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
v.
Boonton Township (Morris)
Custodian of Record

Complaint No. 2010-223

At the December 18, 2012 public meeting, the Government Records Council ("Council") considered the October 23, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this Complaint should be dismissed because the Complainant withdrew his complaint via letter to the GRC and the Office of Administrative Law dated September 19, 2012, as the parties have settled on all outstanding issues in this matter. Therefore, no further adjudication is required.

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

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

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 19, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

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

Jesse Wolosky[1] **GRC Complaint No. 2010-223**
Complainant

v.

Boonton Township (Morris)[2]
Custodian of Records

Records Relevant to Complaint:
1. 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.
2. A copy of East Hanover's current OPRA request form.[3]

Request Made: June 29, 2010
Response Made: July 1, 2010
Custodian: Barbara Shepard
GRC Complaint Filed: August 13, 2010[4]

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. Because the Custodian denied the Complainant access to the requested executive session minutes on the grounds that said minutes had not yet been approved for release by the Township, and because the evidence of record indicates that all of the requested executive session minutes were approved by the governing body for accuracy and content prior to the submission of the Complainant's OPRA request on June 29, 2010, the Custodian has unlawfully denied the Complainant access to the requested executive session minutes for January, February, March, and April 2010. N.J.S.A. 47:1A-1.1.; Wolosky v. Township of Roxbury (Morris), GRC Complaint No. 2010-183 (June 2011),

[1] Represented by Walter Luers, Esq., of the Law Offices of Walter H. Luers, LLC (Clinton, NJ).
[2] Represented by John P. Jansen, Esq. (Boonton, NJ).
[3] Additional records not relevant to the adjudication of this Complaint were also requested.
[4] The GRC received the Denial of Access Complaint on said August 20, 2010.

Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009); Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009); *see also* Wolosky v. County of Sussex, Board of Chosen Freeholders, GRC Complaint No. 2009-26 (February 2010). However, because the Custodian certified on December 13, 2011 that all requested executive session minutes were provided to the Complainant without redactions, the Council declines to order disclosure in this matter

2. Boonton Township's OPRA request form is deficient because it (a) does not contain a statement regarding the requestor's right to challenge a denial of access before the Superior Court or GRC, (b) states that "employee personnel files" are not public records but does not state OPRA's exceptions to the general rule that personnel files are not public records, and (c) states that "police investigation records" are not public records while ignoring the several exceptions thereto contained in N.J.S.A. 47:1A-3.b. Accordingly, consistent with O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Township's official OPRA request form is deficient and potentially misleading to requestors. While OPRA requires that an agency's OPRA request form contain all of the elements set forth in N.J.S.A. 47:1A-5.f., there is no requirement that the form include information regarding exemptions to OPRA. The incomplete recitation of exemptions to disclosure under OPRA on the Township's OPRA request form therefore places a restriction on the public's right to access that is without valid legal basis. However, The GRC declines to order the Custodian to adopt the GRC's Model Request Form or amend its OPRA request form to omit the offending language because the Township in fact already adopted the GRC Model Request Form, posted the revised form to the Town's website and provided the Complainant a copy of same on August 17, 2010.

3. Although the Custodian violated N.J.S.A. 47:1A-5.f. and unlawfully denied access to the requested executive session minutes by means of an unlawful two-tier approval process, the Custodian certified on December 13, 2011 that all requested executive session minutes have been provided to the Complainant and the Custodian further certified that the Township has adopted the model OPRA request form that conforms with N.J.S.A. 47:1A-5.f. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

February 3, 2012

Council's Interim Order distributed to the parties.

April 24, 2012

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

September 4, 2012

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

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this Complaint should be dismissed because the Complainant withdrew his complaint via letter to the GRC and the Office of Administrative Law dated September 19, 2012, as the parties have settled on all outstanding issues in this matter. Therefore, no further adjudication is required.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 23, 2012[5]

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

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

January 31, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant
v.
Boonton Township (Morris)
Custodian of Record

Complaint No. 2010-223

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. By a majority vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian denied the Complainant access to the requested executive session minutes on the grounds that said minutes had not yet been approved for release by the Township, and because the evidence of record indicates that all of the requested executive session minutes were approved by the governing body for accuracy and content prior to the submission of the Complainant's OPRA request on June 29, 2010, the Custodian has unlawfully denied the Complainant access to the requested executive session minutes for January, February, March, and April 2010. N.J.S.A. 47:1A-1.1.; Wolosky v. Township of Roxbury (Morris), GRC Complaint No. 2010-183 (June 2011), Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009); Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009); *see also* Wolosky v. County of Sussex, Board of Chosen Freeholders, GRC Complaint No. 2009-26 (February 2010). However, because the Custodian certified on December 13, 2011 that all requested executive session minutes were provided to the Complainant without redactions, the Council declines to order disclosure in this matter

2. Boonton Township's OPRA request form is deficient because it (a) does not contain a statement regarding the requestor's right to challenge a denial of access before the Superior Court or GRC, (b) states that "employee personnel files" are not public records but does not state OPRA's exceptions to the general rule that personnel files are not public records, and (c) states that "police investigation records" are not public records while ignoring the several exceptions thereto contained in N.J.S.A. 47:1A-3.b. Accordingly, consistent with O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Township's official OPRA request form is deficient and potentially misleading to requestors. While OPRA requires that an agency's OPRA request form contain all of the elements set forth in N.J.S.A. 47:1A-5.f., there is no requirement that the form

include information regarding exemptions to OPRA. The incomplete recitation of exemptions to disclosure under OPRA on the Township's OPRA request form therefore places a restriction on the public's right to access that is without valid legal basis. However, The GRC declines to order the Custodian to adopt the GRC's Model Request Form or amend its OPRA request form to omit the offending language because the Township in fact already adopted the GRC Model Request Form, posted the revised form to the Town's website and provided the Complainant a copy of same on August 17, 2010.

3. Although the Custodian violated N.J.S.A. 47:1A-5.f. and unlawfully denied access to the requested executive session minutes by means of an unlawful two-tier approval process, the Custodian certified on December 13, 2011 that all requested executive session minutes have been provided to the Complainant and the Custodian further certified that the Township has adopted the model OPRA request form that conforms with N.J.S.A. 47:1A-5.f. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. 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 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 3, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

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

Jesse Wolosky[1] **GRC Complaint No. 2010-223**
Complainant

v.

Boonton Township (Morris)[2]
Custodian of Records

Records Relevant to Complaint:
1. 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.
2. A copy of East Hanover's current OPRA request form.[3]

Request Made: June 29, 2010
Response Made: July 1, 2010
Custodian: Barbara Shepard
GRC Complaint Filed: August 13, 2010[4]

Background

June 29, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

July 1, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request.

The Custodian states that meetings are recorded on cassette tapes. The Custodian states that the cost of the tape is $2.40. The Custodian states that she is waiting to hear from her supplier to find out if they have a duplicating machine available for her use and asserts that she expects to hear from them by Tuesday or Wednesday of the upcoming week.

The Custodian maintains that none of the requested executive minutes have been approved for release. The Custodian states that attached to this e-mail is a copy of the

[1] Represented by Walter Luers, Esq., of the Law Offices of Walter H. Luers, LLC (Clinton, NJ).
[2] Represented by John P. Jansen, Esq. (Boonton, NJ).
[3] Additional records not relevant to the adjudication of this Complaint were also requested.
[4] The GRC received the Denial of Access Complaint on said August 20, 2010.

requested OPRA request form. The Custodian states that it will take her until July 15, 2010 to compile the requested information.

July 6, 2010

E-mail from the Complainant to the Custodian. The Complainant states that he grants the Custodian an extension to July 15, 2010.

July 6, 2010

E-mail from the Custodian to the Complainant. The Custodian states that the most recent executive meeting minutes approved for public release are dated September 10, 2007.

August 13, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments: [5]

- Complainant's OPRA request dated June 29, 2010
- Custodian's response to the OPRA request dated July 1, 2010
- E-mail from the Complainant to the Custodian dated July 6, 2010
- E-mail from the Custodian to the Complainant dated July 6, 2010

Complainant's Counsel states that as of the date of this Complaint, the Complainant has not received any of the requested executive session minutes. Counsel states that the Custodian has created a false dichotomy. Counsel states that the governing body has created two categories of executive session minutes: those that have been "approved" but cannot be released and those that have been approved for release. Counsel maintains that the law does not recognize this distinction.

Counsel states that the GRC rejected this distinction in Wolosky v. Vernon Twp. Bd. of Educ., GRC Complaint No. 2009-57 (December 2009) and Taylor v. Twp. of Downe, GRC Complaint No. 2009-174 (July 2010). Counsel asserts that in each of these cases, the GRC held that once a governing body has approved minutes, those minutes are publicly available and access to those minutes cannot be denied on the basis that a second approval is required because no further approval is necessary. Counsel asserts that the GRC should order that the Custodian release the requested minutes immediately subject to any redactions permitted by law.

Counsel asserts that in O'Shea v. Twp. 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, this constituted a denial of access. Counsel argues that the omission of information is a denial of access pursuant to Wolosky v. Vernon Bd. of Educ., GRC Complaint No. 2009-57 (December 2009) (holding that the Board of Education's OPRA form was invalid and constituted a denial of access because it omitted information required by N.J.S.A. 47:1A-5.f.). Counsel states that the Township's OPRA request form does not contain a statement regarding the requestor's right to challenge a denial of access before the Superior Court or GRC. Counsel

[5] Additional correspondence not relevant to the adjudication of this case was also attached.

maintains that this is required by N.J.S.A. 47:1A-5.f. and is not included on the Township's OPRA request form.

Counsel also states that the Township's OPRA request form also incorrectly states that "employee personnel files" are not public records and does not state OPRA's exceptions to the general rule that payroll records, pension amounts, and other categories of personnel records are public records pursuant to N.J.S.A. 47:1A-10. Counsel also maintains that the Township's OPRA request form also states that "police investigation records" are not public records and ignores the several exceptions contained in N.J.S.A. 47:1A-3.b. Counsel states that the GRC should order the Township revise its OPRA request form.

In addition, Counsel maintains that the GRC should require the Custodian to provide the Complainant with copies of the requested minutes with lawful redactions as necessary. Counsel requests that the GRC find that the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and award him a reasonable attorney's fee.

The Complainant does not agree to mediate this complaint.

August 16, 2010

E-mail from the Custodian to the Complainant attaching copies of executive session minutes from January 2010 through April 2010. The Custodian states that attached to this e-mail are executive session minutes from January 2010 through April 2010 that were approved for release to the public at the July 12, 2010 Township Committee meeting.

August 17, 2010

E-mail from the Custodian to the Complainant with an attached copy of the Township's official OPRA request form. The Custodian asserts that attached to this e-mail is a revised copy of the Township's official OPRA request form.

September 8, 2010

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

September 14, 2010

E-mail from the Custodian to the Complainant. The Custodian states that the requested executive session meeting minutes that were approved for release at the September 13, 2010 Township Committee meeting are attached to this e-mail.

September 14, 2010

Custodian's SOI with the following attachments: [6]

- Complainant's OPRA request dated June 29, 2010
- Custodian's response to the OPRA request dated July 1, 2010
- E-mail from the Complainant to the Custodian dated July 6, 2010
- E-mail from the Custodian to the Complainant dated July 6, 2010

[6] Additional correspondence not pertinent to the adjudication of this case was also attached.

- E-mail from the Custodian to the Complainant dated August 16, 2010
- E-mail from the Custodian to the Complainant dated September 14, 2010

The Custodian certifies that she conducted a search for the records and that the requested meeting minutes have a permanent retention requirement and may be archived but not destroyed. The Custodian certifies that the closed session minutes of the February 22, 2010, March 8, 2010, April 12, 2010 and April 26, 2010 meetings were provided on August 16, 2010 upon their approval for release to the public by the governing body on July 12, 2010. The Custodian certifies that the closed session minutes of the January 11, 2010 and February 8, 2010 meetings were provided on September 14, 2010 after their approval for release to the public body by the governing body on September 13, 2010.

The Custodian certifies that the initial request for the records was denied on July 1, 2010 because the requested minutes had not yet been approved by the governing body for release to the public. The Custodian certifies that N.J.S.A. 10:4-12 allows governing bodies to exclude the public from the discussion of certain matters. The Custodian further certifies that N.J.S.A. 4-13 allows governing bodies to determine when executive session discussions can be disclosed.

The Custodian's Counsel argues that the GRC has ruled that once executive session minutes have been "approved" as to accuracy and content they no longer constitute advisory, consultative, or deliberative ("ACD") material and are therefore disclosable with appropriate redactions. *See* Wolosky v. Vernon Twp. Bd. of Educ., GRC Complaint No. 2009-57 (December 2009) and Taylor v. Twp. of Downe, GRC Complaint No. 2009-174 (July 2010). Counsel maintains that the Town was not relying on the ACD exception to disclosure in OPRA but rather the exemptions provided by the Open Public Meetings Act and more specifically N.J.S.A. 10:4-12, 10:4-13 and 10:4-14 as made applicable to OPRA by N.J.S.A. 47:1A-9. Counsel maintains that this makes the disclosure of certain executive session minutes inconsistent with the Open Public Meetings Act.

Counsel maintains that the Township believes that the Legislature left it to the public body to determine when it is appropriate to go into executive session. Counsel states that the Custodian just followed the standard operating procedure that had been in place for many years. Counsel argues that the two layers of approval used by the Township are not "unnecessary," but rather are a thoughtful way to address legal issues. Counsel states that the Township fears that the unintended result of the GRC holdings will be a return to the practice of townships not reviewing and approving executive session minutes until the matter under discussion is resolved. Counsel states that Boonton Township follows the practice of approving the accuracy and content of minutes as soon as possible, but if appropriate, having the approval reflect that the minutes are not approved for release to the public when unresolved matters exist.

Counsel certifies that upon the Complainant notifying the Township that the official OPRA request form was deficient, the Custodian provided the Complainant with a revised form on August 17, 2010 that has been in use ever since. Counsel further certifies that this revised form was posted on the Township's website on August 17,

2010. Counsel certifies that there is no need to order the Township to revise the OPRA request form because the Town has adopted the GRC's model OPRA request form.

December 12, 2011

Letter from the GRC to the Custodian. The GRC requests that the Custodian provide a certified statement confirming the details of the Township's approval process. In addition, the GRC requests that the Custodian provide the dates on which the minutes responsive to the Complainant's request were approved.

December 13, 2011

Letter from the Custodian to the GRC. The Custodian certifies that it is the Township's practice to prepare and present the executive session minutes to the Township Committee for approval as to accuracy and content as soon as possible, but if appropriate, to have the approval process reflect that the minutes are not approved for release to the public. The Custodian certifies that this process is done at the advice of the Township's legal counsel and that once a matter is resolved all minutes are approved for release to the public.

The Custodian certifies that the January 11, 2010 executive session minutes were approved as to accuracy and content on February 8, 2010. The Custodian further certifies that the February 8, 2010 executive session minutes were approved as to accuracy and content on February 22, 2010. The Custodian certifies that the February 22, 2010 executive session minutes were approved as to accuracy and content on March 8, 2010. In addition, the Custodian certifies that the March 8, 2010 executive session minutes were approved as to accuracy and content on April 12, 2010. The Custodian also certifies that the April 12, 2010 executive session minutes were approved as to accuracy and content on April 26, 2010. The Custodian certifies that the April 26, 2010 executive session minutes were approved as to accuracy and content on May 10, 2010. The Custodian also certifies that none of these executive session minutes had been approved for release to the public at the time of the Custodian's July 1, 2010 response to the Complainant's June 29, 2010 OPRA request.

Furthermore, the Custodian certifies that each motion for approval specifically provided that the minutes were not to be released until the matter discussed in executive session had been resolved. The Custodian certifies that she immediately reviewed the minutes in question and determined that four of the six sets could be presented to the Township Committee for approval for public release. The Custodian certifies that on July 12, 2010, the minutes of the February 22, 2010; March 8, 2010; April 12, 2010; and April 26, 2010 executive sessions were approved for release to the public. Additionally, the Custodian certifies that the January 11, 2010 and February 8, 2010 minutes were not approved for release at that time because the matters discussed were still unresolved. The Custodian certifies that on September 13, 2010, the minutes of the January 11, 2010 and February 8, 2010 executive sessions were approved for release to the public. The Custodian certifies that copies of all six sets of executive session minutes were provided to the Complainant without redactions.[7]

[7] Evidence in the record demonstrates that the responsive minutes were provided on August 16, 2010.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

> "… any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* … or *that has been received* in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. *The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*" (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.

Here, the Complainant requested a copy of the approved minutes of each and every closed or executive session held by the governing body during January, February, March and April 2010. The Custodian responded to the Complainant's OPRA request by stating that the most recent executive meeting minutes that were approved for public release were dated September 10, 2007. However, on December 13, 2011, the Custodian certified that all of the requested executive session minutes had been approved by the governing body for accuracy and content prior to the submission of the Complainant's OPRA request on June 29, 2010.

In Merckx v. Township of Franklin Board of Education (Gloucester), 2009-47 (April 2010), the Council addressed the issue of a two-tier approval process for closed session minutes as follows:

> "Because all of the requested closed session minutes, with the exception of the minutes dated January 21, 2009, were approved by the Board of Education at the time of the Complainant's OPRA request and no longer constituted advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., the Custodian failed to bear her burden of proving a lawful denial of access to the requested closed session meeting minutes pursuant to N.J.S.A. 47:1A-6. *A second approval by the governing body for public release of the requested minutes is not required because N.J.S.A. 47:1A-5.g. allows for the redaction of information that is exempt from disclosure under OPRA.* ***In fact, OPRA requires the disclosure of a record with redactions of only the information which is asserted to be exempt from disclosure***. A denial of access to the entire record is therefore unlawful under OPRA." [Emphasis added].

In Wolosky v. Township of Roxbury (Morris), GRC Complaint No. 2010-183 (June 2011), the Custodian denied the Complainant access to executive session minutes on the grounds that said minutes had not yet been approved for release by the Township. Moreover, the Custodian argued that although the minutes were approved as to accuracy and content, they were not approved for release to the general public. The Council noted that it previously found that once the governing body of an agency has approved meeting minutes as to accuracy and content (per the requirement of the Open Public Meetings Act), said minutes are disclosable pursuant to the provision of OPRA. Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009); *see also* Wolosky v. County of Sussex, Board of Chosen Freeholders, GRC Complaint No. 2009-26 (February 2010), stating that "[a]lthough properly approved executive session minutes are disclosable, pursuant to N.J.S.A. 47:1A-5.g., custodians may redact from the minutes those discussions that require confidentiality because the matters discussed therein are unresolved or still pending."

The Council therefore held that because the evidence of record indicated that the Township approved the requested executive session minutes prior to the Complainant's OPRA request, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Moreover, the Council suggested that the Custodian consult the township attorney or some other designated person to determine the resolution of issues discussed in executive session minutes to identify those issues still requiring confidentiality and for which redactions are allowed.

In the matter before the Council, the Custodian denied the Complainant access to executive session minutes on the grounds that said minutes had not yet been approved for release by the Township. However, the evidence of record indicates that all of the requested executive session minutes were approved by the governing body for accuracy and content prior to the submission of the Complainant's OPRA request on June 29, 2010. As in Wolosky v. Township of Roxbury (Morris), GRC Complaint No. 2010-183 (June 2011), the Custodian's denial of access was unlawful under OPRA.

Therefore, because the Custodian denied the Complainant access to the requested executive session minutes on the grounds that said minutes had not yet been approved for release by the Township, and because the evidence of record indicates that all of the requested executive session minutes were approved by the governing body for accuracy and content prior to the submission of the Complainant's OPRA request on June 29, 2010, the Custodian has unlawfully denied the Complainant access to the requested executive session minutes for January, February, March, and April 2010. N.J.S.A. 47:1A-1.1.; Wolosky v. Township of Roxbury (Morris), GRC Complaint No. 2010-183 (June 2011), Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009); Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009); *see also* Wolosky v. County of Sussex, Board of Chosen Freeholders, GRC Complaint No. 2009-26 (February 2010). However, because the Custodian certified on December 13, 2011 that all requested executive session minutes were provided to the Complainant without redactions, the Council declines to order disclosure in this matter.

Whether the Custodian violated OPRA and unlawfully denied access by failing to follow the requirements for a lawful OPRA request form?

OPRA provides that:

> "[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:
>
> (1) specific directions and procedures for requesting a record;
> (2) a statement as to whether prepayment of fees or a deposit is required;
> (3) the time period within which the public agency is required by [OPRA], to make the record available;
> (4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
> (5) space for the custodian to list reasons if a request is denied in whole or in part;
> (6) space for the requestor to sign and date the form; and
> (7) space for the custodian to sign and date the form if the request is fulfilled or denied." N.J.S.A. 47:1A-5.f.

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

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

In the instant matter, as in O'Shea, the Township's official OPRA request form is deficient and potentially misleading to requestors. While OPRA requires that an agency's OPRA request form contain all of the elements set forth in N.J.S.A. 47:1A-5.f., there is no requirement that the form include information regarding exemptions to OPRA. The incomplete recitation of exemptions to disclosure under OPRA on the Town's OPRA request form therefore places a restriction on the public's right to access that is without valid legal basis. The evidence of record in the instant complaint shows that the Town's official OPRA request form is deficient in that:

- The form does not contain a statement regarding the requestor's right to challenge a denial of access before the Superior Court or GRC.

- The form states that "employee personnel files" are not public records, but does not state OPRA's exceptions to the general rule that personnel files are not public records.

- The form states that "police investigation records" are not public records, ignoring the several exceptions thereto contained in N.J.S.A. 47:1A-3.b.

However, the GRC declines to order the Custodian to adopt the GRC's Model Request Form or amend its OPRA request form to omit the offending language because the evidence of record indicates that during the pendency of this matter, the Township adopted the GRC Model Request Form, posted the revised form to the Township's website and provided the Complainant a copy of same on August 17, 2010.

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

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.

In the matter before the council, the Custodian unlawfully failed to supply the Complainant with the requested executive session minutes. Furthermore, Boonton Township was also found to have been in use of an official OPRA request form that contained deficiencies inconsistent with what OPRA prescribes in N.J.S.A. 47:1A-5.f. The Custodian certified on December 13, 2011 that all of the requested executive session minutes were provided to the Complainant and further certified and provided proof that the Township has adopted the model OPRA request form that conforms with N.J.S.A. 47:1A-5.f.

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

Although the Custodian violated N.J.S.A. 47:1A-5.f. and unlawfully denied access to the requested executive session minutes by means of an unlawful two-tier approval process, the Custodian certified on December 13, 2011 that all requested executive session minutes have been provided to the Complainant and the Custodian further certified that the Township has adopted the model OPRA request form that conforms with N.J.S.A. 47:1A-5.f. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

> "[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:
>
> - institute a proceeding to challenge the custodian's decision by filing an action in Superior Court…; or
> - in lieu of filing an action in Superior Court, file a complaint with the Government Records Council…
>
> A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra,* at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the

Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (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.[8] Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

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

In the instant matter, the Complainant filed the Denial of Access Complaint on August 13, 2010, alleging that the Township's OPRA form was deficient, and that the Complainant was unlawfully denied access to requested executive session minutes. Upon filing this Complaint it was revealed that Boonton Township had been in the practice of conducting an unlawful two-tier approval process of minute meetings and had unlawfully denied the Complainant access to the requested executive session minutes because such minutes had not been approved. On August 16, 2010 and September 14, 2010, the Custodian provided the Complainant with the requested minutes. On September 14, 2010, the Custodian certified that the Township had revised their previously deficient OPRA request form through the adoption of the model OPRA request form. Evidence of the record reveals that the Custodian's actions were primarily spurred by the Complainant's filing of the Denial of Access Complaint. Accordingly, the Complaint was the catalyst for the release of the records and the relief ultimately achieved. *See* Mason.

Therefore, 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,

[8] 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.

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian denied the Complainant access to the requested executive session minutes on the grounds that said minutes had not yet been approved for release by the Township, and because the evidence of record indicates that all of the requested executive session minutes were approved by the governing body for accuracy and content prior to the submission of the Complainant's OPRA request on June 29, 2010, the Custodian has unlawfully denied the Complainant access to the requested executive session minutes for January, February, March, and April 2010. N.J.S.A. 47:1A-1.1.; Wolosky v. Township of Roxbury (Morris), GRC Complaint No. 2010-183 (June 2011), Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009); Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009); *see also* Wolosky v. County of Sussex, Board of Chosen Freeholders, GRC Complaint No. 2009-26 (February 2010). However, because the Custodian certified on December 13, 2011 that all requested executive session minutes were provided to the Complainant without redactions, the Council declines to order disclosure in this matter

2. Boonton Township's OPRA request form is deficient because it (a) does not contain a statement regarding the requestor's right to challenge a denial of access before the Superior Court or GRC, (b) states that "employee personnel files" are not public records but does not state OPRA's exceptions to the general rule that personnel files are not public records, and (c) states that "police investigation records" are not public records while ignoring the several exceptions thereto contained in N.J.S.A. 47:1A-3.b. Accordingly, consistent with O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the

Township's official OPRA request form is deficient and potentially misleading to requestors. While OPRA requires that an agency's OPRA request form contain all of the elements set forth in N.J.S.A. 47:1A-5.f., there is no requirement that the form include information regarding exemptions to OPRA. The incomplete recitation of exemptions to disclosure under OPRA on the Township's OPRA request form therefore places a restriction on the public's right to access that is without valid legal basis. However, The GRC declines to order the Custodian to adopt the GRC's Model Request Form or amend its OPRA request form to omit the offending language because the Township in fact already adopted the GRC Model Request Form, posted the revised form to the Town's website and provided the Complainant a copy of same on August 17, 2010.

3. Although the Custodian violated N.J.S.A. 47:1A-5.f. and unlawfully denied access to the requested executive session minutes by means of an unlawful two-tier approval process, the Custodian certified on December 13, 2011 that all requested executive session minutes have been provided to the Complainant and the Custodian further certified that the Township has adopted the model OPRA request form that conforms with N.J.S.A. 47:1A-5.f. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. 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.

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January 24, 2012