



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 18, 2014 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2012-153

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the November 18, 2014 public meeting, the Government Records Council (“Council”) considered the October 21 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed because the Complainant (via Counsel) withdrew his complaint in a letter to the Office of Administrative Law dated September 16, 2014, because the parties have agreed to settle the matter. Therefore, no further adjudication is required.

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

Final Decision Rendered by the  
Government Records Council  
On The 18<sup>th</sup> Day of November, 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: November 20, 2014**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
November 18, 2014 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-153**

**v.**

**Borough of South Bound Brook (Somerset)  
Custodial Agency<sup>2</sup>**

**Records Relevant to Complaint:** All agendas and regular meeting minutes from April 2012 sent via e-mail or fax.<sup>3</sup>

**Custodian of Record:** Donald E. Kazer

**Request Received by Custodian:** May 10, 2012

**Response Made by Custodian:** May 21, 2012 and May 24, 2012

**GRC Complaint Received:** May 24, 2012

**Background**

**November 16, 2013 Council Meeting:**

At its November 16, 2013 public meeting, the Council considered the November 12, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

[I]t cannot determine from the record before it whether certain time entries were inadvertently duplicated, or if Counsel intended to bill for them. Further, the Council cannot determine the accuracy of the information supplied in support of Counsel's fee application. Therefore, since there are issues of contested facts, especially the time expended by Counsel for representing the Complainant, this complaint should be referred to Office of Administrative Law for a hearing to resolve the facts and a determination of appropriate attorney fees.

**Procedural History:**

On November 21, 2013, the Council distributed its Interim Order to all parties. On September 9, 2014, the complaint was transmitted to the Office of Administrative Law ("OAL").

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

<sup>3</sup> The Complainant requested additional records; however, said records are not at issue in this Denial of Access Complaint.

On September 16, 2014, the Complainant's Counsel sent a letter to the OAL withdrawing this complaint because the parties have agreed to settle the matter.

### **Analysis**

No analysis required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant (via Counsel) withdrew his complaint in a letter to the Office of Administrative Law dated September 16, 2014, because the parties have agreed to settle the matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.  
Acting Executive Director

October 21, 2014<sup>4</sup>

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<sup>4</sup> This complaint was prepared for adjudication at the Council's October 28, 2014 meeting, but could not be adjudicated due to lack of quorum.



**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**

Robert A. Verry  
Complainant

Complaint No. 2012-153

v.

Borough of South Bound Brook (Somerset)  
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, by majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that it cannot determine from the record before it whether certain time entries were inadvertently duplicated, or if Counsel intended to bill for them. Further, the Council cannot determine the accuracy of the information supplied in support of Counsel's fee application. Therefore, since there are issues of contested facts, especially the time expended by Counsel for representing the Complainant, this complaint should be referred to Office of Administrative Law for a hearing to resolve the facts and a determination of appropriate attorney fees.

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 19th 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**

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

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-153**

**v.**

**Borough of South Bound Brook  
Custodial Agency<sup>2</sup>**

**Records Relevant to Complaint:** All agendas and regular meeting minutes from April 2012 sent via e-mail or fax.<sup>3</sup>

**Custodian of Record:** Donald E. Kazer

**Request Received by Custodian:** May 10, 2012

**Response Made by Custodian:** May 21, 2012 and May 24, 2012

**GRC Complaint Received:** May 24, 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. 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 necessary detail 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**

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ)

<sup>3</sup> The Complainant requested additional records; however, said records are not at issue in this Denial of Access Complaint.

**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.

#### Procedural History:

On August 27, 2013, the Council distributed its Interim Order to all parties. In response to the Council’s Interim Order, Counsel for the Complainant, John A. Bermingham, Jr. (“Counsel”), submitted a certification and amended time log in support of his application for fees. In his original fee application Counsel sought an award of \$4,560.00, representing 15.2 hours of service at \$300 per hour. The Council found that the original fee application lacked the necessary detail to conduct a proper analysis of the fees requested and to make an award. Accordingly, the Council’s Interim Order directed Counsel to file an amended time log.

On September 6, 2013, Counsel filed a Certification and amended time log in support of his original fee application. In addition to the \$4,560.00 in fees initially sought, Counsel seeks another 2.5 additional billable hours “to research and validate the reasonableness of [his] fees.” Certification of Services for John A. Bermingham, Jr. Esq. (undated) at ¶ 6 (Bermingham Supp. Certif).

On September 12, 2013, Counsel for the Custodian, Francesco Taddeo, Esq. (“Mr. Taddeo”), filed a letter brief objecting to Counsel’s fee application. Letter Brief of Francesco Taddeo, Esq. dated Sept. 12, 2013, (“Taddeo Letter Brief”). Mr. Taddeo argues that the revised fee application filed by Complainant’s Counsel is excessive in light of the limited recovery achieved. Mr. Taddeo also notes that the Applicant seeks to bill “another 2.5 hours to correct [or] revise a bill that he was deficient in submitting for consideration.” (Emphasis in original). Id.

Mr. Taddeo states that the Applicant, in his revised fee application, seeks an additional \$3,000.00 representing ten (10) hours of work. Taddeo Letter Brief pg. 2. Counsel does memorialize an additional ten (10) hours of work in his supplemental application; however, he is not seeking an award for this time, but rather provides the information to demonstrate time which he asserts was expended but not billed for. Letter Brief dated Sept. 16, 2013 from John A. Bermingham (“Bermingham Reply Brief”). Notably, Mr. Taddeo also identifies a time entry itemized in Counsel’s bill in the section for services that were not billed for: “[o]n August 8, . . . for 1.0 hours for communications with opposing counsel [Taddeo]”, which Mr. Taddeo states did not occur. Taddeo Letter Brief, pg. 2.

Moreover, the Council notes examples of time entries billed in the same day with identical descriptions of service and the exact amount of time expended. For example:

- (1) On June 9, 2013, Counsel has two time entries, each for .20 hours, to: “Review and respond to email communication with Client” for a total of .40 hours.
- (2) On June 27, 2013, Counsel has three time entries, each for .60 hours, to: “Review and respond to email communication to opposing counsel. Discuss proposal for the Borough’s consideration” for a total of 1.80 hours.
- (3) On July 1, 2013, Counsel has three time entries, each for .20, to: “Discuss proposal for the Borough’s consideration with client by email communication” for a total of .60 hours.
- (4) Identical to the July 1, 2013 entries, Counsel, on June 27, July 2 and July 7, 2013 has a total of six entries, all for .20 hours, with the exact same description of services: “Discuss proposal for the Borough’s consideration with client by email communication” for an additional 1.20 hours.

### 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 within five (5) business days from receipt of the Council’s Interim Order following the effective date of this decision[] N.J.A.C. 5:105-2.13(b)(5).” In addition, the Council ordered that “[t]he 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).”

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 Order. Thus, the Complainant’s amended fee application was due by close of business on September 6, 2013.<sup>4</sup>

On September 6, 2013, the fifth (5) business day after receipt of the Council’s Order, Counsel for the Complainant filed a supplemental certification of services. Birmingham Supp. Certif. On September 12, 2013, four (4) business days later, the Custodian filed the Taddeo Letter Brief in opposition to Counsel’s supplemental filings.

Both the Complainant and the Custodian complied with the Council’s August 27, 2013 Interim Order.

Counsel seeks a fee award for 17.70<sup>5</sup> hours of service for a total fee of \$5,310.00. Counsel supports his application for fees with certifications, timesheets and letter briefs. The

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<sup>4</sup> Monday, September 2, 2013 was a holiday.

<sup>5</sup> Counsel seeks the original 15.2 hours applied for plus another 2.5 to correct and supplement his original fee application which was deficient, and thus prevented the Council from ruling on the initial application.



Custodian contests the amount of time Counsel spent in representing the Complainant, arguing that it was excessive. For example, the Custodian notes that if the June 27, July 1, July 2 and July 7, 2013 entries are correct, then Counsel spent in excess of three (3) hours to discuss the Borough's offer to settle the matter with the Complainant. Moreover, the Custodian questions whether some of the services billed for were performed. Specifically, the Custodian identifies one entry "[o]n August 8, . . . for 1.0 hours for communications with opposing counsel [Taddeo]" which Mr. Taddeo states did not occur. Taddeo Letter Brief, pg. 2. Although Counsel is not seeking reimbursement for that particular time entry, the discrepancy calls into question the accuracy of Counsel's timekeeping.

The Council cannot determine from the record before it whether certain time entries were inadvertently duplicated, or if Counsel intended to bill for them. Further, the Council cannot determine the accuracy of the information supplied in support of Counsel's fee application. Therefore, since there are issues of contested facts, especially the time expended by Counsel for representing the Complainant, this complaint should be referred to Office of Administrative Law for a hearing to resolve the facts and a determination of appropriate attorney fees.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that it cannot determine from the record before it whether certain time entries were inadvertently duplicated, or if Counsel intended to bill for them. Further, the Council cannot determine the accuracy of the information supplied in support of Counsel's fee application. Therefore, since there are issues of contested facts, especially the time expended by Counsel for representing the Complainant, this complaint should be referred to Office of Administrative Law for a hearing to resolve the facts and a determination of appropriate attorney fees.

Prepared By: Dawn R. SanFilippo  
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

Robert A. Verry  
Complainant

Complaint No. 2012-153

v.

Borough of South Bound Brook  
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, by a majority vote, adopted 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 necessary detail 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**

**Robert A. Verry<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2012-153**

v.

**Borough of South Bound Brook**  
**Custodial Agency<sup>2</sup>**

**Records Relevant to Complaint:** All agendas and regular meeting minutes from April 2012 sent via e-mail or fax.<sup>3</sup>

**Custodian of Record:** Donald E. Kazer

**Request Received by Custodian:** May 10, 2012

**Response Made by Custodian:** May 21, 2012 and May 24, 2012

**GRC Complaint Received:** May 24, 2012

**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 Custodian has complied with the terms of the Council's April 30, 2013 Interim Order because the Custodian provided to the Complainant the April 2012 meeting agenda and provided certified confirmation of same to the Executive Director within the required five (5) business days.
2. The Custodian properly requested an extension of time to respond to the Complainant's OPRA request. However, the Custodian's failure to respond to the request within the extended timeframe resulted in a "deemed" denial of the request. Additionally, the Custodian carried his burden of proving a lawful denial of access to the April 2012

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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).

<sup>3</sup> The Complainant requested additional records; however, said records are not at issue in this Denial of Access Complaint.

meeting minutes. However, the Custodian failed to bear his burden of proving that he provided the Complainant access to the requested April 2012 meeting agenda. As such, the Council ordered the Custodian to disclose said record to the Complainant. As stated above, the Custodian has complied with the Council's April 30, 2013 Interim Order. Further, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were 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.

3. Pursuant to the filing of this Denial of Access Complaint and the Council's April 30, 2013 Interim Order, 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 (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, the Custodian failed to prove that he disclosed the responsive records prior to 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. 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).**

#### Procedural History:

On May 31, 2013, the Council distributed its May 28, 2013 Interim Order ("Interim Order") to all parties.

#### Compliance:

On June 27, 2012, John A. Bermingham, Esq., Counsel for the Complainant ("Counsel") requested and was granted an extension of time to file his Application for Fees. On July 8, 2012, within the extension period, Counsel filed his fee application in accordance with N.J.A.C. 5:105-2.13(b)<sup>4</sup>. The fee application and Certification of Services ("Certification") of counsel set forth the following:

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<sup>4</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.

- (1) The complaint name and number: Robert A. Verry v. Borough of South Bound Brook (Somerset) GRC Complaint No. 2012-153.
- (2) Counsel's law firm affiliation: Law Offices of John A. Birmingham, Jr., LLC.
- (3) A statement of client representation: Counsel certified to his services, including researching OPRA laws; reviewing the previously filed complaint; reviewing of Certification of Robert A. Verry; preparing correspondence and the filing of "various documents;" exchanging of e-mails with the complainant and the GRC and "multiple communications with R. Verry and review of certification."
- (4) The hourly rate of all attorneys and support staff involved in the complaint: Mr. Birmingham, the sole professional who worked on the file, certified that he charges \$300/ hour.
- (5) Copies of time log for each professional involved in the complaint: Counsel supplied a copy of his time sheets, from September 20, 2012 through October 18, 2012 (the "Fee Period"). During Fee Period counsel billed a total of 15.2 hours for a total fee of \$4,560.00.
- (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").

On July 18, 2013, within the ten (10) day response period permitted, Counsel for the Custodian, Francaesco Taddeo, Esq., (hereinafter, the "Custodian's Counsel" or "Ms. Taddeo") filed an objection to Complainant's application for fees. Custodian's Counsel argued that the fees requested were excessive and should be reduced along with Counsel's hourly rate.

### 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 timely filed and served<sup>5</sup> his Certification of Services, seeking a fee award of \$4,560.00, in the time period provided for pursuant to the Court's Interim Order and subsequently extended by the GRC.

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

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<sup>5</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.

Counsel's fee request. N.J.A.C. 5:105-2.13(d). On July 18, 2013, within the ten (10) day response period permitted Custodian's Counsel filed 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)).

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. 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 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 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 \$4,560.00, representing 15.2 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 challenges both Counsel’s hourly rate and the hours he expended on the file.

With respect to Counsel’s request for a \$300 hourly rate, he cites awards of \$325 to \$350 in OPRA cases of New Jersey attorneys who he 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). In his opposition, the Custodian argues that Counsel’s requested hourly rate should be reduced to reflect his experience level, three years as practicing attorney. Further, the Custodian argues that at least one local attorney with greater OPRA experience, charges \$225 per hour.

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. For the year period from “9/20/2012 to 9/23/2012,” Counsel billed 3.6 hours for “[r]eview the DOA Complaint filed

by the Complainant.” As noted by the Custodian in his objection, the complaint in this matter is approximately ten (10) pages long. The Custodian argues that the time spent by Counsel to review the Complaint, which was drafted and filed by the Complainant, is excessive. Moreover, this entry is neither specific as to date nor detail of services. As the Custodian argues, it is questionable whether a review of this document would have taken 3.6 hours over a three (3) day period. The time entry does not provide enough information to recommend a fee award.

For the period from “9/20/2012 to 9/23/2012,” Counsel billed 3.0 hours for “[r]esearch [of] various OPRA provisions and laws.” The time entries are generalized service descriptions over a significant period of time and fail to detail the work performed in tenths of an hour, as the regulations require. N.J.A.C. 5:105-2.13.<sup>6</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<sup>7</sup>. 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. Likewise, the Custodian argues that the Borough should not bear the cost of educating Counsel on OPRA.

On October 18, 2012, Counsel billed a total of 8.6 hours on the instant matter, including, 3.0 hours to “Review Certification of Robert A. Verry;” 2.0 hours to “[p]repare correspondence and communicate with the GRC;” 2.0 hours to “Exchange several emails with Complainant and GRC;” and 1.6 hours to have “Multiple communications with R. Verry and review Certification.” Counsel fails to provide detail in his time entries to explain why review of a client’s previously drafted certification would require 3.0 hours. Similarly, the time entry for preparing correspondence and communicating with the GRC is devoid of detail to aid the Council in its analysis of the reasonableness of this entry.

As the Custodian notes, other than correspondence and oral communications, Counsel does not appear to have drafted or filed any documents in the instant matter. The Complainant, who the Council can take notice is an active filer with the GRC, drafted and filed the complaint and other documents in this case. The Custodian argues that Counsel appeared in the instant matter in an advisory or oversight capacity only. Custodian further argues that in light of Counsel’s minimal role in the case, the hours expended are excessive and served more to educate Counsel than to assist the Complainant.

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<sup>6</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>7</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.

None of these time entries in Counsel's time log fully comply with the mandates of N.J.A.C. 105-2.13(b). Specifically, Counsel fails to provide time-sheets which provide detailed descriptions, in tenths of an hour, of the exact work performed and when performed. N.J.A.C. 105-2.13(b)(5).

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 necessary detail 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 necessary detail 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