Clerk certifies that closed/executive session minutes for the Township Council meetings from January 14, 2010, January 28, 2010, February 4, 2010, February 20, 2010, March 4, 2010, March 25, 2010, April 6, 2010, and April 29, 2010 exist.<sup>9</sup>

In addition, the Clerk certifies that on July 21, 2010, Ms. Brady responded to the Complainant's June 21, 2010 e-mail by stating that the requested minutes were approved by the Township Council as to their substance but had not yet been approved by the Township Council for release to the public. The Clerk further certifies that during the preparation of the SOI, she realized that as of the date of the Complainant's OPRA request on June 29, 2010, the requested minutes had not yet been approved at all, and that accordingly, Ms. Brady's prior statement asserting that the minutes were approved was incorrect.

Furthermore, the Clerk certifies that on July 9, 2010, Ms. Brady informed the Complainant via e-mail that there would be a \$50.00 charge for the conversion of the check registry data for 2008 and 2009 into the form requested by the Complainant due to the need to scan approximately 900 pages of documents in order to convert them into PDFs. The Clerk certifies that on July 20, 2010, Ms. Brady informed the Complainant that she would send the requested check registry data records via e-mail. The Clerk certifies that Ms. Brady attempted to e-mail the check registry data to the Complainant on July 20, 2010 and again on July 21, 2010. The Clerk certifies that also on July 21, 2010, Ms. Brady confirmed via e-mail to the Complainant that there would be no charge associated with this portion of his request. The Clerk maintains that because Ms. Brady did not hear anything further from the Complainant, Ms. Brady assumed that he had received the check registry data.

The Clerk certifies that she did not hear from the Complainant until he filed this Denial of Access Complaint. The Clerk states that she has no problem complying with the Complainant's request. The Clerk argues that if the Complainant was truly interested in obtaining the documents and not simply seeking a reason to file a complaint with the GRC, then this issue could have easily been resolved by making the Custodian's office aware that he did not receive the e-mails.

The Clerk further certifies that while the Township's OPRA request form does not include a space for the clerk to give a reason why a request was denied in whole or in part, her office provides written responses to all OPRA requests. The Clerk certifies that if an OPRA request is denied in whole or in part, the requester is provided with a specific written response why the request has been denied. The Clerk certifies that the information contained on the form is a summary of relevant portions of OPRA and then refers the requester to the corresponding legal citation. The Clerk argues that the Township's OPRA request form does not contain false or misleading information about OPRA.

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<sup>9</sup> The Clerk did not certify as to the search undertaken for the requested minutes, nor did she certify as to the records retention schedule for such minutes.

**April 25, 2011**

Letter from the Complainant's Counsel to the GRC. Counsel states that the Complainant informed him that he never received the requested check registry data in electronic format.

**April 26, 2011**

Letter from the Custodian to the GRC. The Custodian certifies that the following executive minutes were approved by the Randolph Township Council on August 5, 2010 but have yet to be approved for release to the public:

- January 14, 2010
- January 21, 2010
- January 28, 2010
- February 4, 2010
- February 20, 2010
- March 4, 2010
- March 18, 2010
- March 25, 2010
- April 6, 2010
- April 15, 2010
- April 29, 2010

**Analysis**

**Whether the Custodian unlawfully denied the Complainant access to the requested 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.

Furthermore, OPRA maintains that:

“A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the

record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record:

- (1) in a medium not routinely used by the agency
- (2) not routinely developed or maintained by an agency; or
- (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.” N.J.S.A. 47:1A-5.d.

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

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

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

Here, the Complainant requested a copy of the approved minutes of each and every closed or executive session held by the governing body during January, February, March, and April 2010. Although the Custodian asserted in a July 21, 2010 e-mail that the executive session minutes in 2010 had been approved as to their substance but not for release to the public, the Clerk certified in the SOI that the Custodian’s assertion was incorrect and the requested minutes had not been approved by the Township Council for content or for release to the public at the time of the Complainant’s OPRA request. Furthermore, the Custodian certified to the GRC on April 26, 2011 that the minutes responsive to the Complainant’s June 29, 2010 OPRA request were not approved until August 5, 2010, well after the Complainant’s June 29, 2010 OPRA request.

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

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.” Accordingly, all draft minutes of a meeting held by a public body are entitled to the protection of the deliberative process privilege. Such minutes are pre-decisional and 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.

Therefore, because the requested executive session minutes were not approved by the Township Council at the time of the Complainant's OPRA request, such executive session minutes are draft documents that constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, supra. Accordingly, the Custodian has borne her burden of proving a lawful denial of access to the requested executive session minutes pursuant to N.J.S.A. 47:1A-6.

### **Whether the Custodian unlawfully denied access to the requested check registries?**

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the *actual cost* of duplicating the record. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following:

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

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

OPRA further provided 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.

In Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010), which was decided on February 10, 2010, the Appellate Division held that beginning July 1, 2010, unless and until the Legislature amends OPRA to specify otherwise or some other statute or regulation applies, public agencies must charge requestors of government records no more than the reasonably approximated “actual costs” of copying such records. The Legislature subsequently amended OPRA to set rates of \$0.05 for letter sized paper copies and \$0.07 for legal sized paper copies. This amendment took effect on

November 9, 2010, while the Complainant's request in the instant case was made on June 29, 2010.

The submission of an OPRA request represents a snapshot in time wherein a custodian has an obligation to respond based on the law in effect at the time. At the time of this request, OPRA provided 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.). Moreover, while the law at the time of the instant request did 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. *Id.* (emphasis added).

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."

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

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

The GRC has applied the court’s rationale in such decisions as Wolosky v. Sparta Board of Education (Sussex), 2009-56 (October 2009). At issue was the complainant’s request for 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 BOE discovered the “actual cost” of each audiotape to be \$0.68. The Council therefore concluded that pursuant to Spaulding, *supra*, Libertarian Party of Central New Jersey, *supra*, Moore, *supra*, and Dugan, *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 the instant matter, the Custodian initially proposed a copying charge of approximately \$50.00 for the reproduction of the requested check registries. The Complainant disputed the validity of this cost while the Custodian contended that the proposed fee represented the cost of the CFO’s time to gather, print out, and scan the 900 pages of check registries for conversion to PDF. The Custodian has failed to lawfully substantiate such a cost.

The Complainant’s OPRA request states that the requested check registries could be provided in any electronic format that is compatible with the financial software used by the Township. Due to the lack of costs associated with the electronic transmission of records that are already maintained electronically, the GRC has held that custodians cannot charge for such transactions. *See e.g.*, Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010); Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (April 2010); Wolosky v. Township of Green (Sussex), GRC Complaint No. 2009-15 (February 2010); McBride v. Borough of Mantoloking (Bergen), GRC Complaint No. 2009-158 (May 2010). A review of the acceptable formats delineated in the Complainant’s OPRA request yields the conclusion that a conversion of the requested



check registries was unnecessary, as the electronic file format already in use by the Township was one of the mediums acceptable to by the Complainant.

Therefore, in the matter before the Council, the Custodian's proposed \$50.00 charge for the disclosure of electronic records already maintained in the requested electronic format constitutes an "unreasonable burden" to access under OPRA and accordingly is invalid pursuant to N.J.S.A. 47:1A-5.b. See Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006); Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005); and Wolosky v. Sparta Board of Education (Sussex), 2009-56 (October 2009). However, because the evidence of record indicates that the Complainant did not pay said charge and because the Custodian certified in the SOI that she provided the requested records at no charge, it is not necessary for the Council to order a refund in this matter.

**Whether the Township's OPRA request form is misleading to requestors and violates 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 that contains all of the elements set forth therein. 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’s official OPRA request form is deficient. The evidence of record in the instant complaint shows that the Township’s official OPRA request form is deficient in that:

- The form fails to state that requestors have a right to challenge a denial of access to Superior Court or to the Government Records Council
- The form does not provide an area where a Clerk can give a reason why a request was denied in whole or in part.

Therefore, the Council orders that the Township of Randolph 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, the Township of Randolph 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:

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

**Whether the Custodian’s delay in access to the requested records and 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?**

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 requested executive session minutes were not approved by the Township Council in any capacity at the time of the Complainant's OPRA request, such executive session minutes are draft documents that constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and 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 the requested executive session minutes pursuant to N.J.S.A. 47:1A-6.
2. The Custodian's \$50.00 charge for the disclosure of electronic records already maintained in the requested electronic format constitutes an invalid charge that the Council and courts of New Jersey have held to be an "unreasonable burden" to access under OPRA and accordingly is a violation of N.J.S.A. 47:1A-5.b. See Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006); Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005); and Wolosky v. Sparta Board of Education (Sussex), 2009-56 (October 2009). However, because the evidence of record indicates that the Complainant did not pay said charge and because the Custodian certified in the Statement of Information that she provided the requested records at no charge, it is not necessary for the Council to order a refund in this matter.
3. The Township's OPRA request form is deficient because it (a) fails to state that requestors may challenge an agency's denial of access by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council, and (b) fails to provide an area where a custodian can provide a legal reason for denying the request in whole or in part. Accordingly, consistent with O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Township of Randolph's official OPRA request form is deficient and violates OPRA. As such, the Township of Randolph shall either adopt the GRC's model OPRA request form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form by:
  - Instructing a requestor that an agency's denial of access to government records may be challenged by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council.

- Providing a section on the request form where a custodian can provide a legal reason for denying the request in whole or in part.
4. **The Custodian shall provide the requestor with the requested check registry data within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>10</sup>, to the Executive Director.<sup>11</sup> Any applicable charges associated with the electronic transmission of the requested check registry data shall adhere to the guidelines regarding "actual costs" consistent with Item No. 2 of the Interim Order above and as discussed herein.**
  5. **The Custodian shall comply with Item No. 3 of the Interim Order 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 1:4-4<sup>12</sup>, to the Executive Director.**
  6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
  7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Darryl C. Rhone  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

December 13, 2011

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<sup>10</sup> "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."

<sup>11</sup> Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

<sup>12</sup> "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."