



PHILIP D. MURPHY  
*Governor*

TAHESHA L. WAY  
*Lieutenant Governor*

State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

JACQUELYN A. SUÁREZ  
*Commissioner*

## FINAL DECISION

### July 29, 2025 Government Records Council Meeting

Greg Zagaja  
Complainant

Complaint No. 2023-87

v.

Borough of Wallington (Bergen)  
Custodian of Record

At the July 29, 2025, public meeting, the Government Records Council (“Council”) considered the July 22, 2025, Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The portion of the complaint related to the January 6, 2023 OPRA request should be dismissed because it was filed out of time. N.J.A.C. 5:105-2.1(a). Additionally, the Complainant did not provide, nor does the record evidence show that good cause exists to accept this portion of the complaint as within time.
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s February 2, and 20, 2023 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
3. The Custodian did not violate OPRA when assessing a \$70.15 fee to disclose hard copy records responsive to the Complainant’s February 2, 2023 OPRA request Nos. 2, 3, 4, and 6, and February 20, 2023 OPRA request Nos. 2, 3, a portion of 5, 6, and 7. N.J.S.A. 47:1A-5(b). Thus, the current Custodian is not required to disclose the responsive records available for retrieval until remittance of the assessed fee and no unlawful denial of access occurred. N.J.S.A. 47:1A-6; Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
4. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s February 2, 2023 OPRA request Nos. 1, 7, 8, and 9 and February 20, 2023 OPRA request No. 1. Specifically, the current Custodian certified in the Statement of Information, and the record reflects, that no records responsive to these OPRA

requests exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

5. The Custodian unlawfully denied access to the records responsive to the Complainant's February 2, 2023 OPRA request No. 5 and February 20, 2023 request No. 4. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose those records to the Complainant, with redactions where applicable.
6. The Custodian unlawfully denied access the Complainant's February 20, 2023 OPRA request No. 5. N.J.S.A. 47:1A-6; Burlett v. Monmouth Cnty. Bd. of Freeholders, GRC Complaint No. 2004-75 (August 2004); Miller v. Westwood Reg'l Sch. Dist. (Bergen), GRC Complaint No. 2009-49 (February 2010). Thus, the Custodian shall disclose the requested meeting recordings for all six (6) meetings to the Complainant.
7. **The Custodian shall comply with conclusion Nos. 5 and 6 above within twenty (20) business days from receipt of the Council's Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**
8. 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, 71 (2008). Specifically, the filing of this complaint has resulted in an order to disclose the withheld meeting recordings, benefit invoices, and payroll registers. 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, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

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 29<sup>th</sup> Day of July 2025

John A. Alexy, 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: July 31, 2025**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 29, 2025 Council Meeting**

**Greg Zagaja<sup>1</sup>  
Complainant**

**GRC Complaint No. 2023-87**

**v.**

**Borough of Wallington (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

January 6, 2023 OPRA request: Copies of the contract between the Borough of Wallington (“Borough”) and Tax Collector Kathy Sireci.

February 2, 2023 OPRA requests:

1. All e-mails correspondence to/from Michael Kazimir and the Custodian to/from Melissa Dabal, Susane Preinfalk, and Eugene Rachelski with the keywords “OPRA,” “Greg Zagaja,” and “FYI”.
2. Copy of the January 2023 OPRA log.
3. Copies of:
  - a. Meeting agenda and minutes from the January 5, 2023 Reorganization meeting;
  - b. “Sine” meeting agenda and minutes from the January 5, 2023 Reorganization meeting;
  - c. All resolutions from the January 5, 2023 Reorganization meeting.
  - d. Meeting agendas, minutes, and bill lists for the December 5, and 16, 2022 meetings.
4. Copies of all invoices from Arcari, Iovino for 2021, 2022, and 2023 to present.
5. Copies of “Bergen Municipal Employee Benefits” invoices for August 2021, September 2021, October 2021, November 2021, December 2021, September 2022, October 2022, November 2022, December 2022, and January 2023.
6. Copies of the Verizon bills for “01-01-2022-02-01-2023.”
7. All e-mail correspondence to/from Khaldoun Androwis, Ms. Dabal, Mr. Rachelski, and Ms. Preinfalk with the keywords “Greg Zagaja,” “Michael Kazimir,” “Greg,” “Michael,” “Administrator,” “Clerk,” “salary,” and “benefits” from September 15, 2022, through January 30, 2023.
8. Copies of the “records management archiving contract and vendor.”
9. Copies of the “[OPRA] electronic archiving and management system contract and vendor.”

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrman & Knopf, LLP. (Saddle Brook, NJ).

<sup>2</sup> Represented by Richard J. Allen, Jr., Esq., of Kipp & Allen, LLC (Rutherford, NJ).

February 20, 2023 OPRA requests:

1. All e-mails correspondence from Michael Kazimir and the Custodian to Melissa Dabal, Susane Preinfalk, and Eugene Rachelski with the keywords “OPRA,” “Greg Zagaja,” and “FYI” from May 1, 2022 through February 20, 2023.
2. Copy of Resolution No. “2022-001 - 2022-065.”
3. Copy of the Reorganization agenda and all resolutions passed during that meeting.
4. Copy of the payroll register for all public employees for 2021 and 2022.
5. Electronic copies of meeting recordings for meetings held on May 26, 2022; October 13, 2022; October 27, 2022; December 1, 2022; and December 15, 2022.
6. Copy of the employment contract between the Custodian and Borough.
7. Copy of the employment contract between Tax Collector Kathy Sireci and the Borough.

**Custodian of Record:** Ace Antonio<sup>3</sup>

**Request Received by Custodian:** January 6, 2023; February 2, 2023; February 20, 2023

**Response Made by Custodian:** None

**GRC Complaint Received:** April 19, 2023

**Background**<sup>4</sup>

Request and Response:

On January 6, 2023, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

On February 2, 2023, the Complainant submitted nine (9) OPRA requests to the Custodian seeking the above-mentioned records.

On February 20, 2023, the Complainant submitted seven (7) OPRA request to the Custodian seeking the above-mentioned records.

On March 23, 2023, twenty-three (23) business days after receipt of the February 20, 2023 OPRA requests,<sup>5</sup> the Custodian responded in writing stating that records responsive to an unknown number of OPRA requests are available for pick-up at the cost of \$70.15. The Custodian noted that the records being disclosed includes a USB for the audio recordings sought by the Complainant.

On May 1, 2023, the Custodian purportedly e-mailed the Complainant advising that additional records were available for pick-up at the Borough Police Department.

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<sup>3</sup> The current Custodian of Record is Frank Belli.

<sup>4</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.

<sup>5</sup> The Custodian did not specifically identify to which OPRA requests each of the records were responsive.

### Denial of Access Complaint:

On May 9, 2023, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to timely respond to any of the subject OPRA requests thus resulting in a “deemed” denial of access. The Complainant also asserted that the Custodian attempted to impose a special service charge without first offering him the opportunity to accept or reject it.

The Complainant thus requested that the GRC: 1) order disclosure of all records sought; and 2) determine the Complainant is a prevailing party entitled to an award of attorney fees.

### Statement of Information:<sup>6</sup>

On April 15, 2024, the current Custodian filed a Statement of Information (“SOI”). The current Custodian certified that the Borough received the Complainant’s OPRA requests on the dates e-mailed thereto. The current Custodian certified that the Borough’s search included a review of the Borough records and retaining the services of DART Computer Systems to conduct an e-mail search. The current Custodian certified that the Custodian responded in writing on March 23, 2023, advising that a hardcopy packet of records was available for retrieval at a cost of \$70.15. The current Custodian certified that the Custodian responded again on May 1, 2023, advising that additional records were available for retrieval at the Borough Police Department.

The current Custodian affirmed that no records responsive to the Complainant’s February 2, 2023 OPRA request Nos. 1, 7, 8, and 9 existed. The current Custodian contended that the Borough did not unlawfully deny access to any records. The current Custodian certified that records responsive to the Complainant’s February 2, 2023 OPRA request Nos. 2, 3, 4, and 6 were available for retrieval. The current Custodian further averred that the benefit invoices responsive to the Complainant’s February 2, 2023 OPRA request No. 5 were being redacted based on “privacy and other non-disclosable information.” The current Custodian noted that these invoices would be disclosed once the Borough completed the redaction process.

The current Custodian further certified that no records responsive to the Complainant’s February 20, 2023 OPRA request No. 1 existed. The current Custodian further certified that records responsive to the Complainant’s February 20, 2023 OPRA request Nos. 2, 3, a portion of 5, 6, and 7 were available for retrieval. The current Custodian noted that the Borough would not disclose recordings for those meetings with no approved minutes under the “inter agency, or intra agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. The current Custodian further averred that the payroll registers responsive to the Complainant’s February 2, 2023 OPRA request No. 4 were being redacted based on “privacy and other non-disclosable information.” The current Custodian noted that these invoices would be disclosed once the Borough completed the redaction process.

The current Custodian argued that, although the Borough granted access to all records “not otherwise exempt,” the Complainant filed this complaint instead of retrieving the available

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<sup>6</sup> On May 11, 2023, this complaint was referred to mediation. On March 19, 2024, this complaint was referred back to the GRC for adjudication.

records. The current Custodian averred that the OPRA requests did not identify a specific method of delivery or medium preference; thus, the charge for those records was levied to “cover the cost of reproduction only.” The current Custodian noted that this packet of records was still available for retrieval at the Borough Police Department. The current Custodian finally argued that this complaint was not the catalyst for disclosure and thus the Complainant should not be considered a prevailing party.

## Analysis

### Statute of Limitations

The GRC’s regulations provide that:

Any requestor who is denied access, in whole or in part, to a government record by a custodian, at the option of the requestor, may file a complaint with the Council pursuant to N.J.S.A. 47:1A-6. *Such filing shall be made* within 60-calendar days or, if the last day of the period is a Saturday, Sunday, or legal holiday, within the next business day, pursuant to N.J.A.C. 1:1-1.4, after the requestor receives a response from the custodian that grants or denies access or, if the custodian does not respond within seven business days of the request, *within 60-calendar days following the expiration of such seven-business-day period*, whichever is later, unless accompanied by a motion to file within time, showing good cause.

[N.J.A.C. 5:105-2.1(a) (emphasis added).]<sup>7</sup>

In the instant matter, the complaint comprises seventeen (17) individual OPRA requests filed on three (3) separate days: the Complainant alleged that the Custodian failed to respond to any of them. One of those OPRA requests was submitted to the Borough on January 6, 2023. Absent evidence in the record showing that the Custodian responded to this OPRA request, the “deemed” denial date is estimated at January 18, 2023.<sup>8</sup> At the time this complaint was filed, approximately seventy-eight (78) calendar days later, the statute of limitation had clearly expired. Further, the Complainant did not include a motion arguing why this portion of the complaint should be accepted as within time.<sup>9</sup>

Therefore, the portion of the complaint related to the January 6, 2023 OPRA request should be dismissed because it was filed out of time. N.J.A.C. 5:105-2.1(a). Additionally, the Complainant did not provide, nor does the record evidence show that good cause exists to accept this portion of the complaint as within time.

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<sup>7</sup> The GRC notes that P.L. 2024, c. 16, effective September 3, 2024, codified a forty-five (45)-calendar day statute of limitations for all OPRA actions filed either with the New Jersey Superior Court or the GRC. N.J.S.A. 47:1A-6.

<sup>8</sup> This calculation does not include January 16, 2023, which was Dr. Martin Luther King Day, a federal holiday.

<sup>9</sup> The GRC notes OPRA now provides for a 45-calendar-day statute of limitation as of the enactment of P.L. 2024, c.16 on September 3, 2024.

## **Timeliness**

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>10</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

Here, the Complainant submitted several OPRA requests on February 2, and 20, 2023. The Custodian did not respond thereto until March 23, 2023, or more than a month after the first set of OPRA requests and at least twenty-three (23) business days after the second set of OPRA requests.<sup>11</sup> This complaint followed, wherein the Complainant argued that the Custodian's failure to timely respond resulted in a "deemed" denial of access. In the SOI, the current Custodian did not dispute these facts. Thus, the evidence of record supports a "deemed" denial finding here.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's February 2, and 20, 2023 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

## **Copying Costs**

OPRA provides that "the fee assessed for the duplication of a government record embodied in the form of printed matter shall be \$0.05 per letter size page or smaller, and \$0.07 per legal size page or larger . . . ." N.J.S.A. 47:1A-5(b). Moreover, OPRA provides that providing access to records electronically "shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs." Id. Further, the Council has previously held that a custodian is not required to disclose responsive records until after receiving the assessed fee. Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006); see also Ross, Sr. v. N.J. Dep't of Corr., GRC Complaint No. 2018-202 (April 2020).

Further, whenever a custodian asserts that fulfilling an OPRA records request requires an "extraordinary expenditure of time and effort," a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5(c). Should a custodian assess such a charge, "[t]he requestor shall have the opportunity to review and object to the charge prior to it being incurred." Id.

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<sup>10</sup> A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

<sup>11</sup> The GRC notes that portions of both sets of OPRA requests sought "immediate access" records. N.J.S.A. 47:1A-5(e).



Here, the Complainant submitted his OPRA requests via e-mail, but did not include a specific method of delivery by which to obtain any responsive records. The Custodian eventually responded in writing on March 23, 2023, stating that records responsive to the Complainant's February 2, and 20, 2023 OPRA requests were available for retrieval at the Borough upon payment of \$70.15. This complaint followed, wherein the Complainant contended that the Borough attempted to impose a special service charge without giving him the ability to accept or reject same. In the SOI, the Custodian affirmed that the assessed fee was for copy costs associated with record reproduction of records responsive to the Complainant's February 2, 2023 OPRA request Nos. 2, 3, 4, and 6, and February 20, 2023 OPRA request Nos. 2, 3, a portion of 5, 6, and 7. The Custodian also noted that the Complainant never identified a method of delivery or medium in which he wished to obtain the responsive records.<sup>12</sup>

OPRA is clear that an agency can charge a fixed, per-page fee to disclose hard copies of records without prior authorization from a requestor. N.J.S.A. 47:1A-5(b). Comparing the facts here to a plain reading of OPRA supports that the Custodian did not act improperly in charging \$70.15 for copy costs without giving the Complainant the opportunity to accept or reject it. The current Custodian has certified that the assessed fee was based on reproduction costs and not as a result of the assertion of an "extraordinary expenditure of time and effort." It should further be noted that the Complainant did not identify his preferred method of delivery, except for with the February 20, 2023 OPRA request No. 5 seeking "digital" copies of meeting recordings. Thus, without such a limitation, the Custodian chose to disclose records in hardcopy via pickup at cost to the Complainant.

Therefore, the Custodian did not violate OPRA when assessing a \$70.15 fee to disclose hard copy records responsive to the Complainant's February 2, 2023 OPRA request Nos. 2, 3, 4, and 6, and February 20, 2023 OPRA request Nos. 2, 3, a portion of 5, 6, and 7. N.J.S.A. 47:1A-5(b). Thus, the current Custodian is not required to disclose the responsive records available for retrieval until remittance of the assessed fee and no unlawful denial of access occurred. N.J.S.A. 47:1A-6; Paff, GRC 2006-54.

### **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.

Having determined that the Custodian appropriately charged copying costs for records responsive to portions of the Complainant's February 2, and 20, 2023 OPRA requests, the GRC turns to the remaining outstanding requests below.

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<sup>12</sup> The GRC has previously held that where a requestor provides a method of delivery as part of their OPRA request, the custodian is required to disclose records in that manner or at least address same if they cannot comply. See Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014)

February 2, 2023 OPRA request Nos. 1, 7, 8, and 9 & February 20, 2023 OPRA request No. 1

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant submitted multiple OPRA requests on February 2, and 20, 2023. The Custodian responded, stating that certain records were available for retrieval. However, following the filing of this complaint, the current Custodian certified in the SOI that no records existed to the Complainant's February 2, 2023 OPRA request Nos. 1, 7, 8, and 9, and February 20, 2023 OPRA request No. 1.

Upon review, the GRC is persuaded that no unlawful denial of access has occurred to these OPRA requests because the evidence of record supports that no records exist. The current Custodian has certified that no records existed and there is no evidence in the record to refute this certification. Thus, a conclusion in line with Pusterhofer is appropriate here.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's February 2, 2023 OPRA request Nos. 1, 7, 8, and 9 and February 20, 2023 OPRA request No. 1. Specifically, the current Custodian certified in the SOI, and the record reflects, that no records responsive to these OPRA requests exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

February 2, 2023 OPRA request No. 5 & February 20, 2023 OPRA request No. 4

Here, the Complainant's February 2, 2023 OPRA request No. 5 sought benefits invoices for August 2021, September 2021, October 2021, November 2021, December 2021, September 2022, October 2022, November 2022, December 2022, and January 2023. The Complainant's February 20, 2023 OPRA request No. 4 sought payroll registers for 2021 and 2022. Following the filing of this complaint, the current Custodian certified in the SOI that records responsive to these OPRA requests would be disclosed once the redaction process was complete. However, notwithstanding this statement, there is no evidence in the record to suggest that the current Custodian ever disclosed the records to the Complainant. Based on these facts, the GRC must find that an unlawful denial of access occurred.

Accordingly, the Custodian unlawfully denied access to the records responsive to the Complainant's February 2, 2023 OPRA request No. 5 and February 20, 2023 request No. 4. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose those records to the Complainant, with redactions where applicable.

February 20, 2023 OPRA request No. 5

Regarding meeting minutes, the Council has required disclosure thereof once the minutes are approved for accuracy and content. See Wolosky v. Vernon Twp. Bd. of Educ., GRC Complaint No. 2009-57 (December 2009). However, the Council has also held that draft meeting minutes are exempt from disclosure under OPRA. See Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018) (certify. denied, 233 N.J. 484

(2018)); Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006- 51 (August 2006).

Regarding meeting recordings, in Burlett v. Monmouth Cnty. Bd. of Freeholders, GRC Complaint No. 2004-75 (August 2004) and Miller v. Westwood Reg'l Sch. Dist. (Bergen), GRC Complaint No. 2009-49 (February 2010), the Council had held that audio recordings of public session meetings were disclosable because they represented a verbatim account of the meeting, regardless of whether minutes had been approved for accuracy and content.

Here, the Complainant's February 20, 2023 OPRA request No. 5 sought meeting recordings for six (6) specific Borough meetings. In response to this complaint, the current Custodian certified in the SOI that the Borough was disclosing only those recordings for which accompanying minutes were approved. The current Custodian further contended that the remaining recordings without identifying which were being withheld under the ACD exemption until the accompanying minutes were approved. However, the forgoing precedential case law does not support such a denial. Instead, in accordance with Burlett, the Custodian was required to disclose those verbatim recordings regardless of the approval status of the accompanying minutes.

Accordingly, the Custodian unlawfully denied access the Complainant's February 20, 2023 OPRA request No. 5. N.J.S.A. 47:1A-6 Burlett, GRC 2004-75; Miller, GRC 2009-49. Thus, the Custodian shall disclose the requested meeting recordings for all six (6) meetings to the Complainant.

### **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.]

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Appellate Division 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, 71 (2008), the Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing

party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." (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. Further, the Supreme Court expressed 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.]

The Court 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, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

In this matter, the Complainant filed his complaint contending that the Borough charged an permissive special service charge. The Complainant thus asked that the Council order disclosure

of all requested records and award prevailing party attorney's fees. In the SOI, the current Custodian addressed the charge issue by certifying that it was solely for the cost of reproduction. The current Custodian also certified that no records responsive to several of the requests existed. However, the current Custodian denied access to certain meeting recordings and provided no proof that additional records subject to disclosure were ever provided to the Complainant. The Council has ultimately held that the Custodian was not required to disclose those records ready for retrieval until remittance of payment. However, the Council is also holding that the Custodian unlawfully denied access to the withheld meeting recordings and additional records subject to disclosure. Thus, the GRC is compelled to find that the Complainant is a prevailing party entitled to an award of attorney's fees. Specifically, the Complainant has achieved in part the relief sought through the order to disclose withheld meeting recordings and additional responsive records previously not provided to him.

Therefore, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, 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. 51. Specifically, the filing of this complaint has resulted in an order to disclose the withheld meeting recordings, benefit invoices, and payroll registers. 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, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Therefore, the portion of the complaint related to the January 6, 2023 OPRA request should be dismissed because it was filed out of time. N.J.A.C. 5:105-2.1(a). Additionally, the Complainant did not provide, nor does the record evidence show that good cause exists to accept this portion of the complaint as within time.
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant's February 2, and 20, 2023 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

3. The Custodian did not violate OPRA when assessing a \$70.15 fee to disclose hard copy records responsive to the Complainant's February 2, 2023 OPRA request Nos. 2, 3, 4, and 6, and February 20, 2023 OPRA request Nos. 2, 3, a portion of 5, 6, and 7. N.J.S.A. 47:1A-5(b). Thus, the current Custodian is not required to disclose the responsive records available for retrieval until remittance of the assessed fee and no unlawful denial of access occurred. N.J.S.A. 47:1A-6; Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
4. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's February 2, 2023 OPRA request Nos. 1, 7, 8, and 9 and February 20, 2023 OPRA request No. 1. Specifically, the current Custodian certified in the Statement of Information, and the record reflects, that no records responsive to these OPRA requests exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. The Custodian unlawfully denied access to the records responsive to the Complainant's February 2, 2023 OPRA request No. 5 and February 20, 2023 request No. 4. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose those records to the Complainant, with redactions where applicable.
6. The Custodian unlawfully denied access the Complainant's February 20, 2023 OPRA request No. 5. N.J.S.A. 47:1A-6; Burlett v. Monmouth Cnty. Bd. of Freeholders, GRC Complaint No. 2004-75 (August 2004); Miller v. Westwood Reg'l Sch. Dist. (Bergen), GRC Complaint No. 2009-49 (February 2010). Thus, the Custodian shall disclose the requested meeting recordings for all six (6) meetings to the Complainant.
7. **The Custodian shall comply with conclusion Nos. 5 and 6 above within twenty (20) business days from receipt of the Council's Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**
8. 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, 71 (2008). Specifically, the filing of this complaint has resulted in an order to disclose the withheld meeting recordings, benefit invoices, and payroll registers. 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, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees,**

**Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Frank F. Caruso  
Executive Director

July 22, 2025