



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

November 19, 2013 Government Records Council Meeting

Donna Deloy  
Complainant

Complaint No. 2012-128

v.

Township of Lyndhurst (Bergen)  
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council ("Council") considered the November 12, 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. As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: 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. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Counsel, who had been privately retained by the Complainant, indicated that his fee application mirrored the bill he routinely sent to his client. Counsel believed that because he had been privately retained and billed in this manner, the bill he sent to his client would suffice for his submission. Counsel requested an extension of time to file the amended fee application. Notwithstanding the granting of the extension, the matter was presented to the Council without the benefit of Counsel's amended application. The Complainant has established that the complaint should be reconsidered based on mistake as the Council failed to consider probative evidence in the form of the amended fee application. Thus, the Complainant's request for reconsideration should be granted. Cummings v. Bahr, 295 N.J. Super. 374, 384 (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 S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council finds that \$300 is a reasonable fee for an attorney of Counsel's experience representing clients before the GRC. John Paff v. Bordentown Fire Diestict 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.

3. For the reasons set forth within the Council finds that the time expended, 17.0 hours, was not reasonable. The Council finds that 5.2 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. Faugno, Counsel to the Complainant, for the amount of \$1,560.00, representing 5.20 hours of service at \$300 per hour.**

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 19<sup>th</sup> Day of November, 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: November 21, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**November 19, 2013 Council Meeting**

**Donna Deloy<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2012-128**

**v.**

**Township of Lyndhurst (Bergen)**  
**Custodial Agency<sup>2</sup>**

**Records Relevant to Complaint:** Electronic copies of:

1. All permits-checklists plus (2) certificate of occupancy for 243 Newark Avenue;
2. All permits-checklists plus certificate of occupancy -2004 for 241 Newark Avenue;
3. All permits-checklists plus certificate of occupancy for 242-A Orient Way
4. Everything that exists in the files for all three (3) homes plus property record cards.

**Custodian of Record:** Helen Polito

**Request Received by Custodian:** April 18, 2012

**Response Made by Custodian:** April 23, 24 and 25, 2012

**GRC Complaint Received:** April 26, 2012

**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. Counsel's certification failed to provide the information required by N.J.A.C. 5:105-2.13(b). Moreover, Counsel did not, as required, address the reasonableness of the fee when interpreted in light of the Rules of Professional Conduct. See Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at \*10, 21 (stating, fee application must pass ethical scrutiny) (citing Furst, 182 N.J. 1, 21-22 (2004) (applying RPC § 1.5(a))). Counsel's

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<sup>1</sup> Paul Faugno, Esq., Faugno & Associates, LLC (Hackensack NJ).

<sup>2</sup> Gary J. Cucchiara, Esq., Scarinci and Hollenbeck, LLC (Lyndhurst NJ).

submission lacks the information required by the Council's Interim Order, and thus Counsel failed to comply with the Council's Order.

2. In the instant matter Counsel is seeking a fee award of \$6,800.00, representing 17.0 hours at \$400 per hour. The submission provided lacks the required information necessary to conduct a proper analysis as to the reasonableness of Counsel's requested hourly rate and time expended. In the absence of any meaningful record, the Council is unable to make a determination if the requested hourly rate is reasonable. **Accordingly, the Executive Director recommends that the Council does not make a determination on the reasonableness of Counsel's requested hourly rate.**

#### Procedural History:

On August 29, 2013, the Council distributed its Final Decision to all parties.

On September 9, 2013 the Complainant filed a request for reconsideration of the Council's August 29, 2013 Final Decision based on a mistake. Following receipt of the Motion for Reconsideration, the Government Records Council ("GRC") requested that Counsel for the Complainant ("Counsel") file an amended or supplemental fee application.

On September 23, 2013 Counsel filed a supplemental fee application ("Supp. Fee App.") in accordance with N.J.A.C. 5:105-2.13(b).<sup>3</sup> In the fee application and accompanying Certification of Services, Certification of Paul Faugno, Esq., dated September 20, 2013 ("Faugno Supp. Certif"), Counsel set forth the following:

- (1) The complaint name and number: Donna Deloy v. Township of Lyndhurst (Bergen), GRC Complaint No. 2012-128.
- (2) Counsel's law firm affiliation: Faugno & Associates, L.L.C.
- (3) A statement of client representation: Counsel certified to his services, including counseling the client; preparing and reviewing documentation; and guiding and representing the client throughout the process.
- (4) The hourly rate of all attorneys and support staff involved in the complaint: Mr. Faugno, the sole professional who worked on the file, certified that he charged \$400 per hour.
- (5) Copies of time sheets for each professional involved in the complaint: Counsel supplied a copy of his time sheets from April 2, 2012 through June 3, 2013 (the "Fee

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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.

- Period”). During the Fee Period counsel billed a total of seventeen (17.0) hours for a fee of \$6,800.00.
- (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 certifies that “his standard rate for representing the Deloy’s, . . . is \$400 per hour.” He further certifies that \$400 per hour is generally what he charges clients, “although it fluctuates upon the nature and complexity of the case.” Faugno Supp. Certif. at ¶ 5. Counsel certified his education, years of legal and trial experience and representation of clients in cases before the New Jersey Supreme and Superior Courts. In addition, Counsel provides as an exhibit to his certification a few pages from a document entitled “United States Consumer Law Attorney Fee Survey Report 2010-2011<sup>4</sup> (the “Report”). The sections appended include only the Table of Contents and an unannotated table of estimated fees for “New York Region Firms.” Counsel does not certify to representing any clients, other than Complainant, in OPRA matters.
  - (7) Detailed documentation of expenses: Counsel is not seeking reimbursements for expenses.

Counsel filed his amended fee application with the GRC in a timely fashion. The Custodian has not submitted any objections to the Complainant’s request for reconsideration or supplemental application for fees.

### Analysis

#### Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, 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. 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).

On September 9, 2013, six (6) business days from receipt of the Council’s Order, the Complainant filed a request for reconsideration of the Council’s Order dated August 29, 2013.

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

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<sup>4</sup> The Report was drafted by Ronald L. Burdge, Esq. of the Burdge Law Office Co. LPA of Dayton, OH. It is clear that Mr. Burdge intended for the Report to be used by practitioners to determine a reasonable fee as a limited license is provided for use of the Report for that purpose.

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 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 S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: 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. *See Cummings*, 295 N.J. Super. at 384. Counsel, who had been privately retained by the Complainant, indicated that his fee application mirrored the bill he routinely sent to his client. Counsel believed that because he had been privately retained and billed in this manner, the bill he sent to his client would suffice for his submission. Counsel requested an extension of time to file the amended fee application. Notwithstanding the granting of the extension, the matter was presented to the Council without the benefit of Counsel's amended application because it was not made available by the Complainant. The Complainant has established that the complaint should be reconsidered based on mistake as the Council failed to consider probative evidence in the form of the amended fee application because it was not made available by the Complainant. Thus, the Complainant's request for reconsideration should be granted. Cummings, 295 N.J. Super. at 274; D'Atria, 242 N.J. Super. at 401; Comcast Cablevision, 2003 N.J. PUC LEXIS at 5-6.

### **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, (“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 \$6,800.00, representing seventeen (17.0) hours of work at \$400 per hour. Counsel supports this hourly rate through a recitation of his experience, years in practice and with provision of the Report. Faugno Supp. Certif., ¶ 6, 8. Counsel provided only five (5) pages of the sixty (60) page Report. Absent from the Report are the sections including the error rate, methodology, and definition of the geographical areas. Further, instructions on how to interpret the findings were excluded. Finally, the Report estimates the rates for “Consumer Law Attorney[s].” A consumer is defined as a person who acquires goods or services, a buyer. Webster’s II New College Dictionary II, 242 (Houghton Mifflin Co., 1995). The requesting of documents under OPRA does not involve a transaction for goods and services.

The Council finds that \$300 is a reasonable fee for attorneys of Counsel’s experience representing clients before the GRC. John 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 (“Certification”). With his Certification, Counsel attached a two page invoice (“Invoice”) which contained time entries for the period from April 2, 2012 through June 3, 2013 (the “Fee Period”). The Invoice incorporated Counsel’s timesheets for the Fee Period.

Counsel billed a total of seventeen (17) hours for a fee of \$6,800 for services during the Fee Period. Counsel’s contribution to the case, however, was limited to reviewing and advising. Counsel’s timesheets include entries for reviewing the complaint, pleadings and communications; reviewing draft documents for filing; reviewing interim orders and responding to correspondence and other communications. Counsel did not bill for drafting or filing any pleadings or briefs. The Council finds that seventeen (17) hours is an excessive amount of time for acting as a consultant on a relatively straightforward case.

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 one time entry wherein he billed solely for reviewing the OPRA statute. (Legal research regarding the Open Public Records Act. Faguano Certif., Invoice 04/05/2013 entry.) The Council finds that the losing party 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 Central New Jersey, et.

*al. v. The Attorney General of the State of New Jersey, et. al.*, 297 F.3d 253, 271 (App. Div. 2001).

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 for an attorney who acted solely in an advisory capacity. 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:

<b>Date of time entry</b>	<b>Description of Service</b>	<b>Time Expended (in tenths of an hour) and Amount Billed at \$400/hour</b>		<b>Findings from Fee Application Review</b>	<b>Adjusted Entry: Time allowed and total Amount at \$300.00/hour</b>	
04/02/2012	Telephone conference with client regarding request for the records from Lyndhurst	.30	120.00	Conference to discuss the list of requested records does not warrant the full time billed.	.20	60.00
04/03/2012	Review of voluminous ligation files to determine documents in possession and to summarize record request from Lyndhurst	2.20	880.00	Unclear if services were performed in connection with Complainant’s related litigation case with Lyndhurst, or to ascertain what is to be requested in OPRA matter; duplicative of 04/04/2012 entry.	0.00	0.00
04/04/2012	Conference with client to review records missing, and to formulate appropriate request for public records from Lyndhurst.	1.40	560.00	OPRA request, which was broad and straight forward, requested “all” records; therefore detailed review of file to see what was missing was unnecessary.	0.0	0.00
04/05/2012	Legal research regarding the Open Public Records Act.	1.30	520.00		1.30	390.00
04/10/2012	Conference with client to advise as to proper formatting of OPRA request to Lyndhurst, and reviewing and participating in drafting of language for request.	1.40	560.00	OPRA request was general and broadly worded. Verbal instructions to client should have been sufficient. “Participating in drafting” is vague and does not provide adequate description of services performed, or value to the case.	.50	150.00
04/12/2012	Assist in drafting and reviewing of the request to the Township of Lyndhurst.	1.40	560.00	Duplicative of prior entry.	0.00	0.00
04/19/2012	Conference with client for preparation of correspondence	.80	320.00	No indication if counsel drafted said correspondence and if so,	0.00	0.00

	to construction official and commissioners attempting to obtain documentation.			how it could apply to preparation of the OPRA request which was made one day before on April 18, 2012.		
04/23/2012	Receipt and review of correspondence from attorney for Lyndhurst regarding OPRA requests and communion with the Township	.60	240.00	Review of correspondence (page and a half) from attorney for Lyndhurst <sup>5</sup> by experienced counsel does not warrant expenditure of time billed.	.20	60.00
04/24/2012	Conference with client re: correspondence from attorney for Lyndhurst regarding OPRA requests and communications with the Township.	1.30	520.00	Relaying of information to client from previous entry should not take experienced counsel 1.30 hours; record is not clear, time if time was spent discussing the related litigation or the OPRA matter.	.20	60.00
04/25/2012	Receipt and review of correspondence from Lyndhurst and research of OPRA statutes regarding validity of response.	.70	280.00	Duplicative of prior entry.	0.0	0.0
04/27/2012	Conference with client regarding filing of OPRA Complaint.	1.10	440.00	Complaint was filed with the GRC on April 26, 2012, one day prior to the April 27, 2012 input from Counsel. Discussion with Client regarding the of filing of Denial of Access Complaint after the fact does not warrant over an hour expenditure of time.	.20	60.00
04/27/2012	Receipt and review of guidelines regarding mediation to resolve complaint from New Jersey Government Records Council	.30	120.00	Review of standard GRC letter and mediation agreement does not warrant .30 hours expenditure of time for experienced counsel. Counsel's unfamiliarly with the form would be considered part of the learning curve and not chargeable to the Custodian.	.30	90.00
05/08/2013	Conference with client regarding status of complaint with government council, and request for communication with Government Council.	1.60	640.00	The record is devoid of any written inquiry, or memorialization of telephone call seeking status of case. Such phone call with the GRC would be brief as agency policy is to advise callers that the case will be heard in the order it was filed. Therefore, communication of said information from client to attorney would also be brief.	.30	90.00
05/23/2013	Receipt and review statement of information and response by Lyndhurst to Deloy complaint for denial of records,	1.40	560.00	Time expended exceeds what experienced counsel would require to review, analyze and assimilate information contained	1.00	300.00

<sup>5</sup> It appears that Counsel has misdated this time entry as the correspondence from the attorney for Lyndhurst was dated April 25, 2012, not April 23, 2012 as set forth in Counsel's time sheet.

	conference with clients regarding interpretation, and conference with client regarding status.			in the SOI; documentation was not voluminous, some of the exhibits were not relevant to the instant case, but rather concerned the Litigation (which cannot be billed for the OPRA matter); issues presented were not novel.		
06/03/2013	Receipt and review of Opinion and Order from Government Council, preparation of notice of appearance, and the review of billing records, and preparation of application for legal fees.	1.20	480.00	Receipt and review of Opinion and Order, and preparation of initial fee application which was brief, does not warrant over an hour of time for experienced counsel.	1.00	300.00
Totals:		17.00	6,800.00		5.20	1,560.00

For the reasons set forth within the Council finds that the time expended was not reasonable. The Council finds that 5.20 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. Faugno, Counsel to the Complainant, for the amount of \$1,560.00, representing 5.20 hours of service at \$300 per hour.**

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: 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. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Counsel, who had been privately retained by the Complainant, indicated that his fee application mirrored the bill he routinely sent to his client. Counsel believed that because he had been privately retained and billed in this manner, the bill he sent to his client would suffice for his submission. Counsel requested an extension of time to file the amended fee application. Notwithstanding the granting of the extension, the matter was presented to the Council without the benefit of Counsel's amended application. The Complainant has established that the complaint should be reconsidered based on mistake as the Council failed to consider probative evidence in the form of the amended fee application. Thus, the Complainant's request for reconsideration should be granted. Cummings v. Bahr, 295 N.J. Super. 374, 384 (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 S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. The Council finds that \$300 is a reasonable fee for an attorney of Counsel's experience representing clients before the GRC. John 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.
  
3. For the reasons set forth within the Council finds that the time expended, 17.0 hours, was not reasonable. The Council finds that 5.2 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. Faugno, Counsel to the Complainant, for the amount of \$1,560.00, representing 5.20 hours of service at \$300 per hour.**

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

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

November 12, 2013



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

Donna Deloy  
Complainant

Complaint No. 2012-128

v.

Township of Lyndhurst (Bergen)  
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. Counsel’s certification failed to provide the information required by N.J.A.C. 5:105-2.13(b). Moreover, Counsel did not, as required, address the reasonableness of the fee when interpreted in light of the Rules of Professional Conduct. See Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at \*10, 21 (fee application must pass ethical scrutiny) (citing, Furst, 182 N.J. 1, 21-22 (2004) (applying RPC § 1.5(a))). Counsel’s submission lacks the information required by the Council’s Interim Order, and thus Counsel failed to comply with the Council’s Order.
2. In the instant matter Counsel is seeking a fee award of \$6,800.00, representing 17.0 hours at \$400 per hour. The submission provided lacks the required information necessary to conduct a proper analysis as to the reasonableness of Counsel’s requested hourly rate and time expended. In the absence of any meaningful record, the Council is unable to make a determination if the requested hourly rate is reasonable. **Accordingly, the Executive Director recommends that the Council does not make a determination on the reasonableness of Counsel’s requested hourly rate.**

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**

**Donna Deloy<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-128**

**v.**

**Township of Lyndhurst (Bergen)  
Custodial Agency<sup>2</sup>**

**Custodian of Record:** Helen Polito  
**Request Received by Custodian:** April 18, 2012  
**Response Made by Custodian:** April 23, 24 and 25, 2012  
**GRC Complaint Received:** April 26, 2012

**Background**

At its May 28, 2013 public meeting, the Council considered the May 21, 2013 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 did not bear her burden of proof that the requested \$200.00 deposit was authorized under OPRA, such deposit is unlawful. See N.J.S.A. 47:1A-5(f); N.J.S.A. 47:1A-6. However, the Council declines to order disclosure of the requested records because the Custodian provided copies of said records to the Complainant at no cost on May 7, 2013.
2. The Custodian violated N.J.S.A. 47:1A-5(f) by failing to bear her burden of proof that the \$200.00 deposit was authorized under OPRA. However, on May 7, 2013, the Custodian provided the responsive records at no cost to the Complainant. Additionally, the evidence does not indicate that the former Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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<sup>1</sup> Paul Faugno, Esq., Faugno & Associates, LLC (Hackensack NJ).

<sup>2</sup> Gary J. Cucchiara, Esq., Scarinci and Hollenbeck, LLC (Lyndhurst NJ).



3. 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, the Custodian provided the responsive records to the Complainant at no cost. 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, because there is some evidence on record that the Complainant was represented by Counsel, Counsel must enter a notice of appearance along with 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 31, 2013, the Council distributed its Interim Order to all parties.

Compliance:

On June 7, 2013, Counsel for the Complainant (“Counsel”) responded to the Council’s Interim Order. Counsel filed a Notice of Appearance and a certification of Paul Faugno, Esq. Mr. Faugno’s certification provided, in its entirety: “[p]lease see attached bill for professional services rendered. I hereby certify that this is an accurate reflection of my input on behalf of the above-captioned matter on behalf of Donna Deloy.” Certification of Paul Faugno, Esq., (“Faugno Certif.”). To his certification, Counsel attached a two page invoice which contained time entries for the period from April 2, 2012 through June 3, 2013 (the “Fee Period”). Mr. Faugno submission seeks a total fee of \$6,800.00 for 17.0 hours of work at \$400.00 per hour.

The Custodian did not submit an objection to Complainant’s application for fees.

Mr. Faugno’s certification failed to provide the information required by *N.J.A.C. 5:105-2.13(b)*. *N.J.A.C. 5:105-2.13(b)* sets forth the requirements of a fee application, providing in relevant part:

[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.

N.J.A.C. 5:105-2.13(b). Moreover, Counsel did not, as required, address the reasonableness of the fee when interpreted in light of the Rules of Professional Conduct. See Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at \*10, 21 (fee application must pass ethical scrutiny) (citing, Furst, 182 N.J. 1, 21-22 (2004) (applying RPC § 1.5(a))). Counsel's submission lacks the information required by the Council's Interim Order, and thus Counsel failed to comply with the Council's Order.

### **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>3</sup> his Certification of Services, seeking a fee award of \$3,960.00, 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 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)).

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<sup>3</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."

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 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 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 \$6,800.00, representing 17.0 hours at \$400 per hour. The submission provided lacks the required information necessary to conduct a proper analysis as to the reasonableness of Counsel’s requested hourly rate. In the absence of any meaningful record, the Council is unable to make a determination if the requested hourly rate is reasonable. **Accordingly, the Executive Director recommends that the Council does not make a determination on the reasonableness of Counsel’s requested hourly rate.**

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

In support of his request for a fee award Counsel submitted a certification. With his certification, Counsel attached a two page invoice which contained time entries for the period from April 2, 2012 through June 3, 2013 (the “Fee Period”). Faugno Certif. The submission provided lacks the required information necessary for the Council to conduct a proper analysis of the reasonableness of the time expended. In the absence of any meaningful record, the Council is unable to make a determination if the fee requested is fair. **Accordingly, the Executive Director recommends that the Council does not award fees on this record.**

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Counsel’s certification failed to provide the information required by N.J.A.C. 5:105-2.13(b). Moreover, Counsel did not, as required, address the reasonableness of the fee when interpreted in light of the Rules of Professional Conduct. See Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at \*10, 21 (fee application must pass ethical scrutiny) (citing, Furst, 182 N.J. 1, 21-22 (2004) (applying RPC § 1.5(a))). Counsel’s submission lacks the information required by the Council’s Interim Order, and thus Counsel failed to comply with the Council’s Order.
2. In the instant matter Counsel is seeking a fee award of \$6,800.00, representing 17.0 hours at \$400 per hour. The submission provided lacks the required information necessary to conduct a proper analysis as to the reasonableness of Counsel’s requested hourly rate and time expended. In the absence of any meaningful record, the Council is unable to make a determination if the requested hourly rate is reasonable. **Accordingly, the Executive Director recommends that the Council**

**does not make a determination on the reasonableness of Counsel's requested hourly rate.**

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

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

August 20, 2013