



**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

**FINAL DECISION**

**December 18, 2008 Government Records Council Meeting**

Martin O'Shea  
Complainant

Complaint No. 2007-185

v.

Madison Public School District (Morris)  
Custodian of Record

At the December 18, 2008 public meeting, the Government Records Council ("Council") considered the December 10, 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, accepts the Administrative Law Judge's Initial Decision dated October 2, 2008. No further adjudication is required.

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

Final Decision Rendered by the  
Government Records Council  
On The 18<sup>th</sup> Day of 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 22, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Martin O'Shea<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-185**

v.

**Madison Public School District (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A copy of the audio recording of the most recent meeting of the Madison Board of Education.

**Request Made:** June 25, 2007

**Response Made:** June 25, 2007<sup>3</sup>

**Custodian:** Charles R. Milewski

**GRC Complaint Filed:** August 6, 2007

**Background**

**April 30, 2008**

Government Records Council's ("Council") Interim Order. At its April 30, 2008 public meeting, the Council considered the April 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. The Custodian complied with the Council's February 27, 2008 Interim Order by initially responding to the Complainant's Counsel within the five (5) business days ordered by the GRC and releasing the requested record to the Complainant and providing a subsequent certification to the GRC on March 13, 2008.
2. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and the Council's February 27, 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

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<sup>1</sup> Represented by Walter Luers, Esq., of Walter M. Luers, LLC (Oxford, NJ).

<sup>2</sup> Represented by Michael Rowan, Esq., of Porzio, Bromberg & Newman, P.C. (Morristown, NJ).

<sup>3</sup> The Custodian responded by telephone.

complaint should be referred to the Office of Administrative law for the determination of reasonable prevailing party attorney's fees.

**April 30, 2008**

Council's Interim Order distributed to the parties.

**May 21, 2008**

Complaint transmitted to the Office of Administrative Law.

**October 2, 2008**

Administrative Law Judge's ("ALJ") Initial Decision. The ALJ **FINDS** that:

1. The 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.

The ALJ **CONCLUDES** that the parties' agreement meets the requirements of *N.J.A.C.* 1:1-19.1. The ALJ **ORDERS** that the parties comply with the settlement terms and that these proceedings be concluded.

**Analysis**

No legal analysis is required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council accept the Administrative Law Judge's Initial Decision dated October 2, 2008. No further adjudication is required.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

December 10, 2008



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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

**INTERIM ORDER**

**April 30, 2008 Government Records Council Meeting**

Martin O'Shea  
Complainant

Complaint No. 2007-185

v.

Madison Public School District (Morris)  
Custodian of Record

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

1. The Custodian complied with the Council's February 27, 2008 Interim Order by initially responding to the Complainant's Counsel within the five (5) business days ordered by the GRC and releasing the requested record to the Complainant and providing a subsequent certification to the GRC on March 13, 2008.
2. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and the Council's February 27, 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.

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of April, 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, Vice Chairman & Secretary  
Government Records Council

**Decision Distribution Date: April 30, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Martin O'Shea<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-185**

v.

**Madison Public School District (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A copy of the audio recording of the most recent meeting of the Madison Board of Education.

**Request Made:** June 25, 2007

**Response Made:** June 25, 2007<sup>3</sup>

**Custodian:** Charles R. Milewski

**GRC Complaint Filed:** August 6, 2007

**Background**

**February 27, 2008**

Government Records Council's ("Council") Interim Order. At its February 27, 2008 public meeting, the Council considered the February 20, 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. The Custodian's failure to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a "deemed" denial of the complainant's OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Based on the evidence of record, the Custodian has failed to establish sufficient evidence authorizing a special service charge of \$31.50 to produce one (1) audiotape of a Madison BOE meeting. See Libertarian Party of Central Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006). Pursuant to Krisburg v. City of Paterson, Police Department, GRC Complaint No. 2002-55 (December 2002), the Custodian fails to meet the statutory criterion

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<sup>1</sup> Represented by Walter Luers, Esq., of Walter M. Luers, LLC (Atlantic Highlands, NJ).

<sup>2</sup> Represented by Vito Gagliardi, Jr., Esq., of Porzio, Bromberg & Newman, P.C. (Morristown, NJ).

<sup>3</sup> The Custodian responded by telephone.

allowing a custodian to charge more than the actual cost of reproduction of a record. Therefore, the Custodian is limited to charging the actual cost of the audiotape, or \$1.50.

3. **The Custodian shall disclose the requested record at the actual cost of \$1.50 with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g.**
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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.
6. Although the Custodian failed to respond in writing within the statutorily mandated seven (7) business day response time and failed to establish that the a special service charge for production of the requested record was warranted pursuant to OPRA, based on the evidence of record, 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 actions appear to be negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

### **March 3, 2008**

Council's Interim Order distributed to the parties.

### **March 10, 2008**

Letter from the Custodian's Counsel to the Complainant's Counsel. The Custodian's Counsel requests that the Complainant's Counsel notify both the Custodian and Custodian's Counsel whether the Complainant is still interested in obtaining a copy of the requested record. The Custodian's Counsel states that the Complainant may remit payment of \$1.50 in order to obtain the requested record from the Custodian. The Custodian's Counsel also requests that the Complainant's Counsel provide an estimated fee request in order to ascertain whether the issue of prevailing party attorney's fees can be resolved amicably. The Custodian's Counsel finally requests that, due to the time frame set forth by the GRC, the Complainant's Counsel notify the Custodian of the Complainant's interest in the requested record by March 11, 2008.

### **March 11, 2008**



Letter from the Complainant's Counsel to the GRC. The Complainant's Counsel states that the Council's February 27, 2008 Interim Order was served to all parties on March 3, 2008. The Complainant's Counsel states that the Interim Order required compliance within five (5) days of receipt of the Council's Order. The Complainant's Counsel states that five (5) business days elapsed on March 10, 2008 with no evidence of compliance. The Complainant's Counsel finally asserts that the Custodian's violation of the Council's February 27, 2008 Interim Order constitutes a knowing and willful violation of OPRA.

**March 13, 2008**

E-mail from the Complainant to the Custodian. The Complainant states that per the Custodian Counsel's March 12, 2008 facsimile to the Complainant's Counsel, he is interested in obtaining a copy of the requested record and that the Complainant is mailing a check in the amount of \$1.50 to the Custodian.

**March 13, 2008**

Letter from the Custodian to the Complainant. The Custodian states that enclosed is a copy of the requested record. The Custodian further states that the technology department had informed the Custodian that the tape dubbing machine is no longer functioning and that CD's will now be used to record Board meetings.

**March 13, 2008**

Letter from the Custodian to the GRC. The Custodian states that the requested record has been mailed to the Complainant.

**March 14, 2008**

Custodian's response to the Council's Interim Order. The Custodian certifies that he is in receipt of the Council's February 27, 2008 Interim Order. The Custodian further certifies that he directed the Custodian's Counsel to contact the Complainant's Counsel and inquire as to whether the Complainant would still be interested in obtaining the requested record. The Custodian certifies that he received an e-mail on March 13, 2008 from the Complainant affirming that the Complainant was still interested in obtaining the requested record. The Custodian certifies that he sent the requested record to the Complainant on March 13, 2008 and subsequently notified the GRC by letter.

**March 17, 2008**

Letter from the Complainant's Counsel to the GRC.<sup>4</sup>

**Analysis**

**Whether the Custodian complied with the Council's February 27, 2008 Interim Order?**

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<sup>4</sup> The Complainant's Counsel submits information in regards to prevailing party attorney's fees. However, this information is not relevant to the Custodian's compliance of the GRC's February 28, 2008 Interim Order, as this complaint will be referred to OAL for a determination of the appropriate prevailing party attorney's fees pursuant to the Council's February 27, 2008 Interim Order.

The Custodian's Counsel states that he composed and sent a letter on March 10, 2008, or within five (5) days of receipt of the Council's February 27, 2008 Interim Order, inquiring as to whether the Complainant was interested in still receiving the requested record. The Custodian states that the Complainant contacted him on March 13, 2008 advising that he was still interested and would send payment of \$1.50, therefore, the Custodian mailed the requested record on March 13, 2008.

The Complainant's Counsel states in a letter dated March 11, 2008 that he had not received any correspondence from the Custodian, and thus wants the GRC to find the Custodian to have knowingly and willfully violated OPRA.

Based on the evidence of record, the Custodian's Counsel initially responded in writing to the Complainant's Counsel on March 10, 2008, or within five (5) business days of receipt of the Council's February 27, 2008 Interim Order. Additionally, the Custodian was contacted by the Complainant on March 13, 2008, at which time both parties agreed to the payment set forth by the Council and the Custodian provided the record via mail to the Complainant. Therefore, the Custodian complied with the Council's February 27, 2008 Interim Order by initially responding to the Complainant's Counsel within the five (5) business days ordered by the GRC and releasing the requested record to the Complainant and providing a subsequent certification to the GRC on March 13, 2008.

Additionally, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and the Council's February 27, 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. The Custodian complied with the Council's February 27, 2008 Interim Order by initially responding to the Complainant's Counsel within the five (5) business days ordered by the GRC and releasing the requested record to the Complainant and providing a subsequent certification to the GRC on March 13, 2008.
2. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and the Council's February 27, 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.

Prepared By:

Frank F. Caruso  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

April 23, 2008



## State of New Jersey

### GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

### INTERIM ORDER

#### February 27, 2008 Government Records Council Meeting

Martin O'Shea  
Complainant

Complaint No. 2007-185

v.

Madison Public School District (Morris)  
Custodian of Record

At the February 27, 2008 public meeting, the Government Records Council ("Council") considered the February 20, 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. The Custodian's failure to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a "deemed" denial of the complainant's OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Based on the evidence of record, the Custodian has failed to establish sufficient evidence authorizing a special service charge of \$31.50 to produce one (1) audiotape of a Madison BOE meeting. See Libertarian Party of Central Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006). Pursuant to Krisburg v. City of Paterson, Police Department, GRC Complaint No. 2002-55 (December 2002), the Custodian fails to meet the statutory criterion allowing a custodian to charge more than the actual cost of reproduction of a record. Therefore, the Custodian is limited to charging the actual cost of the audiotape, or \$1.50.
3. **The Custodian shall disclose the requested record at the actual cost of \$1.50 with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g.**



4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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.
6. Although the Custodian failed to respond in writing within the statutorily mandated seven (7) business day response time and failed to establish that the a special service charge for production of the requested record was warranted pursuant to OPRA, based on the evidence of record, 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 actions appear to be negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Interim Order Rendered by the  
Government Records Council  
On The 27<sup>th</sup> Day of February, 2008

Robin Berg Tabakin, Vice Chairman  
Government Records Council

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

Government Records Council

**Decision Distribution Date: March 3, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 27, 2008 Council Meeting**

**Martin O'Shea<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-185**

v.

**Madison Public School District (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A copy of the audio recording of the most recent meeting of the Madison Board of Education.

**Request Made:** June 25, 2007

**Response Made:** June 25, 2007<sup>3</sup>

**Custodian:** Charles R. Milewski

**GRC Complaint Filed:** August 6, 2007

**Background**

**June 25, 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.

**June 25, 2007**

Custodian's Response to the OPRA request. The Custodian responds via telephone to the Complainant's OPRA request on the same day following receipt of such request. The Custodian states that the cost to produce a copy of the audiotape of the most recent meeting is \$30. The Custodian also advises the Complainant to call with any additional questions.

**July 9, 2007**

Letter from Complainant's Counsel to the Custodian. The Complainant's Counsel asserts that charging \$30 to have an audiotape copied seems extraordinarily high. The Complainant's Counsel further asserts that this type of medium is often available for a dollar or less in some places.

The Complainant's Counsel states that OPRA requires government agencies to charge the actual cost of copying a record when that record is maintained in the medium

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<sup>1</sup> Represented by Walter Luers, Esq. of Walter M. Luers, LLC (Atlantic Highlands, NJ).

<sup>2</sup> Represented by C. Michael Rowan, Esq. of Porzio, Bromberg & Newman, P.C. (Morristown, NJ).

<sup>3</sup> The Custodian responded by telephone.

requested. The Complainant's Counsel cites that in Libertarian Party of Central Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) the court overturned the defendant's charge of \$55 for township minutes on one diskette and required that the trial court conduct a hearing to determine the actual cost incurred in producing meeting minutes on a computer diskette. The Complainant's Counsel requests that the Custodian inform the Complainant's Counsel of the actual cost incurred by the district in making copies of audiotapes.

The Complainant's Counsel further asserts that if the Custodian claims that \$30 is a special service charge pursuant to N.J.S.A. 47:1A-5.c., then the Custodian should inform the Complainant's Council how this request produces an "extraordinary expenditure of time and effort" to fulfill. The Complainant's Counsel finally states that if he does not hear back from the Custodian within ten (10) days from the date of this letter, then the Complainant's Counsel would pursue alternate remedies.

### **July 25, 2007**

Letter from the Custodian to the Complainant's Counsel. The Custodian advises the Complainant's Counsel that the Madison Board of Education ("BOE") set a \$10 rate for copies of audiotapes of board meetings.

### **August 6, 2007**

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

- Complainant's OPRA request dated June 25, 2007.
- Letter from the Custodian to the Complainant dated July 9, 2007.
- Letter from the Complainant to the Custodian dated July 25, 2007.

The Complainant's Counsel states that the Complainant filed an OPRA request on June 25, 2007 for a copy of an audio recording of the most recent board meeting. The Complainant's Counsel states that the Custodian responded indicating that the cost for providing an audiotape copy is \$30. The Complainant's Counsel further states that he wrote to the Custodian on July 9, 2007 requesting that the Custodian provide the actual cost of the audiotape copy and whether the Custodian thought that producing the audiotape copy warranted a special service charge.

The Complainant's Counsel states that the Custodian responded on July 25, 2007 stating that the Madison BOE had lowered the charge for audiotape copies to \$10, but failed to provide the actual cost of duplication or assert a special service charge. The Complainant's Counsel asserts that the Madison BOE's reduction of cost for audiotapes is proof that Madison Public School District has violated OPRA. The Complainant's Counsel also contends that the current cost of \$10 still fails to represent the actual cost of the record.

The Complainant's Counsel requests the following:

1. [a] declaration be made that the Custodian violated OPRA by attempting to charge \$30 per audiotape because this charge is greater than the actual cost incurred by Madison Public School District.
2. [a] declaration that the Custodian violated OPRA by setting a rate of \$10 per audiotape because this charge is greater than the actual cost incurred by Madison Public School District.
3. [a]n order requiring Madison Public School District to charge a fee for audiotapes that is not in excess of the actual cost of duplication.
4. [a]ttorney's fees as provided by N.J.S.A. 47:1A-6.
5. [a]n order fining the Custodian for a knowing and willful violation of OPRA.

### **August 10, 2007**

Letter from the Custodian to the Complainant's Counsel. The Custodian states that he received the Complainant's Denial of Access complaint on August 9, 2007.

The Custodian asserts that he is surprised to have received a Denial of Access Complaint from the Complainant. The Custodian states in his July 25, 2007 reply to the Complainant, he informed the Complainant to call the Custodian with any questions regarding this request.

The Custodian states that the Madison BOE began audio taping board meetings approximately four and a half (4 ½) years ago. The Custodian further states that the Madison BOE technology department set up the audio taping system in 2002, at which point the Custodian would have to change tapes every forty-five (45) minutes.

The Custodian states that again in 2003, the technology department set the audio taping system to tape board meetings at half speed, giving the Custodian the ability to consume only one tape per meeting. The Custodian also states that a request for a copy of an audiotape was made in the summer of 2003. The Custodian states that the requestor was charged \$30 and that the Custodian was not sure whether the requestor received one (1) or three (3) tapes.<sup>4</sup> The Custodian states that it has been four (4) years since the \$30 audiotape transaction.

The Custodian states that the Madison BOE has stayed current with copying costs pursuant to OPRA, but has not set a price on audiotapes. The Custodian states that the Madison BOE set a \$10 charge on audiotapes at a board meeting on August 24, 2007.

The Custodian reiterates that the meeting is taped at half speed to fit the entire meeting on one (1) tape. The Custodian further states that when a requestor wants a copy of any of these meetings, the technology department has to use certain equipment to convert the tape to regular speed and make a copy. The Custodian asserts that this conversion is estimated to take one (1) hour of the technician's time. The Custodian

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<sup>4</sup> The Custodian points out that he cannot remember if the requestor was supplied with one (1) tape or three (3) tapes and concludes that he does not recall if the request came before or after the technology department had switched the audio taping system to half speed.



finally asserts that one (1) hour of time plus the cost of the audiotape itself was initially estimated to be \$30.

**August 24, 2007**

Offer of Mediation sent to both parties.

**August 27, 2007**

The Complainant declines mediation.

**September 5, 2007**

Request for the Statement of Information and Special Service Charge 14-point analysis sent to the Custodian.

**September 12, 2007**

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel requests an extension of the deadline to submit the Statement of Information.

**September 12, 2007**

E-mail from the GRC to the Custodian's Counsel. The GRC grants the Custodian an extension until September 17, 2007 to file the Statement of Information.

**September 17, 2007**

Custodian's Statement of Information ("SOI") and Special Service Charge 14-point analysis with no attachments.

The Custodian's Counsel states that the Custodian received the Complainant's request on June 25, 2007. The Custodian's Counsel asserts that the Custodian advised the Complainant that the record requested would cost \$30 as per a similar request from 2003. The Custodian's Counsel states that the Complainant's Counsel objected to this charge in a letter dated July 9, 2007. The Custodian's Counsel states that after further reviewing the Madison BOE's expenses associated with the copying and providing of audiotapes of meetings, the Madison BOE decided at its July 24, 2007 meeting to amend the charge for audiotapes to \$10. The Custodian's Counsel states that the Complainant was notified of this change via letter on July 25, 2007.

The Custodian's Counsel states that the Custodian provided a more in-depth explanation of the charge to the Complainant via a letter dated August 10, 2007. The Custodian's Counsel states that each meeting is taped in half speed so that only one tape could be used for the duration of the meeting. The Custodian's Counsel further states that if a requestor would like a copy of a meeting audiotape, the Custodian has to deliver the audiotape to the technology department in order to convert the tape to regular speed.

The Custodian's Counsel states that the Complainant filed a Denial of Access Complaint on August 6, 2007 and declined mediation on August 27, 2007.

The Custodian's Counsel finally asserts that a \$10 charge for the requested record does not impair the Complainant's right to access under OPRA. The Custodian's Counsel further contends that \$10 is reasonably related to the actual cost of producing the

requested record for the Complainant. The Custodian’s Counsel requests that the GRC dismiss the Complainant’s complaint.

In response to the Special Service Charge 14-Point Analysis, the Custodian certified that:

1. The volume, nature, size, number of government records involved.	One (1) audiotape
2. The period of time over which the records were received.	N/A
3. Whether some or all of the records sought are archived.	None were archived.
4. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying.	N/A
5. The amount of time, level, rate and number, if any required to be expended by government employees to monitor the inspection or examination.	N/A
6. The amount of time required to return documents to their original storage place.	N/A
7. The size of the agency.	315 total employees
8. The number of employees available to accommodate documents requested.	Two (2) employees in the technology department.
9. The availability of information technology and copying capabilities.	The Board’s technology department has the equipment necessary to convert the audiotape from half speed to regular speed.
10. What was requested?	An audiotape copy of the Madison BOE’s most recent board meeting.
11. The level(s) of skill necessary to accommodate the request.	The two (2) members of the technology department possess the requisite skill to convert the tapes.

12. The reason(s) that the agency employed, or intends to employ the particular level(s) of skill above.	Such a level of skill is necessary to convert the audiotape into a form that can be provided to a requestor.
13. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	Approximately one (1) hour to convert the audiotape to regular speed.
14. Who in the agency will perform the work associated with each request?	One (1) employee in the technology department.

**September 20, 2007**

The Complainant’s Counsel Response to the Custodian’s SOI. The Complainant’s Counsel asserts that the key issue is what the actual cost of copying one audiotape is and whether the production of an audiotape would warrant a special service charge. The Complainant’s Counsel further asserts that the Complainant never requested the audiotape in a medium differing from the one maintained by the Madison BOE, but that the Custodian is attempting to charge for an unspecified amount of technician time at an undisclosed hourly rate.

The Complainant’s Counsel further contends that the Custodian has completely misstated the law by asserting that \$10 is reasonably related to the actual cost of producing the requested record. The Complainant’s Counsel asserts that the Madison BOE should know that another local board of education had just reduced its cost from \$10 to \$.60 for audiotapes. The Complainant’s Counsel finally requests that the GRC request evidence from the Madison BOE to determine the actual cost of production and set forth the appropriate relief.

**October 3, 2007**

E-mail from the GRC to the Custodian. The GRC requests that the Custodian provide the following additional information in the form of a legal certification:

1. What is involved in the process of copying an audiotape into a playable format?
2. What is the actual cost incurred by Madison BOE per audiotape?
3. What is the hourly rate of the technician who will be handling the conversion of the audiotape?

The GRC requests that the Custodian provide this information by close of business on October 9, 2007.

**October 31, 2007**

Legal Certification from the Custodian to the GRC.

The Custodian certifies that the purpose of taping a meeting at half speed is to ensure that a meeting is contained on a single audiotape. The Custodian further certifies that half speed audiotapes are not playable until converted back to full speed. The Custodian certifies that the Madison BOE employs two individuals with the necessary training to convert these tapes, which entails inserting the meeting audiotape and a blank audiotape into a dual tape deck.

The Custodian certifies that this process takes approximately one (1) hour. The Custodian further certifies that the hourly rate of a technology department employee is \$30 an hour and that the cost of an unconverted audiotape is approximately \$1.50.

### Analysis

#### **Whether the Custodian responded to the Complainant's June 25, 2007 OPRA request in a timely manner?**

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 ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

OPRA further 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 ...* In the event a custodian fails to respond within seven business days after receiving a request, *the*

*failure to respond shall be deemed a denial of 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. 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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

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. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, the custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.

Although the Complainant does not take issue with this violation, the Custodian has a duty to respond in writing to every request, whether access to the requested record is being granted, denied, clarification is being sought or an extension is being requested. The Custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

**Whether the special service charge assessed by the Custodian for duplicating the record requested is warranted and reasonable pursuant to OPRA?**

OPRA provides that:

“[t]he *actual cost* of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but *shall not include* the cost of *labor or other overhead expenses* associated with making the copy *except as provided for in subsection c.*” (Emphasis added.) N.J.S.A. 47:1A-5.b.

OPRA provides:

“Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot

be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*” (Emphasis added.) N.J.S.A. 47:1A-5.c.

OPRA further states that:

“[a] custodian shall permit access to a government record ... in the medium requested if the public agency maintains the record in that medium. If a 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*. If a request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) *requiring a substantial amount of manipulation or programming of information technology*, the *agency may charge, in addition to the actual cost of duplication, a special service charge ... [reasonably] based ... on the cost for any extensive use of information technology ...*” (Emphasis added.) N.J.S.A. 47:1A-5.d.

OPRA requires that only actual costs be charged for duplication of records. If the requested record is not maintained in the medium requested, the Custodian must convert it to the medium requested or disclose it in another meaningful medium. Here, the requested records are maintained at half speed, which is not playable until the audiotape is converted to full speed. Therefore, the Custodian must convert the audiotapes to full speed, or disclose the record in another meaningful medium. The Custodian can charge a special service charge in addition to the actual costs of duplication at full speed only if he can show that the charge is reasonably based on the cost of extensive use of information technology.

Whenever a records custodian asserts that fulfilling an OPRA records request requires an “extraordinary” expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5.c.

The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of a variety of factors. These factors were discussed in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. *Id.* at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. *Id.*

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5.c. *Id.* at

202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA:

- The volume of government records involved;
- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble to documents for inspection or copying;
- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination;<sup>5</sup> and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

The court determined that in the context of OPRA, the term “extraordinary” will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. *Id.* at 202. “[W]hat may appear to be extraordinary to one school district might be routine to another.” *Id.*

Recognizing that many different variables may affect a determination of whether a special service charge is reasonable and warranted, the GRC established an analytical framework for situations which may warrant an assessment of a special service charge. This framework incorporates the factors identified in the Courier Post case, as well as additional relevant factors. For the GRC to determine when and whether a special service charge is reasonable and warranted, a Custodian must provide a response to the following questions:

1. The volume, nature, size, number, of government records involved,
2. The period of time over which the records were received,
3. Whether some or all of the records sought are archived,
4. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying,
5. The amount of time, level, rate and number, if any required to be expended by government employees to monitor the inspection or examination, and,
6. The amount of time required to return documents to their original storage place,
7. The size of the agency,
8. The number of employees available to accommodate documents requests,
9. The availability of information technology and copying capabilities,
10. What was requested,
11. The level(s) of skill necessary to accommodate the request,

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<sup>5</sup> With regard to this factor, the court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

12. The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill above,
13. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents, and
14. Who in the agency will perform the work associated with each request?

In the complaint now before the Council, the Complainant's Counsel contends that the Madison BOE's charge of \$30 for an audiotape is extraordinarily high. The Complainant's Counsel further states that the Board's reduction of the charge to \$10 following the Complainant's Counsel's July 9, 2007 letter is also not representative of the actual cost incurred by the Custodian to produce the record.

The Custodian certifies that a technician working for the Madison BOE will have to convert the audiotape to regular speed in order for it to be playable in a regular tape player. The Custodian further certifies that the cost of the technician's time to convert the tape is \$30 and the audiotape cost is \$1.50.

Therefore, the approximate actual cost comes to \$31.50 which is fifty (.50) cents more than the Custodian's initial charge of \$30 and \$21.50 more than the Custodian's revised charge of \$10. The Council must decide whether the actual cost of \$31.50, as certified by the Custodian, is a special service charge warranted pursuant to OPRA.

The Complainant's Counsel cites to Libertarian Party of Central Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) in his letter to the Custodian dated July 9, 2007. In that case, the defendant was attempting to charge \$55 for meeting minutes on a diskette. The defendant conceded that the meeting minutes being requested were already in electronic form. The court recognized that since "the minutes ... are maintained electronically ... we discern no practical impediment in providing plaintiffs with copies of these records on a computer diskette." *Id.* at 140. The court also stated that "[i]t is also beyond dispute that the actual cost of the diskette is far less than" the \$55 charge being assessed to the plaintiff. The court held that "the fee imposed by the Township of Edison creates an unreasonable burden upon plaintiffs' right of access and is not rationally related to the actual cost of reproducing the records." *Id.* at 141.

According to OPRA, a custodian can charge the "actual cost of duplicating the record ... and shall not include the cost of labor ... except as provided in subsection c." N.J.S.A. 47:1A-5.b. OPRA also allows a custodian to charge a special service charge when a "record cannot be reproduced" without "an extraordinary expenditure of time." N.J.S.A. 47:1A-5.c. Finally, N.J.S.A. 47:1A-5.d allows a custodian to charge an additional fee if the requested record is:

- (1) in a medium not routinely used by the agency;
- (2) not routinely developed or maintained by an agency; or
- (3) requiring a substantial amount of manipulation or programming of information technology.

In this complaint, the Custodian is only tasked with producing one (1) audiotape that is readily available and does not require any additional time to secure the record from



an archive or search through the Madison BOE files. Additionally, similar to the requested record in Murphy, the record requested was already in audiotape form. The overriding difference between the two cases is that while the diskette could have been produced without an overhead involved, the Custodian in this case certifies that a medium conversion is required in order for the record to be produced in a usable form.

The statute is very specific that the evidence must establish that an extraordinary amount of time must be expended in order to justify a special service charge to cover the cost of labor. The Custodian states that one (1) technician will have to spend approximately one (1) hour of time to manufacture a playable audiotape for the Complainant. Therefore, the Custodian is abiding by N.J.S.A. 47:1A-5.d. which requires the Custodian to “convert the record to the medium requested or provide a copy in some other meaningful medium.” However, based on the evidence of record, one (1) hour to produce a record is hardly an “extraordinary expenditure of time and effort” warranting the Custodian to charge for the cost of labor.

Additionally, in Douglas Krisburg v. City of Paterson, Police Department, GRC Complaint No. 2002-55 (December 2002), the Custodian attempted to assess a charge of \$150 to the Complainant for “Calls for Service” tapes. The Custodian asserted that because these records were not maintained in the form requested, the department charged a fee based on Information Technology industry standards. The Council concluded that while the Custodian asserted that one (1) hour of labor and one (1) hour of computer time would be needed to convert the records, the Custodian failed to provide enough evidence to substantiate how conversion of the records resulted in a “substantial amount of manipulation or programming of information technology” warranting a special service charge. N.J.S.A. 47:1A-5.d.

Based on the evidence of record, the Custodian has failed to establish sufficient evidence authorizing a special service charge of \$31.50 to produce one (1) audiotape of a Madison BOE meeting. See Libertarian Party of Central Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006). Pursuant to Krisburg v. City of Paterson, Police Department, GRC Complaint No. 2002-55 (December 2002), the Custodian fails to meet the statutory criterion allowing a custodian to charge more than the actual cost of reproduction of a record. Therefore, the Custodian is limited to charging the actual cost of the audiotape, or \$1.50.

**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 Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under N.J.S.A. § 47:1A-6 and N.J.S.A. § 47:1A-7.f. against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency which falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated state 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. Teeters, supra, 387 N.J. Super. 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 court found that 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.

In the complaint now before the Council, the Complainant’s Counsel asserts that the Custodian’s two proposed charges of \$30, later amended to \$10, for an audiotape of the most recent Madison BOE is not substantiated under OPRA. The Complainant’s Counsel requests the following relief:

1. [a] declaration be made that the Custodian violated OPRA by attempting to charge \$30 per audiotape because this charge is greater than the actual cost incurred by Madison Public School District.
2. [a] declaration that the Custodian violated OPRA by setting a rate of \$10 per audiotape because this charge is greater than the actual cost incurred by Madison Public School District.
3. [a]n order requiring Madison Public School District to charge a fee for audiotapes that is not in excess of the actual cost of duplication.
4. [a]ttorney’s fees as provided by N.J.S.A. 47:1A-6.
5. [a]n order fining the Custodian for a knowing and willful violation of OPRA.

The Custodian certifies that the audiotape must be converted by a Madison BOE technician because the audiotape is not usable in the current form. The Custodian further asserts that the Madison BOE reduced the charge of an audiotape from \$30 to \$10 in order to more closely represent the actual cost.

The Custodian has failed to prove that the proposed charge of \$10 is warranted as a special service charge for reproducing and providing the requested record pursuant to OPRA. See Libertarian Party of Central Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) and Douglas Krisburg v. City of Paterson, Police Department GRC Complaint No. 2002-55 (December 2002). Further, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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 under N.J.S.A. 47:1A-6.

Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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.

**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.

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).

Although the Custodian failed to respond in writing within the statutorily mandated seven (7) business day response time and failed to establish that a special service charge for production of the requested record was warranted pursuant to OPRA, based on the evidence of record, 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 actions appear to be negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a "deemed" denial of the complainant's OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Based on the evidence of record, the Custodian has failed to establish sufficient evidence authorizing a special service charge of \$31.50 to produce one (1) audiotape of a Madison BOE meeting. See Libertarian Party of Central Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006). Pursuant to Krisburg v. City of Paterson, Police Department, GRC Complaint No. 2002-55 (December 2002), the Custodian fails to meet the statutory criterion allowing a custodian to charge more than the actual cost of reproduction of a record. Therefore, the Custodian is limited to charging the actual cost of the audiotape, or \$1.50.
3. **The Custodian shall disclose the requested record at the actual cost of \$1.50 with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g.**
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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.

6. Although the Custodian failed to respond in writing within the statutorily mandated seven (7) business day response time and failed to establish that the a special service charge for production of the requested record was warranted pursuant to OPRA, based on the evidence of record, 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 actions appear to be negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Frank F. Caruso  
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Approved By:

Catherine Starghill, Esq.  
Executive Director

February 20, 2008