



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

**FINAL DECISION**

**May 29, 2012 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2010-187

v.

Borough of Victory Gardens (Morris)  
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed because the Complainant withdrew his complaint via letter to the GRC and the Office of Administrative Law dated April 27, 2012. Accordingly, the case is resolved and there are no 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 29<sup>th</sup> Day of May, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: June 5, 2012**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2010-187**

v.

**Borough of Victory Gardens (Morris)<sup>2</sup>  
Custodian of Records**

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

Copies of:

1. Audio recording of the most recently recorded regular public meeting of the governing body.
2. A copy of the Borough's current OPRA request form.

**Request Made:** June 29, 2010

**Response Made:** June 30, 2010

**Custodian:** Deborah Evans

**GRC Complaint Filed:** July 26, 2010<sup>4</sup>

**Background**

**December 20, 2011**

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

1. The evidence of record indicates that the Custodian provided the Council with a certification of compliance on October 4, 2011, one (1) business day following the receipt of the Council's Interim Order. The Custodian certified that the Borough amended the official OPRA request form as ordered by adopting the GRC's model OPRA request form. Accordingly, the Custodian has complied with the Council's September 27, 2011 Interim Order.

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Office of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Philip Feintuch, Esq., of Feintuch, Porwich, & Feintuch (Jersey City, NJ).

<sup>3</sup> Additional records were requested which are not at issue in this Denial of Access Complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

2. Although the Borough's OPRA request form did not comport with OPRA because it (a) stated that "employee personnel files" are not public records but does not state OPRA's exceptions to the general rule that personnel files are not public records, and (b) stated that "police investigation records" are not public records while ignoring the several exceptions thereto contained in N.J.S.A. 47:1A-3.b., the Custodian bore her burden of proof that the proposed reproduction charge of \$195.00/hr plus \$3.50 for the tape was reasonable pursuant to N.J.S.A. 47:1A-5.d., and the Custodian provided certified confirmation of compliance with the Council's Order on October 4, 2011 that the Borough adopted the GRC's Model OPRA request form as the Borough's official OPRA request form. Additionally, 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.

**December 21, 2011**

Council's Interim Order distributed to the parties.

**March 14, 2012**

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

**April 27, 2012**

Letter from Complainant's Counsel to the Honorable Imre Karaszegi, Administrative Law Judge ("ALJ").<sup>5</sup> Counsel states that the instant matter has been amicably resolved between the parties with the assistance of the Court. Counsel states that the Complainant is withdrawing his Denial of Access Complaint with prejudice.

**Analysis**

No analysis is required in this matter.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew his complaint via letter to the GRC and the Office of Administrative Law dated April 27, 2012. Accordingly, the case is resolved and there are no outstanding issues in this matter. Therefore, no further adjudication is required.

Prepared By: Darryl C. Rhone  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

May 22, 2012

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<sup>5</sup> GRC Executive Director, Catherine Starghill, was copied on this letter.



**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. 2010-187

v.

Borough of Victory Gardens (Morris)  
Custodian of Record

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

1. The evidence of record indicates that the Custodian provided the Council with a certification of compliance on October 4, 2011, one (1) business day following the receipt of the Council's Interim Order. The Custodian certified that the Borough amended the official OPRA request form as ordered by adopting the GRC's model OPRA request form. Accordingly, the Custodian has complied with the Council's September 27, 2011 Interim Order.
2. Although the Borough's OPRA request form did not comport with OPRA because it (a) stated that "employee personnel files" are not public records but does not state OPRA's exceptions to the general rule that personnel files are not public records, and (b) stated that "police investigation records" are not public records while ignoring the several exceptions thereto contained in N.J.S.A. 47:1A-3.b., the Custodian bore her burden of proof that the proposed reproduction charge of \$195.00/hr plus \$3.50 for the tape was reasonable pursuant to N.J.S.A. 47:1A-5.d., and the Custodian provided certified confirmation of compliance with the Council's Order on October 4, 2011 that the Borough adopted the GRC's Model OPRA request form as the Borough's official OPRA request form. Additionally, 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 20<sup>th</sup> Day of December, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2010-187**

v.

**Borough of Victory Gardens (Morris)<sup>2</sup>  
Custodian of Records**

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

1. Audio recording of the most recently recorded regular public meeting of the governing body.
2. A copy of the Borough's current OPRA request form.

**Request Made:** June 29, 2010

**Response Made:** June 30, 2010

**Custodian:** Deborah Evans

**GRC Complaint Filed:** July 26, 2010<sup>4</sup>

**Background**

**September 27, 2011**

At its September 27, 2011 public meeting, the Government Records Council ("Council") considered the September 20, 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 Complainant's request for an audio recording of a recent Borough Council meeting seeks a record in a medium requiring a substantial amount of manipulation or programming of information technology, and because the Custodian has certified that the Borough does not have the ability to reproduce the requested recording and must utilize its vendor Gramco to do so at a rate of \$195.00/hr. plus \$3.50 for the tape, the Custodian has borne her burden of proof under N.J.S.A. 47:1A-6 that the proposed reproduction charge is reasonable

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Office of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Philip Feintuch, Esq., of Feintuch, Porwich, & Feintuch (Jersey City, NJ).

<sup>3</sup> Additional records were requested which are not at issue in this Denial of Access Complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

pursuant to N.J.S.A. 47:1A-5.d. and Libertarian Party of Central New Jersey, 384 N.J. Super. 136 (App. Div. 2006).

2. The Borough's OPRA request form is deficient because it (a) states that "employee personnel files" are not public records but does not state OPRA's exceptions to the general rule that personnel files are not public records, and (b) states that "police investigation records" are not public records while ignoring the several exceptions thereto contained in N.J.S.A. 47:1A-3.b. Accordingly, consistent with O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Borough of Victory Gardens' official OPRA request form is deficient and potentially misleading to requestors. While OPRA requires that an agency's request form contain all of the elements set forth in N.J.S.A. 47:1A-5.f., the inclusion of exemptions to OPRA is not required to be on the request form. The Borough's incomplete recitation of exemptions to disclosure under OPRA on the Borough's OPRA request form, places a restriction on the public's right to access that is without valid legal basis. As such, the Borough of Victory Gardens 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:
  - Providing a section that details the personnel exemption as listed in N.J.S.A. 47:1A-10 or altogether omitting references to personnel records.
  - Providing the details of the circumstances in which police investigation records are disclosable under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
3. **The Custodian shall comply with Item No. 2 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>5</sup>, to the Executive Director.**
4. 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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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<sup>5</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."



**October 3, 2011**

Council's Interim Order distributed to the parties.

**October 4, 2011**

Custodian's certification of compliance attaching a copy of the Borough of Victory Gardens' official OPRA request form. The Custodian certifies that the Borough of Victory Gardens has adopted the GRC's model OPRA request form.<sup>6</sup>

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

The Council's September 27, 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. 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 October 3, 2011.

The evidence of record indicates that the Custodian provided the Council with a certification of compliance on October 4, 2011, one (1) business day following the receipt of the Council's Interim Order. The Custodian certified that the Borough amended the official OPRA request form as ordered by adopting the GRC's model OPRA request form. Accordingly, the Custodian has complied with the Council's September 27, 2011 Interim Order.

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

OPRA states that:

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

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

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably

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<sup>6</sup> The Custodian does not specify the exact date upon which the model form was adopted.

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 Borough’s OPRA request form did not comport with OPRA because it (a) stated that "employee personnel files" are not public records but does not state OPRA's exceptions to the general rule that personnel files are not public records, and (b) stated that "police investigation records" are not public records while ignoring the several exceptions thereto contained in N.J.S.A. 47:1A-3.b., the Custodian bore her burden of proof that the proposed reproduction charge of \$195.00/hr plus \$3.50 for the tape was reasonable pursuant to N.J.S.A. 47:1A-5.d. , and the Custodian provided certified confirmation of compliance with the Council’s Order on October 4, 2011 that the Borough adopted the GRC’s Model OPRA request form as the Borough’s official OPRA request form. Additionally, 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>7</sup> Those changes expand counsel fee awards under

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<sup>7</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.

OPRA.” Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

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

In the instant matter, the Complainant filed the Denial of Access Complaint on July 26, 2010, alleging that the Township’s OPRA form contained misleading information regarding OPRA. The Council’s September 27, 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 1) providing a section that details the exemptions in regards to personnel file requests listed in N.J.S.A. 47:1A-10; and 2) providing the details of the circumstances in which police investigation records are disclosable under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records. The Custodian provided a certification on October 4, 2011 that the Borough adopted the GRC’s model OPRA request form.

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.

### **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 October 4, 2011, one (1) business day following the receipt of the Council's Interim Order. The Custodian certified that the Borough amended the official OPRA request form as ordered by adopting the GRC's model OPRA request form. Accordingly, the Custodian has complied with the Council's September 27, 2011 Interim Order.
2. Although the Borough's OPRA request form did not comport with OPRA because it (a) stated that "employee personnel files" are not public records but does not state OPRA's exceptions to the general rule that personnel files are not public records, and (b) stated that "police investigation records" are not public records while ignoring the several exceptions thereto contained in N.J.S.A. 47:1A-3.b., the Custodian bore her burden of proof that the proposed reproduction charge of \$195.00/hr plus \$3.50 for the tape was reasonable pursuant to N.J.S.A. 47:1A-5.d., and the Custodian provided certified confirmation of compliance with the Council's Order on October 4, 2011 that the Borough adopted the GRC's Model OPRA request form as the Borough's official OPRA request form. Additionally, 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

December 13, 2011





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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**INTERIM ORDER**

**September 27, 2011 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2010-187

v.

Borough of Victory Gardens (Morris)  
Custodian of Record

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

1. Because the Complainant's request for an audio recording of a recent Borough Council meeting seeks a record in a medium requiring a substantial amount of manipulation or programming of information technology, and because the Custodian has certified that the Borough does not have the ability to reproduce the requested recording and must utilize its vendor Gramco to do so at a rate of \$195.00/hr. plus \$3.50 for the tape, the Custodian has borne her burden of proof under N.J.S.A. 47:1A-6 that the proposed reproduction charge is reasonable pursuant to N.J.S.A. 47:1A-5.d. and Libertarian Party of Central New Jersey, 384 N.J. Super. 136 (App. Div. 2006).
2. The Borough's OPRA request form is deficient because it (a) states that "employee personnel files" are not public records but does not state OPRA's exceptions to the general rule that personnel files are not public records, and (b) states that "police investigation records" are not public records while ignoring the several exceptions thereto contained in N.J.S.A. 47:1A-3.b. Accordingly, consistent with O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Borough of Victory Gardens' official OPRA request form is deficient and potentially misleading to requestors. While OPRA requires that an agency's request form contain all of the elements set forth in N.J.S.A. 47:1A-5.f., the inclusion of exemptions to OPRA is not required to be on the request form. The Borough's incomplete recitation of exemptions to disclosure under OPRA on the Borough's OPRA request form, places a restriction on the public's right to access that is without valid legal basis. As such, the Borough of Victory Gardens 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:



- Providing a section that details the personnel exemption as listed in N.J.S.A. 47:1A-10 or altogether omitting references to personnel records.
  - Providing the details of the circumstances in which police investigation records are disclosable under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
3. **The Custodian shall comply with Item No. 2 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>1</sup>, to the Executive Director.**
  4. 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.
  5. 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 27<sup>th</sup> Day of September, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: October 3, 2011**

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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."

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2010-187**

v.

**Borough of Victory Gardens (Morris)<sup>2</sup>  
Custodian of Records**

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

Copies of:

1. Audio recording of the most recently recorded regular public meeting of the governing body.
2. A copy of the Borough's current OPRA request form.

**Request Made:** June 29, 2010

**Response Made:** June 30, 2010

**Custodian:** Deborah Evans

**GRC Complaint Filed:** July 26, 2010<sup>4</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.

**June 30, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1<sup>st</sup>) business day following receipt of such request. The Custodian states that she can send a copy of the Borough's OPRA request form. The Custodian states that she has contacted Gramco, a company that creates the Borough's audio recordings, and is waiting for an estimate of the duplication costs for the requested audio recording.

**June 30, 2010**

E-mail from the Custodian to the Complainant. The Custodian states that she has received the pricing information from Gramco Business Communications ("Gramco") and because her office does not have a scanner, she is mailing a copy of this pricing

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<sup>1</sup> Represented by Walter M. Luers, Esq. (Clinton, NJ).

<sup>2</sup> Represented by Philip Feintuch, Esq., of Feintuch, Porwich, & Feintuch (Jersey City, NJ).

<sup>3</sup> Additional records were requested which are not at issue in this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on July 27, 2010.

information to the Complainant. The Custodian states that she will inform Gramco if the Complainant wishes to have a copy or the Complainant can contact Gramco independently if he wishes.

**July 7, 2010**

E-mail from the Custodian to the Complainant. The Custodian confirms that the cost of the recording is \$195.00/hr. plus \$3.50 for the tape. The Custodian states that she has already sent the Complainant the OPRA request form via U.S. Mail but will fax him another copy of such form on this day.

**July 7, 2010**

E-mail from the Complainant to the Custodian. The Complainant states that he understands the cost for the audio recording is \$195.00/hr. plus \$3.50 for the tape. The Complainant provides a fax number to the Custodian for the requested OPRA request form to be sent to him.

**July 12, 2010**

E-mail from the Complainant to the Custodian. The Complainant disputes the Custodian's estimated charges for the audio recording of \$195.00/hr. plus \$3.50 for the tape. The Complainant acknowledges receipt of the OPRA request form.

**July 12, 2010**

E-mail from the Custodian to the Complainant. The Custodian states that the \$195.00/hr. is what Gramco charges the Borough for reproduction of audio tapes and that said charge is not made by the Borough.

**July 22, 2010**

E-mail from the Custodian to the Complainant. The Custodian states that the minutes for the Borough's meetings are typed on a typewriter and not a computer. The Custodian states that there were thirteen (13) regular meetings of the governing body since January 1, 2010 through June 30, 2010. The Custodian states that there are 121 total pages of minutes. The Custodian states that she does not believe that OPRA costs have yet been finalized with the new copying fees.

**July 23, 2010**

Letter from the Complainant to the Custodian. The Complainant asks if it is possible to hear the audio recording of the June 22, 2010 meeting in the Custodian's office. The Complainant asks if he can bring in a small tape recorder and copy the audio recording of the June 22, 2010 meeting. The Complainant asks the dates of the thirteen (13) regular session minutes between January 1, 2010 and June 30, 2010.

**July 23, 2010**

Letter from the Custodian to the Complainant. The Custodian states that the Complainant can come in, listen to the audio recording and bring his own recorder. The Custodian states that the dates of the Council meetings between January 1, 2010 and June 30, 2010 are: January 5, January 12, January 26, February 9, March 1, March 9, March 23, April 13, April 27, May 11, May 25, June 9, and June 22.

### **June 29, 2010**

Letter from the Complainant to the Custodian. The Complainant asks the length of the audio recording and how many audio tapes comprise the recording.

### **July 26, 2010**

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:<sup>5</sup>

- Complainant’s OPRA request dated June 29, 2010
- Custodian’s response to the Complainant’s OPRA request dated June 30, 2010
- Copy of a pricing quote obtained from Gramco dated June 30, 2010
- Copy of a Gramco “New Jersey State pricing list” dated April 15, 2010
- E-mail from the Custodian to the Complainant dated June 30, 2010
- E-mail from the Custodian to the Complainant dated July 7, 2010
- E-mail from the Complainant to the Custodian dated July 7, 2010
- E-mail from the Complainant to the Custodian dated July 12, 2010
- E-mail from the Custodian to the Complainant dated July 12, 2010
- E-mail from the Custodian to the Complainant dated July 22, 2010
- Letter from the Complainant to the Custodian dated July 23, 2010
- Letter from the Custodian to the Complainant dated July 23, 2010
- Letter from the Complainant do the Custodian dated July 29, 2010
- A copy of the Borough of Victory Gardens OPRA request form

Complainant’s Counsel disputes the validity of the Borough’s OPRA request form. Counsel argues that the Borough’s OPRA request form includes a page of instructions that lists 32 “exceptions to public access to government records.” Counsel states that those exceptions include “pension and personnel records” and “criminal investigatory records.” Counsel states that N.J.S.A. 47:1A-10 contains an exception to the “pension and personnel records” exemption from disclosure. In addition, Counsel argues that such exception states that “an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be a government record.” N.J.S.A. 47:1A-10.

Counsel further states that in regards to “criminal investigatory records,” OPRA contains an exception for several categories of information, including the name, address and age of victims, the type, time and location of the crime, the name, residence and age of the defendant, the identity of the complaining witness, and the circumstances surrounding the arrest (among other things). N.J.S.A. 47:1A- 3.b. Counsel argues that “the purpose of OPRA ‘is to maximize public knowledge of public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” Times of Trenton Publ’g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean County Prosecutor’s Office, 374 N.J. Super. 312, 329 (Law Div. 2004).

Counsel alleges that the Borough’s OPRA request form has a second page that the Complainant has not received. Counsel states that the Custodian, through Counsel, relies

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<sup>5</sup> Additional correspondence not relevant to the adjudication of this complaint was also included.

on Atlantic City Convention Center Authority v. South Jersey Publishing Company, Inc., 135 N.J. 53 (1994) for the proposition that audio tapes are not “public records.” Counsel argues that this case can no longer be relied upon as good law, because Atlantic City was decided under the Right-to-Know Law, which was repealed by OPRA. In addition, Counsel states that under the Right-to-Know law, public records were defined as records that were “required by law to be made, maintained or kept on file[.]” N.J.S.A. 47:1A-2 (repealed). Counsel states that the New Jersey Supreme Court has characterized this definition as “narrow.” Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 43 (1995). Counsel maintains that OPRA's definition of a public record is substantially broader:

Counsel argues that the \$198.50<sup>6</sup> charge for one (1) audio recording appears to reflect a special service charge. Counsel argues that when a public agency copies documents or things in the medium in which those documents or things exist, the public agency must charge “actual cost.” N.J.S.A. 47:1A-5.b. Counsel states that absent extraordinary circumstances, “actual cost” is the material cost of providing the public with a copy, excluding labor and overhead. Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26, 31 (1962) (labor not included in “actual cost” under New Jersey common law); Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271, 280 (App. Div. 2005) (fees allowed under OPRA “consistent” with fees allowed under the Common Law Right of Access); Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 141 n.1, 894 A.2d 72, 75 n.1 (App. Div. 2006) (“direct” cost of copying not appropriate standard); O'Shea v. Madison Public School District, GRC Complaint No. 2007-185 (April 2008); O'Shea v. Township of Vernon, GRC Complaint No. 2007-207 (April 2008).

Furthermore, Counsel argues that the type of medium furnished in response to the request does not matter. Counsel maintains that in either case, N.J.S.A. 47:1A-5.b. limits the cost of a record to “the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy” unless a special service charge is warranted. Counsel states that since the Borough appears to be claiming that it does not have the ability to make a copy of its audio recording and must outsource it, the Borough appears to be charging a “special service charge.” In support of his arguments, Counsel states that for non-paper records, a special service charge is warranted if the conditions of N.J.S.A. 47:1A-5.d. are met, and that provision authorizes a special service charge only if the “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) require a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special service charge. . . [reasonably] based . . . on the cost for any extensive use of information technology . . .” Counsel argues that the \$198.50 special service charge is not reasonable because there is no evidence that the \$198.50 charge reflects the “state contract” price for such services and that there are alternatives that are certainly more reasonable than paying \$198.50 for a copy of a one and one-half (1 ½) hour recording.

The Complainant does not agree to mediate this complaint.

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<sup>6</sup> The Complainant’s Counsel inaccurately refers to Gramco’s charge as \$198.50 when in fact the invoice from said vendor indicates the charge is \$195/hr.

**August 16, 2010**

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

**August 17, 2010**

Letter from Custodian’s Counsel to the GRC attaching the Custodian’s legal certification. The Custodian certifies that the Borough’s OPRA request form is not ambiguous and contains clear, concise and explicit directions. The Custodian states that while the Complainant alleges that the OPRA request form does not contain the time period by which the record must be made available, the Custodian certifies that the back of the Borough’s OPRA request form contains this language. The Custodian instructs the GRC to read the attached OPRA request form. The Custodian argues that there is no basis in fact or law to establish the Complainant’s allegations and this count of the complaint should be dismissed.

The Custodian states that the Council should review Atlantic City Convention Center Authority vs. South Jersey Publishing Company, Inc., 135 N.J. 53, 64 (1994) where the Supreme Court determined that “[a]udio tapes made in course of public meeting for purpose of assisting in preparation of official minutes did not constitute Right-to-Know records and that the records were not required to be 'made, maintained, or kept.” *Id.* The Custodian certifies that the Borough does not keep the recordings as a government record and that a record of the actions that take place during the governing body’s meeting is set forth in the minutes which are adopted by the governing body at its next or a future meeting. The Custodian asserts that accordingly, the Complainant is not entitled to copies of the recording requested.

The Custodian certifies that the charge for an audio recording copy is not set by the Borough and that the Borough does not have the capacity to duplicate the recording of its meetings. The Custodian certifies the charge of \$198.50 is not being made by the Borough and that it is the actual cost from the vendor to the Borough to duplicate the requested recording.<sup>7</sup> The Custodian certifies that this is not a "service charge" as alleged by the Complainant. The Custodian certifies that the sum was established by the Borough's vendor, Gramco. The Custodian certifies that the Complainant was directed to the vendor for additional information.

The Custodian certifies that the Complainant was invited to listen to the requested tape recordings at his leisure and that the Borough in no way denied the Complainant access to the requested recording. The Custodian argues that it would violate the intent of OPRA to cause a municipal body to go to an extraordinary expense to supply the Complainant information which has been made available to him in the only way that the municipal body could do so. The Custodian argues that while the Complainant cites Times of Trenton Publishing Co. vs. Lafayette Yard Community Dev. Corp., 183 N.J. 519, in support of his arguments, that case bears no import on the matter now under discussion because the issue in Trenton was whether a private, non-profit corporation, designated by city to redevelop property donated to it by city, was a public body or public agency and whether it was required to release minutes of board meetings to the public.

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<sup>7</sup> The Custodian attached a copy of an invoice from Gramco to confirm this.

## August 25, 2010<sup>8</sup>

Custodian's SOI with the following attachments:<sup>9</sup>

- Copy of a price list from Gramco dated April 15, 2010
- Complainant's OPRA request dated June 29, 2010
- Custodian's response to the Complainant's OPRA request dated June 30, 2010
- Copy of a quote from Gramco for duplication of tapes dated June 30, 2010
- E-mail from the Custodian to the Complainant dated June 30, 2010
- Copy of the Borough of Victory Gardens OPRA request form

The Custodian's Counsel certifies that the statements made in his August 17, 2010 letter are true and are to be used as his response to the request for a Statement of Information.<sup>10</sup>

## May 11, 2011

Letter from the Custodian to the GRC. The Custodian certifies that at the time of the Complainant's OPRA request, the Borough's official OPRA request form was one (1) page. The Custodian certifies that the request form was in three (3) parts and the requestor received a copy that would be torn off upon the Custodian's receipt of the request. The Custodian certifies that one copy is kept for the Borough's records and the third (3<sup>rd</sup>) copy is attached to the prepared records. The Custodian certifies that the Complainant was sent the OPRA form on June 30, 2010, the day following his OPRA request. The Custodian certifies that a faxed version of the OPRA request form was sent to him on the same day of his request on June 29, 2010.

## Analysis

### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... 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.

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<sup>8</sup> The Custodian instructs the GRC to use his arguments contained in an August 17, 2010 letter as his SOI.

<sup>9</sup> The Custodian did not certify as to the search undertaken for the records responsive to the OPRA request nor did she certify as to whether any records had been destroyed pursuant to the records retention schedule set by the New Jersey Division of Archives and Records Management (DARM).

<sup>10</sup> The Custodian provides no further documentation.



Furthermore, OPRA provides that:

“A copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation. 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 be:

- \$ 0.05 per letter size page or smaller, and
- \$ 0.07 per legal size page or larger.

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. The actual cost of duplicating the record, upon which all copy fees are based, 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...” N.J.S.A. 47:1A-5.b.

Furthermore, OPRA provides that:

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

1. in a medium not routinely used by the agency;
2. not routinely developed or maintained by an agency; or
3. requiring a substantial amount of manipulation or 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 an audio recording of the most recent regular public meeting of the governing body that was recorded. The Complainant’s Counsel argues that the \$195/hr. proposed charge stated by the Custodian for replication of this recording is not reasonable because there is no evidence that the \$195/hr. charge reflects the "state contract" price for such services and that there are more reasonable alternatives to paying \$195/hr. for a copy of a one and one-half (1 ½) hour recording. The Complainant’s Counsel asserted that this is an unwarranted special service charge. The Custodian certified that the Borough does not have the capacity to reproduce the requested recording and that the proposed charge represents the actual cost of the Township’s vendor Gramco to reproduce the requested audio recording.

While OPRA provides that paper copies of government records may be obtained upon payment of the actual cost of duplication not to exceed the enumerated rates of \$0.75/0.50/0.25 per page (N.J.S.A. 47:1A-5.b.), the Act does not provide explicit copy rates for any other medium. N.J.S.A. 47:1A-5.b. goes on to state that the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy. Additionally, OPRA provides that when a request for a record in a medium not routinely used by an agency, not routinely developed or maintained by an agency, or requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the *actual cost of duplication*, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both. N.J.S.A. 47:1A-5.d.

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

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

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

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

In Martin O’Shea v. Township of Vernon, GRC Complainant 2007-207 (March 2008), the complainant contended that the custodian’s charge of \$35.00 for his request for an audio recording of the Township Council’s meeting minutes dated May 14, 2007 violated OPRA because said charge was in excess of the actual cost of duplicating the records. The Complainant stated that the Township of Vernon passed an ordinance which set the fees for copies of sound recordings at \$35.00 for the first ninety (90) minutes and \$25.00 for each additional ninety (90) minutes or part thereof. The Council found that pursuant to N.J.S.A. 47:1A-5.b., Spaulding, supra, Libertarian Party of Central New Jersey, supra; *see also Moore v. Board of Chosen Freeholders of Mercer County*, 39 N.J. 26 (1962) and Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the custodian must charge the actual cost of duplicating the requested records. As such, the custodian’s charge of \$35.00 for an audio recording of the requested meeting minutes was unreasonable and in violation of N.J.S.A. 47:1A-5.b. The custodian was ordered to provide the requested records to the complainant and charge the actual cost of the audiotape and shall not include the cost of labor or other overhead expenses associated with making the copy.

In this complaint, the Complainant requested an audio recording of a Borough Council meeting. The Custodian certified that the Borough does not have the ability to reproduce the requested recording and that the Borough must utilize its vendor Gramco to do so. The Council takes judicial notice of the process required to make duplicates of the Borough’s audio records which is what comprises Gramco’s charge. Specifically, Gramco brings its equipment to the Borough offices to compress the channels of the Borough’s audio recordings from four (4) to one (1) and convert the audio recording speed to a normal speed that will allow for duplication. The Borough’s audio recording equipment does not allow for duplication of its cassettes without this substantial manipulation or programming of the cassettes. The Complainant’s request therefore seeks a record in a medium requiring a substantial amount of manipulation or programming of information technology. Pursuant to N.J.S.A. 47:1A-5.d., the agency

may charge, in addition to the *actual cost of duplication*, a special charge 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. The evidence of record indicates that the Borough's proposed charge of \$195/hr. plus \$3.50 for the tape represents the actual cost to the Borough to reproduce the requested record.<sup>11</sup>

Therefore, because the Complainant's request for an audio recording of a recent Borough Council meeting seeks a record in a medium requiring a substantial amount of manipulation or programming of information technology, and because the Custodian has certified that the Borough does not have the ability to reproduce the requested recording and must utilize its vendor Gramco to do so, and because the Custodian has submitted an invoice from Gramco which establishes that the actual cost to the Borough of reproducing the requested audio tape is \$195.00 plus \$3.50 for the tape, the Custodian has borne her burden of proof under N.J.S.A. 47:1A-6 that the proposed reproduction charge is reasonable pursuant to N.J.S.A. 47:1A-5.d. and Libertarian Party of Central New Jersey, supra.

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

OPRA provides that:

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

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

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<sup>11</sup> The evidence of record indicates that the requested tape is one and one half (1 ½) hours in length; at \$195 per hour, the actual cost of copying the requested recording should be \$292.50 (\$195 + \$97.50); the actual cost of reproduction is therefore higher than the charge of \$195 plus \$3.50 for the tape which was proposed by the Custodian.

(7) space for the custodian to sign and date the form if the request is fulfilled or denied.” N.J.S.A. 47:1A-5.f.

N.J.S.A. 47:1A-5.f. mandates that public agencies adopt an official OPRA request form. While OPRA does not mandate that agencies adopt the GRC’s OPRA request form, the GRC has mandated that agency’s alter those forms which are inconsistent with the requirements of N.J.S.A. 47:1A-5.f. or are potentially misleading to requestors.

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

In the instant matter, as in O’Shea, the Borough’s official OPRA request form is deficient and potentially misleading to requestors. While OPRA requires that an agency’s request form contain all of the elements set forth in N.J.S.A. 47:1A-5.f., the inclusion of exemptions to disclosure under OPRA is not required to be on the request form.

The Borough’s incomplete recitation of exemptions to disclosure under OPRA on the Borough’s OPRA request form, places a restriction on the public’s right to access that is without valid legal basis. The evidence of record in the instant complaint shows that the Borough’s official OPRA request form is deficient in that:

- The form states that "employee personnel files" are not public records, but does not state OPRA's exceptions to the general rule that personnel files are not public records.
- The form states that "police investigation records" are not public records, ignoring the several exceptions thereto contained in N.J.S.A. 47:1A-3.b.

Therefore, the Council orders that the Borough of Victory Gardens 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 Borough of Victory Gardens shall either adopt the GRC’s Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form by:

- Providing a section that details the personnel exemption as listed in N.J.S.A. 47:1A-10 or altogether omitting references to personnel records.

- Providing the details of the circumstances in which police investigation records are disclosable under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.

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

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

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

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant’s request for an audio recording of a recent Borough Council meeting seeks a record in a medium requiring a substantial amount of manipulation or programming of information technology, and because the Custodian has certified that the Borough does not have the ability to reproduce the requested recording and must utilize its vendor Gramco to do so at a rate of \$195.00/hr. plus \$3.50 for the tape, the Custodian has borne her burden of proof under N.J.S.A. 47:1A-6 that the proposed reproduction charge is reasonable pursuant to N.J.S.A. 47:1A-5.d. and Libertarian Party of Central New Jersey, 384 N.J. Super. 136 (App. Div. 2006).
2. The Borough’s OPRA request form is deficient because it (a) states that "employee personnel files" are not public records but does not state OPRA's exceptions to the general rule that personnel files are not public records, and (b) states that "police investigation records" are not public records while ignoring the several exceptions thereto contained in N.J.S.A. 47:1A-3.b. Accordingly, consistent with O’Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Borough of Victory Gardens’ official OPRA request form is deficient and potentially misleading to requestors. While OPRA requires that an agency’s request form contain all of the elements set forth in N.J.S.A. 47:1A-5.f., the inclusion of exemptions to OPRA is not required to be on the request form. The Borough’s incomplete recitation of exemptions to disclosure under OPRA on the Borough’s OPRA request form, places a restriction on the public’s right to access that is without valid legal basis. As such, the Borough of Victory Gardens 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:

- Providing a section that details the personnel exemption as listed in N.J.S.A. 47:1A-10 or altogether omitting references to personnel records.
  - Providing the details of the circumstances in which police investigation records are disclosable under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
3. **The Custodian shall comply with Item No. 2 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.**
  4. 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.
  5. 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

September 20, 2011

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<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."