



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

LORI GRIFA
Acting Commissioner

FINAL DECISION

May 27, 2010 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2007-237

v.

Township of West Milford (Passaic)
Custodian of Record

At the May 27, 2010 public meeting, the Government Records Council ("Council") considered the May 24, 2010 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, accepts the Administrative Law Judge's Initial Decision dated May 19, 2010 in which the Judge approved the Settlement Agreement and Release signed by the parties or their representatives.

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 May, 2010

Robin Berg Tabakin, Chair
Government Records Council



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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 2, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 27, 2010 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2007-237

v.

**Township of West Milford (Passaic)²
Custodian of Records**

Records Relevant to Complaint:

- August 24, 2007 Request:
 1. All documents distributed to members of the Township Council in advance of, or during the meeting on, August 22, 2007, that include proposed changes to the Township's original, but now repealed, attorney accountability ordinance.
 2. The sheets of paper that include Council Member Joseph Smolinski's suggestions for a proposed attorney accountability ordinance that he held during the Council meeting on June 27, 2007 and mentioned during the Council meeting on August 22, 2007.
- August 27, 2007 Request: The list of goals submitted by each Council member to Mayor DiDonato.

Request Made: August 24, 2007 and August 27, 2007

Response Made: August 30, 2007 and August 31, 2007

Custodian: Antoinette Battaglia

GRC Complaint Filed: October 2, 2007

Background

December 18, 2008

Government Records Council's ("Council") Interim Order. At its December 18, 2008 public meeting, the Council considered the December 10, 2008 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J.Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken 196 N.J. 51 (2008), the Complainant is a "prevailing party" and entitled to an award of a reasonable attorney's fee. Thus, the Council denies the Custodian's Council's request for Reconsideration.

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Fred Semrau, Esq., of Dorsey & Semrau, Attorneys at Law (Boonton, NJ).

2. This complaint should be referred to the Office of Administrative Law for the determination of reasonable “prevailing party” attorney’s fees for the reasons set forth in the Council’s July 30, 2008 Interim Order.

December 19, 2008

Council’s Interim Order distributed to the parties.

March 11, 2009

Complaint transmitted to the Office of Administrative Law (“OAL”).

May 4, 2010

Settlement Agreement and Release submitted to OAL by Complainant’s Counsel.

May 19, 2010

Administrative Law Judge’s (“ALJ”) Initial Decision. The ALJ **FINDS** that:

1. “[t]he parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives’ signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

As such, the ALJ **CONCLUDES** that “this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved.” The ALJ **ORDERS** “the parties [to] comply with the settlement terms and that these proceedings be concluded.”

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Administrative Law Judge’s Initial Decision dated May 19, 2010 in which the Judge approved the Settlement Agreement and Release signed by the parties or their representatives.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 24, 2010



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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ROBIN BERG TABAKIN, Chair
COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

December 18, 2008 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2007-237

v.

Township of West Milford (Passaic)
Custodian of Record

At the December 18, 2008 public meeting, the Government Records Council ("Council") considered the December 10, 2008 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J.Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken 196 N.J. 51 (2008), the Complainant is a "prevailing party" and entitled to an award of a reasonable attorney's fee. Thus, the Council denies the Custodian's Council's request for Reconsideration.
2. This complaint should be referred to the Office of Administrative Law for the determination of reasonable "prevailing party" attorney's fees for the reasons set forth in the Council's July 30, 2008 Interim Order.

Interim Order Rendered by the
Government Records Council
On The 18th Day of December, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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



David Fleisher, Secretary
Government Records Council

Decision Distribution Date: December 19, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

**Findings and Recommendations of the Executive Director
December 18, 2008 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2007-237

v.

**Township of West Milford (Passaic)²
Custodian of Records**

Records Relevant to Complaint:

- August 24, 2007 Request:
 1. All documents distributed to members of the Township Council in advance of, or during the meeting on, August 22, 2007, that include proposed changes to the Township's original, but now repealed, attorney accountability ordinance.
 2. The sheets of paper that include Council Member Joseph Smolinski's suggestions for a proposed attorney accountability ordinance that he held during the Council meeting on June 27, 2007 and mentioned during the Council meeting on August 22, 2007.
- August 27, 2007 Request: The list of goals submitted by each Council member to Mayor DiDonato.

Request Made: August 24, 2007 and August 27, 2007

Response Made: August 30, 2007 and August 31, 2007

Custodian: Antoinette Battaglia

GRC Complaint Filed: October 2, 2007

Background

July 30, 2008

Government Records Council's ("Council") Interim Order. At its July 30, 2008 public meeting, the Council considered the July 23, 2008 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. Because the Custodian amended the Township's OPRA request form to include the language of N.J.S.A. 47:1A-10 and provided certified

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Dominic P. DiYanni, Esq., of Dorsey & Semrau, Attorneys at Law (Boonton, NJ).

confirmation of compliance to the Executive Director within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's May 28, 2008 Interim Order.

2. Because the Custodian did not unlawfully deny access to the requested records, and because the Custodian provided the requested records to the Complainant in the medium requested, as well as because the Custodian complied with the Council's May 28, 2008 Interim Order, it is concluded that 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. However, the Custodian's misrepresentation of OPRA's personnel records exemption on the Township's OPRA request form appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Pursuant to Teeters v. DYFS, 387 N.J.Super. 423 (App. Div. 2006), and the Council's May 28, 2008 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

July 31, 2008

Council's Interim Order distributed to the parties.

August 11, 2008

Custodian Counsel's Request for Reconsideration. The Custodian's Counsel contends that the Council should reconsider its findings regarding the award of "prevailing party" attorney's fees pursuant to N.J.S.A. 47:1A-6. Counsel states that N.J.S.A. 47:1A-6 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 which shall be heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or
- In lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

The right to institute a proceeding under this section shall be solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner. The public agency shall have the burden of proving

that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. **A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.**" (Emphasis added).

Counsel contends that in order for a requestor to qualify for attorney's fees under N.J.S.A. 47:1A-6, he must establish that he was denied access to government records and that he is the "prevailing party" in the matter. Counsel alleges that the instance when a requestor is denied access to a government record by a custodian of record is the only type of instance where a requestor may file an action contesting such denial pursuant to OPRA.

Counsel states that the Complainant's OPRA requests were not requests for personnel records but were requests for other types of records which were either provided or lawfully denied. As such, Counsel asserts that although the Council ordered the Township to amend the portion of its OPRA Request Form regarding personnel records, as requested by the Complainant in his Denial of Access Complaint, the Complainant was not unlawfully denied access to government records and therefore cannot be considered a "prevailing party" pursuant to N.J.S.A. 47:1A-6. Counsel requests that the Council reconsider its July 30, 2008 Interim Order and find that the Complainant is not a "prevailing party."

August 13, 2008

Complainant Counsel's written objection to Custodian Counsel's Request for Reconsideration. The Complainant's Counsel contends that the Township's grounds for reconsideration which are "mistake" and "illegality" are actually an opportunity for the Township to reargue a point which Counsel asserts is inappropriate pursuant to Capital Finance Co. v. Asterbadi, 398 N.J.Super. 299, 310 (App. Div. 2008) ("Reconsideration cannot be used to expand the record and reargue a motion."). Counsel states that rather than explaining how the Council's July 30, 2008 Interim Order was a mistake or illegal, the Custodian's Counsel describes the Township's interpretation of N.J.S.A. 47:1A-6 and fails to explain why it did not make this argument in the Statement of Information.

Counsel contends that the Custodian's Counsel is actually challenging the Council's May 28, 2008 Interim Order in which the Council stated that "a requestor may be deterred from submitting an OPRA request for certain personnel records because the Township's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records." Counsel states that once the Council held that a denial of access had occurred, the only remaining issue was whether the filing of a Denial of Access Complaint brought about a change in the Custodian's position, as was sought in said complaint. Counsel states that the Complainant's Denial of Access Complaint asserted that the Township's failure to include the personnel record exceptions on the OPRA Request Form was a barrier to access and that the Township denied access by maintaining false statements on the request form.

Additionally, Counsel states that case law on whether a party may be a "prevailing party" in cases where access to a specific record was not denied is sparse. However, Counsel contends that the Appellate Division has rejected an argument similar

to that of the Custodian's Counsel in this matter. Counsel states that in Kuehne Chemical Co., Inc. v. North Jersey Dist. Water Supply Com'n, 300 N.J. Super. 433 (App. Div. 1997) (decided under the Right-to-Know Law), the defendant argued that the plaintiff was not a "prevailing party" because the court gave plaintiff declaratory relief. Counsel states that the court rejected this argument by stating that "[m]erely because the judgment purported to give declaratory relief is not a basis to deny the award here." *Id.* at 443-44. Counsel states that the Appellate Division affirmed the lower court's award of attorney's fees even though there was no actual denial of access. Counsel contends that there is no reason for the Council to depart from this precedent.

August 28, 2008

Letter from Custodian's Counsel to GRC. The Custodian's Counsel states that the primary outcome of the Council's July 30, 2008 Interim Order upheld the Custodian's denial of access. Counsel contends that the principal goal of the Complainant's Denial of Access Complaint was not the amendment of the Township's OPRA Request Form. Counsel states that in a recent Appellate Division decision, Burnett v. County of Bergen, et al. Docket No. A-2002-06T2 (August 2008) the plaintiff challenged the denial of prevailing party attorney's fees by asserting that he won the "principal goal of his lawsuit." The court held that:

"...the Court's ruling, which we affirm in its entirety, rendered a plaintiff a non-prevailing part with respect to **most** of the issues raised by him in the Order to Show Cause. As Judge Moses noted, the gravamen of the plaintiff's application was the redaction of Social Security numbers. Accordingly, we are satisfied under the circumstances presented here, the Trial Court properly denied counsel fees."

Regarding this instant complaint, Counsel asserts that the gravamen of the complaint challenged two (2) denials of access which the Council upheld. Counsel contends that the third issue, which related to the Township's OPRA Request Form, was not the principal goal of the complaint. As such, Counsel claims that the Council should follow the court's findings in Burnett, *supra*, and reverse its decision regarding the award of prevailing party attorney's fees.

Analysis

Whether the Council should reconsider its July 30, 2008 Interim Order in which the Council found that the Complainant is a "prevailing party" entitled to an award of reasonable attorney's fees?

OPRA provides that:

"[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or

- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

The Custodian's Counsel states that the Complainant's OPRA requests were not requests for personnel records but were requests for other types of records which were either provided or lawfully withheld. As such, Counsel asserts that although the Council ordered the Township to amend the portion of its OPRA Request Form regarding personnel records as requested by the Complainant in his Denial of Access Complaint, the Complainant was not unlawfully denied access to government records and therefore cannot be considered a "prevailing party" pursuant to N.J.S.A. 47:1A-6.

The Council's July 30, 2008 Interim Order which held that the Complainant is a "prevailing party" entitled to an award of reasonable attorney's fees was based in part on N.J.S.A. 47:1A-6. Said provision of OPRA provides that a requestor who is denied access to government records may either file action in Superior Court or file a complaint with the GRC.

In this instant complaint, the Complainant was denied access to the records requested in his August 24, 2007 and August 27, 2007 requests and chose to file a Denial of Access Complaint with the GRC. A portion of the Complainant's complaint also challenged the Township's OPRA request form on the basis that said form does not list the three (3) exceptions to OPRA's personnel records exemption. N.J.S.A. 47:1A-10.

N.J.S.A. 47:1A-6 also states that a requestor who prevails in any proceeding shall be entitled to an award of a reasonable attorney's fee. Although the Council upheld the Custodian's denial of access to the Complainant's OPRA requests, the Council also ordered the Custodian to amend its OPRA request form as requested by the Complainant in his Denial of Access Complaint. As such, the Complainant prevailed in part.

The Council's July 30, 2008 Interim Order also based its decision that the Complainant is a "prevailing party" entitled to an award of reasonable attorney's fees on Teeters v. DYFS, 387 N.J.Super. 423 (App. Div. 2006). In Teeters, the court held that a complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432.

In this matter, the Complainant filed a Denial of Access Complaint because the Custodian denied access to the Complainant's August 24, 2007 OPRA request on the basis that the requested records are exempt from disclosure as advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Additionally, the Complainant alleged that the Township's OPRA Request Form violated OPRA because said form indicated that public records do not include employee personnel files, but failed to also list the three (3) exceptions to OPRA's personnel records exemption. N.J.S.A. 47:1A-10. The Complainant asserted in his Denial of Access Complaint that this misinformation is a barrier to access.

The Council's May 28, 2008 Interim Order ordered the Custodian to either delete the portion of the Township's OPRA Request Form regarding the personnel records exemption, or amend said statement to include the remainder of the applicable provision of OPRA (N.J.S.A. 47:1A-10). In a certification dated June 7, 2008, the Custodian certified that the Township adopted Resolution No. 2008-223 which mandated the changes to the Township's OPRA Request Form regarding personnel records.

The evidence of record indicates that prior to the filing of the Complainant's Denial of Access Complaint, the Township's OPRA request form contained inaccurate information. The evidence of record also indicates that the Complainant asserted in his Denial of Access Complaint that the Township's OPRA request form violated OPRA. Additionally, the evidence of record indicates that the Council ordered the Custodian to amend the Township's OPRA Request Form because said form contained inaccurate information pertaining to OPRA's personnel records exemption at N.J.S.A. 47:1A-10 and was essentially denying access to all personnel records, in violation of OPRA. Further, the evidence shows that the Custodian complied with the Council's Interim Order and amended its OPRA Request Form.

Thus, pursuant to Teeters, *supra*, the Complainant's Denial of Access Complaint brought about a change (voluntary or otherwise) in the Custodian's conduct. Specifically, the Custodian amended the Township's OPRA request form to include the correct citation to OPRA's personnel records exemption. As such, the Complainant is a "prevailing party" entitled to an award of a reasonable attorney's fee.

However, the Custodian's Counsel contends that the Council should reverse its decision regarding the award of "prevailing party" attorney's fees because the gravamen of the complaint challenged two (2) denials of access which the Council upheld. Counsel contends that the third issue, which related to the Township's OPRA Request Form, was not the principal goal of the complaint. Counsel cites to a recent Appellate Division decision, Burnett v. County of Bergen, et al, Docket No. A-2002-06T2 (August 2008) in which the court did not award "prevailing party" attorney's fees and stated that "...the Court's ruling, which we affirm in its entirety, rendered a plaintiff a non-prevailing party with respect to most of the issues raised by him in the Order to Show Cause..." It should be noted, however, that the issue of attorney's fees was not raised at oral argument in the Appellate Division case and the quotation cited by the Custodian's Counsel refers to dicta in the Appellate Division decision. As such, Burnett, *supra*, does not apply to this instant matter.

Additionally, since the Council's ruling on this matter, 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 court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra*, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon 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 (7th ed. 1999)). The court in Mason, *supra*, held that

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

Under the catalyst theory discussed in Mason, *supra*, in order to be considered a “prevailing party” entitled to an award of a reasonable attorney’s fee, the Complainant in this matter must demonstrate a factual causal nexus between the complaint and the relief ultimately achieved. It is evident that the filing of the Complainant’s Denial of Access Complaint directly resulted in the Custodian amending the Township’s request form because the Complainant asserted that the form violated OPRA and the Custodian amended said form in direct response to the Council’s Interim Order. Additionally, the Complainant must demonstrate that the relief ultimately secured by the Complainant had a basis in law. It is evident that such amendment was based on law because the Township’s request form incorrectly cited to OPRA’s personnel records exemption. Therefore, pursuant to Mason, *supra*, the Complainant is entitled to an award of a reasonable attorney’s fee.

The Complainant’s Counsel states that, pursuant to Kuehne Chemical Co., Inc. v. North Jersey Dist. Water Supply Com’n, 300 N.J. Super. 433 (App. Div. 1997) (decided under the Right-to-Know Law), declaratory relief is not a basis to deny an award of “prevailing party” attorney’s fees. However, said case is not applicable to this matter since it deals with the Right-to-Know-Law which was superseded by OPRA.

Therefore, pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*, the Complainant is a “prevailing party” and entitled to an award of a reasonable attorney’s fee. Thus, the Council denies the Custodian’s Council’s request for Reconsideration.

This complaint should be referred to the Office of Administrative Law for the determination of reasonable “prevailing party” attorney’s fees for the reasons set forth in the Council’s July 30, 2008 Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken 196 N.J. 51 (2008), the Complainant is a “prevailing party” and entitled to an award of a reasonable attorney’s fee. Thus, the Council denies the Custodian’s Council’s request for Reconsideration.
2. This complaint should be referred to the Office of Administrative Law for the determination of reasonable “prevailing party” attorney’s fees for the reasons set forth in the Council’s July 30, 2008 Interim Order.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 10, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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ROBIN BERG TABAKIN, Chair
COMMISSIONER JOSEPH V. DORIA, JR.
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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

July 30, 2008 Government Records Council Meeting

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Complainant

Complaint No.2007-237

v.

Township of West Milford (Passaic)
Custodian of Record

At the July 30, 2008 public meeting, the Government Records Council ("Council") considered the July 23, 2008 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian amended the Township's OPRA request form to include the language of N.J.S.A. 47:1A-10 and provided certified confirmation of compliance to the Executive Director within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's May 28, 2008 Interim Order.
2. Because the Custodian did not unlawfully deny access to the requested records, and because the Custodian provided the requested records to the Complainant in the medium requested, as well as because the Custodian complied with the Council's May 28, 2008 Interim Order, it is concluded that 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. However, the Custodian's misrepresentation of OPRA's personnel records exemption on the Township's OPRA request form appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Pursuant to Teeters v. DYFS, 387 N.J.Super. 423 (App. Div. 2006), and the Council's May 28, 2008 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Therefore, the Complainant is a prevailing party entitled to an award of a



reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 30th Day of July, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: July 31, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 30, 2008 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2007-237

v.

**Township of West Milford (Passaic)²
Custodian of Records**

Records Relevant to Complaint:

- August 24, 2007 Request:
 1. All documents distributed to members of the Township Council in advance of, or during the meeting on August 22, 2007, that include proposed changes to the Township's original, but now repealed, attorney accountability ordinance.
 2. The sheets of paper that include Council Member Joseph Smolinski's suggestions for a proposed attorney accountability ordinance that he held during the Council meeting on June 27, 2007 and mentioned during the Council meeting on August 22, 2007.
- August 27, 2007 Request: The list of goals submitted by each Council member to Mayor DiDonato.

Request Made: August 24, 2007 and August 27, 2007

Response Made: August 30, 2007 and August 31, 2007

Custodian: Antoinette Battaglia

GRC Complaint Filed: October 2, 2007

Background

May 28, 2008

Government Records Council's ("Council") Interim Order. At its May 28, 2008 public meeting, the Council considered the May 21, 2008 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. Because of the nature of the requested records responsive to the Complainant's August 24, 2007 OPRA request (a Council member's suggested changes to a Township ordinance), said records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as advisory, consultative or deliberative material because said records are pre-decisional and contain

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² Represented by Fred Semrau, Esq., of Dorsey & Semrau, Attorneys at Law (Boonton, NJ).

opinions, recommendations, or advice about agency policies or decisions. *See In Re Liquidation of Integrity Insurance Co.*, 165 N.J. 75 (2000). As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

2. Although the Custodian's initial written response to the Complainant's OPRA request dated August 27, 2007 did not make the requested records available in the medium requested, because the Custodian made the requested records available to the Complainant in the medium requested in her subsequent written response to the Complainant, which was within the statutorily mandated seven (7) business day time period to respond pursuant to N.J.S.A. 47:1A-5.i., the Custodian did not violate N.J.S.A. 47:1A-5.d.
3. Because public agencies are expressly directed to adopt an official OPRA request form, and because the Township of West Milford has adopted its own form, as well because the GRC's Advisory Opinion No. 2006-01 states that a requestor may use the model form when a public agency has not adopted an official form, the GRC declines to order the Township of West Milford to adopt the model request form.
4. The Custodian shall either delete the portion of the Township's OPRA request form regarding the personnel records exemption, or amend said statement to include the remainder of the applicable provision of OPRA. Specifically,

“the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

- an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;
- personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
- data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.” N.J.S.A. 47:1A-10.

5. **The Custodian shall comply with item # 4 above within five (5) business days from receipt of the Council's Interim Order and provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

June 3, 2008

Council's Interim Order distributed to the parties.

June 7, 2008

Custodian's response to the Council's Interim Order. The Custodian certifies that at its workshop meeting on June 4, 2008, the Township adopted Resolution No. 2008-223 which mandates the changes to the Township's OPRA request form regarding personnel records. The Custodian attaches a copy of said resolution which states:

"...the following information [shall] be included in the Records Request Form to be used by the Township of West Milford.

'the personnel or pension records of any individual in the possession of a public agency including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

1. an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;
2. personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
3. data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.' N.J.S.A. 47:1A-10."

Additionally, the Custodian attaches a copy of the newly adopted OPRA request form which includes the language referenced above.

Analysis

Whether the Custodian complied with the Council's May 28, 2008 Interim Order?

The Custodian certified that via Resolution No. 2008-223, the Township adopted a new OPRA request form which includes the provision of OPRA regarding the release of personnel records, N.J.S.A. 47:1A-10. The Custodian provided the GRC with a copy of said resolution and the newly adopted OPRA request form.

Therefore, because the Custodian amended the Township's OPRA request form to include the language of N.J.S.A. 47:1A-10 and provided certified confirmation of compliance to the Executive Director within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's May 28, 2008 Interim Order.

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

OPRA states that:

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

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

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

The Custodian in this complaint carried her burden of proving a lawful denial of access to the Complainant's August 24, 2007 request, pursuant to N.J.S.A. 47:1A-6, because the records responsive are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Additionally, the Custodian did not violate N.J.S.A. 47:1A-5.d because she provided the Complainant with the records responsive to his August 27, 2007 request in the medium requested within the statutorily mandated seven (7) business days. Further, the Custodian complied with the Council's May 28, 2008 Interim Order by amending its OPRA request form to include the language of N.J.S.A. 47:1A-10 and provided certified confirmation of compliance to the Executive Director within the time frame as ordered by the Council.

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

Therefore, because the Custodian did not unlawfully deny access to the requested records, and because the Custodian provided the requested records to the Complainant in the medium requested, as well as because the Custodian complied with the Council's May 28, 2008 Interim Order, it is concluded that 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. However, the Custodian's misrepresentation of OPRA's personnel records exemption on the Township's OPRA request form appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

OPRA provides that:

"[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

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

In Teeters, the complainant appealed from a final decision of the GRC which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under OPRA, N.J. Stat. Ann. § 47:1A-6 and N.J. Stat. Ann. § 47:1A-7(f), against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee Accordingly, the Court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

Regarding this instant complaint, the Custodian sought a finding that the Custodian violated OPRA and denied access by not utilizing the GRC’s model request form and maintaining false statements on the Township’s OPRA request form. In the May 21, 2008 Findings and Recommendations, the Council stated that “a requestor may be deterred from submitting an OPRA request for certain personnel records because the Township’s form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records.” The Council ordered the Custodian to either delete the portion of the Township’s OPRA request form regarding the personnel records exemption, or amend said statement to include the remainder of N.J.S.A. 47:1A-10. The Custodian certified on June 7, 2008 that she complied with said order and amended the Township’s OPRA request form to include the language of N.J.S.A. 47:1A-10.

Therefore, pursuant to Teeters, *supra*, and the Council’s May 28, 2008 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6 and Teeters, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian amended the Township’s OPRA request form to include the language of N.J.S.A. 47:1A-10 and provided certified confirmation of compliance to the Executive Director within the five (5) business days as ordered by the Council, the Custodian has complied with the Council’s May 28, 2008 Interim Order.

2. Because the Custodian did not unlawfully deny access to the requested records, and because the Custodian provided the requested records to the Complainant in the medium requested, as well as because the Custodian complied with the Council's May 28, 2008 Interim Order, it is concluded that 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. However, the Custodian's misrepresentation of OPRA's personnel records exemption on the Township's OPRA request form appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

3. Pursuant to Teeters v. DYFS, 387 N.J.Super. 423 (App. Div. 2006), and the Council's May 28, 2008 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Dara Lownie
Senior Case Manager

Approved by: Catherine Starghill, Esq.
Executive Director

July 23, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

May 28, 2008 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2007-237

v.

Township of West Milford (Passaic)
Custodian of Record

At the May 28, 2008 public meeting, the Government Records Council ("Council") considered the May 21, 2008 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. Because of the nature of the requested records responsive to the Complainant's April 24, 2007 OPRA request (a Council member's suggested changes to a Township ordinance), said records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as advisory, consultative or deliberative material because said records are pre-decisional and contain opinions, recommendations, or advice about agency policies or decisions. *See In Re Liquidation of Integrity Insurance Co.*, 165 N.J. 75 (2000). As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
2. Although the Custodian's initial written response to the Complainant's OPRA request dated August 27, 2007 did not make the requested records available in the medium requested, because the Custodian made the requested records available to the Complainant in the medium requested in her subsequent written response to the Complainant, which was within the statutorily mandated seven (7) business day time period to respond pursuant to N.J.S.A. 47:1A-5.i., the Custodian did not violate N.J.S.A. 47:1A-5.d.
3. Because public agencies are expressly directed to adopt an official OPRA request form, and because the Township of West Milford has adopted its own form, as well because the GRC's Advisory Opinion No. 2006-01 states that a requestor may use the model form when a public agency has not adopted an



official form, the GRC declines to order the Township of West Milford to adopt the model request form.

4. The Custodian shall either delete the portion of the Township's OPRA request form regarding the personnel records exemption, or amend said statement to include the remainder of the applicable provision of OPRA. Specifically,

“the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

- an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;
- personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
- data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.” N.J.S.A. 47:1A-10.

5. **The Custodian shall comply with item # 4 above within five (5) business days from receipt of the Council's Interim Order and provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of May, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: June 3, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 28, 2008 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2007-237

v.

**Township of West Milford (Passaic)²
Custodian of Records**

Records Relevant to Complaint:

- August 24, 2007 Request:
 1. All documents distributed to members of the Township Council in advance of, or during the meeting on August 22, 2007, that include proposed changes to the Township's original, but now repealed, attorney accountability ordinance.
 2. The sheets of paper that include Council Member Joseph Smolinski's suggestions for a proposed attorney accountability ordinance that he held during the Council meeting on June 27, 2007 and mentioned during the Council meeting on August 22, 2007.
- August 27, 2007 Request: The list of goals submitted by each Council member to Mayor DiDonato.

Request Made: August 24, 2007 and August 27, 2007

Response Made: August 30, 2007 and August 31, 2007

Custodian: Antoinette Battaglia

GRC Complaint Filed: October 2, 2007

Background

August 24, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

August 31, 2007

Assistant Municipal Clerk's response to the Complainant's OPRA request dated August 24, 2007. The Assistant Clerk responds in writing to the request on the fifth (5th) business day following receipt of such request. The Assistant Clerk states that access to the requested records is denied because the requested records are exempt from disclosure under OPRA as said records constitute advisory, consultative, or deliberative material.

¹Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

²Represented by Fred Semrau, Esq., of Dorsey & Semrau, Attorneys at Law (Boonton, NJ).

The Assistant Clerk states that the requested records include an individual's proposed suggestions for changes to an ordinance which may become Township policy.

August 27, 2007

Complainant's second OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant requests that the Custodian provide the requested records via e-mail or regular mail.

August 30, 2007

The Assistant Municipal Clerk's response to the Complainant's OPRA request dated August 27, 2007. The Assistant Clerk responds in writing to the request on the third (3rd) business day following receipt of such request. The Assistant Clerk states that the requested records are available for review in the Clerk's office during regular business hours.

September 1, 2007

Letter from Complainant to Assistant Clerk regarding the Complainant's OPRA request dated August 27, 2007. The Complainant states that his OPRA request sought access to the requested records via e-mail or regular mail. The Complainant states that said request also asked that the Custodian advise as to the fees for copies, which the Complainant states was not included in the Assistant Clerk's letter dated August 30, 2007. The Complainant asks that the Assistant Clerk provide said information.

September 4, 2007

Facsimile from Custodian to Complainant on the fifth (5th) business day following the Custodian's receipt of the Complainant's request. The Custodian apologizes for the miscommunication of the Complainant's OPRA request dated August 27, 2007 and states that she assumed the Complainant would want to review the records responsive before deciding to purchase copies. The Custodian states that there are two (2) records responsive consisting of three (3) pages. The Custodian states that the cost is \$2.25 plus \$0.41 for postage which amounts to \$2.66.

October 2, 2007

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated August 24, 2007
- Complainant's OPRA request dated August 27, 2007
- Assistant Clerk's response to the Complainant's second request dated August 30, 2007
- Assistant Clerk's response to the Complainant's first request dated August 31, 2007
- Letter from Complainant to Assistant Clerk dated September 1, 2007
- Blank copy of the Township of West Milford's OPRA Request Form

The Complainant's Counsel states that the Complainant submitted his OPRA request on August 24, 2007 and received a letter response from the Custodian dated

August 31, 2007 in which the Custodian denied said request on the basis that the requested records are exempt from disclosure under OPRA as advisory, consultative, or deliberative material.

Counsel states that the Complainant's request involves records which were distributed in advance to the West Milford Township Council members and contains suggestions for changes to the proposed attorney accountability ordinance. Regarding the request for the records the Township Council members received in advance of the August 22, 2007 Council meeting, Counsel states that the Custodian has not specifically identified whether any records responsive exist, or who authored and reviewed the records, making it impossible to determine if the Custodian's claim of privilege is appropriate. However, Counsel asserts that even if any privilege is applicable, said privilege was waived because Council members discussed and quoted proposed versions of the attorney accountability ordinance from the requested records at the Council's August 22, 2007 meeting. Counsel contends that New Jersey law recognizes privilege waivers. *See In re Grand Jury Subpoena Issued to Galasso*, 389 N.J. Super. 281, 297-98, 913 A.2d 78, 87 (App. Div. 2006); *Weingarten v. Weingarten*, 234 N.J. Super. 318, 326, 560 A.2d 1243, 1247 (App. Div. 1989) (Disclosure of confidential communications constitutes a waiver); N.J.R.E. 530. Counsel states that the court in *Weingarten* held that once a privilege is waived, that waiver extends to "related privileged information pertaining to the same subject matter."

Regarding the Complainant's request for suggestions, Counsel asserts that said records are not privileged. Counsel contends that if the authors of the records were members of the public, since the Custodian failed to identify the records responsive and the authors of said records, the Township cannot make a non-privileged record privileged by relying on it during deliberations. Counsel asserts that the deliberative process privilege applies if a document is both "predecisional" and "deliberative." Additionally, Counsel states that pursuant to *Berger v. I.R.S.*, 487 F. Supp. 2d 482, 498 (D.N.J. 2007), a document is predecisional if "it is received by the decision maker on the subject of the decision prior to the time the decision is made," and it is deliberative if it "reflects the give-and-take of the consultative process."³ Thus, Counsel contends that the requested suggestions are not deliberative if said suggestions were written by members of the public because they reflect unsolicited suggestions to the Council rather than any "give-and-take" of the Council. However, Counsel also contends that even if said suggestions are privileged, said privilege was waived when said suggestions were discussed at the public meeting, pursuant to *Weingarten, supra*.

Additionally, Counsel states that the Complainant submitted a second OPRA request on August 27, 2007 in which the Complainant sought access to the requested records via e-mail or regular mail. Counsel states that the Custodian responded to said request via letter dated August 30, 2007 in which the Custodian informed the Complainant that the requested records are available for review in the Clerk's office. Counsel states that the Custodian gave no reason why the records could not be e-mailed or mailed to the Complainant. Counsel also states that the Complainant requested that

³ Counsel states that although the court, in *Berger*, discussed the deliberative process privilege, the GRC, in *Parave-Fogg v. Lower Alloways Creek Township*, GRC Complaint No. 2006-51 (2006) indicated that the advisory, consultative, or deliberative privilege is "equivalent to the deliberative process privilege." Martin O'Shea v. Township of West Milford (Passaic), 2007-237 – Findings and Recommendations of the Executive Director 3

the records be provided by e-mail or regular mail and that he be advised as to the fees associated with fulfilling the request, via letter to the Custodian dated September 1, 2007. Counsel contends that the Custodian violated OPRA by not providing a copy of the requested records in the medium requested pursuant to N.J.S.A. 47:1A-5.d.

Further, Counsel asserts that the Township's OPRA request form does not follow the GRC's model form and violated OPRA. Counsel states that the Township's form indicates that public records do not include employee personnel files, but said form does not list the three (3) exceptions to OPRA's personnel record exemption. N.J.S.A. 47:1A-10. Counsel contends that if the form states the rule, it should also state the exceptions and that anything else is a barrier to access public records.

Moreover, Counsel requests the following relief from the GRC:

1. A finding that the Custodian violated OPRA and unlawfully denied access to the Complainant's request dated August 24, 2007 by refusing to provide the requested records
2. A finding that the Custodian violated OPRA and unlawfully denied access to the Complainant's request dated August 27, 2007 by failing to provide the requested records via e-mail or regular mail
3. A finding that the Custodian violated OPRA and denied access by not utilizing the GRC's model request form and by maintaining false statements on the Township's request form
4. An order compelling the Custodian to provide immediate access to all of the requested records
5. An order compelling the Custodian to adopt the GRC's model request form
6. A finding that the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and award of a reasonable attorney's fee
7. A fine against the Custodian if the GRC determines that she knowingly and willfully violated OPRA

October 10, 2007

Offer of Mediation sent to both parties.

October 15, 2007

Custodian's signed Agreement to Mediate.

October 16, 2007

Complainant declines the Offer of Mediation.

October 25, 2007

Request for the Statement of Information sent to the Custodian.

November 2, 2007

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated August 24, 2007
- Complainant's OPRA request dated August 27, 2007

- Custodian's response to the Complainant's second OPRA requested dated August 30, 2007
- Custodian's response to the Complainant's first OPRA request dated August 31, 2007
- Letter from Complainant to Custodian dated September 1, 2007
- Facsimile from Custodian to Complainant dated September 4, 2007
- Blank copy of the Township of West Milford's OPRA Request Form
- GRC Advisory Opinion No. 2006-01⁴

The Custodian certifies that she responded to the Complainant's August 24, 2007 OPRA request via letter dated August 31, 2007, after receiving legal advice from the Township Attorney, in which the Custodian denied access to the records pursuant to OPRA's advisory, consultative, or deliberative material exemption (N.J.S.A. 47:1A-1.1). The Custodian certifies that the requested records reflect a Council member's suggestions and comments as to a new Township ordinance.

The Custodian also certifies that she responded to the Complainant's August 27, 2007 OPRA request via letter dated August 30, 2007. The Custodian certifies that in response to the Complainant's letter dated September 1, 2007, the Custodian attempted to fax a response letter dated September 4, 2007 to the Complainant; however, the Custodian certifies that the fax failed twice and thus the Custodian forwarded said letter to the Complainant via regular mail on September 4, 2007.

Additionally, the Custodian states that the Complainant's Denial of Access Complaint challenges the Township's OPRA request form. The Custodian states that pursuant to N.J.S.A. 47:1A-7.b., the GRC shall "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian." The Custodian contends that there was no OPRA request that relates to this portion of the Complainant's Denial of Access Complaint and thus there was no denial of such request. The Custodian asserts that the GRC has no jurisdiction to adjudicate this portion of the Complainant's complaint. The Custodian also contends that this portion of the Complainant's complaint has no merit because the Township's OPRA form complies with the requirements of N.J.S.A. 47:1A-5.f. Additionally, the Custodian states that GRC Advisory Opinion No. 2006-01 provides that "[n]othing in OPRA suggests that some requestors may forego using the official request form."

December 10, 2007

Letter from Complainant's Counsel to GRC in response to the Custodian's SOI. The Complainant's Counsel states that the cover letter of the Custodian's SOI indicates that additional records were provided to the GRC which were not provided to the Complainant. Counsel states that if the Custodian's purpose in providing the GRC with these records is for an *in camera* review, Council requests an index detailing the names, dates, authors, and recipients of the records. Counsel states that if the Custodian's

⁴ The Custodian attached additional records to the SOI which are not relevant to the adjudication of this complaint.

purpose was to support the Township's position on its legal arguments, Counsel requests copies of said records.⁵

Counsel also states that regarding the records responsive to the Complainant's request dated August 24, 2007, the Custodian failed to respond to Counsel's argument that the privilege, if any, was waived. Counsel states that if the Township takes the position that the privilege was not waived, the Township should address that argument.

Additionally, Counsel contends that the GRC is authorized to review the Township's OPRA request form. Counsel asserts that the GRC's review of the Township's form is prompted by the Complainant's OPRA requests to the Township. Counsel also contends that the GRC has the statutory authority to promulgate the model OPRA request form that public agencies must adopt.

January 9, 2008

E-mail from GRC to Complainant's Counsel. The GRC states that the records provided to the GRC in the Custodian's SOI which were not provided to the Complainant are memoranda from the Custodian's Counsel advising the Custodian on how to respond to the Complainant's OPRA requests which are the subject of this Denial of Access Complaint. The GRC states that it will not review said records *in camera* because the GRC is only concerned with the actions of the Custodian and not the advice the Custodian received from legal counsel. Thus, the GRC states that said records are not relevant to the adjudication of this complaint.⁶

April 16, 2008

Letter from GRC to Custodian. The GRC states that the Custodian's document index included in the Custodian's SOI dated November 2, 2007 does not identify the records responsive to the Complainant's requests. The GRC requests that the Custodian complete the document index as required.

April 21, 2008⁷

Custodian's completed document index. The Custodian states that the records responsive to the Complainant's OPRA request dated August 24, 2007 are Council President Smolinski's personal notes. The Custodian states that she is unaware of the number of pages of the Council President's notes because said notes were only provided to legal counsel and not provided to the Custodian. The Custodian asserts that the notes reflect the Council President's suggestions and comments on a proposed ordinance.

Additionally, the Custodian states that the records responsive to the Complainant's OPRA request dated August 27, 2007 is a memorandum from the Township Administrator to the Mayor and Township Council dated August 22, 2007

⁵ The records to which the Complainant's Counsel refers are listed as "additional records which are not relevant to the adjudication of this complaint" in the list of records included with the Custodian's Statement of Information.

⁶ It should also be noted that the GRC does not conduct *in camera* reviews at the request of the parties.

⁷ Additional correspondence was submitted by the parties; however, said correspondence is not relevant to the adjudication of this complaint.

which included each Council member's list of goals. The Custodian states that said memorandum is three (3) pages.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... *The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also states that:

"[a] custodian shall permit access to a government record and *provide a copy thereof in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium..." (Emphasis added.) N.J.S.A. 47:1A-5.d.

Additionally, OPRA provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request...*" (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

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

Complainant’s August 24, 2007 Request

The Complainant’s Counsel states that the Custodian has not specifically identified whether any records responsive exist, or who authored and reviewed the records, making it impossible to determine if the Custodian’s claim of privilege is appropriate.

In John Paff v. N.J. Department of Labor, 392 N.J. Super. 334 (App. Div. 2007), the court directed public agencies to provide the following information in response to Denial of Access Complaints filed with the GRC:

1. the search undertaken to satisfy the request
2. the documents found that are responsive to the request
3. the determination of whether the document or any part thereof is confidential and the source of the confidential information
4. a statement of the agency’s document retention/destruction policy and the last date on which documents that may have been responsive to the request were destroyed

The GRC requires that custodians provide the above information with the Custodian’s Statement of Information in the form of a legal certification pursuant to N.J. Court Rule 1:4-4. Custodians are not required to provide such information at the time in which they are either granting or denying access to an OPRA request. *See* Bellan-Boyer v. NJ Department of Community Affairs, Commissioner’s Office, GRC Complaint No. 2007-114 (October 2007).

Additionally, the Custodian certifies that she responded to the Complainant’s August 24, 2007 OPRA request via letter dated August 31, 2007, after receiving legal advice from the Township Attorney, in which the Custodian denied access to the records pursuant to OPRA’s advisory, consultative, or deliberative material exemption (N.J.S.A. 47:1A-1.1). The Custodian certifies that the requested records reflect a Council member’s suggestions and comments as to a new Township ordinance.

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are

formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). Federal district courts and circuit courts of appeal subsequently adopted the privilege and its rationale. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the ‘preponderating policy’ and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, citing McClain, *supra*, 99 N.J. at 361-62, 492 A.2d 991.

In In Re Liquidation of Integrity, *supra*, 165 N.J. at 84-5, the judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
 - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
 - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
 - i. Deliberative materials do not include purely factual materials.
 - ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
 - c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.
 - d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.
 - e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency*.

In this instant matter, the Complainant's Counsel asserts that even if any privilege is applicable, said privilege was waived because Council members discussed and quoted proposed versions of an attorney accountability ordinance at the Township Council's August 22, 2007 meeting. The Complainant's Counsel contends that New Jersey law recognizes privilege waivers. See In re Grand Jury Subpoena Issued to Galasso, 389 N.J. Super. 281, 297-98, 913 A.2d 78, 87 (App. Div. 2006); Weingarten v. Weingarten, 234 N.J. Super. 318, 326, 560 A.2d 1243, 1247 (App. Div. 1989).

However, the cases cited by the Complainant's Counsel relate to the waiver of the attorney-client privilege and not OPRA's advisory, consultative, or deliberative material exemption, which is at issue in this instant complaint. Thus, because attorney-client privilege is not at issue in this present matter, the cases cited by the Complainant's Counsel do not apply here.

Additionally, the Complainant's Counsel cites N.J.R.E. 530 to support his assertion that even if the requested records were privileged, said privilege was waived

when the Township Council discussed the requested records at the Township Council meeting.

N.J.R.E. 530 provides that:

“[a] person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone...”

However, the above citation, which is part of the New Jersey Rules of Evidence, does not apply to administrative agencies such as the GRC. Rule 101 of the Rules of Evidence provides that “...proceedings before administrative agencies shall not be governed by these rules.” N.J.R.E. 101(a)(3).

Therefore, because of the nature of the requested records responsive to the Complainant’s April 24, 2007 OPRA request (a Council member’s suggested changes to a Township ordinance), said records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as advisory, consultative or deliberative material because said records are pre-decisional and contain opinions, recommendations, or advice about agency policies or decisions. See In Re Liquidation of Integrity, supra. As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

Complainant’s August 27, 2007 Request

The Complainant’s Counsel states that the Complainant’s August 27, 2007 OPRA request sought access to records via e-mail or regular mail. The Complainant’s Counsel states that the Custodian responded to said request via letter dated August 30, 2007 in which the Custodian informed the Complainant that the requested records were available for review in the Clerk’s office. Counsel contends that the Custodian violated OPRA by not providing a copy of the requested records in the medium requested pursuant to N.J.S.A. 47:1A-5.d.

The Custodian states that she assumed the Complainant would want to review the records responsive before deciding to purchase copies. Via letter dated September 4, 2007, the fifth (5th) business day following the Custodian’s receipt of the Complainant’s request, the Custodian informed the Complainant that there are two (2) records responsive consisting of three (3) pages. The Custodian stated that the cost is \$2.25 plus \$0.41 for postage which amounts to \$2.66.

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. Additionally, OPRA provides that “[a] custodian shall permit access to a government record and *provide a copy thereof in the medium requested* if the public agency maintains the record in that medium...” N.J.S.A. 47:1A-5.d.

In this complaint, the Custodian provided the Complainant with a written response to his OPRA request on the third (3rd) business day following the Custodian's receipt of such request and advised the Complainant that the requested records were available for review in the Clerk's office. However, the Custodian amended her response to the Complainant via letter dated September 4, 2007, the fifth (5th) business day following the Custodian's receipt of the request, in which the Custodian made the requested records available to the Complainant in the medium requested (the Custodian advised the Complainant of the copy fees for paper copies).

Therefore, although the Custodian's initial written response to the Complainant's OPRA request dated August 27, 2007 did not make the requested records available in the medium requested, because the Custodian made the requested records available to the Complainant in the medium requested in her subsequent written response to the Complainant, which was within the statutorily mandated seven (7) business day time period to respond pursuant to N.J.S.A. 47:1A-5.i., the Custodian did not violate N.J.S.A. 47:1A-5.d.

Whether the Custodian violated OPRA and unlawfully denied access by not utilizing the GRC's model request form?

OPRA provides that:

“[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

- (1) specific directions and procedures for requesting a record;
- (2) a statement as to whether prepayment of fees or a deposit is required;
- (3) the time period within which the public agency is required by [OPRA], to make the record available;
- (4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (5) space for the custodian to list reasons if a request is denied in whole or in part
- (6) space for the requestor to sign and date the form;
- (7) space for the custodian to sign and date the form if the request is fulfilled or denied. N.J.S.A. 47:1A-5.f.

The Complainant's Counsel asserts that the Township's OPRA request form does not follow the GRC's model form and violated OPRA. Counsel states that the Township's form indicates that public records do not include employee personnel files,

but said form does not list the three (3) exceptions to OPRA's personnel record exemption. N.J.S.A. 47:1A-10. Counsel contends that if the form states the rule, it should also state the exceptions and that anything else is a barrier to access public records.

The Custodian asserts that the form adopted by the Township complies with all of the requirements set forth in N.J.S.A. 47:1A-5.f. Additionally, the Custodian states that GRC Advisory Opinion No. 2006-01 provides that "[n]othing in OPRA suggests that some requestors may forego using the official request form."

The GRC's Advisory Opinion No. 2006-01 provides that a valid OPRA request is one that is submitted on the agency's official OPRA request form. N.J.S.A. 47:1A-5.f mandates that public agencies adopt an official OPRA request form. However, the GRC's Advisory Opinion No. 2006-01 also provides that "[w]hen an agency has not adopted its own official OPRA records request form, requestors may submit their records request on the Model Request Form located on the Government Records Council website (www.nj.gov/grc/)."

Therefore, because public agencies are expressly directed to adopt an official OPRA request form, and because the Township of West Milford has adopted its own form, as well because the GRC's Advisory Opinion No. 2006-01 states that a requestor may use the model form when a public agency has not adopted an official form, the GRC declines to order the Township of West Milford to adopt the model request form.

Nevertheless, the Township's official OPRA request form states that:

"[t]he term 'public records' generally includes those records determined to be public in accordance with P.L. 2001 c. 404. The term does not include *employee personnel files*, police investigation records, public assistance files, or other matters in which there is a right of privacy or confidentiality or which is specifically exempted by law." (Emphasis added).

While the Township's form advises requestors that personnel records are exempt from disclosure (pursuant to N.J.S.A. 47:1A-10), the form does not also inform requestors that there are exceptions to the personnel record exemption under OPRA. N.J.S.A. 47:1A-1 provides that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions..." Additionally, custodians must grant or deny access to records in accordance with the law. Thus, a requestor may be deterred from submitting an OPRA request for certain personnel records because the Township's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records.

Therefore, the Custodian shall either delete the portion of the Township's OPRA request form regarding the personnel records exemption, or amend said statement to include the remainder of the applicable provision of OPRA. Specifically,

“the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

- an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;
- personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
- data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.” N.J.S.A. 47:1A-10.

Whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

The Council defers analysis of whether the Custodian is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because of the nature of the requested records responsive to the Complainant’s April 24, 2007 OPRA request (a Council member’s suggested changes to a Township ordinance), said records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as advisory, consultative or deliberative material because said records are pre-decisional and contain opinions, recommendations, or advice about agency policies or decisions. *See In Re Liquidation of Integrity Insurance Co.*, 165 N.J. 75 (2000). As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

2. Although the Custodian's initial written response to the Complainant's OPRA request dated August 27, 2007 did not make the requested records available in the medium requested, because the Custodian made the requested records available to the Complainant in the medium requested in her subsequent written response to the Complainant, which was within the statutorily mandated seven (7) business day time period to respond pursuant to N.J.S.A. 47:1A-5.i., the Custodian did not violate N.J.S.A. 47:1A-5.d.
3. Because public agencies are expressly directed to adopt an official OPRA request form, and because the Township of West Milford has adopted its own form, as well because the GRC's Advisory Opinion No. 2006-01 states that a requestor may use the model form when a public agency has not adopted an official form, the GRC declines to order the Township of West Milford to adopt the model request form.
4. The Custodian shall either delete the portion of the Township's OPRA request form regarding the personnel records exemption, or amend said statement to include the remainder of the applicable provision of OPRA. Specifically,

“the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

 - an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;
 - personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
 - data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.” N.J.S.A. 47:1A-10.
5. **The Custodian shall comply with item # 4 above within five (5) business days from receipt of the Council's Interim Order and provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Custodian is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Prepared By:

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Approved By:

Catherine Starghill, Esq.
Executive Director

May 21, 2008