



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-191

v.

Township of Denville (Morris)
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 23, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this Complaint should be dismissed because the Complainant withdrew his complaint via letter to the GRC and the Office of Administrative Law dated October 12, 2012, as the parties have resolved all outstanding issues in this matter. Therefore, no further adjudication is required.

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

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

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 19, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-191

v.

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

Records Relevant to Complaint: Copies of:

1. Audio recording of the most recently recorded regular public meeting of the governing body.
2. Approved minutes of each and every closed or executive session held by the governing body during January, February, March, and April 2010.
3. A copy of the Township's current OPRA request form.³

Request Made: June 29, 2010

Response Made: July 9, 2010

Custodian: Donna I. Costello

GRC Complaint Filed: August 1, 2010⁴

Background

March 27, 2012

At its March 27, 2012 public meeting, the Government Records Council ("Council") considered the March 20, 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 February 8, 2012, 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 actual costs associated with the reproduction of the

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

² Represented by Fred Semrau, Esq., of Dorsey & Semrau, LLC (Boonton, NJ).

³ The Complainant requested additional records which are not at issue in this complaint.

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

requested audio recording. Accordingly, the Custodian has complied with the Council's January 31, 2012 Interim Order.

2. The evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008) a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters and Mason. Thus, this Complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

February 2, 2012

Council's Interim Order distributed to the parties.

March 29, 2012

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

October 12, 2012

Letter from the Complainant's Counsel to the Honorable James A. Geraghty, A.L.J., with copy to the GRC. Counsel states that the parties have resolved all outstanding issues in this matter and he therefore is withdrawing the Denial of Access Complaint with prejudice.

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 October 12, 2012, as the parties have resolved all outstanding issues in this matter. Therefore, no further adjudication is required.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 23, 2012⁵

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



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

March 27, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-191

v.

Township of Denville (Morris)
Custodian of Record

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

1. The evidence of record indicates that the Custodian provided the Council with a certification of compliance on February 8, 2012, 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 actual costs associated with the reproduction of the requested audio recording. Accordingly, the Custodian has complied with the Council’s January 31, 2012 Interim Order.
2. The evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008) a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters and Mason. Thus, this Complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees. Based on the New



Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

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

Robin Berg Tabakin, Chair
Government Records Council

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

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: March 29, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-191

v.

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

Records Relevant to Complaint: Copies of:

1. Audio recording of the most recently recorded regular public meeting of the governing body.
2. Approved minutes of each and every closed or executive session held by the governing body during January, February, March, and April 2010.
3. A copy of the Township's current OPRA request form.³

Request Made: June 29, 2010

Response Made: July 9, 2010

Custodian: Donna I. Costello

GRC Complaint Filed: August 1, 2010⁴

Background

January 31, 2012

At its January 31, 2012 public meeting, the Government Records Council ("Council") considered the January 24, 2012 Executive Director's Findings and Recommendations and all related documents submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to provide an anticipated date upon which the records responsive to the Complainant's request for executive session minutes would be provided to the Complainant. Accordingly, the Complainant is in violation of OPRA pursuant to N.J.S.A. 47:1A-5.i. and Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003), because the Custodian's response was not proper.

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

² Represented by Fred Semrau, Esq., of Dorsey & Semrau, LLC (Boonton, NJ).

³ The Complainant requested additional records which are not at issue in this complaint.

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

2. Because the Custodian responded to the Complainant's request for a copy of the Township's official OPRA request form by referring the Complainant to the Township's website, instead of scanning the form and providing an electronic copy as requested, the Custodian violated N.J.S.A. 47:1A-1. Kaplan v. Winslow Township's Board of Education, Complaint No. 2009-148 (June 2010 Interim Order).
3. The legislative intent of OPRA is to provide the public with the least restrictive means of access to those government records in which a requestor is entitled. The Township's practice of requiring requestors to provide a portable USB drive to obtain electronic copies of audio recordings imposes an unlawful restriction of access that is in violation of N.J.S.A. 47:1A-1 and is a burden placed upon requestors that is not supported by law.
4. The proposed \$1.00 charge for the CD to make the requested audio recording of the most recently recorded regular public meeting of the governing body is likely not the actual cost of such CD. As such, the Custodian's proposed charge of \$1.00 for an audio recording in CD format violated N.J.S.A. 47:1A-5.b. and the Custodian must charge the "actual cost" of duplicating the requested record. See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006); Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006); Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005).
5. The Custodian's initial response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g., O'Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008), because she failed to address the Complainant's preferred method of delivery (e-mail), and instead provided the requested OPRA request form as a paper copy. See also N.J.S.A. 47:1A-5.d. ("[a] custodian shall permit access to a government record...in the medium requested..."). Accordingly, the Custodian will provide the Complainant with the requested official OPRA request form in the specified electronic format (PDF).
6. The unapproved, draft executive session minutes dated January, March, and April 2010 responsive to the Complainant's request constitute draft advisory, consultative, or deliberative material and thus are exempt from the definition of a government record at pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to draft minutes

pursuant to N.J.S.A. 47:1A-6 because the requested draft executive session minutes were not approved by the governing body at the time of the Complainant's request.

7. The Township's official OPRA request form is deficient because (a) the form states that "police investigation records" were not public records, ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b.; (b) the form fails to provide a section on the request form where a custodian can provide a legal reason for denying the request in whole or in part and (c) 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. 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 Township's inclusion of OPRA exemptions without all of the pertinent information qualifying such exemptions is an effective denial of access as it states a restriction on the public's right to access that is without valid legal basis. As such, Township of Denville 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 the details of the circumstances in which police investigation records can be requested under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
 - 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.
8. **The Custodian shall disclose to the Complainant the requested records (a copy of the Township of Denville's official OPRA request form, revised as required in Paragraph No. 7 herein, and audio recordings of the most current regular Township meeting). If applicable, the Custodian shall calculate the appropriate charge in accordance with Paragraph No. 4 above and shall make the amount of the charge available to the Complainant within three (3) business days from receipt of the Council's Interim Order. If a special service charge is applicable and the Complainant fails to pay the special service charge for the requested records by the tenth (10th) business day from receipt of the Council's Interim**

Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director.

9. **The Custodian shall comply with Paragraphs No. 7 and 8 above within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director.**
10. 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.
11. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

February 2, 2012

Council's Interim Order distributed to the parties.

February 8, 2012

Custodian's certification of compliance. The Custodian certifies that she received the Council's Interim Order on February 3, 2012. The Custodian certifies that the Township adopted the GRC's model OPRA request form on July 12, 2010 and provided the OPRA request form to the Complainant on said date. The Custodian further certifies that she calculated the actual cost for an audio recording of the most recent regular Township Council meeting as \$0.36 per compact disc ("CD") and provided the Complainant with the relevant costs on February 7, 2012 via e-mail. In addition, the Custodian certifies that there are no special services charges associated with the reproduction of the requested records.

Analysis

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

The Council's January 31, 2012 Interim Order specifically directed the Township to amend the official OPRA request form by bringing it into compliance with N.J.S.A. 47:1A-5.f. via the omission or change of the offending material or the adoption of the GRC's model OPRA request form. Furthermore, the Interim Order also required the Custodian to provide the Complainant with the actual costs associated with the Complainant's request for an audio recording of the most recent Township council meeting. The Interim Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within ten (10) business days from receipt of said order. The Council distributed the Order on February 2, 2012.

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

The evidence of record indicates that the Custodian provided the Council with a certification of compliance on February 8, 2012, 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 actual costs associated with the reproduction of the requested audio recording. Accordingly, the Custodian has complied with the Council's January 31, 2012 Interim Order.

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

OPRA states that:

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

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

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

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

In the instant matter, the Custodian failed to provide in his response to the Complainant's OPRA request with a date certain upon which the Complainant could expect the requested records and the Custodian proposed an invalid fee for the requested audio recording of the most recent Township Council meeting in violation of N.J.S.A.

47:1A-5.b. Furthermore, the Custodian imposed an unreasonable burden upon the Complainant's right of access to the requested OPRA request form by referring the Complainant to a website instead of providing access in violation of N.J.S.A. 47:1A-1 and Kaplan v. Winslow Township's Board of Education, Complaint No. 2009-148 (June 2010 Interim Order). Additionally, the Custodian's response instructing the Complainant to provide a USB port to facilitate the provision of the requested records was also unlawful and constituted an unreasonable restriction on access, as such a practice is not supported by law. Moreover, the Township's OPRA request form did not comport with OPRA. However, the Custodian provided a certification to the GRC that the Township adopted the GRC's model request form as the Township's official OPRA request form on July 12, 2010 and complied with the Council's January 31, 2012 Interim Order by providing the Complainant with an estimate of the actual cost associated with the reproduction of the audio recordings. Finally, the Custodian lawfully denied the Complainant access to meeting minutes for January, February, March, and April 2010 because same had not been approved by the Township Council. *See Parave-Fogg, supra.*

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 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

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

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

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

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement

agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.

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

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

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

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

⁶ The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

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 August 1, 2010, alleging in part that the initial cost that the Custodian provided to him for the reproduction of the requested audio recordings was not the actual cost as mandated by N.J.S.A. 47:1A-5.b. Accordingly, the Council's January 31, 2012 Interim Order required the Custodian to provide the Complainant with the actual cost of reproducing said record. In compliance with the Council's Interim Order, the Custodian provided the Council with a certification on February 8, 2012 attesting that she provided the Complainant with the lawful costs of duplication pursuant to N.J.S.A. 47:1A-5.b. See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006); Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006); Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005).

Therefore, pursuant to Teeters, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters and Mason. Thus, this Complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The evidence of record indicates that the Custodian provided the Council with a certification of compliance on February 8, 2012, 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 actual costs associated with the reproduction of the requested audio recording. Accordingly, the Custodian has complied with the Council's January 31, 2012 Interim Order.

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

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008) a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters and Mason. Thus, this Complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill
Executive Director

March 20, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

January 31, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-191

v.

Township of Denville (Morris)
Custodian of Record

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

1. Although the Custodian provided a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to provide an anticipated date upon which the records responsive to the Complainant’s request for executive session minutes would be provided to the Complainant. Accordingly, the Complainant is in violation of OPRA pursuant to N.J.S.A. 47:1A-5.i. and Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003), because the Custodian’s response was not proper.
2. Because the Custodian responded to the Complainant’s request for a copy of the Township’s official OPRA request form by referring the Complainant to the Township’s website, instead of scanning the form and providing an electronic copy as requested, the Custodian violated N.J.S.A. 47:1A-1. Kaplan v. Winslow Township’s Board of Education, Complaint No. 2009-148 (June 2010 Interim Order).
3. The legislative intent of OPRA is to provide the public with the least restrictive means of access to those government records in which a requestor is entitled. The Township’s practice of requiring requestors to provide a portable USB drive to obtain electronic copies of audio recordings imposes an unlawful restriction of access that is in violation of N.J.S.A. 47:1A-1 and is a burden placed upon requestors that is not supported by law.
4. The proposed \$1.00 charge for the CD to make the requested audio recording of the most recently recorded regular public meeting of the governing body is likely not the actual cost of such CD. As such, the Custodian’s proposed charge of \$1.00 for an audio recording in CD format violated N.J.S.A. 47:1A-5.b and the Custodian must charge the “actual cost” of duplicating the requested record. See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006); Libertarian Party of



Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006); Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005).

5. The Custodian's initial response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g., O'Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008), because she failed to address the Complainant's preferred method of delivery (e-mail), and instead provided the requested OPRA request form as a paper copy. *See also* N.J.S.A. 47:1A-5.d. ("[a] custodian shall permit access to a government record...in the medium requested..."). Accordingly, the Custodian will provide the Complainant with the requested official OPRA request form in the specified electronic format (PDF).
6. The unapproved, draft executive session minutes dated January, March, and April 2010 responsive to the Complainant's request constitute draft advisory, consultative, or deliberative material and thus are exempt from the definition of a government record at pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive session minutes were not approved by the governing body at the time of the Complainant's request.
7. The Township's official OPRA request form is deficient because (a) the form states that "police investigation records" were not public records, ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b.; (b) the form fails to provide a section on the request form where a custodian can provide a legal reason for denying the request in whole or in part and (c) 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. 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 Township's inclusion of OPRA exemptions without all of the pertinent information qualifying such exemptions is an effective denial of access as it states a restriction on the public's right to access that is without valid legal basis. As such, Township of Denville 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 the details of the circumstances in which police investigation records can be requested under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
 - 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.

8. **The Custodian shall disclose to the Complainant the requested records (a copy of the Township of Denville's official OPRA request form, revised as required in Paragraph No. 7 herein, and audio recordings of the most current regular Township meeting). If applicable, the Custodian shall calculate the appropriate charge in accordance with Paragraph No. 4 above and shall make the amount of the charge available to the Complainant within three (3) business days from receipt of the Council's Interim Order. If a special service charge is applicable and the Complainant fails to pay the special service charge for the requested records by the tenth (10th) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director.**
9. **The Custodian shall comply with Paragraphs No. 7 and 8 above within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.**
10. 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.
11. 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 31st Day of January, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: February 2, 2012

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-191

v.

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

Records Relevant to Complaint: Copies of:

1. Audio recording of the most recently recorded regular public meeting of the governing body.
2. Approved minutes of each and every closed or executive session held by the governing body during January, February, March, and April 2010.
3. A copy of the Township's current OPRA request form.³

Request Made: June 29, 2010

Response Made: July 9, 2010

Custodian: Donna I. Costello

GRC Complaint Filed: August 1, 2010⁴

Background

June 29, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above via e-mail with an attached official OPRA request form. The Complainant requests that the response and records should be provided electronically for request Items No. 2, 3 and 4.

July 9, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that she has received the Complainant's OPRA request and that there is no charge for an audio recording of a Council meeting because the Township's policy is to have the requestor provide a portable USB drive for the storage of the requested recording. The Custodian asserts that the most recent minutes at the time of this e-mail are from the Council's June 15, 2010 meeting; such minutes are scheduled to be approved by the Council on

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

² Represented by Fred Semrau, Esq., of Dorsey & Semrau, LLC (Boonton, NJ).

³ The Complainant requested additional records which are not at issue in this complaint.

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

July 13, 2010. The Custodian further states that the only closed session minutes responsive to the Complainant's request that can be released are dated February 16, 2010. The Custodian states that a copy of the current OPRA request form can be found on the township's website.

July 12, 2010

E-mail from the Complainant to the Custodian. The Complainant states that he does not have a portable USB drive and inquires how the Custodian will furnish him with the requested audio recording.

July 12, 2010

E-mail from the Custodian to the Complainant with an attached copy of the approved February 16, 2010 closed session minutes. The Custodian states that the Complainant can provide a CD and obtain the recording for free or the Township can provide the Complainant with a CD containing the recordings for a cost of \$1.00. The Custodian states that the most recent approved closed session minutes dated February 16, 2010 are attached.

July 14, 2010

E-mail from the Complainant to the Custodian. The Complainant inquires why the cost of the CD is \$1.00. The Complainant alleges he cannot open the minutes provided and requests that they be provide to him as a .PDF file. The Complainant requests that the OPRA request form be e-mailed to him as an attached file.

July 16, 2010

E-mail from the Complainant to the Custodian. The Complainant again inquires why the cost of the CD is \$1.00. The Complainant alleges he cannot open the minutes provided and requests that they be provide to him as a .PDF file. The Complainant requests that the OPRA request form be e-mailed to him as an attached file.

July 26, 2010

E-mail from the Complainant to the Custodian. The Complainant asks that the Custodian not make a copy of the requested audio recording unless the Complainant decides to purchase same. The Complainant asks whether the Township held closed sessions between January 1, 2010 and April 30, 2010 and whether the Custodian is asserting that the February 16, 2010 minutes are the only ones approved for release. The Complainant acknowledges receipt of a hard copy of the requested OPRA request form.⁵

July 27, 2010

E-mail from the Custodian to the Complainant. The Custodian states that closed sessions were held on March 9, 2010, March 16, 2010 and March 23, 2010. The Custodian states that only the minutes from February 16, 2010 have been approved for release and all other closed session minutes contain references to ongoing matters that have not yet been resolved.

⁵ The Custodian certifies in her Statement of Information that she provided the requestor with a hard copy of the OPRA request form on or about July 12, 2010.

August 2, 2010

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:⁶

- Complainant’s OPRA request dated June 29, 2010
- Custodian’s response to the OPRA request dated July 9, 2010
- A copy of the Township of Denville’s official OPRA request form
- 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 Complainant to the Custodian dated July 14, 2010
- E-mail from the Complainant to the Custodian dated July 16, 2010
- E-mail from the Complainant to the Custodian dated July 26, 2010
- E-mail from the Custodian to the Complainant dated July 27, 2010

The Complainant’s Counsel argues that the GRC has long recognized that, like minutes for open public agency meetings, minutes for closed public agency meetings must be released to the public, subject to any applicable redactions. O’Shea v. Township of Fredon, GRC Complaint No. 2007-251 (April 2008) (holding that approved minutes must be released with redactions, unapproved minutes can be withheld); Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (September 2005) (holding that approved executive session minutes must be released and, if redacted, redactions must have written explanations setting forth the lawful basis for each redaction); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (June 2008) (holding that approved executive session minutes must be released and, if redacted, redactions must have written explanations setting forth the lawful basis for each redaction); Paff v. City of Plainfield, GRC Complaint No. 2006-103 (December 2006) (holding that a custodian who refused to release minutes until there was no longer a danger to the public interest violated OPRA). Counsel states that the Custodian should not have denied access to the March 9, March 16 and March 23, 2010 closed session meeting minutes in their entirety. Counsel maintains that the Custodian should have provided access to those records while making any necessary redactions.

Counsel states that in O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the GRC held that if a public agency’s OPRA form contained false or misleading information about OPRA, that constituted a denial of access. Counsel argues that in the instant complaint, as in the O’Shea case, the Township’s OPRA request 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. Counsel states that the Township’s OPRA request form states that police investigation records are not public records, ignoring the several exceptions contained in N.J.S.A. 47: 47:1A-3.b. Counsel maintains that the Township’s OPRA request form contains no statement regarding a requestor’s right to appeal any denial of access to Superior Court or the GRC. Counsel maintains that based upon the O’Shea decision, the GRC should force the Township to revise its OPRA request form. *See also* O’Shea v. Stillwater, GRC Complaint No. 2007-253 (November 2008) (holding that several portions of Stillwater’s OPRA request form were incomplete or misleading and ordering Stillwater to correct the deficiencies).

⁶ Additional documentation not relevant to the adjudication of this complaint was also submitted. Jesse Wolosky v. Township of Denville (Morris), 2010-191 – Findings and Recommendations of the Executive Director

Counsel states that the Complainant requested that a copy of the Township's official OPRA request form be provided to him as an attached electronic file. Counsel asserts that the Custodian failed to do so. Counsel argues that it is well-established that when a requestor asks for a government record to be transmitted to him or her in a particular medium, the Custodian must abide by that request and transmit the document in the requested medium. Silkes v. Township of Dover, GRC Complaint No. 2009-60 (February 2010); O'Shea v. Township of Fredon, GRC Complaint No. 2007-251 (February 2008) (requiring the Custodian to acknowledge the Complainant's preference for delivery); Paff v. Borough of Sussex, GRC Complaint No. 2008-38 (July 2008) (requiring the Custodian to transmit a record via the requested means if that method is available to the Custodian). Counsel asserts that the Custodian has violated N.J.S.A. 47:1A-5.g. (requiring the Custodian to comply with OPRA requests) and N.J.S.A. 47:1A-5.d. (requiring access in the medium requested or requiring conversion to the medium requested). Counsel states that the Custodian's failure to provide the OPRA request form constitutes a "deemed denial." N.J.S.A. 47:1A-5.i.

In addition, Counsel asks that the GRC order the Custodian to provide the Township's official OPRA request form electronically as an attached file; to either adopt the GRC's model request form or amend the OPRA request form to eliminate misleading information and include information required by law; and to disclose the closed session minutes withheld by the Custodian. Counsel also requests that the Complainant be found to be a prevailing party and be awarded 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 21, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 29, 2010
- Custodian's response to the OPRA request dated July 9, 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 Complainant to the Custodian dated July 14, 2010
- E-mail from the Complainant to the Custodian dated July 16, 2010
- E-mail from the Complainant to the Custodian dated July 26, 2010
- E-mail from the Custodian to the Complainant dated July 27, 2010

The Custodian certifies that the recordings of the Township's meetings must be retained for eighty (80) days. The Custodian certifies that the executive session minutes must be retained permanently. The Custodian certifies that the Township's OPRA request form must be retained until the law is changed. The Custodian certifies that the check registry data must be retained for a period of six (6) years.

The Custodian certifies that the Township does not maintain a copy of its OPRA request form in a .PDF format, the medium requested by the Complainant and further certifies that she directed the Complainant to the Township's website where the OPRA request form can be found and downloaded. The Custodian certifies that she also provided the requestor with a hard copy of the OPRA request form on or about July 12, 2010. The Custodian certifies that she was able to obtain copies of the executive session minutes and determined that the only executive session minutes which contained any information about a subject matter that had already been concluded was the February 16, 2010 minutes; the Custodian certifies that such minutes were provided to the Complainant on July 12, 2010.

The Custodian certifies that all other executive session minutes that were responsive to the request contain references to matters which had not been concluded at the time the request was made. The Custodian certifies that she advised the requestor that all of those items were not yet concluded and thus were not releasable under OPRA and the Open Public Meetings Act ("OPMA").

The Custodian certifies that the Complainant refused all efforts and offers to provide to him the requested audio recordings of meetings. The Custodian further certifies that the Township acknowledges the alleged deficiencies in the OPRA request form and has already made appropriate revisions. The Custodian argues that this should not be considered a deemed denial because while the Complainant cites O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), as his only authority regarding the issue, this decision came down in May of 2008; well before the subsequent May 2009 Appellate Division decision in Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). The Custodian asserts that in Renna, the Appellate Division noted that the OPRA provision setting forth the requirements for a valid record request states that "[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically or otherwise conveyed to the appropriate custodian." The Custodian states that the Court recommended that requestors use official OPRA request forms but did not require such usage. The Custodian maintains that the Court stated that "[w]e conclude that the form should be used, but no request for information should be rejected if such form is not used."

The Custodian states that while the Court recognized the policy advantages of an official form, the Court held that "[n]evertheless these legitimate policy concerns must cede to the broader policy of governmental transparency and the right of citizens to have open and virtually unfettered access to government records." The Custodian argues that this decision has changed the mandatory requirement of having to utilize the public entity's OPRA request form and therefore the argument that an optional request form's deficiency constitutes a denial of access under OPRA is misplaced. The Custodian argues that the form is now optional and thus cannot be viewed as misleading since many requestors are not even utilizing official OPRA request forms.

The Custodian certifies that the requestor was not provided with a .PDF copy of the Township's OPRA request form because the Township does not maintain its OPRA request form in .PDF format. The Custodian states that N.J.S.A. 47:1A-5.d. specifically states 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.”

The Custodian certifies that she has complied with OPRA and that since the Township does not maintain the OPRA request form in the .PDF medium requested, she provided the Complainant a hard copy of the record as well as a link to the Township’s website where he could electronically download a copy of the form.

The Custodian certifies that it is undisputed that access was denied to three (3) sets of executive session minutes from three (3) meetings in March 2010 because every item discussed in those minutes were ongoing matters and none had been resolved prior to the Complainant’s OPRA request. The Custodian certifies that because she believed that the requested records would have to be fully redacted in order to be provided, it was not necessary to provide the requested minutes. The Custodian certifies that she instead advised the Complainant that none of the matters discussed had been concluded and thus those minutes were non-disclosable. The Custodian argues that this is not a knowing and willful violation of OPRA.

July 22, 2011

E-mail from the GRC to Custodian’s Counsel. The GRC requests that the Custodian submit a legal certification stating the dates that the Township Council approved the closed session minutes of meetings held on February 16, 2010, March 9, 2010, March 16, 2010 and March 23, 2010, as well as any other closed sessions held during the time period relevant to this complaint (January, February, March, and April 2010) and whether any closed session meeting minutes have not been approved by the Township Council as of this date.

October 21, 2011

Letter from the Custodian to the GRC. The Custodian certifies that at the time of the Complainant’s OPRA request, the requested March 9, 2010, March 16, 2010, and March 23, 2010 closed session minutes had not yet been approved. The Custodian certifies that the only closed session minutes responsive to the Complainant’s OPRA request that were approved at the time of the request were the February 16, 2010 closed session minutes. Accordingly, the Custodian certifies that the February 16, 2010 closed session minutes were the only minutes that were provided to the Complainant upon receipt of his request.

Analysis

Whether the Custodian’s response to the Complainant’s OPRA request was sufficient?

OPRA provides that:

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

that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.” N.J.S.A. 47:1A-5.d.

OPRA also provides that:

“A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA] as amended and supplemented, the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5.g.

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

In Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003), while responding to the complainant’s OPRA request, the custodian provided an initial response by telephone and letter indicating that the Township Administrator would be responding to the request at a later (unspecified) date. It was not until well after the filing of a Denial of Access Complaint that the requestor received a written response from the custodian advising that the Township would not be responding because the "request" sought information and not government records. The GRC held that the custodian was obligated to respond to the complainant’s request in seven (7) business days, either rejecting the request as defective under OPRA or advising the requestor of the specific date by which a response would be provided. Having chosen to defer a response to the request to the Township Administrator with an open-ended response timeframe, the Council found that the custodian erred by failing to advise the requestor of the date by which the Administrator would respond, effectively violating N.J.S.A. 47:1A-5.i.

⁷ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA. Jesse Wolosky v. Township of Denville (Morris), 2010-191 – Findings and Recommendations of the Executive Director

In the matter before the Council, the Custodian's response to the OPRA request herein failed to provide the Complainant with a date certain upon which to expect disclosure of the requested records. While the Custodian informed the Complainant that the executive session minutes from February 16, 2010 were available, the lack of a specific date on which the Complainant could expect a response to the request provides an open-ended response timeframe in violation of OPRA. See Russomano, *supra*.

Therefore, although the Custodian provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to provide an anticipated date upon which the records responsive to the Complainant's request for when the executive session minutes would be provided to the Complainant. Accordingly, the Complainant is in violation of OPRA pursuant to N.J.S.A. 47:1A-5.i. and Russomano v. Twp of Edison, GRC Complaint No. 2002-86 (July 2003).

Furthermore, the Custodian's response to the Complainant's request for a copy of the Township's official OPRA request form was also insufficient, as the Custodian merely directed the Complainant as to where the form could be found. The Council has found such conduct impermissible. For example, in Kaplan v. Winslow Township's Board of Education, Complaint No. 2009-148 (June 2010 Interim Order), the GRC held that the referral of a Complainant to an agency's website to obtain requested records is a failure to provide access in violation of N.J.S.A. 47:1A-1 and constitutes a deemed denial.

In this instant matter, as in Kaplan, the Custodian responded to the Complainant's request for a record by merely directing the Complainant to a website where the sought after record could be obtained. The Custodian should have either granted or denied access to a copy of the actual record itself instead of directing the Complainant to download the requested OPRA request form. Accordingly, the Custodian has violated N.J.S.A. 47:A-1 and the failure to sufficiently respond to the Complainant's request for the Township's official OPRA request form constitutes a deemed denial. Kaplan, *supra*.

Therefore, because the Custodian responded to the Complainant's request for a copy of the Township's official OPRA request form by referring the Complainant to the Township's website, instead of scanning the form and providing an electronic copy as requested, the Custodian violated N.J.S.A. 47:1A-1. Kaplan v. Winslow Township's Board of Education, Complaint No. 2009-148 (June 2010 Interim Order).

Finally, in response to the Complainant's request for an audio recording of the most recently recorded regular public meeting of the governing body, the Custodian initially informed the Complainant that it is the Township's policy to require requestors to provide a portable USB drive to facilitate requests for audio recordings. Such a practice does not comport with OPRA.

The legislative intent of OPRA is to provide the public with the least restrictive means of access to those government records in which a requestor is entitled. The Township's practice of requiring requestors to provide a portable USB drive to obtain electronic copies of audio recordings imposes an unlawful restriction of access that is in violation of N.J.S.A. 47:1A-1 and is a burden placed upon requestors that is not supported by law.

Whether the Custodian’s proposed cost of \$1.00 for a copy of a CD containing the requested audio recording of the last Township meeting is lawful?

The Council next turns to the issue of whether the Custodian violated OPRA by quoting the Complainant a \$1.00 charge for reproduction of the requested audio recording of the most recently held Township meeting on CD.

OPRA sets forth the amount to be charged for a government record in printed form. Specifically, OPRA states:⁸

“[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.

Whenever a records custodian asserts that fulfilling an OPRA records request requires an “extraordinary” expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5.c. In this regard, OPRA provides:

“Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the*

⁸ N.J.S.A. 47:1A-5.b. was amended effective November 9, 2010 to set the permissible copying fees to \$0.05 per letter size or smaller and \$0.07 per legal size page or larger. However, the request at issue herein was made on June 29, 2010, prior to the change in law.

actual direct cost of providing the copy or copies ...” (Emphasis added.) N.J.S.A. 47:1A-5.c.

OPRA also states that:

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

The Council’s experience in adjudicating matters involving the reproduction of audio recordings in electronic formats would have us find that it is unlikely that the proposed \$1.00 cost for the reproduction of the audio recording is indeed the actual cost. Furthermore, the Complainant has inquired why the cost of reproducing the audio recordings is \$1.00. Evidence in the record has provided no basis that validates the \$1.00 charge proposed by the Custodian. Accordingly, the Council must examine this issue.

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. However, OPRA does provide that whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter cannot be reproduced by ordinary document copying equipment in ordinary business size, the public agency may charge in addition to the *actual cost* of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copies. N.J.S.A. 47:1A-5.c. 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-5b*."

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."

Further, in Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the court cited to Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), in 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.

Moreover, the GRC previously decided on this issue in O'Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008). In that case, the custodian responded to the complainant's OPRA request for an audio recording of the Council's May 14, 2007 public and executive session in a timely manner stating that the cost for a meeting disc would be \$35.00. The custodian also requested that the complainant indicate whether he would like the custodian to prepare the record. Subsequently, the complainant filed a Denial of Access Complaint arguing that the proposed fee did not represent the "actual cost," and that copying fees prescribed in a Township ordinance, Chapter 250, Article II § 250.9(E), appear to violate OPRA.

In the instant complaint, the evidence of record indicates that the Complainant requested an audio recording of the most recently recorded regular public meeting of the governing body. The evidence of record also indicates that the Custodian responded to the OPRA request in writing in a timely manner stating that duplication of the audio recording in CD format would be \$1.00. The Complainant disputed the proposed charge in the Denial of Access Complaint; the

Custodian failed to provide any evidence that the proposed \$1.00 charge was the actual cost of the CD required to make the requested recording.

As such, the proposed \$1.00 charge for the CD to make the requested audio recording of the most recently recorded regular public meeting of the governing body is likely not the actual cost of such CD. As such, the Custodian's proposed charge of \$1.00 for an audio recording in CD format violated N.J.S.A. 47:1A-5.b and the Custodian must charge the "actual cost" of duplicating the requested record. See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006); Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006); Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005).

Whether the Custodian provided the requested OPRA request form in the specified medium?

OPRA provides:

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

In the Complainant's OPRA request, he identified that he preferred the sought after OPRA request form be e-mailed as an electronic .PDF attachment. The Custodian instead provided the Complainant with a paper copy of the requested record. In the Complainant's Denial of Access Complaint, the Complainant reiterates his disapproval with the Custodian's inability to comply with his preferred delivery method. In the Custodian's SOI, the Custodian certified that the requestor was not provided with an electronically formatted .PDF copy of the Township's OPRA request form because the Township does not maintain its OPRA request form in .PDF format. In addition, the Complainant argues that the paper copy of the OPRA request form that was provided to the Complainant constituted a "meaningful medium" as permitted by N.J.S.A. 47:1A-5.d.

In O'Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), the complainant contended that the custodian's response to his OPRA request was insufficient because it did not address his preference for e-mailed records over paper copies via regular mail. The Council held that "[a]ccording to [the] language of N.J.S.A. 47:1A-5.g., the custodian was given two ways to comply and should have, therefore, responded acknowledging the complainant's preferences with a sufficient response for each."⁹ The Council further held that "the Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records."

⁹ The Council noted that N.J.S.A. 47:1A-5.g. states that if a Custodian is "unable to comply with a request for access, then the Custodian shall indicate the specific basis" for noncompliance. In O'Shea, supra, the Complainant stated in his request that receipt of the requested records by e-mail was preferred over having to pay copying costs. Jesse Wolosky v. Township of Denville (Morris), 2010-191 – Findings and Recommendations of the Executive Director

Moreover, in Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008), the complainant requested that the records be provided via e-mail or facsimile, and the custodian failed to address the method of delivery in his response to the OPRA request. Despite the fact the custodian responded in writing granting access to the requested record in a timely manner, the Council determined that the “Custodian’s response [was] insufficient because she failed to specifically address the Complainant’s preference for receipt of the records...[t]herefore, the Custodian...violated OPRA...” *Id.*

Here, the Custodian granted access to the responsive records but not in the preferred method of delivery. While the Custodian contends that the Township does not maintain the requested OPRA request form in the requested electronic .PDF format, this not a sufficient excuse as it is the Custodian’s duty to obtain a quote from a vendor regarding the actual cost of the necessary conversion and provide the quote to the Complainant. Here, the Custodian failed to do so. Thus the Custodian’s initial response to the Complainant’s OPRA request was insufficient.

Therefore, the Custodian’s initial response to the Complainant’s OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g., O’Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008), because she failed to address the Complainant’s preferred method of delivery (e-mail), and instead provided the requested OPRA request form as a paper copy. *See also N.J.S.A. 47:1A-5.d.* (“[a] custodian shall permit access to a government record...in the medium requested...”).

Whether the Custodian violated OPRA and unlawfully denied access by not providing redacted copies of the requested executive session minutes?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

In the matter before the Council, the Complainant requested a copy of “minutes of each and every closed or executive session held by the governing body during January, February, March, and April 2010 that have been approved.” In response, the Custodian informed the Complainant that aside from the February 16, 2010 closed session minutes,¹⁰ all of the executive session minutes that were responsive to the request pertained to matters which had not been concluded at the time the request was made and had not yet been approved by the governing body. The GRC has consistently held that those minutes that have not been approved are considered draft documents that are not subject to disclosure pursuant to OPRA.

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

¹⁰ The Custodian certifies that she provided the Complainant with the February 16, 2010 minutes on July 12, 2010. Jesse Wolosky v. Township of Denville (Morris), 2010-191 – Findings and Recommendations of the Executive Director

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 intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.”

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

In the matter before the Council, the Custodian certified in their October 21, 2010 letter to the GRC that at the time of the Complainant’s OPRA request, the responsive March 9, 2010, March 16, 2010, and March 23, 2010 closed session minutes had not yet been approved. Furthermore, the Custodian certified that the only closed session minutes responsive to the Complainant’s OPRA request that were approved at the time of the request were the February 16, 2010 closed session minutes. Evidence in the record reveals that the February 16, 2010 closed session minutes were provided to the Complainant on July 12, 2010.

Therefore, in the matter before the Council, the remaining unapproved, draft executive session minutes dated January, March, and April 2010 responsive to the Complainant’s request constitute draft advisory, consultative, or deliberative material and thus are exempt from the definition of a government record at pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive session minutes were not approved by the governing body at the time of the Complainant’s request.

Whether the Township's official OPRA request form violates OPRA?

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.

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 Township's inclusion of OPRA exemptions without all of the pertinent information qualifying such exemptions is an effective denial of access as it states a restriction on the public's right to access that is without valid legal basis. A review of the Township's official OPRA request form used by the Complainant in making the within OPRA request, 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.
- The form stated that "police investigation records" are not public records, ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b.

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

In Martin O’Shea v. Township of West Milford (Pasaic), GRC Complaint No. 2007-237, 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 GRC found that the omission of this information was potentially misleading to requestors who sought such information and ordered the Custodian to either delete the portion of the Township’s OPRA request form referencing personnel records (as it was not required by N.J.S.A. 47:1A-5.f.) or include the exemption to the personnel records provision in its entirety.

In the instant matter, as in O’Shea, the Township of Denville’s official OPRA request form is deficient and potentially misleading to requestors. As such, Township of Denville 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 the details of the circumstances in which police investigation records can be requested under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
- 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 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. Although the Custodian provided a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to provide an anticipated date upon which the records responsive to the Complainant’s request for executive session minutes would

be provided to the Complainant. Accordingly, the Complainant is in violation of OPRA pursuant to N.J.S.A. 47:1A-5.i. and Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003), because the Custodian's response was not proper.

2. Because the Custodian responded to the Complainant's request for a copy of the Township's official OPRA request form by referring the Complainant to the Township's website, instead of scanning the form and providing an electronic copy as requested, the Custodian violated N.J.S.A. 47:1A-1. Kaplan v. Winslow Township's Board of Education, Complaint No. 2009-148 (June 2010 Interim Order).
3. The legislative intent of OPRA is to provide the public with the least restrictive means of access to those government records in which a requestor is entitled. The Township's practice of requiring requestors to provide a portable USB drive to obtain electronic copies of audio recordings imposes an unlawful restriction of access that is in violation of N.J.S.A. 47:1A-1 and is a burden placed upon requestors that is not supported by law.
4. The proposed \$1.00 charge for the CD to make the requested audio recording of the most recently recorded regular public meeting of the governing body is likely not the actual cost of such CD. As such, the Custodian's proposed charge of \$1.00 for an audio recording in CD format violated N.J.S.A. 47:1A-5.b and the Custodian must charge the "actual cost" of duplicating the requested record. *See* Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006); Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006); Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005).
5. The Custodian's initial response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g., O'Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008), because she failed to address the Complainant's preferred method of delivery (e-mail), and instead provided the requested OPRA request form as a paper copy. *See also* N.J.S.A. 47:1A-5.d. ("[a] custodian shall permit access to a government record...in the medium requested..."). Accordingly, the Custodian will provide the Complainant with the requested official OPRA request form in the specified electronic format (PDF).
6. The unapproved, draft executive session minutes dated January, March, and April 2010 responsive to the Complainant's request constitute draft advisory, consultative, or deliberative material and thus are exempt from the definition of a government record at pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to Parave-Fogg v. Lower Alloways Creek Township,

GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive session minutes were not approved by the governing body at the time of the Complainant's request.

7. The Township's official OPRA request form is deficient because (a) the form states that "police investigation records" were not public records, ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b.; (b) the form fails to provide a section on the request form where a custodian can provide a legal reason for denying the request in whole or in part and (c) 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. 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 Township's inclusion of OPRA exemptions without all of the pertinent information qualifying such exemptions is an effective denial of access as it states a restriction on the public's right to access that is without valid legal basis. As such, Township of Denville 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 the details of the circumstances in which police investigation records can be requested under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
- 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.

8. **The Custodian shall disclose to the Complainant the requested records (a copy of the Township of Denville's official OPRA request form, revised as required in Paragraph No. 7 herein, and audio recordings of the most current regular Township meeting). If applicable, the Custodian shall calculate the appropriate charge in accordance with Paragraph No. 4 above and shall make the amount of the charge available to the Complainant within three (3) business days from receipt of the Council's Interim Order. If a special service charge is applicable and the Complainant fails to pay the special service charge for the requested records by the tenth (10th) business day from receipt of the Council's**

Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director.

9. **The Custodian shall comply with Paragraphs No. 7 and 8 above within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹¹ to the Executive Director.**
10. 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.
11. 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

January 24, 2012

¹¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
Jesse Wolosky v. Township of Denville (Morris), 2010-191 – Findings and Recommendations of the Executive Director