



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

March 25, 2014 Government Records Council Meeting

Jeff Carter  
Complainant

Complaint No. 2011-262

v.

Franklin Fire District #2 (Somerset)  
Custodian of Record

At the March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 18, 2014 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:

1. Three hundred (\$300) an hour is a reasonable fee for attorneys of Counsel’s experience representing clients before the GRC. Paff v. Bordentown Fire District No. 2 (Burlington), GRC Complaint No. 2012-153 (2013) (The rate of \$300 is reasonable for a[n] [OPRA] practitioner . . . in this geographical area.) Accordingly, the Council finds that Counsel’s hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.
2. The time expended was not reasonable. The Council finds that 13.50 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham, Counsel to the Complainant, for the amount of \$4,050.00, representing 13.50 hours of service at \$300 per hour.**
3. Counsel did not request a lodestar adjustment, no enhancement should be awarded.

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



Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of March, 2014

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: March 27, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Executive Director  
March 25, 2014 Council Meeting**

**Jeff Carter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-262**

**v.  
Franklin Fire District #2 (Somerset)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of all regular and special meeting minutes from January 1, 2011 through April 22, 2011.

**Custodian of Record:** William Kleiber  
**Request Received by Custodian:** April 22, 2011  
**Response Made by Custodian:** April 26, 2011  
**GRC Complaint Received:** August 3, 2011

**Background**

August 27, 2013 Council Meeting:

At its August 27, 2013 public meeting, the Council considered the August 20, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application, although largely conforming with the requirements of N.J.A.C. 1:105-2.13(b), lacks the required detail necessary to conduct a proper analysis. The time log provided by Counsel was overly broad as to time periods and vague as to work performed. There is not sufficient information to determine the nature of, and time spent by Counsel on, different tasks. Therefore, the descriptions of services provided by Counsel failed to fully comply with the requirements of N.J.C.A. 5:105-2.13(b)(5) and are in need of clarification and additional detail such that the Council is able to determine the reasonableness of the hourly rate charged and hours expended. **Accordingly, the Executive Director recommends that the Council does not award fees on this incomplete record, and that the Complainant or his attorney be permitted to submit an amended time log to the Council in support of Counsel's application for fee award within five**

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

<sup>2</sup> Represented by Eric M. Perkins, Esq. (Skillman, NJ).

**(5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5) business days from the date of service of the amended time log in support of application for attorney's fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**

2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

### Procedural History:

On August 29, 2013, the Council distributed its Interim Order to all parties.

On September 6, 2013, the Complainant responded to the Council's Interim Order. The Complainant's Counsel, John A. Birmingham, Jr., Esq. ("Counsel"), filed a supplemental fee certification (Certification of John A. Birmingham, Jr., Esq., September 6, 2013 ("Supplemental Certification")) in support of his amended application ("Amended Application") for fees.

On September 15, 2013, Counsel for the Custodian, Eric M. Perkins, Esq. ("Mr. Perkins") filed an opposition to Counsel's amended fee application ("Opposition") noting that Counsel's fee request increased dramatically. Opposition, pg. 1.

### Analysis

#### Compliance

At its August 27, 2013 meeting, the Council permitted the "Complainant or his attorney . . . to submit an amended time log to the Council in support of Counsel's application for fee award." N.J.A.C. 5:105-2.13(b)(5). On August 29, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Interim Order. Thus, the Complainant's amended fee application was due by close of business on September 6, 2013.

On September 6, 2013 the fifth (5) business day after receipt of the Council's Interim Order, Counsel for the Complainant, in compliance with the Interim Order, filed an Amended Application. On September 16, 2013, the sixth (6) business day after receipt of Counsel's Amended Application, Mr. Perkins filed his Opposition. Although Mr. Perkin's reply was one day late, the Council, in the interest of justice, will consider the Custodian's submission.

#### Counsel's Amended Fee Application

In his Supplemental Certification Counsel certifies that "[t]he preparation of a more detailed time log required a thorough manual review of my case file . . . and result[ing] in more billing entries (than originally submitted)." Counsel certifies that he expended 42 hours in time, not 12.6 hours as set forth in his original fee application. The 42 hours resulted in billings of \$12,600. However, counsel certified that some of the time spent in the instant matter was duplicative of time spent in a companion case, Jeff Carter v. Franklin Fire District #2 (Somerset)

2011-228. As such, Counsel requests a fee of \$8,400 rather than \$12,600. The current request for fees exceeds the original request by \$4,620.00. Counsel also included in his Amended Application for fees the time he expended complying with the Council's August 27, 2013 Interim Order.

#### Custodian's Opposition to Amended Fee Application

Mr. Perkins filed a letter, on behalf of the Custodian, in opposition to the Amended Application of Counsel. Mr. Perkins states that the Board of Commissioners (the "Board") objected to both the original and Amended Applications. Although the Board does not object to Counsel's hourly rate, they do object to what is argued are "extreme amounts of time . . . ascribe[d]" to work performed in connection with the case. Mr. Perkins states that the Custodian is unable to rebut Counsel's fee application via line by line analysis of the timesheets because such a costly undertaking would be borne by the public.

However, Mr. Perkins argues that the within case did not involve difficult or novel issues of law. Mr. Perkins advances that the only issue was the Board's ability to provide the requested records in a timely fashion. Opposition at pg 1. Moreover, Mr. Perkins notes that the Amended Application dramatically increased the fees sought in the case.

#### **Prevailing Party Attorney Fee Award**

"Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't. of Corrections, ("NJDPM") 185 N.J. 137, 152 (2005) (quoting Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted)). However, this principle is not without exception. NJDPM, 185 N.J. at 152. Some statutes, such as OPRA, incorporate a "fee-shifting measure: to ensure 'that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.'" NJDPM, 185 N.J. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989)).

New Jersey public policy, as codified in OPRA, is that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State." NJDPM, 185 N.J. at 153 (citing N.J.S.A. 47:1A-1). 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. *See generally*, NJDPM, 185 N.J. 137. "By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the

Legislature intended to even the fight.” Id. at 153. (quoting, Courier News v. Hunterdon Cty. Prosecutor’s Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006). Further, the Council found a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Accordingly, the Council ruled that the Complainant was a prevailing party entitled to an award of a reasonable attorney’s fee and directed the Complainant to file an application for attorney’s fees.

#### **A. Standards for Fee Award**

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” NJDPM, 185 N.J. at 153. (quoting Rendine v. Pantzer, 141 N.J. 292, 324 (1995) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983))). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. See Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting, Rendine, 141 N.J. at 337). What the fee-shifting statutes do not contemplate is that the losing party has to pay for the learning experience of attorneys for the prevailing party. See, HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing, Council Enter., Inc. v. Atl. City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Once the reasonable number of hours has been ascertained, the court should adjust the lodestar in light of the success of the prevailing party in relation to the relief sought. See Walker, 415 N.J. Super. at 606 (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004)). The loadstar amount may be adjusted, either upward or downward, depending on the degree of success achieved. See NJDPM, 185 N.J. at 153-55. OPRA neither mandates nor prohibits enhancements. Rivera v. Office of the Cnty. Prosecutor, 2012 N.J. Super. Unpub. LEXIS 2752 \*1, \* 10 (Law Div. Dec. 2012) (citing NJDPM, 185 N.J. at 157 (applying Rendine, 141 N.J. 292 (1995) to OPRA)). However, “[b]ecause enhancements are not preordained . . . enhancements should not be made as a matter of course.” NJDPM, 185 N.J. at 157.

“[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting, Hensley, 461 U.S. at 435). Notwithstanding that position, the NJDPM

court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar,” but cautioned that “[o]rdinarily the facts of an OPRA case will not warrant and enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157.

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at \*10-11 (citing Furst, 182 N.J. 1, 21-22 (2004) (applying RPC § 1.5(a))).

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

Rivera, at 11 (citing R.P.C. 1.5(a)). In addition, N.J.A.C. 5:105-2.13(b) sets forth the information which counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by that Code section permits the reviewing tribunal to analyze the reasonableness of the requested fee.

Finally, the Appellate Division has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate the fact that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting Furey v. County of Ocean, 287 N.J. Super. 42, 46 (1996)).

## **B. Evaluation of Fee Application**

### **1. Lodestar Analysis**

#### **a. Hourly Rate**

In the instant matter Counsel is seeking a fee award of \$8,400, representing a net of 28 hours of work at \$300 per hour. Counsel certifies that he billed a total of 42 hours in the case, but some time was duplicative of time billed to a companion case, Carter v. Franklin Fire District #2, GRC Complaint No. 2011-228. Counsel supports this hourly rate through a recitation of his experience and years in practice. Certification of John A. Bermingham, Esq. dated June 24, 2013, at ¶ 7.

The Council finds that \$300 an hour is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. Paff v. Bordentown Fire District No. 2 (Burlington), GRC Complaint No. 2012-153 (2013) (The rate of \$300 is reasonable for a[n] [OPRA] practitioner . . . in this geographical area.) Accordingly, the Council finds that Counsel's hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.

#### **b. Time Expended**

In support of his original request for a fee award Counsel submitted a certification ("Original Certification"). With his Original Certification, Counsel attached a one (1) page chart itemizing Counsel's Hours and Expenses ("Original Time Log"). The Original Time Log contained time entries for the period from April 1, 2012 through May 28, 2013 (the "Fee Period"). Counsel billed a total of 12.6 hours for a fee of \$3,780.00 for services only during the Fee Period. Counsel's description of services included: reviewing the complaint; researching OPRA provisions and other law; drafting, reviewing and filing a letter brief; preparing correspondence and filing other documents with the RCS; exchanging emails with the Complainant and the GRC.

In response to the Council's August 27, 2013 Interim Order, Counsel submitted a supplemental certification ("Supplemental Certification") and amended time log ("Amended Time Log") to the GRC. In his Supplemental Certification Counsel explained that preparing a more detailed time log required him to review his file and resulted in additional billings. Counsel's Amended Time Log reflects a total of 42 hours expended for \$12,600 dollars. However, Counsel apparently made an addition error, as the individual time entries total only 40.40 hours representing \$12,000.

Of those 40.40 hours, the Amended Time Log reflects that 13.80 hours, representing \$4,140.00 in fees, were duplicative of time expended in the companion case GRC 2011-228. Counsel chose to bill all the duplicative time to the companion case. The additional billing entries on the Amended Time Log, after subtracting the time billed in the companion case resulted in a net total of 26.60 hours<sup>3</sup>, or \$7,980.00. Thus, Counsel's fee request rose from \$3,780.00 to \$7,980.00.

In his supplemental application, Counsel billed over five (5) hours of time to the Council's August 27, 2013 Interim Order. The August 27, 2013 Interim Order permitted Counsel to supplement his original fee application in order to comply with RPC 1.5(a), N.J.A.C. 105-2.13(b)(5) and Council's order dated May 28, 2013, which awarded fees. The Council finds that preparation and filing of the Amended Application was necessitated by Counsel's failure to comply with the standards for filing a fee application and to provide the Council with sufficient information to make a determination of a proper award. Accordingly, the GRC finds that the costs associated with Counsel's supplementation of his deficient application must be borne by Counsel.

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<sup>3</sup> Although Counsel's Amended Time Log referenced total billings of 42.00 hours, the actual time was 40.40 hours. Thus, (40.40 total hours - 13.80 hours billed to companion case) = 26.60 net hours. Accordingly, (26.60 hours x 300 dollars /hour) = \$7,980, not the \$8,400 reflected in Counsel's submission.



Further, the Council finds that the time spent on the file exceeds that which an experienced OPRA attorney would require. For example, Counsel includes at least two time entries wherein he billed for reviewing Court Rule 1:4-4. (Research and review RULE 1:04. Form and Execution of Papers including N.J. Court Rule 1:4-4. Supplemental Certification of John A. Bermingham dated September 6, 2013, 5/29/2013 time entry. Counsel spent 1.2 hours or \$360.00 reviewing N.J. Court Rule 1:4-4, the rule which contains the standard certification language required in New Jersey. The Council finds that the Custodian should not be expected to pay for the time a prevailing party spends coming up to speed on an area of law it is unfamiliar with. Planned Parenthood of Cent. N.J., et. al. v. The Attorney Gen. of the State of N.J., et. al., 297 F.3d 253, 271 (App. Div. 2001). Similarly the Council finds that the Custodian should not be borne with the expense of learned and experienced counsel familiarizing himself with often used required New Jersey certification language.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. Although the Council finds that Counsel's fee application conforms with the requirements of N.J.A.C. 1:105-2.13(b), it finds the total time is excessive. Each time entry was reviewed and considered. The time expended by Counsel was evaluated in light of the work performed and the benefit to the Complainant, if any, and to determine whether it was reasonable when considered by the standards set forth in R.P.C. 1.5(a).

The GRC conducted a review of the fee application submitted. The recommendations of the Executive Director following that review are set forth in the following table:

| Date of time entry | Description of Service   | Time Expended (in tenths of an hour) and Amount Billed at \$300/hour |        | Findings from Fee Application Review | Adjusted Entry: Time allowed and total Amount at \$300.00/hour |        |
|--------------------|--|--|--------|--------------------------------------|--|--------|
|                    |  |  |        |                                      |  |        |
| 6/18/2012          | Review of DOA compliant in the matter of <u>Carter v. Franklin Fire District No. 2 (Somerset)</u> , GRC Complaint No. 2011-262 to determine merits of representation. Review various communications file by client with GRC since DOA complaint was filed, along with various communications from Custodian and Custodian's counsel.           | 1.80   | 540.00 |                                      | 1.80   | 540.00 |
| 6/19/2012          | Research the following and statutory provisions of OPRA case law: <u>N.J.S.A. 47:1A-6; 47:1A-5(g). Paff v. Willingboro Board of Education (Burlington)</u> , GRC Complaint No. 2007-272 (May 2008); <u>Teeters v. DYFS</u> , 387 N.J. Super. 423 (App. Div. 2006), <u>Mason v. City of Hoboken and City Clerk of the City of Hoboken</u> , 196 | 2.80   | 840.00 |                                      | 2.80   | 840.00 |

|           |  |      |        |  |      |        |
|-----------|--|------|--------|--|------|--------|
|           | <u>N.J. 51 (2008); Buckhannon Board &amp; Care Home v. West Virginia Department of Health &amp; Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001); Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001); and New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't Corrections, 185 N.J. 137, 143-44 (2005) (NJDPM).</u>  |      |        |  |      |        |
| 6/20/2012 | Email Communication with client regarding Counsel's Letter Brief for GRC 2011-262.   | 0.60 | 180.00 | Email exchange does not warrant a time expenditure of .60 hours.   | 0.60 | 180.00 |
| 6/20/2012 | Review of Counsel's Letter Brief for GRC 2011-262.   | 1.00 | 300.00 | Duplicative of entry, also dated 6/20/2-13, below which bills for preparation of the letter brief. * (See below).  | 0.00 | 0.00   |
| 6/20/2012 | Review of <u>Teeter's v. DYFS, 387 N.J. Super. 423 (App. Div. 2006)</u> for relevancy.   | 0.80 | 240.00 | Review of a single case by experienced counsel does not warrant a time expenditure of .80 hours.   | 0.20 | 60.00  |
| 6/20/2012 | Review of <u>Buckhannon Board &amp; Care Home v. West Virginia Dep't of Health &amp; Human Services, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)</u> for relevancy.  | 0.80 | 240.00 | Review of a single case by experienced counsel does not warrant a time expenditure of .80 hours.   | 0.20 | 60.00  |
| 6/20/2012 | Review of; <u>Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001);</u> and <u>New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't Corrections, 185 N.J. 137, 143-44 (2005) (NJDPM)</u> for "prevailing party" awards and a quick re-review of <u>Buckhannon Board &amp; Care Home v. West Virginia Dep't of Health &amp; Human Services, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001).</u> | 1.60 | 480.00 | Duplicative of prior entries. Cases were previously reviewed. Experienced OPRA counsel would not require an additional 1.6 hours to review the listed cases again.   | 0.00 | 0.00   |
| 6/20/2012 | Prepare letter brief and exhibits arguing that client's DOA Complaint was the catalyst prompting the Custodian's (unlawfully) belated disclosure of the responsive records that the Custodian possessed from the onset of the original OPRA request.   | 2.60 | 780.00 | Preparation of a 3 ¼ (doubled spaced) letter brief does not warrant the time expended, particularly when research was previously completed.<br><br>* Prior entry also dated 6/20/2013 is duplicative of entry. | 0.50 | 150.00 |
| 6/21/2012 | Enter appearance on client's behalf with GRC via email.  | 0.20 | 60.00  |  | 0.20 | 60.00  |
| 6/21/2012 | Filed letter brief and exhibits with GRC, Custodian and Custodian's counsel via email.   | 0.20 | 60.00  |  | 0.20 | 60.00  |

|            |  |      |        |   |      |       |
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|            |  |      |        |   |      |       |
| 10/18/2012 | Email communication client regarding GRC 2011-262.   | 0.40 | 120.00 | Email exchange with client does not warrant the time expended because the entry is duplicative of entry on companion case GRC Complaint 2011-228 on 10/18/2012.   | 0.20 | 60.00 |
| 10/19/2012 | Email communication client regarding GRC 2011-262.   | 0.20 | 60.00  |   | 0.20 | 60.00 |
| 10/20/2012 | Email communication client regarding GRC 2011-262.   | 0.20 | 60.00  |   | 0.20 | 60.00 |
| 10/25/2012 | Review Email communication from GRC indicating that GRC 2011-262 was scheduled for October 30, 2012 meeting. Follow-up email communications with client.   | 0.20 | 60.00  |   | 0.20 | 60.00 |
| 10/25/2012 | Multiple email communications with client regarding GRC 2011-262.  | 0.60 | 180.00 | Duplicative of prior entry.   | 0.20 | 60.00 |
| 10/26/2012 | Multiple email communications with client regarding GRC 2011-262.  | 0.60 | 180.00 | Email exchange with client does not warrant the time expended.  | 0.20 | 60.00 |
| 10/28/2012 | Email communications with client regarding GRC 2011-262.   | 0.20 | 60.00  |   | 0.20 | 60.00 |
| 10/30/2012 | Review email communications from GRC; Review Interim Order for GRC 2011-262.   | 0.40 | 120.00 | Review of email from GRC and Interim Order does not warrant .40 hour expenditure of time  | 0.20 | 60.00 |
| 11/20/2013 | Review email communications from GRC indication that GRC 2011-262 was scheduled for November 27, 2012 meeting. Follow-up email communications with client. | 0.40 | 120.00 | Review of standard scheduling email from GRC and communication of same to client does not warrant .40 hour expenditure of time.   | 0.20 | 60.00 |
| 12/19/2012 | Review email communications from GRC; review Interim Order for GRC 2011-262. Email communications with client regarding request for reconsideration.       | 0.40 | 120.00 | The reconsideration motion in the instant matter did not bring about a change (voluntary or otherwise) in the behavior of the Custodian. Counsel fees are awarded only for services which resulted in the "prevailing party" ruling, <i>i.e.</i> that brought about a change in the behavior of the Custodian. Accordingly, the fee associated work performed in connection with reconsideration in the instant matter will not be awarded. A fee award for review of the | 0.20 | 60.00 |

|            |  |      |   |                  |      |       |
|------------|--|------|---|------------------|------|-------|
|            |  |      |   | IO in warranted. |      |       |
| 12/27/2012 | Research the following case law and following relevant documents for case preparation and request for reconsideration for GRC 2011-228 & 2011-262; <u>Carter v. Franklin Fire District No. 2 (Somerset)</u> , GRC Complaint No. 2012-05 request for reconsideration certification (64 pages, including exhibits); <u>N.J.A.C. 5:105-2.10</u> ; <u>N.J.S.A. 47:1A-5(i)</u> . Begin drafting client certification for request for reconsideration.   | 2.60 | Applicant notes that this was billed under GRC 2001-228 |                  | 0.00 | 0.00  |
| 12/28/2012 | Research the following case law and following relevant documents for case preparation and request for reconsideration for GRC 2011-228 & 2011-262; <u>O'Shea and John Paff v. Borough of Emerson</u> , No. 9008-07, slip op. at 11-12 (2008 WL 2328239) ( <u>N.J. Super. Law Div.</u> , June 3, 2008); <u>N.J.S.A. 41:1a-5(g)</u> ; <u>N.J.A.C. 5:105-2.10</u> ; <u>N.J.S.A. 47:1A-5(i)</u> and <u>Kelley v. Township of Rockaway</u> , GRC Complaint No. 2007-11 (Interim Order October 3, 2007). Work on client's request for reconsideration certification. | 2.00 | Applicant notes that this was billed under GRC 2001-228 |                  | 0.00 | 0.00  |
| 12/28/2012 | Research the following case law and following relevant documents for case preparation and request for reconsideration for GRC 2011-228 & 2011-262; <u>Carroll v. Commissioners of Fire District No. 2 et. al.</u> , Docket No. SOM-L-1274-12; <u>Carter v. Franklin Fire District No. 2 (Somerset)</u> , GRC Complaint No. 2011-259; <u>N.J.A.C. 5:105-2.10</u> ; <u>N.J.S.A. 47:1A-5(g)</u> ; and <u>N.J.S.A. 47:1A-5(i)</u> . Work on client's request for reconsideration certification.  | 2.60 | Applicant notes that this was billed under GRC 2001-228 |                  | 0.00 | 0.00  |
| 1/1/2013   | Email communications with client regarding GRC 2011-262.   | 0.20 | 60.00   |                  | 0.20 | 60.00 |
| 1/2/2013   | Finalize legal research regarding request for reconsideration for GRC 2011-228 & 2011-262. Finalization client's request for reconsideration certification, along with request for reconsideration applications.   | 2.00 | Applicant notes that this was billed under GRC 2001-228 |                  | 0.00 | 0.00  |
| 1/3/2012   | Email communications with client regarding GRC 2011-228 and 2011-262 and client's request for reconsideration certification (30  | 1.00 | Applicant notes that this was billed                    |                  | 0.00 | 0.00  |

|           |   |      |   |   |      |        |
|-----------|---|------|---|---|------|--------|
|           | Pages, including exhibits).   |      | under GRC 2001-228                                      |   |      |        |
| 1/3/2012  | File client's request for reconsideration certification and application for GRC 2011-228 & 2011-262 with GRC, Custodian, and Custodian's counsel via email.   | 0.20 | Applicant notes that this was billed under GRC 2001-228 |   | 0.00 | 0.00   |
| 3/5/2012  | File change of address with GRC via email.  | 0.20 | Applicant notes that this was billed under GRC 2001-228 |   | 0.00 | 0.00   |
| 5/9/2012  | Email communication regarding case status update.   | 0.20 | Applicant notes that this was billed under GRC 2001-228 |   | 0.00 | 0.00   |
| 5/22/2013 | Review email communications from GRC indicating that GRC 2011-262 was scheduled for May 28, 2012 meeting. Follow-up email communications with client.   | 0.60 | Applicant notes that this was billed under GRC 2001-228 |   | 0.00 | 0.00   |
| 5/29/2013 | Review email communication from Brigitte Lillie regarding Legal Certification pursuant to N.J. Court Rule 1:4-4.  | 0.80 | 240.00  | Basic research of Court Rule 1:4-4, certification language required by NJ Court Rules. Review of court rule setting forth the standard certification language governing should not require .80 expenditure of time by experienced counsel.  | 0.40 | 120.00 |
| 5/29/2013 | Research and review RULE 1:04. Form and Execution of Papers including N.J. Court Rule 1:4-4.  | 0.40 | 120.00  | Basic research of Court Rule 1:4-4, certification language required by NJ Court Rules. Review of court rule setting forth the standard certification language governing should not require an additional .40 expenditure of time by experienced counsel; time entry is duplicative of previous entry. | 0.00 | 0.00   |
| 5/29/2013 | Review email communication from GRC; review specific Interim Order for GRC 2011-262. Email communication with client regarding request for reconsideration and Interim Order for GRC 2011-262 implications. | 0.60 | 180.00  | Review of standard scheduling email from GRC, IO and communication of same to client does not warrant .60 hour expenditure of time.   | 0.30 | 90.00  |
| 5/29/2013 | Review email communication from GRC with Custodian's letter requesting stays for GRC 2011-228, 2011-262, and 2011-382. Several  | 0.80 | 240.00  | Applicant notes that this was billed  | 0.00 | 0.00   |

|           |  |      |  |   |      |        |
|-----------|--|------|--|---|------|--------|
|           | email communications with client regarding Custodian's request.  |      | under GRC 2001-228                                       |   |      |        |
| 5/30/2013 | Email communications with client regarding GRC 2011-228 & 2011-262.  | 0.60 | Applicant notes that this was billed under GRC 2001-228  |   | 0.00 | 0.00   |
| 5/31/2013 | Email communications with client regarding GRC 2011-228 & 2011-262.  | 0.60 | Applicant notes that this was billed under GRC 2001-228  |   | 0.00 | 0.00   |
| 6/1/2013  | Email communications with client regarding GRC 2011-228 & 2011-262.  | 0.40 | Applicant notes that this was billed under GRC 2001-228. |   | 0.00 | 0.00   |
| 6/8/2013  | Review draft certification and email with client.  | 0.80 | 240.00   |   | 0.80 | 240.00 |
| 6/8/2013  | Email communication with client regarding draft certification.   | 0.20 | 60.00  | Duplicative of prior entry.   | 0.00 | 0.00   |
| 6/9/2013  | Email communication with client regarding draft certification.   | 0.20 | 60.00  |   | 0.20 | 60.00  |
| 6/10/2013 | Email communication with client regarding FRC procedure change with respect to how reasonable attorney fees awards are handled and how this affects GRC 2011-262 | 0.40 | 120.00   |   | 0.40 | 120.00 |
| 6/10/2013 | Request (10) day extension to comply with GRC's newly implemented procedure in GRC 2011-262.   | 0.20 | 60.00  | The time expended requesting an extension of time is not chargeable to the Custodian.                       | 0.00 | 0.00   |
| 6/10/2013 | Email communication with client regarding withdrawal of Request (10) day extension to comply with GRC's newly implemented procedure in GRC 2011-262.             | 0.20 | 60.00  | The time expended in conjunction with the request for extension of time is not chargeable to the Custodian. | 0.00 | 0.00   |
| 6/10/2013 | Email communication to GRC regarding withdrawal of Request (10) day extension to comply with GRC's newly implemented procedure in GRC 2011-262.                  | 0.20 | 60.00  | The time expended in conjunction with the request for extension of time is not chargeable to the Custodian. | 0.00 | 0.00   |
| 6/22/2013 | Email communication with client regarding Certification for 2011-262.  | 0.40 | 120.00   | The time expended for email communication with client is excessive.   | 0.20 | 60.00  |
| 6/24/2013 | File certified application with GRC via email for an award of reasonable attorney's fees for GRC 2011-262; copy Custodian and Custodian's counsel.               | 0.20 | 60.00  |   | 0.20 | 60.00  |
| 8/20/2013 | Review email communication form GRC indicating that GRC 2011-228   | 0.40 | 120.00   | Review of standard scheduling email from GRC  | 0.20 | 60.00  |

|                    |   |       |   |   |       |            |
|--------------------|---|-------|---|---|-------|------------|
|                    | & 2011-262 were scheduled for August 27, 2013 meeting. Follow-up email communications with client.  |       |   | and communication of same to client does not warrant .40 hour expenditure of time.  |       |            |
| 8/29/2013          | Review email communication from GRC; review specific Final Decision for 2011-262. Email communication with client regarding request for more detailed time log.                               | 0.40  | 120.00  | Applicant's original fee application did not fully comply with requirements of <u>N.J.A.C. 5:105-2.13(b)</u> and <u>RPC 1.2.</u> , and thus failed to comply with the Council's May 28, 2013 IO. The Council in its August 27, 2013 IO provided applicant with opportunity to amend his submission to fully comply with its previous IO. The costs associated with the applicant's re-submission should be borne the Applicant. | 0.00  | 0.00       |
| 8/30/2013          | Review Rule of Professional Conduct 1.5(a) regarding detailed (sic) of counsel's time log specifically for GRC 2011-262.  | 0.60  | 180.00  | See explanation set forth above for 8/29/2013 entry.  | 0.00  | 0.00       |
| 8/31/2013          | Manually review entire case file for GRC 2011-262 to identify all specific entries to compile more detailed entries in compliance with the GRC's August 27, 2013 Final Decision.              | 2.40  | 720.00  | See explanation set forth above for 8/29/2013 entry.  | 0.00  | 0.00       |
| 9/4/2013           | Prepare revised certification for amended time log to comply with the GRC's August 27, 2013 Final Decision for GRC 2011-262.  | 1.80  | 540.00  | See explanation set forth above for 8/29/2013 entry.  | 0.00  | 0.00       |
| 9/6/2013           | File revised certified amended time log with GRC (via email) in compliance with the GRC's August 27, 2013 Final Decision for GRC 2011-228 & 2011-262; copy Custodian and Custodian's counsel. | 0.20  | Applicant notes that this was billed under GRC 2001-228 |   | 0.00  | 0.00       |
| Totals:            |   | 40.40 |   |   |       |            |
| Net amount billed: | Total hours minus hours billed solely to 2011-228. (40.40 hrs- 13.80 ) = 26.60 hours.   | 26.60 | \$7,980.00  |   | 13.50 | \$4,050.00 |

For the reasons set forth within the Council finds that the time expended was not reasonable. The Council finds that 13.50 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham, Counsel to the Complainant, for the amount of \$4,050.00, representing 13.50 hours of service at \$300 per hour.**

## 2. Enhancement Analysis

Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Three hundred (\$300) an hour is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. Paff v. Bordentown Fire District No. 2 (Burlington), GRC Complaint No. 2012-153 (2013) (The rate of \$300 is reasonable for a[n] [OPRA] practitioner . . . in this geographical area.) Accordingly, the Council finds that Counsel's hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.
2. The time expended was not reasonable. The Council finds that 13.50 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham, Counsel to the Complainant, for the amount of \$4,050.00, representing 13.50 hours of service at \$300 per hour.**
3. Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Prepared and Approved By: Dawn R. SanFilippo  
Senior Counsel

March 18, 2014





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

August 27, 2013 Government Records Council Meeting

Jeff Carter  
Complainant

Complaint No. 2011-262

v.

Franklin Fire District #2  
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council (“Council”) considered the August 20, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel’s fee application, although largely conforming with the requirements of N.J.A.C. 1:105-2.13(b), lacks the required detail necessary to conduct a proper analysis. The time log provided by Counsel was overly broad as to time periods and vague as to work performed. There is not sufficient information to determine the nature of, and time spent by Counsel on, different tasks. Therefore, the descriptions of services provided by Counsel failed to fully comply with the requirements of N.J.C.A. 5:105-2.13(b)(5) and are in need of clarification and additional detail such that the Council is able to determine the reasonableness of the hourly rate charged and hours expended. **Accordingly, the Executive Director recommends that the Council does not award fees on this incomplete record, and that the Complainant or his attorney be permitted to submit an amended time log to the Council in support of Counsel’s application for fee award within five (5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5) business days from the date of service of the amended time log in support of application for attorney’s fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**
2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.



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 27th Day of August, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: August 29, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
August 27, 2013 Council Meeting**

**Jeff Carter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-262**

**v.**

**Franklin Fire District #2<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of all regular and special meeting minutes from January 1, 2011 through April 22, 2011.

**Custodian of Record:** William Kleiber  
**Request Received by Custodian:** April 22, 2011  
**Response Made by Custodian:** April 26, 2011  
**GRC Complaint Received:** August 3, 2011

**Background**

May 28, 2013 Council Meeting:

At its May 28, 2013 public meeting, the Council considered the May 21, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Complainant has failed to establish in his request for reconsideration of the Council's December 18, 2012 Interim Order that: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence, and has failed to show that the Council acted arbitrarily, capriciously or unreasonably. Further, the Complainant failed to present any evidence which was not available at the time of the Council's adjudication which would change the substance of the Council's decision. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City.

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

<sup>2</sup> Represented by Eric M. Perkins, Esq. (Skillman, NJ).

County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. The Council's December 18, 2012 conclusion No. 3 should be amended as follows:

“Therefore, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, Ms. Accardi provided to the Complainant two (2) sets of meeting minutes responsive to the Complainant’s OPRA request after the filing of this 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, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney’s fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).”**

#### Procedural History:

On May 29, 2013, the Council distributed its May 28, 2013 Interim Order (“Interim Order”) to all parties.

#### Compliance:

On June 24, 2013, eighteen (18) business days from the effective date of the Interim Order, John A. Bermingham, Esq., Counsel for the Complainant, (“Counsel”) filed his fee application in accordance with N.J.A.C. 5:105-2.13(b)<sup>3</sup>. The fee application and Certification of Services (“Certification”) of counsel set forth the following:

- (1) The complaint name and number: Carter v. Franklin Fire District #2, 2011-262.
- (2) Counsel’s law firm affiliation: Law Offices of John A. Bermingham, Jr., LLC.
- (3) A statement of client representation: Counsel certified to his services, including researching OPRA laws; reviewing the previously filed complaint; drafting,

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<sup>3</sup> N.J.A.C. 5:105-2.13(b) sets forth the requirements of a fee application, providing in relevant part: (b) . . . [t]he [fee] application must include a certification from the attorney(s) representing the complainant that includes: 1. The Council's complaint reference name and number; 2. Law firm affiliation; 3. A statement of client representation; 4. The hourly rates of all attorneys and support staff involved in the complaint; 5. Copies of weekly time sheets for each professional involved in the complaint, which includes detailed descriptions of all activities attributable to the project in 0.1 hour (six-minute) increments; 6. Evidence that the rates charged are in accordance with prevailing market rates in the relevant community. Such evidence shall include: (i) Years of related or similar experience; (ii) Skill level; and (iii) Reputation; and 7. A detailed listing of any expense reimbursements with supporting documentation for such costs.

- reviewing and submitting a letter brief, preparing correspondence and the filing of “various documents;” and exchanging of e-mails with the complainant and the GRC.
- (4) The hourly rate of all attorneys and support staff involved in the complaint: Mr. Bermingham, the sole professional who worked on the file, certified that he charges \$300/ hour.
  - (5) Copies of weekly time sheets for each professional involved in the complaint: Counsel supplied a copy of a time log, from April 1, 2012 through May 28, 2013 (the “Fee Period”). During Fee Period counsel billed a total of 12.6 hours for a total fee of \$3,780.00.
  - (6) Evidence that the rates charged are in accordance with prevailing rates in the relevant community, including years of experience, skill level and reputation: Counsel certified to ten (10) years of teaching and legal experience, but limited experience with respect to OPRA.
  - (7) Detailed documentation of expenses: Counsel is not seeking reimbursements for expenses.

Accordingly, Complainant’s Counsel filed a timely fee application with the Government Records Council (“GRC”).

### **Analysis**

In its May 28, 2013 Interim Order, the Council found the Complainant was a prevailing party and thus was entitled to submit an application for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). Counsel for Complainant filed and served<sup>4</sup> his Certification of Services, seeking a fee award of \$3,780.00, within twenty (20) business days provided for pursuant to the Court’s Interim Order.

Council’s Interim Order further provided that the Custodian was afforded ten (10) business days, from the date of service of the application for attorney’s fees, to object to Counsel’s fee request. N.J.A.C. 5:105-2.13(d). The Custodian did not submit an objection to Complainant’s application for fees.

### **Prevailing Party Attorney Fee Award**

“Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney’s fee from the loser.” New Jerseyans for a Death Penalty Moratorium v. New Jersey Dept. of Corrections, (“NJMDP”) 185 N.J. 137, 152 (2005) (quoting, Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted)). However, this principle is not without exception. NJDPM, 185 N.J. at 152. Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with

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<sup>4</sup> N.J.A.C. 5:105-2.13(c) provides in relevant part: “(c) The complainant, or his or her attorney, must serve all parties with the application for attorney’s fees and all attachments thereto.”

bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.” NJDPM, 185 N.J. at 153 (quoting, Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

New Jersey public policy, as codified in OPRA, is that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” NJDPM, 185 N.J. at 153 (citing, N.J.S.A. 47:1A-1). 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. See generally, NJDPM, 185 N.J. 137. “By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” Id. at 153. (quoting, Courier News v. Hunterdon Cty. Prosec. Off., 378 N.J. Super. 539, 546 (App. Div.2005)).

In the instant matter, the Council found the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. at 432. Further, the Council found a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 73. Accordingly, the Council ruled that the Complainant was a prevailing party entitled to an award of a reasonable attorney’s fee and was directed to file an application for attorney’s fees.

#### **A. Standards for Fee Award**

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” NJDPM, 185 N.J. at 153. (quoting, Rendine, 141 N.J. at 324 (quoting, Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting, Rendine, 141 N.J. at 337). What the fee-shifting statutes do not contemplate is that the losing party has to pay for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing, Council Enter., Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Once the reasonable number of hours has been ascertained, the court should adjust the lodestar in light of the success of the prevailing party in relation to the relief sought. Walker,

415 N.J. Super. at 606 (citing, Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004)). The lodestar amount may be adjusted, either upward or downward, depending on the degree of success achieved. See NJDPM, 185 N.J. at 153-55. OPRA neither mandates nor prohibits enhancements. Rivera v. Office of the Cty. Prosec., 2012 N.J. Super. Unpub. LEXIS 2752 \*1, \* 10 (Law Div. Dec. 2012) (citing, NJDPM, 185 N.J. at 157 (applying, Rendine, 141 N.J. 292 (1995) to OPRA)). However, “[b]ecause enhancements are not preordained . . . enhancements should not be made as a matter of course.” NJDPM, 185 N.J. at 157.

“[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting, Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting, Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success. . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting, Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting, Hensley, 461 U.S. at 435). Notwithstanding that position, the NJDPM court cautioned that “unusual circumstances may occasionally justify and upward adjustment of the lodestar,” but cautioned that “[o]rdinarily[] the facts of an OPRA case will not warrant and enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157.

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at \*10-11 (citing, Furst, 182 N.J. 1, 21-22 (2004) (applying RPC § 1.5(a))).

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

Rivera, at 11 (citing, R.P.C. 1.5(a)). In addition, N.J.A.C. 5:105-2.13(b) sets forth the information which counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by that Code section permits the reviewing tribunal to analyze the reasonableness of the requested fee.

Finally, the appellate court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate the fact that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are

available for such purposes.” HIP, 291 N.J. Super. at 167 (quoting, Furey v. County of Ocean, 287 N.J. Super. 42, 46 (1996)).

## **B. Evaluation of Fee Application**

### **1. Lodestar Analysis**

#### **a. Hourly Rate**

In the instant matter Counsel is seeking a fee award of \$3,780.00, representing 12.6 hours at \$300 per hour. In support of this hourly rate, Counsel submits legal precedent of the rates of attorneys that were ruled as reasonable. The Custodian does not challenge Counsel’s fee application.

With respect to Counsel’s request for a \$300 hourly rate, Counsel cites awards of \$325 to \$350 in OPRA cases of New Jersey attorneys who Counsel certifies “frequently litigate OPRA cases.” Certification of John A. Bermingham, Jr., Esq., dated June 24, 2013, (hereinafter, “Bermingham Certif.”) at ¶ 7. However, Counsel candidly states that the work required a “familiarity with the law regarding OPRA” and that his previous experience with OPRA was “limited.” Bermingham Certif. at ¶ 2 subsection 1(c). The rate of \$300 is reasonable for a practitioner with experience and skill level in this geographical area. However, for the reasons set forth below, the Council is unable to make a determination if \$300 is reasonable for this practitioner.

#### **b. Time Expended**

In support of his request for fees, Counsel submitted a log of his time. On April 1, 2012, Counsel billed 3.0 hours for “[r]eview the DOA Complaint filed by the Complainant.” The actual complaint in this matter is approximately eight (8) pages long, although there are voluminous exhibits appended. The Complainant stated in GRC Complaint No. 2011-262 that some of the exhibits are responsive to the within complaint, but others were “not responsive to this [2011-262] complaint.” It is unclear from the time log if Counsel’s “review of the complaint” consisted of reviewing exhibits which were relevant to the within complaint or which were either irrelevant, or relevant to another complaint.<sup>5</sup>

For the year period from “4/1/2012 to 5/28/2013,” Counsel billed 3.0 hours for “[r]esearch [of] various OPRA provisions and laws.”<sup>6</sup> The time entry is a generalized service

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<sup>5</sup> Attached as Exhibit C to GRC Complaint No. 2011-262 are approximately 14 pages of records which the Complaint states were responsive to the document request that is the subject of GRC Complaint No. 2011-228. Counsel currently has a fee application pending before the GRC for services performed in connection with GRC Complaint 2011-228. Due to the lack of detail in the respective fee applications it is unclear if some of the work performed on the two cases may have been redundant. Hours are not reasonably expended if they were excessive, redundant, or otherwise unnecessary. See, Hensley, 461 U.S. at 434.

<sup>6</sup> Counsel currently has three fee applications pending before this Council: Robert A. Verry v. Borough of South Bound Brook (GRC Complaint No. 2012-153), Jeff Carter v. Franklin Fire District #2 (GRC Complaint No. 2011-228) and Jeff Carter v. Franklin Fire District #2 (GRC Complaint No. 2011-262). All three applications contain an identical time entry of three (3) or four (4) hours for: “Research various OPRA provisions and laws.” It is unclear whether this time was repetitive or shared between the files.



description spanning a long period of time and fails to detail the work performed in tenths of an hour, as the regulations require. N.J.A.C. 5:105-2.13.<sup>7</sup> “An attorney’s application should be sufficiently detailed to allow a trial court to determine the nature of the work performed and by whom, as well as the reasonableness of the hourly rate and the hours expended.” Furst, 182 N.J. 1, 25 (2005) (citing, Rendine, 141 N.J. at 317). It is unclear from the submission if Counsel was researching legal issues specific to the instant matter, or if he was researching OPRA in general in order to become familiar with the statute. Although general research into an area new to an advocate may be necessary for proper representation of his or her client, the client cannot be charged for an attorney mastering the learning curve. See, HIP, 291 N.J. Super. at 144. This is especially true where the attorney is charging an hourly rate commensurate with colleagues who have skill and expertise in the law.

For the period from “6/15/2012-6/20/2012” Counsel billed 2.6 hours to “draft, review and submit Letter Brief.” This submission was filed on or about June 21, 2012, prior to the Council’s October 30, 2012 Order which found that the Complainant was a “prevailing party.” The time entry for drafting the brief does not strictly comply with the mandates of N.J.A.C. 105-2.13(b). Specifically, Counsel fails to provide time-sheets which provide specific descriptions, in tenths of an hour, of the exact work performed and when. N.J.A.C. 105-2.13(b)(5). However, Counsel’s informal letter brief, filed on June 20, 2012, presents both factual and legal arguments supporting the Council’s finding that Complainant was a “prevailing party.” The letter brief sets forth well settled law and does not argue any issues which are new, unique or of great public interest. The Council finds that based upon the record before it, a partial award of approximately 1.5 hours would be warranted at an hourly rate commensurate with Counsel’s experience.

Counsel’s entry for 2.0 hours, which spans an entire year, denotes “[p]repare correspondence and file various documents with the GRC.” The entry fails to provide specific dates or descriptions of any correspondence or documents to aid the Council in its analysis. Despite this broad description, the GRC case file contains only one filing, other than the letter brief addressed above, of significance: a motion for reconsideration and a certification of the Complainant dated January 2, 2013<sup>8</sup>. However, this filing was made after the Council’s October 30, 2012 Order finding the Complainant to be a “prevailing party,” and thus did not contribute to the Council’s finding of “prevailing party.” No fees can be awarded in connection with the filing of the motion for reconsideration because the work did not bring about a change (voluntary or otherwise) in the Custodian’s conduct. Teeters, 387 N.J. Super. at 432.

Another entry, for 2.0 hours, was attributed to “[e]xchange [of] several e-mails with Complainant and GRC.” Since specific dates of service were not provided, the Council is unable to determine if the “various e-mails” were sent prior to or after the Council’s October 30, 2012 decision. Therefore, as it is billed, no fee can be awarded in connection with this entry. Similarly, the entry for “[r]esearch [of] various OPRA provisions and law,” dated “6/1/2012-5/28/2013,”

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<sup>7</sup> N.J.A.C. 5:105-2.13 requires the provision of: Copies of weekly time sheets for each professional involved in the complaint, which includes detailed descriptions of all activities attributable to the project in 0.1 hour (six-minute increments).

<sup>8</sup> The Certification of Jeff Carter is identical to the Certification filed in support of the Complainant’s motion for reconsideration in case number 2011-288: “GRC Complaint Nos. 2011-228 and 2011-262” (emphasis added). The Council will not address the questions of whether Counsel split his billing for this certification between the two cases as for reasons set forth above they decline to award a fee on this filing. However, the Council notes that the time-log is devoid of any indication that time was split between two cases for the preparation of this Certification.

does not provide specificity as to either date or subject matter researched and thus the reasonableness cannot be determined.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application, although largely conforming with the requirements of N.J.A.C. 1:105-2.13(b), lacks the required detail necessary to conduct a proper analysis. The time log provided by Counsel was overly broad as to time periods and vague as to work performed. There is not sufficient information to determine the nature of, and time spent by Counsel on, different tasks. Therefore, the descriptions of services provided by Counsel failed to fully comply with the requirements of N.J.C.A. 5:105-2.13(b)(5) and are in need of clarification and additional detail such that the Council is able to determine the reasonableness of the hourly rate charged and hours expended. **Accordingly, the Executive Director recommends that the Council does not award fees on this incomplete record, and that the Complainant or his attorney be permitted to submit an amended time log to the Council in support of Counsel's application for fee award within five (5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5) business days from the date of service of the amended time log in support of application for attorney's fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**

## 2. Enhancement Analysis

Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application, although largely conforming with the requirements of N.J.A.C. 1:105-2.13(b), lacks the required detail necessary to conduct a proper analysis. The time log provided by Counsel was overly broad as to time periods and vague as to work performed. There is not sufficient information to determine the nature of, and time spent by Counsel on, different tasks. Therefore, the descriptions of services provided by Counsel failed to fully comply with the requirements of N.J.C.A. 5:105-2.13(b)(5) and are in need of clarification and additional detail such that the Council is able to determine the reasonableness of the hourly rate charged and hours expended. **Accordingly, the Executive Director recommends that the Council does not award fees on this incomplete record, and that the Complainant or his attorney be permitted to submit an amended time log to the Council in support of Counsel's application for fee award within five (5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5) business**

**days from the date of service of the amended time log in support of application for attorney's fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**

2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Prepared By: Dawn R. SanFilippo, Esq.  
Senior Counsel

Approved By: Brandon D. Minde, Esq.  
Executive Director

August 20, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

May 28, 2013 Government Records Council Meeting

Jeff Carter  
Complainant  
v.

Complaint No. 2011-262

Franklin Fire District No. 2 (Somerset)  
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Complainant has failed to establish in his request for reconsideration of the Council’s December 18, 2012 Interim Order that: 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence, and has failed to show that the Council acted arbitrarily, capriciously or unreasonably. Further, the Complainant failed to present any evidence which was not available at the time of the Council’s adjudication which would change the substance of the Council’s decision. Thus, the Complainant’s request for reconsideration be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council’s December 18, 2012 conclusion No. 3 should be amended as follows:

“Therefore, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, Ms. Accardi provided to the Complainant two (2) sets of meeting minutes responsive to the Complainant’s OPRA request after the filing of this 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. 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. *See N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d)."*

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of May, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 29, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**May 28, 2013 Council Meeting**

**Jeff Carter**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2011-262**

v.

**Franklin Fire District No. 2 (Somerset)**<sup>2</sup>  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of all regular and special meeting minutes from January 1, 2011 through April 22, 2011.

**Request Made:** April 22, 2011

**Response Made:** April 26, 2011

**GRC Complaint Filed:** August 3, 2011<sup>3</sup>

**Background**

**December 18, 2012 Council Meeting:**

At its December 18, 2012 public meeting, the Council considered the October 23, 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. The Custodian's failure to produce minutes for the Franklin Fire District No. 2 March 16, 2011 and April 20, 2011 meetings results in a denial of access to the responsive records. *See Quirk v. Nutley Board of Education (Essex)*, GRC Complaint No. 2007-187 (October 2007). Moreover, the Custodian unlawfully denied access to said records. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure because the Complainant was provided with the outstanding records.
2. The Custodian unlawfully denied access to the March 16, 2011 and April 20, 2011 meeting minutes by failing to provide same at the time of the response to said OPRA request; however, Ms. Accardi responded on behalf of the Custodian in a timely manner and the additional minutes were eventually provided to the Complainant.

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA). Mr. Bermingham entered a notice of appearance before the GRC on June 21, 2012.

<sup>2</sup> William Kleiber, Custodian of Records. Represented by Eric M. Perkins, Esq. (Skillman, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

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

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, Ms. Accardi provided to the Complainant two (2) sets of meeting minutes responsive to the Complainant's OPRA request after the filing of this 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.

#### Procedural History:

On December 19, 2012, the Council distributed its Interim Order to all parties.

#### Complainant's Reconsideration:

On January 3, 2013, the Complainant requests that the Council reconsider its December 18, 2012 Interim Order based on a mistake, new evidence<sup>4</sup> and extraordinary circumstances.

The Complainant contends that the GRC arbitrarily and capriciously held that the Custodian did not knowingly and willfully violate OPRA under the totality of the circumstances.<sup>5</sup> The Complainant argues that the GRC created a paradox by determining that the Custodian unlawfully denied access but that his actions "... do not rise to the level of a knowing

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<sup>4</sup> New evidence is that which could not have been provided prior to the Council's decision because it did not exist at the time.

<sup>5</sup> The Complainant requests that the GRC take judicial notice of his request for reconsideration in GRC Complaint No. 2012-05, in which the Custodian also failed to respond but was not found to have knowingly and willfully violated OPRA. There, the GRC determined that the Complainant's request was overly broad and thus invalid.

and willful violation of OPRA and *unreasonable* denial of access under the totality of the circumstances.” (Emphasis added.) The Complainant contends that it is not possible for a “deemed” denial and an unreasonable denial of access to exist in the same complaint.<sup>6</sup> The Complainant contends these statements have no basis in fact or evidence because they contradict each other. The Complainant contends that certain situations could result in a holding that a denial of access may not have been reasonable. The Complainant contends that the evidence of record shows that the Custodian failed to provide readily available minutes until 140 days after the filing of this OPRA request.

The Complainant contends that compelling evidence as to why the Custodian denied access to the responsive meeting minutes is because the FFD was found to have violated the Open Public Meetings Act (“OPMA”) on November 15, 2012 for failing to create work session minutes. Carroll v. Fire District No. 2 of Franklin Township, Docket No. SOM-L-1274-12 (November 15, 2012). The Complainant argues that the Custodian’s Counsel noted in his September 8, 2011 letter to the GRC that minutes for three (3) workshop meetings did not exist. The Complainant contends that the GRC must, consistent with the Law Division decision and in fundamental fairness, order the Custodian to disclose those meeting minutes not previously created<sup>7</sup> at the time of his OPRA request along with audio recordings of those meetings.<sup>8</sup>

### Analysis

#### Reconsideration

Parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. *N.J.A.C.* 5:105-2.10. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C.* 5:105-2.10(a) – (e).

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D’Atria v. D’Atria, 242 *N.J. Super.* 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 *N.J. Super.* 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D’Atria, *supra*, 242 *N.J. Super.* at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable

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<sup>6</sup> The Complainant notes that he is advancing similar arguments in his request for reconsideration filed in GRC Complaint No. 2011-228.

<sup>7</sup> The GRC has no authority to order a custodian to create and provide minutes pursuant to the OPMA. N.J.S.A. 47:1A-7(b).

<sup>8</sup> The Complainant’s OPRA request did not seek audio recordings; therefore, these records are not at issue herein.



whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

On January 3, 2013, the Complainant filed the request for reconsideration of the Council’s December 18, 2012 Final Decision, nine (9) business days after the issuance of the Council’s Order.

The Complainant argued that the Council created a paradox in finding that the Custodian unlawfully denied access to the responsive Notice but did not unreasonably deny access under the totality of the circumstances. The Complainant argued that the Law Division’s Order in Carroll v. Fire District No. 2 of Franklin Township, Docket No. SOM-L-1274-12 (November 15, 2012) provides sufficient impetus for the Custodian’s failure to respond to the Complainant’s OPRA request.

The Council should reject the Complainant’s request for reconsideration. The Complainant’s request for reconsideration merely expresses dissatisfaction with the Council’s Decision and provides no new supporting evidence not previously contemplated by the Council to prove that the Council made a mistake or that extraordinary circumstances existed that would warrant a reversal of the Council’s holding. Additionally, the Complainant cites to Carroll as a reason why the Custodian knowingly and willfully violated OPRA; however, the case dealt with the FFD’s failure to create minutes that incidentally the Custodian’s Counsel noted did not exist in his September 8, 2011 letter to the GRC. The Council’s holding contemplated all evidence contained in the record as indicated in its December 18, 2012 Interim Order conclusion No. 2.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: 1) that the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, *supra*. The Complainant failed to do so. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably in determining that the Custodian did not knowingly and willfully violate OPRA. See D’Atria, *supra*. Further, the Complainant failed to present any evidence which was not available at the time of the Council’s adjudication which would change the substance of the Council’s decision. Thus, the Complainant’s request for reconsideration should be denied. Cummings, *supra*; D’Atria, *supra*; Comcast, *supra*.

### **Prevailing Party Attorney’s Fees:**

The Council’s December 18, 2012 Interim Order held that this complaint should be referred to the Office of Administrative Law “for the determination of reasonable prevailing party attorney’s fees” remain unchanged. However, the Council should amend conclusion No. 3 to reflect that the Council will be determining the reasonable attorney’s fees instead of referring

same to the Office of Administrative Law. Thus, the Council's December 18, 2012 conclusion No. 3 should be amended as follows:

“Therefore, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, *supra*, at 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, *supra*. Specifically, Ms. Accardi provided to the Complainant two (2) sets of meeting minutes responsive to the Complainant’s OPRA request after the filing of this 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*. 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. *See* N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney’s fees to object to the attorney’s fees requested. N.J.A.C. 5:105-2.13(d).**”

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Complainant has failed to establish in his request for reconsideration of the Council’s December 18, 2012 Interim Order that: 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence, and has failed to show that the Council acted arbitrarily, capriciously or unreasonably. Further, the Complainant failed to present any evidence which was not available at the time of the Council’s adjudication which would change the substance of the Council’s decision. Thus, the Complainant’s request for reconsideration be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. The Council’s December 18, 2012 conclusion No. 3 should be amended as follows:

“Therefore, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a

Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, Ms. Accardi provided to the Complainant two (2) sets of meeting minutes responsive to the Complainant's OPRA request after the filing of this 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. 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. *See N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).*"

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Brandon D. Minde, Esq.  
Executive Director

May 21, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

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Commissioner

INTERIM ORDER

December 18, 2012 Government Records Council Meeting

Jeff Carter  
Complainant

Complaint No. 2011-262

v.

Franklin Fire District No. 2 (Somerset)  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 23, 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. The Custodian failure to produce minutes for the Franklin Fire District No. 2 March 16, 2011 and April 20, 2011 meetings results in a denial of access to the responsive records. *See Quirk v. Nutley Board of Education (Essex)*, GRC Complaint No. 2007-187 (October 2007). Moreover, the Custodian unlawfully denied access to said records. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure because the Complainant was provided with the outstanding records.
2. The Custodian unlawfully denied access to the March 16, 2011 and April 20, 2011 meeting minutes by failing to provide same at the time of the response to said OPRA request; however, Ms. Accardi responded on behalf of the Custodian in a timely manner and the additional minutes were eventually provided to the Complainant. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s unlawful denial of access does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, Ms. Accardi provided to the Complainant two (2) sets of meeting minutes responsive to the Complainant’s OPRA request after the filing of this 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.

Interim Order Rendered by the  
Government Records Council  
On The 18<sup>th</sup> 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**

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

**Jeff Carter<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2011-262**

v.

**Franklin Fire District No. 2 (Somerset)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of all regular and special meeting minutes from January 1, 2011 through April 22, 2011.

**Request Made:** April 22, 2011

**Response Made:** April 26, 2011

**Custodian:** William Kleiber

**GRC Complaint Filed:** August 3, 2011<sup>3</sup>

**Background**

**April 22, 2011**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that the preferred method of delivery is e-mail or facsimile if the records are not available electronically.

**April 26, 2011**

Custodian's response to the OPRA request. On behalf of the Custodian, Ms. Sandi Accardi ("Ms. Accardi"), Franklin Fire District ("FFD") Secretary, responds in writing via e-mail to the Complainant's OPRA request on the second (2<sup>nd</sup>) business day following receipt of such request. The Custodian states that attached are the responsive minutes.

**August 3, 2011**

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:<sup>4</sup>

- Complainant's OPRA request dated April 22, 2011.

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Camden, NJ). Mr. Bermingham entered a notice of appearance before the GRC on June 21, 2012.

<sup>2</sup> Represented by Eric M. Perkins, Esq. (Skillman, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The Complainant attached additional records that are not relevant to the instant complaint.

- E-mails from Ms. Accardi to the Complainant dated April 26, 2011 (with attachments).
- Records responsive to the Complainant’s OPRA request:
  - Regular meeting minutes dated January 12, 2011.
  - Regular meeting minutes dated January 19, 2011.
  - Regular meeting minutes dated January 27, 2011.
  - Regular meeting minutes dated February 16, 2011.
  - Regular meeting minutes dated March 2, 2011.
- E-mail from the Ms. Accardi to the Complainant dated July 22, 2011 (with attachments).

The Complainant states that he submitted an OPRA request to the FFD on April 22, 2011 via e-mail and facsimile. The Complainant states that on April 26, 2011, Ms. Accardi e-mailed<sup>5</sup> him meeting minutes for the following dates:

- January 12, 2011
- January 19, 2011
- January 27, 2011
- February 16, 2011
- March 2, 2011

The Complainant states that on July 22, 2011, Ms. Accardi sent him “Adequate Notice” (“Notice”) of all public meetings for 2011 in response to an unrelated OPRA request.<sup>6</sup> The Complainant states that upon reviewing the Notice, he discovered that the FFD held public meetings on the following dates:

- April 5, 2011
- April 7, 2011
- April 13, 2011
- April 20, 2011

The Complainant states that notwithstanding Ms. Accardi’s April 26, 2011 response, the Complainant never received copies of minutes for these dates. The Complainant further states that submissions related to other complaints before the GRC,<sup>7</sup> the Custodian’s Counsel noted that the FFD formally adopted an agreement with Network Blade on March 16, 2011 thus confirming that the FFD held a public meeting on said date. The Complainant states that he never received minutes for this meeting either.

The Complainant contends that this request is one of several OPRA requests which the Custodian has failed to adhere to the requirements of OPRA. The Complainant contends that the facts indicate that the Custodian has created a pattern of knowingly and

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<sup>5</sup> The Complainant notes that Ms. Accardi sent 23 e-mails with various records responsive to this request and other requests not relevant to the instant complaint.

<sup>6</sup> This OPRA request is the subject of Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint No. 2011-228 (Interim Order dated September 25, 2012).

<sup>7</sup> Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint Nos. 2011-140, 2011-141 and 2011-142.

willfully mishandling the Complainant's OPRA requests. The Complainant thus requests the following:

1. A determination that the Custodian has violated OPRA by failing to respond within the statutorily mandated time frame.<sup>8</sup>
2. A determination ordering disclosure of all responsive records.
3. A determination that the Custodian knowingly and willfully violated OPRA.

The Complainant does not agree to mediate this complaint.

### **August 16, 2011**

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

### **September 2, 2011**

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on August 16, 2011 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

### **September 8, 2011**

Letter from the Custodian's Counsel to the GRC. Counsel states that Ms. Accardi has provided him with the GRC's request for the SOI. Counsel requests that this submission be entered as a supplement to the previously filed SOI.<sup>9</sup>

Counsel states that the Complainant contends that he was not provided with certain sets of minutes. Counsel states that Ms. Accardi cannot find any record that the minutes for the March 16, 2011 and April 20, 2011 meetings were sent to the Complainant; thus, the FFD cannot deny the Complainant's contention that he did not receive same. Counsel notes that the Complainant stated that Counsel previously acknowledged that a meeting was held on March 16, 2011. Counsel further states that he has directed Ms. Accardi to send this pair of minutes to the Complainant.

Counsel states that the April 5, 2011, April 7, 2011, and April 13, 2011 meetings were workshop meetings as noted in the Notice: no formal action was taken at these meetings and no minutes were maintained. Counsel states that because no minutes were taken, the FFD cannot provide same to the Complainant.

### **September 8, 2011**

E-mail from the Complainant to the GRC. The Complainant states that he is in receipt of Custodian Counsel's letter and notes that he has not received a copy of the SOI that Counsel purports to have been filed.

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<sup>8</sup> The GRC notes that the evidence of record indicates that Ms. Accardi responded on behalf of the Custodian in a timely manner; however, the Complainant now disputes that said response did not include all responsive records.

<sup>9</sup> The GRC did not receive an SOI in this matter.



### **September 12, 2011**

E-mail from the GRC to the Complainant. The GRC states that it has not received an SOI. The GRC states that as noted in a letter sent to all parties on September 2, 2011, the deadline to provide an SOI was September 7, 2011. The GRC states that because it has not received an SOI, it will proceed with the adjudication process.

### **June 21, 2012<sup>10</sup>**

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

- Letter from the GRC to the Custodian dated September 2, 2011.
- Letter from the Custodian's Counsel to the GRC dated September 8, 2011.
- E-mail from the Complainant to the GRC dated September 8, 2011.
- E-mail from the GRC to the Complainant dated September 12, 2011.

Counsel states that in his September 8, 2011 letter to the GRC, the Custodian's Counsel attempted to supplement the SOI. Counsel states that in an e-mail to the Complainant on September 12, 2011, the GRC stated that it never received an SOI and that the complaint would be adjudicated accordingly. Counsel states that notwithstanding the Custodian's failure to submit an SOI, Counsel acknowledged in his letter to the GRC that minutes for the FFD's March 16, 2011 and April 20, 2011 meetings were not provided to the Complainant. Counsel further states that the Custodian's failure to provide responsive minutes led to the filing of this complaint.

Counsel contends that although Ms. Accardi responded to the request providing access to some records, said response was insufficient because she failed to provide all records responsive. *See Paff v. Willingboro Board of Education (Burlington)*, GRC Complaint No. 2007-272 (May 2008). Counsel contends that the remaining minutes were not provided to the Complainant until after the filing of this complaint, thus his request was "deemed" denied. Counsel thus requests the following:

1. A determination that the Custodian has violated OPRA by failing to respond within the statutorily mandated time frame.<sup>11</sup>
2. A determination ordering disclosure of any remaining responsive records not previously disclosed.
3. A determination that the Custodian knowingly and willfully violated OPRA.
4. A determination that the Complainant is a prevailing party entitled to reasonable attorney's fees.

Counsel states that in considering whether the Complainant is a prevailing party in accordance with N.J.S.A. 47:1A-6, the Appellate Division's decision in Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) is controlling. Counsel states that the Court held that a complainant is a prevailing party when he or she achieves the desired result

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<sup>10</sup> The Complainant Counsel's letter was dated June 20, 2012; however, the GRC did not receive same until June 21, 2012.

<sup>11</sup> The GRC notes that the evidence of record indicates that Ms. Accardi responded on behalf of the Custodian in a timely manner; however, the Complainant now disputes that said response did not include all responsive records.

because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Counsel states that the Court further held that attorney's fees may be awarded when a requestor is successful (or partially successful) via 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.*

Counsel contends that because the Complainant did not receive all responsive records until after he filed this complaint, the Complainant is a prevailing party because the filing of this complaint brought about a change in the Custodian's conduct. *See also Mason v. City of Hoboken and City Clerk of the City of Hoboken*, 196 N.J. 51 (2008). Counsel further contends that Custodian Counsel's September 8, 2011 letter proves that this complaint was the catalyst for disclosure of the remaining minutes.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to the requested meeting minutes?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

At issue herein is whether the Custodian's failure to provide meeting minutes for March 16, 2011 and April 20, 2011 constitutes a denial of access. Specifically, although Ms. Accardi responded in a timely manner on behalf of the Custodian providing access to

responsive records, the Complainant later determined that he was not provided with all responsive records after reviewing the Notice.

The Complainant filed this complaint contending that the Custodian's failure to provide these additional minutes amounted to a violation of OPRA. The Complainant's Counsel submitted a letter brief on June 20, 2012 arguing that the Custodian's response was insufficient pursuant to Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

In Paff, *supra*, the Council determined that the custodian's failure to respond to each individual OPRA request item resulted in an insufficient response. The Council reasoned that "[b]ased on OPRA and the GRC's holding in [O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005)(holding that a custodian is required to respond to multiple OPRA requests for the same records individually)], a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request." *Id.* The Council's holding in Paff is not exactly on point with this complaint because the Complainant's OPRA request was itemized in the same manner as the request at issue in Paff.

The facts of this complaint are more closely related to those in Quirk v. Nutley Board of Education (Essex), GRC Complaint No. 2007-187 (October 2007). In Quirk, the custodian responded in a timely manner providing access to a copy of the requested record. However, the complainant filed a denial of access complaint after discovering that the record provided was missing one (1) page. In the SOI, the custodian asserted that once he received the complaint, he immediately recognized the record and did not realize that he did not provide the agreement to the Complainant. The Council, noting that a custodian has an obligation to search their files for all responsive records pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), determined that:

"... the Custodian failed to disclose an identifiable government record when he provided some, but not all, of the records responsive which were not otherwise exempt from disclosure. The Custodian's failure to produce the "School Agreement" may have been inadvertent, but the Custodian is still required to make prompt and accurate responses to a requestor. Therefore, the Custodian's failure to produce the "School Agreement" record in response to the Complainant's June 22, 2007 OPRA request results in a deemed denial of access to this record. N.J.S.A. 47:1A-5.i." *Id.*

The Council did not order disclosure of the responsive record because the custodian attached a copy of same to the SOI.

Here, the Custodian initially failed to provide all responsive records. As in Quirk, following the filing of this complaint, the Custodian's Counsel sent a letter to the GRC on September 8, 2011 stating that he would order Ms. Accardi to forward to the Complainant those minutes not already provided. The Complainant's Counsel acknowledged as much in his June 20, 2012 letter by arguing that the Complainant was a prevailing party because he received records after the filing of this complaint. Thus, the

evidence of record indicates that the Complainant received these records at some point after that time.

Therefore, the Custodian's failure to produce minutes for the FFD's March 16, 2011 and April 20, 2011 meetings results in a denial of access to the responsive records. See Quirk, *supra*. Moreover, the Custodian unlawfully denied access to said records. However, the GRC declines to order disclosure because the Complainant was provided with the outstanding records.

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

OPRA states that:

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

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

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

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

The Custodian unlawfully denied access to the March 16, 2011 and April 20, 2011 meeting minutes by failing to provide same at the time of the response to said OPRA request; however, Ms. Accardi responded on behalf of the Custodian in a timely manner and the additional minutes were eventually provided to the Complainant. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.

Therefore, it is concluded that the Custodian's unlawful denial of access 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.*

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 Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, *supra*, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities

Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

“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 at 73-76 (2008).

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

In the instant complaint, the Complainant argued that the Custodian failed to provide him with all responsive minutes for the FFD’s March 16, 2011 and April 20, 2011 meetings. The Complainant based his claim on the Notice he received in response to a separate OPRA request. On September 8, 2011, the Custodian’s Counsel noted in a letter to the GRC that the FFD could not defend its failure to disclose these records and that he would order Ms. Accardi to forward the outstanding records immediately. Thereafter, on June 20, 2012, the Complainant’s Counsel entered his appearance in the matter and argued that the Complainant is a prevailing party entitled to reasonable attorney’s fees because the FFD disclosed the outstanding records to the Complainant following the filing of this complaint.

As noted above, the FFD failed to disclose all responsive records and did not provide the outstanding records until after the Complainant filed this complaint. Moreover, the Custodian’s Counsel noted that the disclosure of these records was a direct result of the Complainant’s complaint by stating that the FFD could not deny the Complainant’s contention that he did not receive same. Therefore, the Complainant is a prevailing party entitled to 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, Ms. Accardi provided to the Complainant two (2) sets of meeting minutes responsive to the Complainant's OPRA request after the filing of this 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. The Custodian failure to produce minutes for the Franklin Fire District No. 2 March 16, 2011 and April 20, 2011 meetings results in a denial of access to the responsive records. *See* Quirk v. Nutley Board of Education (Essex), GRC Complaint No. 2007-187 (October 2007). Moreover, the Custodian unlawfully denied access to said records. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure because the Complainant was provided with the outstanding records.
2. The Custodian unlawfully denied access to the March 16, 2011 and April 20, 2011 meeting minutes by failing to provide same at the time of the response to said OPRA request; however, Ms. Accardi responded on behalf of the Custodian in a timely manner and the additional minutes were eventually provided to the Complainant. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's unlawful denial of access does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, Ms. Accardi provided to the Complainant two (2) sets of meeting minutes responsive to the Complainant's OPRA request after the filing of this 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.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

October 23, 2012<sup>12</sup>

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<sup>12</sup> 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.