



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. 2013-135

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 the Complainant was required to establish either of the necessary criteria set forth above: either 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 v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The Complainant failed to establish that the complaint should be reconsidered based on a mistake and new evidence. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Specifically, the Complainant failed to submit compelling evidence that the record sought was something other than draft minutes. Thus, the Complainant Counsel's request for reconsideration should be denied. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; 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).

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**

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

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

**GRC Complaint No. 2013-135**

v.

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

**Records Relevant to Complaint:** Electronic copy via e-mail or fax of the prepared script the Mayor and Council read from at the January 1, 2010 reorganization meeting.

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

**Request Received by Custodian:** May 3, 2013

**Response Made by Custodian:** May 6, 2013

**GRC Complaint Received:** May 8, 2013

**Background**

**March 25, 2014 Council Meeting:**

At its March 25, 2014 public meeting, the Council considered the March 18, 2014 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:

1. The approved minutes the Custodian provided to the Complainant on May 6, 2013 is the official record of the reorganization meeting and not the draft minutes forwarded on May 8, 2013. O’Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007); Burdick v. NJ Office of Admin. Law, GRC Complaint No. 2009-150 (February 2012). Thus, the Custodian did not unlawfully deny access to the responsive record.
2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no 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

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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).

Hoboken, 196 N.J. 51 (2008). Specifically, the Complainant did not prevail here because the record sought was not subject to disclosure, regardless of the fact that the Custodian disclosed same on May 8, 2013 and thus no violation of OPRA occurred. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

#### Procedural History:

On March 27, 2014, the Council distributed its Final Decision to all parties. On April 7, 2014, the Complainant sought an extension of time to file a request for reconsideration. On the same day, the GRC granted the Complainant ten (10) additional business days, or until April 28, 2014, to submit same.

On April 28, 2014, the Complainant filed a request for reconsideration of the Council's Final Decision based on a mistake and new evidence. Therein, the Complainant argued that the GRC erroneously concluded that the record at issue was draft meeting minutes. The Complainant contended that he used the term "prepared script" at the time of his request because it's the only way he could think to describe the record the Borough utilized prior its meeting. The Complainant asserted that the prepared script, which existence he had personal knowledge of from his employment at the Borough of South Bound Brook ("Borough"), is actually the reorganization meeting "agenda."

The Complainant argued that the record meets the definition of an "agenda" in Black's Law Dictionary, it was clearly created prior to the meeting and its status as an "agenda" is supported by the fact that the Custodian has retained same well after the 2010 meeting. Further, the Complainant argued that the Borough Council would read from a document prepared prior to the meeting and that, in fact, the record he sought was not a "prepared script" but an "agenda" required to be prepared prior to a meeting under the Open Public Meetings Act ("OPMA"). The Complainant also noted that the courts recently decided that the public has a right to a full agenda prior to a meeting. Opderbeck v. Midland Park Bd. of Educ., 2013 N.J. Super. Unpub. LEXIS 3010, 3027 (December 24, 2013).

The Complainant thus contended that the Council needs to take into reconsideration of the fact that the record at issue: 1) is an agenda; 2) is the record required to be created by OPMA prior to a meeting; 3) has been maintained on file; and 4) is the record the Custodian identified. The Complainant asserted that it is understandable how the GRC could reach a conclusion that the "agenda" was draft minutes because the records are similar; however, they are distinctly different for the reasons stated. The Complainant further noted that the website [www.sbbnj.com](http://www.sbbnj.com) indicates that no agendas were listed for past reorganization meetings, even though Council approved one in its February 2009 minutes. The Complainant also noted that a video of meeting online shows Councilmembers reading directly from the record at issue as a guide.

The Complainant alleged that the GRC's finding here is similar to its finding in Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint No. 2011-382 (Interim Order dated May 28, 2013). The Complainant stated that there, the Council determined that the custodian did

not unlawfully deny access to “warrants” because no record termed “warrants.” However, on reconsideration, the complainant provided evidence to the contrary that forced the Council to reverse its decision and send the complaint to the Office of Administrative Law for a knowing and willful hearing. The Complainant argued that the facts here are similar: the Custodian repeatedly contended that he possessed no record called a “prepared script” and the evidence herein contradicts that contention. Further, the Complainant asserted that although the record at issue did not contain the word “agenda,” it satisfied all the requirements of one under OPMA.

The Complainant also stated that in Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2011), the Appellate Division determined that a custodian could not argue that a request lacked specificity if he/she was able to search for and locate a responsive record. The Complainant argued that it is undisputed that the Custodian searched for and located a record he believed to be responsive regardless of the physical name of the record.

In closing, the Complainant asserted that the Council erroneously applied O’Shea, 391 N.J. Super. 534 and Burdick, GRC 2009-150 because those cases referred to records created during a meeting and hearing respectively, while the record at issue was created prior to the reorganization meeting. The Complainant contended that the court’s decision in Opderbeck, 2013 N.J. Super. Unpub. LEXIS at 3027 is directly on point.

On June 6, 2014, the GRC sought additional information from the Custodian. Specifically, the GRC requested the Custodian submit a certification answering the following:

1. Whether the record the GRC determined to be draft meeting minutes was created prior to the meeting?
2. Whether the record was utilized as a meeting agenda provided to members of the public and Borough Council prior to the meeting?

The GRC requested that the Custodian’s certification be provided by close of business on June 11, 2014.

On June 11, 2014, the Custodian responded to the GRC’s request for additional information. The Custodian certified that the record provided to the Complainant was draft minutes, evidenced by the fact that same changed following the 2010 reorganization meeting. The Custodian compared the minutes to creating a draft resolution prior to a meeting that is not a government record until Council action is taken. Further, the Custodian certified that there was a separate document utilized as an agenda. The Custodian certified that the Borough Council was in possession of both the draft minutes and agenda at the meeting.

Following receipt of the Custodian’s legal certification, on June 11, 2014, the GRC requested that the Custodian provide a copy of the agenda to which the Custodian referred, if same still existed. On June 17, 2014, the Complainant’s Counsel disputed, via e-mail, that there was never an agenda for the 2010 reorganization meeting posted to the Borough’s website. Counsel requested that the GRC forward a copy of the agenda the Custodian providing and noted that the Complainant reserved the right to refute the Custodian’s June 11, 2014 legal

certification. On July 2, 2014, the Complainant's Counsel requested that the GRC enact a deadline for the Custodian to submit a copy of the agenda it requested on June 11, 2014.

On July 3, 2014, the GRC e-mailed the Custodian recapitulating its request for the agenda and providing a deadline for submission until July 9, 2014. Subsequent to a granted extension of time, on July 16, 2014, the Custodian's Counsel submitted two (2) agendas from 2013 and 2014 reorganization meetings. The GRC e-mailed Custodian's Counsel advising that it received the agenda; however, it was requesting the 2010 reorganization meeting agenda and not agendas for subsequent meetings. On July 17, 2014, the Custodian's Counsel e-mailed the GRC the agenda for the 2010 reorganization meeting.

On August 8, 2014, Complainant's Counsel submitted a rebuttal to the Custodian's certifications noting that all positions raised in this complaint still stand. Counsel, now referring to the responsive record as "Document X," reiterated some of his reconsideration arguments.

Moreover, Counsel maintained that the responsive record was a government record and did not contain any ACD material. Counsel contended that it is factually indisputable that the record was created prior to the January 2010 reorganization meeting and was used as a guide for the meeting.<sup>3</sup> Counsel contended that Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006) did not apply here because the minutes in that case were created after the meetings. Counsel asserted that the GRC still accepted the Custodian's argument without any basis on when said minutes were approved. Counsel argued that not reconsidering this complaint sets a dangerous precedent of allowing for the creation of minutes prior to the meeting they are supposed to memorialize.

Additionally, and for "historical perspective," Counsel asserted that in 2006, the Complainant sought to have an item added to a meeting agenda. Counsel asserted that the Custodian advised him at that time that only the Borough Council could request items to be placed on agendas. Counsel asserted that the Custodian's statement can be interpreted to mean that the Borough Council must take an official vote to add items to the agenda. N.J.S.A. 10:4-7 et seq. Further, Counsel stated that the Complainant advised the Custodian via e-mail on January 2, 2009 that he wished to receive advance notice of all 2009 meetings and did the same on January 3, 2010 for 2010 meetings. Counsel contended that based on the following, it can be inferred that no agenda existed until after the GRC sought to obtain same:

1. The Complainant was never provided with a copy of the meeting notice for the 2010 reorganization meeting.
2. On July 18, 2014, the Custodian confirmed that no meeting minutes for an "agenda meeting" for the 2010 reorganization meeting existed.
3. No agenda for the 2010 reorganization meeting was ever posted to the Borough's website nor are there "agenda meeting" minutes posted.
4. In response to a February 10, 2010 OPRA request, the Custodian did not provide the Complainant a copy of the agenda. Further, he denied the agenda's existence in response

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<sup>3</sup> Counsel included a link to the video of that meeting in which he asserted that the Council could be seen reading from "Document X."

to this request by stating that “[t]he . . . approve[d] meeting minutes from that meeting . . . is the only document concerning the Jan. 1, 2010 meeting.”

5. The Custodian certified on June 11, 2014, that both the Council members were in possession of both the draft minutes and agenda at the meeting; however, the Custodian did not provide the agenda as supporting evidence at that time until being forced to do so by the GRC on July 17, 2014.
6. The Custodian and Custodian’s Counsel were served the Complainant’s request for reconsideration and failed to file objections or produce the agenda. Counsel noted that he objected to the Custodian’s additional arguments outlined in the June 11, 2014 certification because the Custodian’s time frame to submit objections had passed at that point.
7. Considering that no “agenda minutes” exist as would be required by N.J.S.A. 10:4-14, it is clear that no meeting took place and that the Custodian recently created the agenda.
8. The agenda provided by the Custodian, without a evidence of a formal meeting to set same, brings into question who placed items on the agenda and when was it actually created.

Further, Counsel noted that GRC previously acknowledged that the Complainant attempted to compromise on multiple occasions prior to filing this complaint. *See Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2013-135 (Final Decision dated March 25, 2014) at 2. Counsel contended that notwithstanding the Complainant’s attempts to compromise and his filing of this complaint prior to disclosure of the responsive record, the Council determined that he was not a prevailing party.

### 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).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council’s Final Decision on April 28, 2014, the last day of the extended time frame to submit same.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” *D’Atria v. D’Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent

evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 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).

Here, the Complainant requested reconsideration of this complaint on the basis of “mistake” and “new evidence.” The Complainant contended that the GRC erred by deciding the responsive record was draft minutes; rather, the record was actually an agenda created prior to the meeting and not subject to the ACD exemption. In response to a request for additional information, the Custodian certified that an agenda that was not the responsive record was created for the 2010 reorganization meeting. The Custodian submitted a copy of this agenda at the request of the GRC. Thereafter, the Complainant’s Counsel set forth several arguments in which he questioned the validity of the agenda provided to the GRC.

After a review of all evidence and arguments submitted, the GRC is not satisfied that the Complainant established the necessary criteria warranting reconsideration. Contrary to the Complainant’s argument that the record was actually an “agenda,” the Custodian provided the GRC with a copy of the 2010 reorganization meeting agenda (as well as agendas for 2013 and 2014). Having received the agenda, Complainant’s Counsel started referring to the record as “Document X” while attempting to question whether the agenda the Custodian provided to the GRC was created after it requested a copy of same on June 11, 2014. However, none of the arguments set forth were compelling enough to call into question the existence of the agenda.

Further, the GRC rejects that this complaint is similar to Opderbeck, 2013 N.J. Super. 534. The plaintiff there filed suit against Midland Park Board of Education challenging the custodian’s denial of attachments to agendas that he did not receive prior to relevant meetings. That is clearly not the issue here because the record in question has been determined to be draft minutes and the Complainant’s request did not seek attachments to an agenda.

Moreover, the GRC rejects Complainant Counsel’s argument that this decision sets a dangerous precedent allowing agencies to create minutes at any time before or after a meeting. The GRC has no authority over the OPMA. For this reason, its decision determining that the record at issue here was draft minutes does not set a precedent that a municipality can create minutes prior to a meeting. In fact, whether an agency creates minutes before a meeting, after a meeting or not at all is of no moment to the GRC when determining whether a complainant was unlawfully denied access to same.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 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. The Complainant failed to establish that the complaint should be reconsidered based on a mistake and new evidence. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. Specifically, the Complainant failed to submit compelling evidence that the record sought was something other than draft minutes. Thus, the Complainant Counsel's request for reconsideration should be denied. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find the Complainant was required to establish either of the necessary criteria set forth above: either 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 v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The Complainant failed to establish that the complaint should be reconsidered based on a mistake and new evidence. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Specifically, the Complainant failed to submit compelling evidence that the record sought was something other than draft minutes. Thus, the Complainant Counsel's request for reconsideration should be denied. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *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).

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  
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CHRIS CHRISTIE  
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FINAL DECISION

March 25, 2014 Government Records Council Meeting

Robert A. Verry  
Complainant

Complaint No. 2013-135

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 18, 2014 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 approved minutes the Custodian provided to the Complainant on May 6, 2013 is the official record of the reorganization meeting and not the draft minutes forwarded on May 8, 2013. O’Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007); Burdick v. NJ Office of Admin. Law, GRC Complaint No. 2009-150 (February 2012). Thus, the Custodian did not unlawfully deny access to the responsive record.
2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no 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 Complainant did not prevail here because the record sought was not subject to disclosure, regardless of the fact that the Custodian disclosed same on May 8, 2013 and thus no violation of OPRA occurred. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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



Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

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

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 25, 2014 Council Meeting**

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

**GRC Complaint No. 2013-135**

v.

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

**Records Relevant to Complaint:** Electronic copy via e-mail or fax of the prepared script the Mayor and Council read from at the January 1, 2010 reorganization meeting.

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

**Request Received by Custodian:** May 3, 2013

**Response Made by Custodian:** May 6, 2013

**GRC Complaint Received:** May 8, 2013

**Background<sup>3</sup>**

**Request and Response:**

On May 3, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 6, 2013, the Custodian responded in writing denying access because there is no record called a “prepared script.” The Custodian stated that attached are the approved minutes for the reorganization meeting. On the same day, the Complainant disputed the existence of the record arguing that the Custodian prepares a document for the Council to read during the meeting. The Complainant noted that he is not seeking draft or approved minutes, rather, he is seeking that record created for the Council’s reading at the meeting regardless of its actual title.

The Custodian advised the Complainant that the record he handed to Council is a draft document exempt as inter-agency or intra-agency advisory, consultative or deliberative (“ACD”) material under N.J.S.A. 47:1A-1.1. The Custodian advised that the only record for the reorganization meeting is the approved minutes. The Complainant contended that the record was no longer ACD the moment it was read into the minutes at the reorganization meeting and should henceforth be disclosed in a timely manner or the Complainant would pursue further action. The

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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 parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Custodian responded advising the Complainant that he provided the approved minutes and that the draft record was the record handed to the Council.

Denial of Access Complaint:

On May 8, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that on May 6, 2013, the Custodian changed his denial of access from no record existing, to the record being ACD material and back to no record existing. The Complainant thus requested that the GRC: (1) determine that the Custodian violated OPRA by failing to disclose the responsive record; (2) order immediate disclosure of the record; (3) determine that the Custodian knowingly and willfully violated OPRA warranting the imposition of a civil penalty; (4) determine that the Complainant is a prevailing party subject to reasonable attorney’s fees; and (5) take any further action deemed by the GRC to be equitable and just.

Statement of Information:

On June 20, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that no “prepared script” existed and thus was not produced; however, he provided the Complainant with approved minutes for the meeting on May 6, 2013. The Custodian certified that on May 8, 2013, even though the document handed to the Council prior to the January 2010, reorganization meeting was a draft and thus ACD material, he provided same to the Complainant via e-mail.

Additional Submissions:

On July 4, 2013, the Complainant contended that after denying a responsive record existed (and subsequent to the filing of this complaint), the Custodian disclosed the responsive record. The Complainant argued that the Custodian’s responses clearly prove that he knowingly and willfully violated OPRA. The Complainant further contended that he is a prevailing party because this complaint was clearly the impetus for the Custodian to change his conduct and thus provide the Complainant with the relief requested.

The Complainant noted that in the past, the GRC has denied the Complainant fees because he failed to compromise and work through problematic requests. Mason v. City of Hoboken, 196 N.J. 51 (2008). The Complainant asserted that this case is a perfect example of the Custodian’s failure to compromise even though the Complainant sought a cooperative balance in the face of being unlawfully denied access to records.

On November 1, 2013, the GRC requested that the Custodian supply a copy of the record he provided to the Complainant on May 8, 2013 for review. On November 5, 2013, the Custodian certified that he was providing the GRC with a copy of the draft reorganization meeting minutes sent to the Complainant on May 8, 2013. Further, the Custodian affirmed that no “prepared script” exists and that he provided the draft minutes to the Complainant notwithstanding the fact that same are exempt from disclosure. N.J.S.A. 47:1A-1.1.

On November 7, 2013, the Complainant noted that the Custodian's last statement to the Complainant on May 6, 2013 was that he did not possess a responsive record; however, the Custodian disclosed same on May 8, 2013 after the filing of this complaint. The Complainant further argued that had the Custodian truly believed that the record was exempt from disclosure, he would not have disclosed same after the filing of this complaint. The Complainant further contended that the record is not a draft record because minutes are created from a tape recorder and not the record provided. The Complainant argued that the record provided on May 8, 2013 was a final and complete copy.

### Analysis

#### Unlawful Denial of Access

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

OPRA further provides that "[g]overnment record' or 'record' means any paper, written or printed book . . . information stored or maintained electronically . . . [t]he terms shall not include [ACD] material." N.J.S.A. 47:1A-1.1. Regarding draft meeting minutes, the Council has previously determined same are exempt from disclosure pursuant to OPRA. In Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council held that ". . . the Custodian has not unlawfully denied access to the requested meeting minutes as . . . said minutes had not been approved by the governing body and as such, they constitute [ACD] material and are exempt from disclosure . . ." (*citing* N.J.S.A. 47:1A-1.1). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-106 (February 2009) and Wolosky v. Stillwater Township (Sussex), GRC Complaint No. 2009-30 (January 2010).

Further, in O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007), the Court determined that the handwritten notes taken by the Board Secretary during an executive session were not "government records" within the meaning of OPRA because it was the formal minutes of the meeting that constituted the "public record" and not the Secretary's handwritten notes. The Council subsequently applied this decision in Burdick v. NJ Office of Admin. Law, GRC Complaint No. 2009-150 (February 2012) in determining that the requested "backup recording" of a hearing was not subject to disclosure because it was not the "official record" record of the hearing. Id. at 9.

Here, the Custodian certified in the SOI and subsequently on November 5, 2013, that no "prepared script" existed, that the responsive record was the approved meeting minutes, and further that the record handed to the Council prior to the reorganization meeting was a draft copy of the minutes. The draft minutes, although ACD material, were provided to the Complainant on May 8, 2013. In an effort to confirm the forgoing, the GRC obtained a copy of the "draft" record the Custodian provided to the Complainant on May 8, 2013 and that the Complainant confirmed on July 3, 2013 and November 7, 2013 was the record sought. It is clear, based on a comparison

to the approved version posted to the Borough's website, that the responsive record was a draft copy of the reorganization minutes.<sup>4</sup> Specifically, the responsive record does not include how the Council voted, whereas the approved version contains this information. Additionally, the approved version provided to the Complainant on May 6, 2013, includes public comments, the motions made to close the meeting and the time the meeting ended. Thus, it is clear that the responsive record provided on May 8, 2013 is a draft version of the final minutes.

Based on the evidence of record here, the record the Custodian disclosed on May 8, 2013 was a draft record that he was not required to disclose. It is clear that the approved minutes he initially provided to the Complainant not only contained the same information as the draft minutes, but also included the Council's official actions, comments and other information. Similar to the Council's decision in Burdick, GRC 2009-150 holding that a backup tape is not the official record of a hearing, the approved minutes the Custodian initially provided to the Complainant was the final and complete record and not the draft version the Complainant received on May 8, 2013, as he argued. This also conforms with the Council's decision in Parave-Fogg, GRC 2006-51, whereby minutes are not subject to disclosure until approved by a governing body.

Based on the foregoing, the approved minutes the Custodian provided to the Complainant on May 6, 2013 is the official record of the reorganization meeting and not the draft minutes forwarded on May 8, 2013. O'Shea, 391 N.J. Super. at 534; Burdick, GRC 2009-150. Thus, the Custodian did not unlawfully deny access to the responsive record.

The GRC finally notes that the Complainant's assertions that the Custodian changed his denial of access to the responsive record are specious. The evidence indicates that the Custodian has consistently certified that no "prepared script" existed and that the version of the minutes disclosed to the Complainant on May 8, 2013 was a draft document, regardless of the title of the record.

### **Prevailing Party Attorney's Fees**

OPRA provides that:

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

N.J.S.A. 47:1A-6.

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<sup>4</sup> <http://www.sbbnj.com/councilminutes10/specials10/January%201,2010%20Reorganization2.pdf>. It should be noted that on May 6, 2013, the Complainant advised that he was not seeking draft or approved minutes for the meeting. However, the record the Complainant acknowledged to be responsive was in fact an incomplete or draft copy of the approved minutes.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties,” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason, further held that:



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

Id. at 76.

Here, the Complainant argued that the Custodian unlawfully denied him access to the record handed to Borough Council prior to its reorganization meeting. After the filing of this complaint, the Custodian provided same even though still contending that the record was a draft document not subject to access under OPRA. The Council agreed, determining that the Custodian did not unlawfully deny access to the responsive record because same was a draft version of the minutes the Custodian initially provided on May 6, 2013. Essentially, regardless of the fact that the Custodian disclosed the record, the Council has not ruled in favor of the Complainant and thus he is not a prevailing party. Mason, 196 N.J. at 73-76.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Complainant did not prevail here because the record sought was not subject to disclosure, regardless of the fact that the Custodian disclosed same on May 8, 2013 and thus no violation of OPRA occurred. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The approved minutes the Custodian provided to the Complainant on May 6, 2013 is the official record of the reorganization meeting and not the draft minutes forwarded on May 8, 2013. O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007); Burdick v. NJ Office of Admin. Law, GRC Complaint No. 2009-150 (February 2012). Thus, the Custodian did not unlawfully deny access to the responsive record.
2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no 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 Complainant did not prevail here because the record sought was not subject to disclosure, regardless of the fact that the

Custodian disclosed same on May 8, 2013 and thus no violation of OPRA occurred. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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