



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

John Paff
Complainant

Complaint No. 2010-307

v.

Neptune Township Housing Authority (Monmouth)
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 25, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed because the Complainant withdrew his complaint via e-mail to the GRC dated October 24, 2012 (via legal counsel) because the parties have reached settlement 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**

**John Paff¹
Complainant**

GRC Complaint No. 2010-307

v.

**Neptune Township Housing Authority (Monmouth)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. The resolutions required by N.J.S.A. 10:4-13 that authorized the three (3) most recent executive sessions held by the Neptune Township Housing Authority (“NTHA”). If the resolutions are contained in the public session minutes, only the relevant pages need be provided.
2. The executive session minutes of any the meetings referred to above, redacted as necessary.
3. Detailed legal invoices submitted to the NTHA by any attorney who worked for or on behalf of the NTHA for March, April and May 2010.

Request Made: August 26, 2010

Response Made: September 15, 2010

Custodian: Paul Caverly

GRC Complaint Filed: November 17, 2010³

Background

April 25, 2012

Government Records Council’s (“Council”) Interim Order. At its April 25, 2012 public meeting, the Council considered the April 18, 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, found that:

1. Because Ms. Davis failed to timely forward the Complainant’s August 26, 2010 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, Ms. Davis has violated N.J.S.A. 47:1A-5.h. pursuant to Krywda v. Barnegat Township School District (Ocean), GRC Complaint No. 2008-138 (February 2009).

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

² Represented by Bart Cook, Esq. (Asbury Park, NJ).

³ The GRC received the Denial of Access Complaint on said date.

2. The Custodian's initial verbal response on September 23, 2010 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 he failed to address the Complainant's preferred method of delivery (e-mail or facsimile). Moreover, the Custodian's September 24, 2010 response is insufficient pursuant N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008) because he failed to individually address each of the Complainant's three (3) request items.
3. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond in writing granting access to same. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
4. The unapproved, draft executive session minutes of the Neptune Township Housing Authority dated June 28, 2010 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian was not required to provide the responsive minutes upon the NTHA's approval of same on September 21, 2010. Additionally, if the Complainant wanted to receive a copy of the responsive minutes once the NTHA approved same, he was required to submit a new OPRA request pursuant to Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (Interim Order dated February 28, 2007) and Blau v. Union County, GRC Complaint No. 2003-75 (January 2005).
5. Because the Custodian failed to bear his burden of proving by the preponderance of the competent, credible evidence that the actual cost of providing records via facsimile is more than \$0.00, the Custodian's proposed charge of \$2.25 for the cost of providing records in this manner is unreasonable and in violation of N.J.S.A. 47:1A-5.b. However, the Council declines to order a recalculation of copying costs because the Custodian provided the responsive invoices and resolution to the Complainant and the Complainant did not pay any of the costs proposed by the Custodian. The GRC further declines to address the Custodian's Statement of Information argument that \$60.00 represented the actual cost to retrieve and fax the responsive records because the Complainant was not actually charged this fee despite the Custodian presenting the argument in the Statement of Information.
6. Although Ms. Davis violated N.J.S.A. 47:1A-5.h. by failing to forward the Complainant's OPRA request to the Custodian in a timely manner, she did forward same to the Custodian on September 15, 2010. Moreover, the Custodian violated N.J.S.A. 47:1A-5.g. by responding insufficiently to the Complainant's OPRA request and N.J.S.A. 47:1A-5.e. by failing to respond

immediately to the Complainant's OPRA request for invoices. The Custodian further violated N.J.S.A. 47:1A-5.b. because the cost for providing the responsive records via facsimile was unreasonable under OPRA. However, the Custodian provided access to the responsive resolution and invoices. Further, the responsive minutes were unapproved and thus exempt as inter-agency or intra-agency advisory, consultative, or deliberative material at the time the Complainant amended his OPRA request on September 15, 2010. Additionally, the evidence of record does not indicate that the OPRA violations of both Ms. Davis and the Custodian had positive elements of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the actions of Ms. Davis and the Custodian 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.

7. 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. Specifically, the Custodian provided the Complainant with a responsive resolution after the filing of the instant complaint. 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 complaint 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.

April 27, 2012

Council's Interim Order ("Order") distributed to the parties.

May 1, 2012

Complaint transmitted to the Office of Administrative Law.

October 24, 2012

E-mail from the Complainant's Counsel to the GRC attaching a letter from Counsel to the Honorable Susan M. Scarola, Administrative Law Judge, dated October 24, 2012.

Counsel states that this matter has been settled and all of the terms of the settlement have been fulfilled; therefore, the Complainant withdraws this complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew his complaint via e-mail to the GRC dated October 24, 2012 (via legal counsel) because the parties have reached settlement in this matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 25, 2012⁴

⁴ 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 meeting 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

April 25, 2012 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2010-307

v.

Neptune Township Housing Authority (Monmouth)
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because Ms. Davis failed to timely forward the Complainant’s August 26, 2010 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, Ms. Davis has violated N.J.S.A. 47:1A-5.h. pursuant to Krrywda v. Barnegat Township School District (Ocean), GRC Complaint No. 2008-138 (February 2009).
2. The Custodian’s initial verbal response on September 23, 2010 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 he failed to address the Complainant’s preferred method of delivery (e-mail or facsimile). Moreover, the Custodian’s September 24, 2010 response is insufficient pursuant N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008) because he failed to individually address each of the Complainant’s three (3) request items.
3. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond in writing granting access to same. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
4. The unapproved, draft executive session minutes of the Neptune Township Housing Authority dated June 28, 2010 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian was not required to provide the responsive minutes upon the NTHA’s approval of same on September



21, 2010. Additionally, if the Complainant wanted to receive a copy of the responsive minutes once the NTHA approved same, he was required to submit a new OPRA request pursuant to Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (Interim Order dated February 28, 2007) and Blau v. Union County, GRC Complaint No. 2003-75 (January 2005).

5. Because the Custodian failed to bear his burden of proving by the preponderance of the competent, credible evidence that the actual cost of providing records via facsimile is more than \$0.00, the Custodian's proposed charge of \$2.25 for the cost of providing records in this manner is unreasonable and in violation of N.J.S.A. 47:1A-5.b. However, the Council declines to order a recalculation of copying costs because the Custodian provided the responsive invoices and resolution to the Complainant and the Complainant did not pay any of the costs proposed by the Custodian. The GRC further declines to address the Custodian's Statement of Information argument that \$60.00 represented the actual cost to retrieve and fax the responsive records because the Complainant was not actually charged this fee despite the Custodian presenting the argument in the Statement of Information.
6. Although Ms. Davis violated N.J.S.A. 47:1A-5.h by failing to forward the Complainant's OPRA request to the Custodian in a timely manner, she did forward same to the Custodian on September 15, 2010. Moreover, the Custodian violated N.J.S.A. 47:1A-5.g by responding insufficiently to the Complainant's OPRA request and N.J.S.A. 47:1A-5.e by failing to respond immediately to the Complainant's OPRA request for invoices. The Custodian further violated N.J.S.A. 47:1A-5.b because the cost for providing the responsive records via facsimile was unreasonable under OPRA. However, the Custodian provided access to the responsive resolution and invoices. Further, the responsive minutes were unapproved and thus exempt as inter-agency or intra-agency advisory, consultative, or deliberative material material at the time the Complainant amended his OPRA request on September 15, 2010. Additionally, the evidence of record does not indicate that the OPRA violations of both Ms. Davis and the Custodian had positive elements of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the actions of Ms. Davis and the Custodian 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.
7. 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. Specifically, the Custodian provided the Complainant with a responsive resolution after the filing of the instant complaint. 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 complaint 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 25th Day of April, 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: April 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**John Paff¹
Complainant**

GRC Complaint No. 2010-307

v.

**Neptune Township Housing Authority (Monmouth)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. The resolutions required by N.J.S.A. 10:4-13 that authorized the three (3) most recent executive sessions held by the Neptune Township Housing Authority (“NTHA”). If the resolutions are contained in the public session minutes, only the relevant pages need be provided.
2. The executive session minutes of any the meetings referred to above, redacted as necessary.
3. Detailed legal invoices submitted to the NTHA by any attorney who worked for or on behalf of the NTHA for March, April and May 2010.

Request Made: August 26, 2010

Response Made: September 15, 2010

Custodian: Paul Caverly

GRC Complaint Filed: November 17, 2010³

Background

August 26, 2010

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA. The Complainant indicates that the preferred method of delivery is via e-mail or facsimile.

September 14, 2010

Voicemail message from the Complainant to the Custodian. The Complainant requests that the Custodian respond to his OPRA request.

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

² Represented by Bart Cook, Esq. (Asbury Park, NJ).

³ The GRC received the Denial of Access Complaint on said date.

September 15, 2010

Custodian's response to the OPRA request. The Custodian responds verbally via voicemail to the Complainant's OPRA request on the same day as receipt of such request.⁴ The Custodian states that he has questions regarding the Complainant's OPRA request.

September 15, 2010

E-mail from the Complainant to the Custodian. The Complainant states that pursuant to a conversation earlier in the day, he is modifying request Items No. 1 and No. 2 to seek the resolution and minutes for the executive session held in May or June 2010. The Complainant states that the NTHA Board of Commissioners ("Board") will approve the minutes sought at its September 21, 2010 meeting. The Complainant grants the Custodian an extension of time until September 22, 2010 to e-mail or fax the responsive records to him.

September 23, 2010

Voicemail message from the Custodian to the Complainant. The Custodian states that the responsive records are ready for pickup. The Custodian requests that the Complainant advise how he wishes to pay for the responsive records.

September 24, 2010

E-mail from the Complainant to the Custodian. The Complainant states that he received the Custodian's voicemail advising that the records are available for pickup and asking how the Complainant would pay for same. The Complainant states that, as noted in his OPRA request, his preferred method of delivery is via e-mail or facsimile. The Complainant also asks that the Custodian advise whether there is a cost for e-mail or fax.

September 24, 2010

Facsimile from the Custodian to the Complainant with the following attachments:

- Invoice for February 2010.
- Invoice for March 2010.
- Invoice for April 2010.
- Special meeting minutes dated June 28, 2010.

The Custodian requests that the Complainant remit a check for \$2.25 (3 pages at \$0.75 per page).

September 24, 2010

Letter from the Complainant to the Board.⁵ The Complainant states that he submitted an OPRA request to the NTHA on August 26, 2010. The Complainant states that he left a voicemail at the NTHA on September 14, 2010 after not receiving a timely response. The Complainant states that the Custodian left a voicemail for him on

⁴ The Custodian certified in the Statement of Information that he did not receive the Complainant's OPRA request from Ms. Eleanor Davis, Bookkeeper, until September 15, 2010.

⁵ The Complainant e-mailed a copy of this letter to the Custodian on September 24, 2010 and requested that the Custodian disseminate the letter to the Board.

September 15, 2010 advising that he had questions about the Complainant's OPRA request.

The Complainant states that he returned the Custodian's call on the same day. The Complainant states that the Custodian advised that the Board rarely holds executive sessions and that the last one was held in June 2010. The Complainant states that the Custodian further advised that it would take a substantial effort for him to locate the resolutions and minutes from the two (2) earlier sessions. The Complainant states that the Custodian advised that the June 2010 minutes were set to be approved by the Board on September 21, 2010.

The Complainant states that he agreed to modify his OPRA request to seek the minutes and resolution of only the June 2010 meeting and granted an extension of time until September 22, 2010 for the Custodian to provide the responsive records via e-mail or facsimile. The Complainant further states that he informed the Custodian that the fact that the minutes were not approved does not affect the Board's duty to make same available. The Complainant states that he sent an e-mail to the Custodian memorializing their conversation.

The Complainant states that the Custodian left a voicemail on September 23, 2010 advising that the records were ready for pickup and requesting that the Complainant advise how he wished to pay the associated copy cost. The Complainant states that he sent an e-mail to the Custodian on September 24, 2010 noting that his preferred method of delivery is via e-mail or facsimile. The Complainant states that he also asked the Custodian if there was a fee associated with electronic delivery. The Complainant states that he subsequently received a five (5) page fax from the Custodian on September 24, 2010 noting that the associated copy cost is \$2.25.

The Complainant states that the Custodian violated N.J.S.A. 47:1A-5.i. by failing to respond within the seven (7) business day time frame as required under OPRA. The Complainant further states that \$0.75 per page charge appears to ignore the Appellate Division's decision in Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010). The Complainant states that in Smith, the Court held that beginning July 1, 2010, unless and until the Legislature amends OPRA, public agencies must charge the approximated "actual cost" of copying such records. The Complainant asks if it is the NTHA's position that it costs \$0.75 per page to fax records.

The Complainant further states that although he requested a copy of the NTHA's most recent executive session minutes (from June 28, 2010), the Complainant has only received the public session minutes from same. The Complainant states that as such, the Custodian has failed to grant or deny access to the Complainant's request for executive session minutes and should do so by September 29, 2010 to avoid the filing of a complaint with the GRC.⁶

⁶ The Complainant also discusses the Open Public Meetings Act ("OPMA"). The GRC does not have the authority to adjudicate issues that arise under OPMA. N.J.S.A. 47:1A-7.b.
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September 29, 2010

Letter from the Complainant to the Board. The Complainant states that the purpose of this letter is to follow-up with the Custodian on this date. The Complainant states that he contacted the Custodian regarding the requested executive session minutes. The Complainant states that the Custodian alleged that the public session minutes he provided to the Complainant on September 24, 2010 were the minutes responsive to the Complainant's OPRA request. The Complainant states that the Custodian became argumentative and disputed the Complainant's assertion that he is required to address the Complainant's preferred method of delivery. The Complainant states that the Custodian also demanded payment for the records provided via facsimile.

The Complainant requests that the NTHA provide a written response to his OPRA request item seeking the minutes for the Board's June 28, 2010 executive session. The Complainant notes that if the minutes do not exist, the NTHA should state same. The Complainant states that he will extend the time frame to respond to October 4, 2010.

September 29, 2010

E-mail from the Custodian to the Complainant. The Custodian states that the NTHA office hours are 8:00 a.m. to 4:00 p.m. five (5) days a week. The Custodian states that the Complainant may come in, review any records, and pay for copies if applicable. The Custodian states that the minutes of the Board's June 28, 2010 meeting are in the office and available for review at the Complainant's leisure.⁷

October 1, 2010

E-mail from the Complainant to the Custodian. The Complainant states that he provided a preferred method of delivery and yet the Custodian insists that he come to the office. The Complainant questions whether the Custodian is refusing to provide the responsive records in the preferred method of delivery.

The Complainant states that the Custodian alleges that the responsive minutes are available at the Custodian's office. The Complainant states that the Custodian provided a copy of the Board's June 28, 2010 public session minutes via facsimile on September 24, 2010. The Complainant requests that the Custodian confirm whether the minutes held at the Custodian's office are different from those provided on September 24, 2010.

The Complainant states that the Custodian insists that the Complainant pay a fee for the records provided on September 24, 2010. The Complainant requests that the Custodian clarify whether he is charging copying fees of \$0.75/\$0.50/\$0.25 per page or a lesser amount.

The Complainant further states that he is seeking records and not a lawsuit; however, the Custodian's alleged position is without legal merit and the Complainant could consider this position as a knowing and willful violation of OPRA. The Complainant suggests that the Custodian consult with Counsel prior to responding to this

⁷ The Custodian does not indicate whether the minutes are the same as those provided to the Complainant via facsimile on September 24, 2010.

e-mail. The Complainant notes that if the Custodian needs additional time to respond beyond October 4, 2010, the Custodian must request same prior to that date.

October 4, 2010

E-mail from the Complainant to the Custodian. The Complainant states that based on a conversation with the Custodian, the Complainant understands that the NTHA is willing to e-mail or fax the responsive records, minutes dated June 28, 2010 exist that are different from those the Custodian previously provided to the Complainant and the NTHA believes it is permitted to charge the enumerated copy costs provided for in N.J.S.A. 47:1A-5.b.⁸

The Complainant requests that the Custodian e-mail or fax to him the minutes alleged to be different from those previously provided. The Complainant further requests that the Custodian advise if there are any costs associated with production of the records via e-mail or fax.

November 17, 2010

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

- Complainant’s OPRA request dated August 26, 2010.
- E-mail from the Complainant to the Custodian dated September 15, 2010.
- E-mail from the Complainant to the Custodian dated September 24, 2010.
- Facsimile from the Custodian to the Complainant dated September 24, 2010 (with attachments).
- Letter from the Complainant to the Board dated September 24, 2010.
- Letter from the Complainant to the Board dated September 29, 2010.
- E-mail from the Custodian to the Complainant dated September 29, 2010.
- E-mail from the Complainant to the Custodian dated October 1, 2010.
- E-mail from the Complainant to the Custodian dated October 4, 2010.

The Complainant’s Counsel states that the NTHA failed to provide the Complainant with responsive records, overcharged the Complainant for copies of records and has deliberately stalled the Complainant’s attempts to obtain the responsive records.

Counsel states that the Complainant submitted an OPRA request to the NTHA on August 26, 2010 and received no response from the NTHA. Counsel states that the Complainant called the NTHA on September 14, 2010 and left a message seeking a response. Counsel states that the Custodian called the Complainant on September 15, 2010 and left a voicemail message stating that he had questions regarding the Complainant’s OPRA request. Counsel states that the Complainant returned the Custodian’s call later that morning at which time the Custodian stated that the NTHA rarely holds executive sessions and that he believed the last session was held in June 2010. Counsel states that the Custodian further advised the Complainant that the Board

⁸ The enumerated fees previously identified in OPRA at N.J.S.A. 47:1A-5.b. were \$0.75/\$0.50/\$0.25 per page. The Court rendered these fees invalid as of July 1, 2010 pursuant to Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010).

would approve those minutes on September 21, 2010. Counsel states that the Complainant thus amended his OPRA request Items No. 1 and No. 2.

Counsel states that on September 23, 2010, the Custodian left a voicemail for the Complainant advising that the responsive records were available for pickup and asking how the Complainant wished to pay for same. Counsel states that the Complainant sent an e-mail to the Custodian on September 24, 2010 advising that he wanted the records delivered via e-mail or facsimile. Counsel states that the Custodian faxed the Complainant three (3) invoices and the special meeting minutes for June 28, 2010. Counsel states that the Custodian further advised that the total copying cost would be \$2.25, or \$0.75 per page for three (3) pages.

Counsel states that the Complainant sent a letter to the Board on September 24, 2010, which memorialized his September 15, 2010 conversation with the Custodian. Counsel states that the Complainant advised the Board that the proposed cost violated the Court's holding in Smith. Counsel states that the Complainant further advised that the Custodian provided him with public session minutes instead of executive session minutes. Counsel states that the Complainant thus reiterated his request for executive session minutes and extended the time frame to respond until September 29, 2010.

Counsel states that the Custodian called the Complainant on September 29, 2010 and advised that the minutes provided were executive session minutes. Counsel states that the Custodian further advised that OPRA did not require that he send the records to the Complainant; rather the Complainant must retrieve the records at the NTHA and must pay the copy cost associated with same. Counsel states that the Complainant terminated the telephone call after the Custodian became agitated. Counsel states that the Complainant sent a letter to the Board on September 29, 2010 memorializing the September 29, 2010 telephone call. Counsel states that the Complainant further requested that the NTHA provide a written response regarding the June 28, 2010 executive session minutes.

Counsel states that the Custodian e-mailed the Complainant on September 29, 2010 advising that the records were ready for inspection at the NTHA and that the Complainant may pay any applicable copy costs. Counsel further states that based on two subsequent e-mails, the Complainant determined the following:

1. The Custodian was willing to provide records via e-mail or facsimile.
2. There existed minutes for the June 28, 2010 meeting that were different from the minutes provided to the Complainant via facsimile on September 24, 2010.
3. The NTHA's position was that it charged the appropriate copying cost for copies of the responsive records.

Counsel states that to date, the NTHA has not provided the Complainant with a copy of the responsive June 28, 2010 executive session minutes, has failed to provide a lawful basis for not providing same and has not provided a legal basis for charging \$2.25 for copies of records provided via facsimile.

Counsel states that OPRA mandates 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.” Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006)(citing N.J.S.A. 47:1A-1). Further, Counsel states that “[t]he purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004). Counsel states that in any action under OPRA, the burden of proof rests with the public agency. N.J.S.A. 47:1A-6.

Counsel states that a custodian of record must bear the burden of proof in any proceeding under OPRA. N.J.S.A. 47:1A-6 and Paff v. Township of Lawnside (Camden), GRC Complaint No. 2009-155 (October 2010). Counsel contends that there is no doubt that the records requested by the Complainant are government records as defined under OPRA. N.J.S.A. 47:1A-1.1. Counsel states that the Complainant seeks copies of the NTHA’s June 28, 2010 executive session minutes that the Board approved on September 21, 2010. Counsel notes that although the Complainant submitted his initial OPRA request on August 24, 2010, the Complainant reiterated his request on September 24, 2010 and again on September 29, 2010.

Counsel contends that the Custodian failed to respond in writing until nearly a month after submission of the OPRA request, which results in the OPRA request being “deemed” denied. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Counsel also contends that the Custodian ignored the Complainant’s preferred method of delivery, which is a violation of OPRA pursuant to Paff v. County of Camden, GRC Complaint No. 2009-25 (Interim Order dated January 26, 2010)

Counsel further disputes the NTHA’s charge of \$0.75 per page for copies of the responsive records pursuant to Smith (requiring public agencies to charge the reasonably approximated actual cost for copies of government records). Counsel states that according to the GRC’s OPRA presentation, “[r]ecords provided via e-mail or fax are likely free unless [the Custodian] can prove an actual cost [is] associated [with delivery].” *Id.* at slide 42. Counsel contends that unless the NTHA can prove that the actual cost of providing records via facsimile is greater than zero, the GRC should determine that the Custodian violated OPRA for attempting to charge the Complainant for records provided via facsimile.

Counsel states that approved executive session minutes are public records under OPRA that should be disclosed to the Complainant. Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (Interim Order dated April 30, 2008). Counsel states that the Complainant initially requested executive session minutes for the most recent three (3) meetings and subsequently narrowed his request to seek the June 28, 2010 executive session minutes on September 15, 2010. Counsel asserts that the Complainant has reiterated his request for the minutes several times, yet the Custodian never provided the

Complainant with a definitive response. Counsel asserts that the Custodian provided to the Complainant on September 24, 2010 minutes that appeared to be public session minutes but were actually executive session minutes. Counsel notes that the Custodian then contradicted himself in subsequent communications, leading the Complainant to believe that there was a different set of minutes available for review at the NTHA office.

Counsel further contends that the GRC should find that the Custodian knowingly and willfully violated OPRA. Counsel contends that the Complainant has made a strong effort to educate the Custodian about OPRA including citations to specific provisions and case law. Counsel contends that the Complainant has also gone to great lengths to have a complete understanding of the Custodian's position and has instead received confusing responses throughout the pendency of this issue.

Counsel requests the following:

1. A determination ordering the Custodian to provide the responsive executive session minutes via e-mail or facsimile.
2. A determination that the NTHA violated OPRA by attempting to charge the Complainant \$2.25 for three (3) pages of faxed records.
3. A determination that the Custodian violated OPRA by failing to respond in writing within the statutorily mandated time frame. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
4. A determination that the Custodian may have knowingly and willfully violated OPRA and unreasonably denied access to the responsive records under the totality of the circumstances. N.J.S.A. 47:1A-11.a.
5. A determination that the Complainant is a prevailing party entitled to reasonable attorney's fees. N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

November 26, 2010

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

November 23, 2010⁹

Facsimile from the Custodian to the Complainant with the following attachments:

- Executive session minutes dated June 28, 2010 (with redactions).¹⁰
- NTHA Resolution No. 1800-1 authorizing executive session dated June 28, 2010.

November 30, 2010

Facsimile from the Custodian to the Complainant with the following attachments:

- Executive session minutes dated June 28, 2010 (with redactions).¹¹

⁹ The Complainant's Counsel forwarded to the GRC the Custodian's facsimile and attached records on November 29, 2010.

¹⁰ The Custodian redacted the minutes by replacing the alleged privileged material with "Discussion Redacted." The extent of the material redacted was not visually obvious.

- Resolution No. 1800-1.

November 30, 2010

Letter from the Custodian to the GRC. The Custodian requests an extension of time until December 10, 2010 to submit the SOI.

The Custodian states that an extension is necessary because he did not receive the SOI request until November 29, 2010, at which point he contacted the Custodian's Counsel. The Custodian states that he was not able to meet with Counsel until November 30, 2010 and will be out of the office until December 6, 2010.

December 3, 2010

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until December 10, 2010 to submit the SOI.

December 10, 2010

Custodian's SOI with the following attachments:

- Facsimile from the Custodian to the Complainant dated September 24, 2010 (with attachments).
- Facsimile confirmation sheet dated September 24, 2010.
- Facsimile from the Custodian to the Complainant dated November 23, 2010 (with attachments).
- Facsimile confirmation sheet dated November 23, 2010.
- Facsimile from the Custodian to the Complainant dated November 30, 2010 (with attachments).
- Facsimile confirmation sheet dated November 30, 2010.¹²

The Custodian certifies that all records responsive to the request are retained for seven (7) years in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management. The Custodian further certifies that fiscal records are kept at the NTHA for one (1) year and then sent to a warehouse for (6) years.¹³

The Custodian certifies that the NTHA received a fax from the Complainant on August 26, 2010. The Custodian certifies that an employee placed the fax on the desk of Ms. Eleanor Davis ("Ms. Davis"), Bookkeeper, without reading said fax. The Custodian certifies that Ms. Davis returned from vacation on August 31, 2010, at which time she began reviewing five (5) days' worth of mail and rent receipts. The Custodian certifies that Ms. Davis located the Complainant's OPRA request in her outbox on September 14, 2010 and brought the request to the Custodian on September 15, 2010. The Custodian asserts that he cannot explain why he did not receive the Complainant's OPRA request

¹¹ The Custodian redacted the minutes by blacking out the alleged privileged material. The extent of the material redacted was visually obvious.

¹² The Custodian submitted additional documents that are not relevant to this complaint.

¹³ The Custodian did not certify to the search undertaken to locate the records responsive as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

until September 15, 2010. The Custodian asserts that the NTHA is a small agency with a limited budget and a small multi-tasking staff.

The Custodian certifies that when he became aware of the OPRA request on September 15, 2010, he telephoned the Complainant and left a message. The Custodian certifies that the Complainant contacted him an hour later, at which time he informed the Complainant that the NTHA last held an executive session in June 2010. The Custodian certifies that he called the Complainant on September 23, 2010 and asked how he intended to pay for the responsive records. The Custodian certifies that the Complainant did not pay for the records; however, the Custodian faxed the records to the Complainant on September 24, 2010. The Custodian certifies that the minutes provided to the Complainant were special meeting minutes that contained executive session discussions. The Custodian contends that he assumed the special session minutes were responsive to the Complainant's request because the minutes included a resolution passed by the Board after returning from executive session.

The Custodian certifies that on November 23, 2010, after consulting with Counsel and re-drafting the minutes based on Counsel's directives, he faxed the Complainant the redacted minutes and NTHA amended Resolution 1800-1. The Custodian certifies that again on November 30, 2010,¹⁴ he refaxed the minutes to the Complainant, this time with visually obvious redactions. The Custodian certifies that the redacted information regarded Jersey Shore University Medical Center's purchase of 19 Davis Avenue, which is a fifty (50) unit senior housing complex.

The Custodian states that OPRA provides that "[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation." N.J.S.A. 47:1A-5.b. The Custodian contends that he charged the Complainant an appropriate fee for paper copies, yet the Complainant never paid and/or refused to pay this fee. The Custodian further argues that the actual cost associated with producing the responsive records is \$60.00 (for one half hour to retrieve and provide the record divided by \$125,000, the yearly salary of the Custodian). The Custodian contends that although the Complainant did not remit payment for the records to the NTHA, the Custodian provided the responsive records to the Complainant.

December 15, 2010

Letter from the Complainant's Counsel to the GRC with the following attachments:

- Complainant's OPRA request dated August 26, 2010.
- Facsimile from the Custodian to the Complainant dated September 24, 2010 (with attachments).
- Letter from the Complainant to the Board dated September 24, 2010.
- Template resolution form.

¹⁴ The Custodian asserts that he re-sent this fax on November 23, 2010; however, the evidence of record indicates that the facsimile is actually dated November 30, 2010.

Counsel states that on November 30, 2010, the Custodian faxed the June 28, 2010 executive session minutes to the Complainant. Counsel notes that, unlike the minutes faxed to the Complainant on November 23, 2010, these minutes contained more information, were redacted in a visually obvious manner and were longer. Counsel further asserts that the Custodian also provided a resolution purported to be the responsive resolution as part of his November 30, 2010 facsimile.¹⁵ Counsel contends that it is almost impossible that the resolution provided was the record responsive because the resolution was on the form that the Complainant provided to the Board in his September 24, 2010 letter.

Counsel further asserts that the Custodian's failure to comply with OPRA encompasses his failure to respond in a timely manner. Counsel notes that the Custodian certified in the SOI that he did not receive the OPRA request until September 15, 2010 and does not dispute receiving the Complainant's September 14, 2010 voicemail. Counsel contends that even in light of these facts, the Custodian did not respond in writing to the Complainant's OPRA request until September 24, 2010. Counsel asserts that the Custodian claims the NTHA is a small agency; however, being a small agency would likely minimize the possibility of OPRA requests being misplaced or lost.

Counsel further disputes that there was an actual cost associated with providing the responsive records to the Complainant via facsimile. Counsel asserts that the Custodian did not explain in the SOI why he spent thirty minutes to find the four (4) pages of records sent to the Complainant on September 24, 2010. Counsel further contends that the Custodian also did not explain why the search could not be delegated to another staff person.

Counsel contends that although the Complainant advised the Custodian that the actual cost of providing records electronically is likely zero and provided supporting case law, the Custodian has changed the actual cost from \$2.25 to \$60.00. Counsel contends that the evidence of record herein supports a conclusion that the Custodian may have knowingly and willfully violated OPRA. Counsel contends that the Complainant attempted to advise the Custodian regarding the need to charge the actual cost of copies provided and cited applicable case law. Counsel requests that the GRC determine that the Custodian may have knowingly and willfully violated OPRA.

March 12, 2012

Letter from the GRC to the Custodian. The GRC states that its regulations provide that "[t]he Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint." *N.J.A.C. 5:105-2.4(1)*. The GRC states that it has reviewed the parties' submissions in this complaint and has determined that additional information is required.

¹⁵ The evidence of record supports that the Custodian only faxed a cover letter and copy of the redacted meeting minutes to the Complainant on November 30, 2010. *See* Facsimile confirmation sheet dated November 30, 2010 attached to the SOI.

The GRC states that the evidence of record indicates that the Custodian assessed a copying cost of \$2.25 for providing the responsive records to the Complainant via facsimile. The GRC states that the Custodian, however, failed to provide as part of the SOI any proof that the Custodian incurred any actual cost (inclusive of materials and supplies only) to provide the records to the Complainant via facsimile. Further, the GRC states that the Custodian argued in the SOI that he believed the actual cost associated with providing the responsive records to the Complainant via facsimile was \$60.00 (for one half hour to retrieve and provide the record divided by \$125,000 yearly salary of the Custodian).

The GRC thus requests a legal certification, pursuant to N.J. Court Rule 1:4-4, stating whether the NTHA incurred an actual cost to provide records to the Complainant via facsimile.

The GRC notes that the actual cost of providing records "... 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 ..." N.J.S.A. 47:1A-5.b. The GRC further requests that the Custodian provide any supporting documentation with the legal certification.

The GRC requests that the Custodian provide the requested legal certification by close of business on March 14, 2012. The GRC notes that submissions received after this deadline date may not be considered by the Council for adjudication.

March 14, 2012

Custodian's legal certification attaching the following:

- Invoice No. 27831A-1 dated June 10, 2011 (Toner for fax machine).
- Invoice No. 020173-1 dated September 21, 2011 (Overage for copy machine).
- Shipping receipt dated March 9, 2012 (Toner for copy machine).

The Custodian certifies that the attached documents support the Custodian's argument that an actual cost was associated with providing the records via facsimile. The Custodian certifies that the cost for toner on the fax machine is quite high as the NTHA is a small agency and does not have the advantage of buying in bulk. The Custodian further certifies that Invoice No. 020173-1 indicates that the NTHA was charged a rate of \$0.019 per copy from September 23, 2011 to September 23, 2012.

The Custodian certifies that he cannot calculate the number of copies one toner cartridge produces, but the cost is far greater than that of a municipality, larger housing authority, county or State agency.

Analysis

Whether Ms. Davis violated N.J.S.A. 47:1A-5.h by not forwarding the Complainant's OPRA request to the Custodian in a timely manner?

OPRA provides that:

“Any officer or *employee* of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.” (Emphasis added.) N.J.S.A. 47:1A-5.h.

In the instant complaint, the Complainant submitted his OPRA request via facsimile to the NTHA on August 26, 2010 and did not receive an initial response from the Custodian until September 15, 2010. The Custodian certified in the SOI that the NTHA received the Complainant’s OPRA request on August 26, 2010; however, an employee placed it on Ms. Davis’ desk. The Custodian further certified that Ms. Davis was out of the office until August 31, 2010 and did not locate the Complainant’s OPRA request until September 14, 2010. The Custodian finally certified that Ms. Davis forwarded the Complainant’s OPRA request to the Custodian on September 15, 2010.

N.J.S.A. 47:1A-5.h. provides and the Council has consistently held that an employee of a public agency who receives an OPRA request must either direct the requestor to the custodian or forward the requestor’s OPRA request to the custodian. In Krrywda v. Barnegat Township School District (Ocean), GRC Complaint No. 2008-138 (February 2009), the complainant submitted an OPRA request to Mr. John J Germano (“Mr. Germano”) on June 20, 2008. The complainant subsequently filed a complaint after not receiving a response. In the SOI, the custodian certified that he did not receive the complainant’s OPRA request from Mr. Germano until July 14, 2008. The Council thus determined that:

“... because Mr. Germano failed to forward the Complainant’s June 20, 2008 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian within the statutorily mandated seven (7) business days required, Mr. Germano has violated N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007)(holding that Lt. Caroline Clark violated OPRA by failing to forward the request or direct the requestor to the proper Custodian of record pursuant to N.J.S.A. 47:1A-5.h.)” *Id.* at pg. 4.

The facts of Krrywda are similar to the facts here. Specifically, an employee at the NTHA received the OPRA request via facsimile and placed the request on Ms. Davis’ desk on August 26, 2010. Ms. Davis returned to the NTHA from vacation on August 31, 2010, or the third (3rd) business day after the NTHA received the Complainant’s OPRA request. Even under the condition that Ms. Davis could not have received the Complainant’s OPRA request until returning from vacation, Ms. Davis still failed to forward the Complainant’s OPRA request to the Custodian until the tenth (10th) business day after she returned from vacation. Thus, Ms. Davis violated N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i. by failing to forward the Complainant’s OPRA request to the Custodian in a timely manner.

Therefore, because Ms. Davis failed to timely forward the Complainant’s August 26, 2010 OPRA request to the Custodian or direct the Complainant to submit the OPRA

request directly to the Custodian, Ms. Davis violated N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i. pursuant to Krrywda.

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

OPRA also provides that:

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

Moreover, OPRA provides that:

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

The evidence of record herein indicates that the Custodian did not receive the Complainant’s OPRA request until September 15, 2010. The Custodian initially responded verbally on the same day as receipt of said request seeking clarification of the Complainant’s OPRA request. Further, the evidence of record indicates that the Custodian verbally notified the Complainant on September 23, 2010 that the responsive records were ready for pickup. The Custodian subsequently provided via facsimile to the Complainant three (3) invoices and one (1) set of special meeting minutes dated June 28, 2010 on September 24, 2010, or the seventh (7th) business day after the Custodian received the OPRA request.

However, the Custodian initially failed to address the Complainant’s preferred method of delivery, e-mail or facsimile, when verbally notifying the Complainant on September 23, 2010 that the responsive records were available for disclosure. The Custodian instead insisted that the Complainant retrieve the records from the NTHA.¹⁶

The Custodian provided invoices and minutes on September 24, 2010, the seventh (7th) business day after he received the Complainant’s OPRA request from Ms. Davis, that were not the minutes sought by the Complainant but failed to provide any explanation why he believed the minutes were responsive. Moreover, the Custodian

¹⁶ The GRC will not address whether the Complainant’s OPRA request is “deemed” denied because the Custodian provided access to records via facsimile on the seventh (7th) business day after he received the OPRA request from Ms. Davis. Specifically, although the Custodian’s formal response on September 23, 2010 was not in writing, the Custodian provided access to records on the seventh (7th) business day as the response.

failed to address as part of his September 24, 2010 response any resolutions responsive to the Complainant's request Item No. 2.

The GRC has previously adjudicated complaints in which a custodian did not address the preferred method of delivery. 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."¹⁷ 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." In Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008), the complainant requested that the records be provided by e-mail or facsimile, and the custodian failed to address the method of delivery. In Paff, 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..."

The GRC has also adjudicated complaints in which a custodian failed to respond to each request item individually. In Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the complainant's counsel asserted that the custodian violated OPRA by failing to respond to each of the complainant's request items individually within seven (7) business days. The GRC examined how the facts in Paff applied to its prior holding in O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005)(that the custodian's initial response stating that the complainant's request was a duplicate of a previous request to the complainant's June 22, 2007 request was legally insufficient because the custodian has a duty to answer each request individually). The Council reasoned that, "[b]ased on OPRA and the GRC's holding in O'Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request." The GRC ultimately held that:

"[a]lthough the Custodian responded in writing to the Complainant's August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g." *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009) *and* Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).

¹⁷ 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.

The facts of the instant complaint are similar to the complaints discussed *infra*. Specifically, the Custodian failed to address the Complainant's preferred method of delivery in his initial verbal response on September 23, 2010. Further, the Custodian failed to address each request item individually in his September 24, 2010 facsimile to the Complainant. Thus, the Custodian's responses were insufficient.

The Custodian's initial verbal response on September 23, 2010 is insufficient pursuant to N.J.S.A. 47:1A-5.g., O'Shea, supra, and Paff, supra, because he failed to address the Complainant's preferred method of delivery (e-mail or facsimile). Moreover, the Custodian's September 24, 2010 e-mail is insufficient pursuant N.J.S.A. 47:1A-5.g. and Paff, supra because he failed to individually address each of the Complainant's three (3) request items.

Whether the Custodian timely responded to the Complainant's OPRA request Item No. 3 (detailed legal invoices) for immediate access records?

OPRA provides that:

"Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." (Emphasis added.) N.J.S.A. 47:1A-5.e.

The Complainant's OPRA request Item No. 3 sought invoices submitted to the NTHA by any attorney working on behalf of the NTHA for March, April and May 2010. The requested invoices are specifically classified under OPRA as "immediate access" records pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that "immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggest that the Custodian was still obligated to immediately notify the Complainant..." Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

OPRA further requires a written response to an OPRA request. N.J.S.A. 47:1A-5.g. Although N.J.S.A. 47:1A-5.i. speaks directly to the seven (7) business day time frame, the provision carries a caveat for "shorter time [periods] ... otherwise provided by statute ..." Additionally, the Legislature clearly intended that all OPRA requests be responded to in writing by providing that custodians "... shall indicate the specific basis [for a denial of access] on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5.g. Had the Legislature intended to allow custodians to simply grant access to immediate access records without providing a written response, it would have included such language within N.J.S.A. 47:1A-5.e. Moreover, N.J.S.A. 47:1A-5.g. provides for no exceptions when responding to immediate access records.

Here, the Custodian responded verbally to the Complainant's OPRA request on the same day as receipt of said request seeking clarification and granted access to the

responsive invoices on the seventh (7th) business day after receipt of said request. However, the Custodian failed to respond in writing immediately to the Complainant's request Item No. 3 granting access to the responsive invoices. Thus, the Custodian has violated N.J.S.A. 47:1A-5.e. because the Custodian had an obligation to respond to OPRA request Item No. 3 for immediate access records immediately, even if said records are part of a larger request containing a combination of records requiring a response within seven (7) business days and immediate access records requiring an immediate response, as was the case here.

Therefore, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond in writing granting access to the responsive invoices. See Herron, supra.

Whether the Custodian unlawfully denied access to the requested June 28, 2010 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 ... 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.

Notwithstanding the fact that the Custodian provided the Complainant a redacted copy of the NTHA's June 28, 2010 executive session minutes on November 30, 2010, the Council is permitted to raise additional defenses regarding the disclosure of records

pursuant to Paff v. Township of Plainsboro, Docket No. A-2122-05T2 (App. Div. 2007).¹⁸ In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act ("OPMA") prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The Court held that:

"[t]he GRC has an independent obligation to 'render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA...The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

The Court further stated that:

"[a]side from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998)(citing Isko v. Planning Bd. Of Livingston, 51 N.J. 162, 175 (1968)(lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956)(question for reviewing court is propriety of action reviewed, not the reason for the action), aff'd, 24 N.J. 139 (1957)." *Id.*

The evidence of record indicates that the Complainant amended his OPRA request on September 15, 2010 seeking the June 28, 2010 executive session minutes. At that time, the Complainant noted in his e-mail to the Custodian that the NTHA would not approve the responsive minutes until September 21, 2010. The Custodian subsequently made the responsive minutes available to the Complainant after the NTHA approved said minutes. Thus, the amended OPRA request sought minutes that were "draft" at the time of such amended request. Under OPRA, draft minutes are considered advisory, consultative and deliberative ("ACD") material until a public body officially approves said minutes.

As a general matter, draft documents are ACD 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

¹⁸ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).
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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. *Ibid.* See Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that “inter-agency or intra-agency advisory, consultative, or deliberative material” is not included within the definition of a government record. N.J.S.A. 47: 1A-1 .1.

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

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

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

Additionally, the GRC has previously ruled on the issue of whether draft minutes are exempt from disclosure pursuant to OPRA. In Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council held that “...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency [ACD] 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 OPMA, to "keep reasonably comprehensible minutes." N.J.S.A. 10:4-14.

Moreover, in Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (Interim Order dated February 28, 2007), the complainant argued that the custodian had an obligation to notify him when the responsive draft meeting minutes would be approved. The Council, citing to Blau v. Union County, GRC Complaint No. 2003-75 (January 2005), held that

"[a]t the time of the Complainant's request, the requested meeting minutes did not exist. The Custodian is not obligated any further than to either grant or deny access at the time of the request. The Custodian denied the Complainant's request on the basis that the meeting minutes did not exist. *If the Complainant wants to receive a copy of said meeting minutes once they become available as approved, he must submit a new OPRA request ...*" (Emphasis added.) *Id.*

As previously stated above, the Complainant sought minutes that were not yet approved at the time of his amended OPRA request, thus the Council's holding in Parave-Fogg, supra, applies. Although the Complainant's Counsel noted in the Denial of Access Complaint that the Complainant reiterated his request on September 24, 2010 and again on September 29, 2010, the evidence indicates that the subject letters represented a continuation of the events originating with the Complainant amending his OPRA request on September 15, 2010. However, regardless whether the Complainant continued to pursue disclosure of the responsive minutes, said minutes were not approved at the time the Complainant amended his OPRA request and are thus considered ACD under OPRA. Moreover, the Custodian was not obligated to provide access to the responsive minutes once the NTHA approved same pursuant to Donato and Blau, supra.

Therefore, the unapproved, draft executive session minutes of the NTHA dated June 28, 2010 constitute ACD material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, supra. Accordingly, the Custodian was not required to provide the responsive minutes upon the NTHA's approval of same on September 21, 2010. Additionally, if the Complainant wanted to receive a copy of the responsive minutes once the NTHA approved same, he was required to submit a new OPRA request pursuant to Donato and Blau, supra.

The GRC further notes that the Complainant stated in his September 24, 2010 letter to the NTHA that although the minutes were not approved, the Board's duty to make same available is not affected. This premise is applicable to OPMA, which requires that minutes "shall be promptly available to the public to the extent that making such matters public ..." N.J.S.A. 10:4-14. However, the GRC has no authority to adjudicate whether a custodian has complied with OPMA. N.J.S.A. 47:1A-7.b. See Donato, supra (holding that whether meeting minutes should have been prepared and maintained in the

Borough's official minute books does not fall under the authority of the GRC and is not governed by OPRA).

The GRC further notes that the Complainant's Counsel contended that the resolution provided to the Complainant on November 30, 2010 could not have been the responsive resolution because it was on a form that the Complainant provided to the NTHA in a letter dated September 24, 2010. However, the GRC has previously determined that it does not have the authority to adjudicate matters involving the authenticity of government records. See Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005)(holding that the GRC "does not oversee the content of documentation" but "does oversee the disclosure and non-disclosure of documents.") Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004)(GRC does not have the authority to adjudicate the validity of a record) and Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC's authority to adjudicate).

Whether the Custodian violated N.J.S.A. 47:1A-5.b. by charging copying costs for records provided via facsimile?

At the time of the Complainant's OPRA request, OPRA provided that "... 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 ..." (Emphasis added.) N.J.S.A. 47:1A-5.b. OPRA further provided that a custodian must charge "[t]he actual cost of duplicating the record ..." to include the "cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy..." *Id.* However, prior to the Complainant's OPRA request, in Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010), the Appellate Division ordered all public agencies to calculate and charge the "actual cost" of providing paper copies.¹⁹

The GRC has previously held that the actual cost of providing records electronically is likely \$0.00. See Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010)("the Custodian's charge of \$7.50 to scan and e-mail records to the Complainant is a violation of N.J.S.A. 47:1A-5.b. because said fee does not reflect the actual cost of providing the copies, which is likely zero ... Thus, the Complainant is not required to pay the Custodian's \$7.50 charge." *Id.* at page 11). Although the Council has determined on multiple occasions that an agency delivering records via e-mail likely incurs no cost, the issue herein is whether the NTHA incurred a cost to send records to the Complainant via facsimile. Thus, on March 12, 2012, the GRC requested that the Custodian legally certify and provide supporting documentation answering the following question: Whether the NTHA incurred an actual cost to provide records to the Complainant via facsimile?

¹⁹ The Legislature subsequently amended OPRA to provide that a public agency may charge \$0.05 per copy for letter size paper and \$0.07 for legal size paper. This amendment took effect on November 9, 2010.
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The Custodian certified on March 14, 2012 that the actual cost the NTHA incurred appeared quite high because the NTHA does not have the advantage of buying in bulk. The Custodian further certified that he could not calculate the number of copies that one toner cartridge could produce. Of the supporting documentation attached, the only bill that appears relevant to the instant matter is the fax toner bill. However, the Custodian has failed to submit competent, credible evidence sufficient to establish that the NTHA incurred a cost to fax records. Specifically, the Custodian certified that he could not provide an estimated number of pages produced per toner cartridge. Moreover, although a fax machine needs toner to print incoming faxes, the Complainant requested that the Custodian fax responsive records to him. Thus, the only likely use for fax machine toner would be the printing of a transmission receipt.

Therefore, because the Custodian failed to bear his burden of proving by the preponderance of the competent, credible evidence that the actual cost of providing records via facsimile is more than \$0.00, the Custodian's proposed charge of \$2.25 for the cost of providing records in this manner is unreasonable and in violation of N.J.S.A. 47:1A-5.b. However, the Council declines to order a recalculation of copying costs because the Custodian provided the responsive invoices and resolution to the Complainant and the Complainant did not pay any of the costs proposed by the Custodian. The GRC further declines to address the Custodian's SOI argument that \$60.00 represented the actual cost to retrieve and fax the responsive records because the Complainant was not actually charged this fee despite the Custodian presenting the argument in the SOI.

Whether the actions of Ms. Davis and the Custodian rise to the level of knowing and willful violations of OPRA and unreasonable denials of access under the totality of the circumstances?

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian

“knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

Although Ms. Davis violated N.J.S.A. 47:1A-5.h. by failing to forward the Complainant’s OPRA request to the Custodian in a timely manner, she did forward same to the Custodian on September 15, 2010. Moreover, the Custodian violated N.J.S.A. 47:1A-5.g. by responding insufficiently to the Complainant’s OPRA request and N.J.S.A. 47:1A-5.e. by failing to respond immediately to the Complainant’s OPRA request for invoices. The Custodian further violated N.J.S.A. 47:1A-5.b. because the cost for providing the responsive records via facsimile was unreasonable under OPRA. However, the Custodian provided access to the responsive resolution and invoices. Further, the responsive minutes were unapproved and thus exempt as ACD material at the time the Complainant amended his OPRA request on September 15, 2010. Additionally, the evidence of record does not indicate that the OPRA violations of both Ms. Davis and the Custodian had positive elements of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the actions of Ms. Davis and the Custodian do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. 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 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), *cert. 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. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) 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)."

The Complainant's Counsel filed this complaint requesting that the GRC order the Custodian to disclose the responsive executive session minutes to the Complainant. Counsel further requested that the GRC determine that the NTHA violated OPRA by assessing a charge to provide records to the Complainant via facsimile and determine that the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in a timely manner.

The evidence of record indicates that the Custodian provided to the Complainant access to three (3) invoices and meeting minutes via facsimile on September 24, 2010. There is no evidence that the Custodian provided the Complainant with a copy of the responsive resolution. Additionally, the Complainant disputed whether the minutes the Custodian provided were responsive. After the filing of the instant complaint, the Custodian forwarded the Complainant the responsive resolution and a set of executive session minutes that appeared to be responsive to the Complainant's amended OPRA request. Although the Custodian was not required to provide the requested minutes because they were still ACD material at the time of the Complainant's amended OPRA request, the Custodian did change his conduct by providing access to the resolution after the filing of this complaint. Therefore, the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Pursuant to Teeters, *supra*, 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, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided the Complainant with a responsive resolution after the filing of the instant complaint. 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, *supra*, and Mason, *supra*. 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 complaint 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 Ms. Davis failed to timely forward the Complainant's August 26, 2010 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, Ms. Davis has violated N.J.S.A. 47:1A-5.h. pursuant to Krywda v. Barnegat Township School District (Ocean), GRC Complaint No. 2008-138 (February 2009).
2. The Custodian's initial verbal response on September 23, 2010 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 he failed to address the Complainant's preferred method of delivery (e-mail or

facsimile). Moreover, the Custodian's September 24, 2010 response is insufficient pursuant N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008) because he failed to individually address each of the Complainant's three (3) request items.

3. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond in writing granting access to same. *See* Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
4. The unapproved, draft executive session minutes of the Neptune Township Housing Authority dated June 28, 2010 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian was not required to provide the responsive minutes upon the NTHA's approval of same on September 21, 2010. Additionally, if the Complainant wanted to receive a copy of the responsive minutes once the NTHA approved same, he was required to submit a new OPRA request pursuant to Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (Interim Order dated February 28, 2007) and Blau v. Union County, GRC Complaint No. 2003-75 (January 2005).
5. Because the Custodian failed to bear his burden of proving by the preponderance of the competent, credible evidence that the actual cost of providing records via facsimile is more than \$0.00, the Custodian's proposed charge of \$2.25 for the cost of providing records in this manner is unreasonable and in violation of N.J.S.A. 47:1A-5.b. However, the Council declines to order a recalculation of copying costs because the Custodian provided the responsive invoices and resolution to the Complainant and the Complainant did not pay any of the costs proposed by the Custodian. The GRC further declines to address the Custodian's Statement of Information argument that \$60.00 represented the actual cost to retrieve and fax the responsive records because the Complainant was not actually charged this fee despite the Custodian presenting the argument in the Statement of Information.
6. Although Ms. Davis violated N.J.S.A. 47:1A-5.h. by failing to forward the Complainant's OPRA request to the Custodian in a timely manner, she did forward same to the Custodian on September 15, 2010. Moreover, the Custodian violated N.J.S.A. 47:1A-5.g. by responding insufficiently to the Complainant's OPRA request and N.J.S.A. 47:1A-5.e. by failing to respond immediately to the Complainant's OPRA request for invoices. The Custodian further violated N.J.S.A. 47:1A-5.b. because the cost for providing the responsive records via facsimile was unreasonable under OPRA. However, the Custodian provided access to the responsive resolution and invoices. Further, the responsive minutes were unapproved and thus exempt as inter-

agency or intra-agency advisory, consultative, or deliberative material material at the time the Complainant amended his OPRA request on September 15, 2010. Additionally, the evidence of record does not indicate that the OPRA violations of both Ms. Davis and the Custodian had positive elements of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the actions of Ms. Davis and the Custodian 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.

7. 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. Specifically, the Custodian provided the Complainant with a responsive resolution after the filing of the instant complaint. 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 complaint 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: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 18, 2012