



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 28, 2012 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2008-161

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed because the Complainant withdrew his complaint via e-mail to the GRC dated August 13, 2012 (via legal counsel) because the parties have settled this matter. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 28th Day of August, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: August 30, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2008-161

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Inspection of the Borough of South Bound Brook's ("Borough") sick time calculation related to a Settlement Agreement.³

Request Made: May 3, 2008

Response Made: May 12, 2008

Custodian: Donald E. Kazar

GRC Complaint Filed: July 29, 2008⁴

Background

December 20, 2011

Government Records Council's ("Council") Interim Order. At its December 20, 2011 public meeting, the Council considered the December 13, 2011 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 Council reconsiders its July 26, 2011 Final Decision Findings and Recommendations to include an analysis of whether the Complainant is a prevailing party entitled to reasonable attorney's fees because the Council previously failed to address same in its Final Decision.
2. Because the Complainant has failed to establish in his motion for reconsideration of the Council's July 26, 2011 Final Decision that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, said motion for reconsideration is denied.

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ). Counsel entered his appearance in this matter on February 7, 2011.

² Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previously represented by William T. Cooper, III, Esq., of Cooper & Cooper (Somerville, NJ).

³ The Settlement Agreement is between the Complainant and the Borough of South Bound Brook.

⁴ The GRC received the Denial of Access Complaint on said date.

Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's May 24, 2011 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. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Council's Interim Order required the Custodian to disclose one (1) record with only partial redactions. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

December 21, 2011

Council's Interim Order distributed to the parties.

March 15, 2012

Complaint referred to the Office of Administrative Law.

August 13, 2012

E-mail from the Complainant's Counsel to the GRC attaching a letter from Counsel to the Honorable Patricia M. Kerins, Administrative Law Judge, dated August 13, 2012. Counsel states that this matter has been settled and the Complainant thus withdraws this complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew his complaint via e-mail to the GRC dated August 13, 2012 (via legal counsel) because the parties have settled this matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012



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
Commissioner

INTERIM ORDER

December 20, 2011 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2008-161

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the December 20, 2011 public meeting, the Government Records Council (“Council”) considered the December 13, 2011 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. The Council reconsiders its July 26, 2011 Final Decision Findings and Recommendations to include an analysis of whether the Complainant is a prevailing party entitled to reasonable attorney’s fees because the Council previously failed to address same in its Final Decision.
2. Because the Complainant has failed to establish in his motion for reconsideration of the Council’s July 26, 2011 Final Decision that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council’s May 24, 2011 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. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Council’s Interim Order required the Custodian to disclose one (1) record with only partial redactions. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing



party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 20th Day of December, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 21, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 20, 2011 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2008-161

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Inspection of the Borough of South Bound Brook's ("Borough") sick time calculation related to a Settlement Agreement.³

Request Made: May 3, 2008

Response Made: May 12, 2008

Custodian: Donald E. Kazar

GRC Complaint Filed: July 29, 2008⁴

Background

July 26, 2011

Government Records Council's ("Council") Final Decision. At its July 26, 2011 public meeting, the Council considered the July 19, 2011 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 provided a copy of the March 11, 2008 executive session minutes with redactions in accordance with the Council's May 24, 2011 Interim Order to the Complainant on June 1, 2011, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the extended time frame to comply with the Council's Interim Order, the Custodian has complied with the Council's May 24, 2011 Interim Order.
2. Although the Custodian unlawfully denied access to the requested March 11, 2008 executive session minutes because only paragraph No. 2 and No. 3 should have been redacted as discussions regarding a personnel matter

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ). Counsel entered his appearance in this matter on February 7, 2011.

² Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previously represented by William T. Cooper, III, Esq., of Cooper & Cooper (Somerville, NJ).

³ The Settlement Agreement is between the Complainant and the Borough of South Bound Brook.

⁴ The GRC received the Denial of Access Complaint on said date.

pursuant to N.J.S.A. 10:4-12.b(8), the Custodian lawfully denied access to the remainder of the records as such records were exempt from disclosure as attorney-client privileged material. N.J.S.A. 47:1A-1.1. Further, the Custodian timely complied with both the Council's April 29, 2009 and May 24, 2011 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

July 27, 2011

Council's Final Decision distributed to the parties.

August 2, 2011

E-mail from the Complainant to the GRC. The Complainant states that he has reviewed the Council's Final Decision and found that it is silent as to whether the Complainant is a prevailing party. The Complainant requests that the GRC advise as to the status of a prevailing party determination.

The Complainant states that based on the evidence of record, he would conclude that he is a prevailing party. The Complainant requests that if he is not a prevailing party, the GRC advise as to the specific reasoning for this decision.

The Complainant states that he is drafting a request for reconsideration and asks that the GRC advise whether he is required to use a specific format.

August 3, 2011

E-mail from the GRC to the Complainant. The GRC states that it is considering whether to reconsider the instant complaint based on the issue of prevailing party attorney's fees raised by the Complainant.

Additionally, the GRC states that its regulations provide that:

- “(a) The Council, at its own discretion, may reconsider any decision it renders.
- (b) Requests for reconsideration must be filed within 10 business days following receipt of a Council decision.
- (c) Requests must be in writing, delivered to the Council and served on all parties.
- (d) Parties must file any objection to the request for reconsideration within 10 business days following receipt of the request.
- (e) The Council will provide all parties with written notification of its determination regarding the request for re-consideration.” *N.J.A.C.* 5:105-2.10.

The GRC states that it requires a request for reconsideration form to be completed.

August 3, 2011

E-mail from the Complainant to the GRC. The Complainant advises that he will file his request for reconsideration within the required ten (10) business day time frame and complete the form as required.

August 4, 2011

Complainant's request for reconsideration with the following attachments:

- Complainant's OPRA request dated May 3, 2008.⁵
- Final payroll calculations of holiday, personal, comp and vacation time (undated).

The Complainant requests that the GRC reconsider its July 26, 2011 Final Decision based on a mistake.

The Complainant states that it is his understanding that the legal standard for a request for reconsideration falls under *N.J.A.C. 5:105-2.10*. The Complainant states that applicable standards hold that a "party should not seek reconsideration based upon dissatisfaction with a decision." See White v. William Patterson University, GRC Complaint No. 2008-216 (August 2009)(quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). The Complainant asserts that the crux of his request for reconsideration is that the Custodian speciously provided the GRC with records for an *in camera* review that were not responsive to the Complainant's OPRA request.

The Complainant further states that he understands that a request for reconsideration "should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence[.]" See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)(quoting D'Atria, supra, at 401). The Complainant asserts that the GRC did not "consider ... competent evidence," because the Custodian refused to or failed to provide the responsive records and instead provided nonresponsive records to the GRC for an *in camera* review.

The Complainant asserts that as a result, this request for reconsideration seeks to correct the record and to allow the GRC to make a reasonable decision based on the true and competent evidence. The Complainant asserts that more specifically, had the Custodian provided to the GRC for an *in camera* review the actual records responsive to the Complainant's OPRA request, the GRC would have based its decision on that evidence. The Complainant asserts that instead, the Custodian provided nonresponsive records knowing that such records were not subject to disclosure and that the GRC would uphold his denial of access.

The Complainant states that in response to a previous OPRA request for time calculations, the Custodian disclosed a one (1) page record containing payroll

⁵ The Complainant also submitted a copy of an OPRA request dated April 14, 2008 which was not the subject of the instant complaint. The Complainant received the attached calculations pursuant to this OPRA request.

calculations of holiday, personal, compensatory and vacation time. The Complainant states that the record did not include a sick time calculation, at which point the Complainant could have filed a complaint against the Custodian for failing to provide same. The Complainant states that instead, he submitted the OPRA request at issue herein for the sick time calculation.

The Complainant states that the GRC specifically lists “sick time calculation” as the record sought in each of its decisions. The Complainant contends that instead of the Custodian providing this simple calculation, the Custodian took the position that there were records responsive to the Complainant’s OPRA request that the Custodian knew were privileged and for which the GRC would not allow disclosure:

- Three (3) e-mails between Donald E. Kazar and William T. Cooper, III, Borough Attorney, entitled: Accumulated Time Owed dated February 21, 2008 (1 page).
- Letter of William T. Cooper, III, entitled: Robert Verry Settlement Agreement dated March 4, 2008 (3 pages).
- Letter from William T. Cooper, III to Stacey L. Pilato, Borough Labor Attorney, entitled: Borough of South Bound Brook – Chief Robert Verry dated March 6, 2008 (1 page).
- Legal memorandum from Eric Martin Bernstein, Borough Labor Attorney, to William T. Cooper, III entitled: Borough of South Bound Brook and Chief Robert Verry dated March 10, 2008 (4 pages).
- Executive Session Minutes dated March 11, 2008.

The Complainant argues that the records provided for an *in camera* review were not the records responsive to the Complainant’s OPRA request. The Complainant argues that the record responsive to his OPRA request should have been a calculation similar to those provided as part of his previous OPRA request and not e-mails, legal memorandum, or minutes. The Complainant argues that by previously disclosing the calculations for holiday, personal, compensatory and vacation time, the Borough has acknowledged that the sick time calculation sought is also subject to disclosure under OPRA. The Complainant asserts that the Custodian has merely attempted to block disclosure of the actual calculation by asserting that the records provided for an *in camera* review were responsive to the Complainant’s OPRA request.

The Complainant argues that if it is the Borough’s position that no sick time calculation exists and the Borough’s first communication regarding same is the e-mail dated February 21, 2008, then the Custodian should have responded stating that no calculation responsive exists. The Complainant argues that because the Custodian disclosed the other four (4) calculations and did not state that no sick time calculation existed, it is clear that there is a record that exists and is subject to disclosure. The Complainant contends that there is no evidence in the record indicating that the GRC received a record showing the sick time calculation or that the Custodian certified that no record responsive existed.

August 19, 2011

E-mail from the Complainant to the GRC. The Complainant states that the Borough has not filed any objections to the request for reconsideration within the ten (10) business day time frame provided for in the GRC's regulations. *N.J.A.C. 5:105-2.10(d)*. The Complainant states that because the Borough has not filed an objection, it is evident that the Borough supports the Complainant's position and they agree that the request for reconsideration is proper.⁶

August 19, 2011

E-mail from Custodian's Counsel to the GRC. Counsel states that the Borough objects to the Complainant's request for reconsideration; however, he was not able to submit the Borough's objection in a timely manner due to extenuating circumstances. Counsel therefore requests that the GRC accept this objection accordingly.

August 19, 2011

E-mail from the Complainant to the GRC. The Complainant states that OPRA's regulations provide that objections "must" be filed within ten (10) business days after receipt of the request for reconsideration. The Complainant, citing to *Ballentine's Law Dictionary*, notes that "must" is mandatory and not discretionary.

The Complainant further notes that the GRC previously denied the Complainant's request for reconsideration in regard to Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010) because it was not submitted within the time frame provided by *N.J.A.C. 5:105-2.10*. The Complainant states that the same standard should apply and Custodian Counsel's objection should be denied.

The Complainant states that his request for reconsideration should rely solely on his position.⁷

November 1, 2011

E-mail from the GRC to the Custodian. The GRC states that it recently received a request for reconsideration from the Complainant. The GRC states that the Complainant's request for reconsideration has raised a question of material fact. The GRC states that specifically, it is unclear whether a responsive sick time calculation similar to the four (4) calculations provided in response to a previous OPRA request exists. The GRC requests that the Custodian certify to the following:

1. Whether a single record containing the requested sick time calculation existed at the time of receipt of the Complainant's May 3, 2008 OPRA request?

The GRC requests that the Custodian provide the requested certification by close of business on November 3, 2011.

⁶ The Complainant notes that he would withdraw his request for reconsideration if the Borough releases the actual record responsive to his OPRA request.

⁷ The Complainant reiterates that he would withdraw the request for reconsideration if the Borough releases the actual record responsive to his OPRA request.

November 2, 2011

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until November 9, 2011 to submit the requested legal certification.

November 3, 2011

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until November 9, 2011 to submit the requested legal certification

November 8, 2011

Custodian's legal certification. The Custodian certifies that the Borough previously produced records of calculations regarding other areas of compensation made to the Complainant. The Custodian certifies that excluding the records provided for an *in camera* review, there was no single record containing the requested sick time calculation that could be provided to the Complainant at the time of the Complainant's OPRA request.

The Custodian asserts that the GRC should remain mindful that the Complainant is involved in active litigation with the Borough and seeks to obtain an unfair advantage by his constant harassing and improper OPRA requests.

November 16, 2011

Complainant's legal certification. The Complainant certifies that on November 1, 2011, the GRC sought additional information from the Custodian regarding whether a single record containing the requested sick time calculation existed at the time of the May 3, 2008 OPRA request.

The Complainant asserts that although he is not sure why the GRC narrowed the inquiry down to a single record, the GRC wanted to confirm that no records containing the sick time calculation existed. The Complainant asserts that according to the evidence of record, it has been established that the records provided for an *in camera* review were not responsive to his OPRA request. The Complainant argues that any references the Custodian makes to the records reviewed *in camera* should be disregarded as moot.

The Complainant asserts that the GRC's request for additional information required a simple "yes" or "no." The Complainant asserts that the Custodian's misleading response confirmed that a single record containing the requested sick time calculation existed at the time of the May 3, 2008 OPRA request but that it could not be produced: "... there is no single document that can be produced to the Complainant as of May 3, 2008." Custodian's certification dated November 8, 2011, Paragraph 4.

The Complainant further disputes the last paragraph of the certification as an attempt to prejudice both the Complainant's OPRA requests and complaints including the instant matter.

Analysis

Whether the Council should reconsider its July 26, 2011 Final Decision to include an analysis of whether 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 ... in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L.2001, c.404 (C.47:1A-7) ... The public agency shall have the burden of proving that the denial of access is authorized by law ... *A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.*” (Emphasis added.) N.J.S.A. 47:1A-6.

Moreover, pursuant to *N.J.A.C.* 5:105-2.10(a), the Council, “at its own discretion, may reconsider any decision it renders.” *Id.*

In this matter, the Council rendered its Final Decision without including an analysis of whether the Complainant was a prevailing party entitled to reasonable attorney's fees because neither the Complainant nor Counsel requested same. However, in Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court held that:

“*OPRA itself contains broader language on attorney's fees than the former RTKL did.* OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). *The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the [\$500.00] cap on fees and permit a reasonable, and quite likely higher, fee award. [Footnote omitted.] Those changes expand counsel fee awards under OPRA.*” (Emphasis added.) *Id.* at 73-76.

Based on the Court's specific language in Mason, *supra*, a complainant need not request that the Council determine whether he/she is a prevailing party entitled to reasonable attorney's fees because N.J.S.A. 47:1A-6 is not permissive; rather, it is mandatory. The Council must, therefore, include a consideration of prevailing party attorney's fees whenever the facts of the case so indicate.

Therefore, the Council reconsiders its July 26, 2011 Final Decision Findings and Recommendations pursuant to *N.J.A.C.* 5:105-2.10(a) to include an analysis of whether the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Whether the Complainant has met the required standard for reconsideration of the Council's July 26, 2011 Final Decision on the basis of mistake?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Order dated July 26, 2011 on August 4, 2011, six (6) business days after receipt of the Council's Order.

The Complainant stated that he requested reconsideration based on mistake. The Complainant argued that the Custodian misled the GRC by providing records for an *in camera* review that were not responsive to the Complainant's OPRA request.

The Custodian's Counsel subsequently submitted an objection to the motion for reconsideration on August 19, 2011; however, said objection was received one (1) day after the expiration of the Borough's time frame to file objections absent a request for an extension to provide same. *N.J.A.C. 5:105-2.10(d)*.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g., Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria, supra*, 242 N.J. Super. at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*.

In support of his request for reconsideration, the Complainant provided to the GRC a list of calculations he received from the Custodian in response to an earlier OPRA request not at issue herein. The Complainant also resubmitted his May 3, 2008 OPRA request showing that he requested from the Custodian only the sick time calculation. Both of these records were previously submitted to the GRC as part of the Denial of Access Complaint. In his motion for reconsideration, the Complainant argues that the GRC failed to “consider ... competent evidence” because the Custodian provided the GRC records for an *in camera* review that were not responsive to the OPRA request and that the Custodian knew would fall within the exemptions cited by the Borough.

In the request for reconsideration, the Complainant raised a question of material fact: *i.e.*, why the Borough provided four (4) calculations in list form and then asserted that the sick time calculation would be contained within five (5) records comprised of e-mails, letters and meeting minutes.

On November 1, 2011, the GRC requested that the Custodian legally certify to whether a single record containing the requested sick time calculation existed. The Custodian responded on November 8, 2011 certifying that aside from the records provided for an *in camera* review, no single record containing the requested calculation existed at the time of the Complainant’s OPRA request. On November 16, 2011, the Complainant subsequently submitted a certification in an attempt to refute the Custodian’s certification; however, he presented no evidence to refute same. The Complainant’s argument that if four (4) calculations existed in a list, the fifth (5th) calculation must also be similarly contained within one record is speculative in the absence of any direct evidence that a record containing the requested sick time exists.

Thus, the Complainant has failed to submit any new evidence in support of his motion. As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. The Complainant failed to do so. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint. *See D’Atria, supra*. Notably, the Complainant failed to submit any evidence proving that the Custodian provided misleading records to the GRC for an *in camera* review. In the request for reconsideration, the Complainant made the same arguments that he made in his Denial of Access Complaint. Further, the Complainant failed to present any evidence which was not available at the time of the Council’s adjudication that would change the substance of the Council’s decision.

Therefore, because the Complainant has failed to establish in his motion for reconsideration of the Council’s July 26, 2011 Final Decision that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, said motion for reconsideration is denied. *Cummings, supra; D’Atria, supra; Comcast, supra*.

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 the Open Public Records Act (OPRA), 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 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.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the 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, at 71, (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)). In Buckhannon, the

Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

The Mason Court then examined the catalyst theory within the context of New Jersey law, stating that:

“New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term “prevailing party” within the meaning of the federal Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved;” in other words, plaintiff’s efforts must be a “necessary and important factor in obtaining the relief,” *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) “it must be shown that the relief ultimately secured by plaintiffs had a basis in law,” *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that “[a] plaintiff is considered a prevailing party ‘when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.’” *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); *see also* Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart “generously” defines “a prevailing party [a]s one who succeeds ‘on any significant issue in litigation [that] achieves some of the benefit the parties

sought in bringing suit" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon ... " *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4

(repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA." (Footnote omitted). Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

The Court in Mason, *supra*, at 76, 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)."

However, in Mason, the New Jersey Supreme Court shifted the traditional burden of proof to the responding agency in one category of cases: when an agency has failed to respond *at all* to a request within seven business days. The Court noted that:

"OPRA requires that an agency provide access or a denial no later than seven business days after a request. The statute also encourages compromise and efforts to work through certain problematic requests. But under the terms of the statute, the agency must start that process with some form of response within seven business days of a request. *If an agency fails to respond at all within that time frame, but voluntarily discloses records after a requestor files suit, the agency should be required to prove that the lawsuit was not the catalyst for the agency's belated disclosure.* Such an approach is faithful to OPRA's clear command that an agency not sit silently once a request is made." (Emphasis added). Mason v. City Clerk of the City of Hoboken, 196 N.J. 51, 77 (2008).

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight (8) business days later, or one (1) day beyond the statutory limit. *Id.* at 79. As a result, the Court shifted the burden to Hoboken to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind the City's voluntary disclosure. *Id.* Because Hoboken's February 20 response included a copy of a memo dated February 19 -- the seventh (7th) business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

In the instant complaint, the Borough initially denied access to five (5) records as attorney-client privileged material. In its April 29, 2009 Interim Order, the Council ordered that the five (5) records be submitted for an *in camera* review. The Custodian complied with the Council's Order on May 5, 2009.

The Council completed its *in camera* review and subsequently ordered in its May 24, 2011 Interim Order that the Custodian provide the Complainant the March 11, 2008 executive session minutes redacting only paragraphs No. 2 and No. 3. The Custodian

complied with the Council's Order on June 1, 2011. Thus, the filing of this complaint brought about a change in the Custodian's behavior as he was ordered to disclose a portion of one (1) of the five (5) records for which the Custodian asserted were exempt from disclosure.

Therefore, pursuant to Teeters, *supra*, and the Council's May 24, 2011 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. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Council's Interim Order required the Custodian to disclose one (1) record with only partial redactions. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Council reconsiders its July 26, 2011 Final Decision Findings and Recommendations to include an analysis of whether the Complainant is a prevailing party entitled to reasonable attorney's fees because the Council previously failed to address same in its Final Decision.
2. Because the Complainant has failed to establish in his motion for reconsideration of the Council's July 26, 2011 Final Decision that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's May 24, 2011 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. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Council's Interim Order required the Custodian to disclose one (1) record with only partial redactions. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 13, 2011



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
Commissioner

FINAL DECISION

July 26, 2011 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2008-161

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the July 26, 2011 public meeting, the Government Records Council (“Council”) considered the July 19, 2011 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 provided a copy of the March 11, 2008 executive session minutes with redactions in accordance with the Council’s May 24, 2011 Interim Order to the Complainant on June 1, 2011, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the extended time frame to comply with the Council’s Interim Order, the Custodian has complied with the Council’s May 24, 2011 Interim Order.
2. Although the Custodian unlawfully denied access to the requested March 11, 2008 executive session minutes because only paragraph No. 2 and No. 3 should have been redacted as discussions regarding a personnel matter pursuant to N.J.S.A. 10:4-12.b(8), the Custodian lawfully denied access to the remainder of the records as such records were exempt from disclosure as attorney-client privileged material. N.J.S.A. 47:1A-1.1. Further, the Custodian timely complied with both the Council’s April 29, 2009 and May 24, 2011 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

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 26th Day of July, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: July 27, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 26, 2011 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2008-161

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: To inspect the Borough of South Bound Brook's sick time calculation related to a Settlement Agreement.³

Request Made: May 3, 2008

Response Made: May 12, 2008

Custodian: Donald E. Kazar

GRC Complaint Filed: July 29, 2008⁴

Background

May 24, 2011

Government Records Council's ("Council") Interim Order. At its May 24, 2011 public meeting, the Council considered the April 20, 2011⁵ 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 provided the GRC with the requested records and the Custodian's certification reiterating that all the records are exempt from disclosure as attorney-client privileged material in compliance with the Council's April 29, 2009 Interim Order in a timely manner. Therefore, the Custodian complied with the Council's April 29, 2009 Interim Order.

2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of**

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ). Counsel entered his appearance in this matter on February 7, 2011.

² Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previously represented by William T. Cooper, III, Esq., of Cooper & Cooper (Somerville, NJ).

³ The Settlement Agreement is between the Complainant and the Borough of South Bound Brook.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ This complaint was prepared for adjudication on October 21, 2009; however, said complaint was not adjudicated due to the Council's lack of quorum.

this Order and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director.

3. The Custodian unlawfully denied access to the requested executive minutes dated March 11, 2008 because only paragraphs 2 and 3 should be redacted as being exempt from disclosure according to the Open Public Meetings Act as a discussion for which a public body may exclude the public regarding any personnel matter. N.J.S.A. 10:4-12.b(8). The remainder of the record must be disclosed to the Complainant. The Custodian lawfully denied the Complainant access to the remainder of the requested records as such records are exempt from disclosure as attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1.
4. 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.

May 25, 2011

Council's Interim Order distributed to the parties.

May 31, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that he is in receipt of the Council's May 24, 2011 Interim Order and various other submissions from the GRC regarding complaints not at issue here. Counsel requests an extension of time until June 3, 2011 to submit certified compliance of the Council's order.

May 31, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until June 3, 2011 to submit certified compliance of the Council's order.

June 1, 2011

Custodian's response to the Council's May 24, 2011 Interim Order attaching a copy of the Borough of South Bound Brook's ("Borough") March 11, 2008 executive session minutes (with redactions).

The Custodian certifies that the Council held in its April 20, 2011 Findings & Recommendations of the Executive Director that the Borough lawfully denied access to a majority of the records responsive to the Complainant's OPRA request. The Custodian certifies that the Council further held that the March 11, 2008 executive session minutes were not exempt from disclosure and ordered the Custodian to provide said minutes with only paragraph No. 2 and No. 3 redacted.

The Custodian certifies that pursuant to the Council's May 24, 2011 Interim Order, he is simultaneously providing a copy of the March 11, 2008 executive session

minutes with the appropriate redactions to the Complainant and the GRC. The Custodian certifies that the Borough is henceforth in compliance of the Council's order.

Analysis

Whether the Custodian complied with the Council's May 24, 2011 Interim Order?

The Council's May 24, 2011 Interim Order specifically directed the Custodian to "... comply with the Council's Findings of the *In Camera* Examination ..." which ordered disclosure of the March 11, 2008 executive session minutes with redactions for only paragraph No. 2 and No. 3 of the minutes as said paragraphs contain exempt discussions regarding a personnel matter pursuant to N.J.S.A. 10:4-12.b(8). Said Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of said Order.

The Custodian's Counsel contacted the GRC on May 31, 2011 requesting an extension of time until June 3, 2011 to comply with the Council's order. The GRC responded on the same day granting said extension.

On June 1, 2011, or four (4) business days after receipt of the Council's Interim Order and within the extended time frame to comply, the Custodian provided certified confirmation of compliance with the Council's order to the Executive Director of the GRC certifying that the Complainant was simultaneously being provided with a copy of the March 11, 2008 executive session minutes redacted in accordance with the Council's order.

Therefore, because the Custodian provided a copy of the March 11, 2008 executive session minutes with redactions in accordance with the Council's May 24, 2011 Interim Order to the Complainant on June 1, 2011, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the extended time frame to comply with the Council's Interim Order, the Custodian has complied with the Council's May 24, 2011 Interim Order.

Whether the Custodian's delay in access to the March 11, 2008 executive session minutes rises 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, 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, 107 (App. Div. 1996)).

Although the Custodian unlawfully denied access to the requested March 11, 2008 executive session minutes because only paragraph No. 2 and No. 3 should have been redacted as discussions regarding a personnel matter pursuant to N.J.S.A. 10:4-12.b(8), the Custodian lawfully denied access to the remainder of the records as such records were exempt from disclosure as attorney-client privileged material. N.J.S.A. 47:1A-1.1. Further, the Custodian timely complied with both the Council’s April 29, 2009 and May 24, 2011 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided a copy of the March 11, 2008 executive session minutes with redactions in accordance with the Council’s May 24, 2011 Interim Order to the Complainant on June 1, 2011, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the extended time frame to comply with the Council’s Interim Order, the Custodian has complied with the Council’s May 24, 2011 Interim Order.
2. Although the Custodian unlawfully denied access to the requested March 11, 2008 executive session minutes because only paragraph No. 2 and No. 3 should have been redacted as discussions regarding a personnel matter pursuant to N.J.S.A. 10:4-12.b(8), the Custodian lawfully denied access to the

remainder of the records as such records were exempt from disclosure as attorney-client privileged material. N.J.S.A. 47:1A-1.1. Further, the Custodian timely complied with both the Council's April 29, 2009 and May 24, 2011 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

July 19, 2011



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
Commissioner

INTERIM ORDER

May 24, 2011 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2008-161

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 2011 *In Camera* 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 provided the GRC with the requested records and the Custodian’s certification reiterating that all the records are exempt from disclosure as attorney-client privileged material in compliance with the Council’s April 29, 2009 Interim Order in a timely manner. Therefore, the Custodian complied with the Council’s April 29, 2009 Interim Order.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director.**
3. The Custodian unlawfully denied access to the requested executive minutes dated March 11, 2008 because only paragraphs 2 and 3 should be redacted as being exempt from disclosure according to the Open Public Meetings Act as a discussion for which a public body may exclude the public regarding any personnel matter. N.J.S.A. 10:4-12.b.(8). The remainder of the record must be disclosed to the Complainant. The Custodian lawfully denied the Complainant access to the remainder of the requested records as such records are exempt from disclosure as attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1.
4. 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.



Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination¹
1	Three (3) e-mails dated 2/21/08 between Donald E. Kazar and William T. Cooper, III (Borough Attorney) entitled: Accumulated Time Owed (1 page)	E-mail discussions between the Custodian and the Borough Attorney regarding the amount of time the Complainant is owed pursuant to the settlement agreement.	Custodian asserts that this record is exempt from disclosure as attorney-client privileged information and information generated on behalf of a public employee in connection with a complaint and/or grievance filed with the Borough.	This record is exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
2	Letter dated 3/4/08 of William T. Cooper, III (Borough Attorney) entitled: Robert Verry Settlement Agreement (3 pages)	Letter from the Borough Attorney containing legal advice, legal interpretations, and legal strategy.	Custodian asserts that this record is exempt from disclosure as attorney-client privileged information and information generated on behalf of a public employee in	This record is exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

¹ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

			connection with a complaint and/or grievance filed with the Borough.	
3	Letter from William T. Cooper, III (Borough Attorney) to Stacey L. Pilato (Borough Labor Attorney) dated 3/6/08 entitled: Borough of South Bound Brook – Chief Robert Verry (1 page)	Letter from the Borough Attorney to the Borough Labor Attorney discussing the legal issues of the settlement payment from the Borough to the Complainant.	Custodian asserts that this record is exempt from disclosure as attorney-client privileged information and information generated on behalf of a public employee in connection with a complaint and/or grievance filed with the Borough.	This record is exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
4	Legal memo dated 3/10/08 from Eric Martin Bernstein (Borough Labor Attorney) to William T. Cooper, III (Borough Attorney) entitled: Borough of South Bound Brook and Chief Robert Verry (4 pages)	Letter from the Borough Labor Attorney containing legal advice, legal interpretations, and legal strategy.	Custodian asserts that this record is exempt from disclosure as attorney-client privileged information and information generated on behalf of a public employee in connection with a complaint and/or grievance filed with the Borough.	This record is exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
5	Executive Session Minutes dated 3/11/08	Minutes of the Borough's March 11, 2008 executive session.	Custodian asserts that this record is exempt from disclosure as	This record is <u>not</u> exempt from disclosure in its entirety. However,

			attorney-client privileged information and information generated on behalf of a public employee in connection with a complaint and/or grievance filed with the Borough.	paragraphs 2 and 3 should be redacted as being exempt from disclosure according to the Open Public Meetings Act as a discussion for which a public body may exclude the public regarding any personnel matter. <u>N.J.S.A. 10:4-12.b.(8)</u> .
--	--	--	---	--

Interim Order Rendered by the
Government Records Council
On The 24th Day of May, 2011

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: May 25, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2008-161

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: To inspect the Borough of South Bound Brook's sick time calculation related to a Settlement Agreement.³

Request Made: May 3, 2008

Response Made: May 12, 2008

Custodian: Donald E. Kazar

GRC Complaint Filed: July 29, 2008⁴

Records Submitted for *In Camera* Examination:

1. E-mails between Donald E. Kazar and Borough Attorney William T. Cooper, III dated 2/21/08;
2. Legal memo from Borough Attorney William T. Cooper, III to Donald Kazar dated 3/4/08;
3. Letter from William T. Cooper, III to Stacey L. Pilato, Esq. of Eric M. Bernstein Associates dated 3/6/08;
4. Legal memo from Labor Attorney Eric M. Bernstein to Borough Attorney William T. Cooper, III dated 3/10/08; and
5. Borough Council executive meeting minutes dated 3/11/08.

Background

April 29, 2009

Government Records Council's Interim Order. At the April 29, 2009 public meeting, the Government Records Council ("Council") considered the April 22, 2009 Executive Director's Findings and Recommendations 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 No legal representation listed on record.

² Represented by William T. Cooper, III, Esq., of Cooper & Cooper (Somerville, NJ).

³ The Settlement Agreement is between the Complainant and the Borough of South Bound Brook.

⁴ The GRC received the Denial of Access Complaint on said date.

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of all five (5) records responsive to the Complainant's May 3, 2008 OPRA request in order to determine the validity of the Custodian's assertion that the records constitute the exemptions cited by the Custodian pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁷, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. 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.

May 1, 2009

Council's Interim Order ("Order") distributed to the parties.

May 5, 2009⁸

Certification of the Custodian in response to the Council's Interim Order with the requested records for the *in camera* review attached. The Custodian certifies that the requested records for the *in camera* review are attached, as well as a copy of the Tort Claim Notice filed upon the Borough on or about September 9, 2008 on behalf of the Complainant. Further, the Custodian certifies that it remains the Borough's position that the enclosed records are exempt from disclose under the attorney-client privilege.

Analysis

Whether the Custodian complied with the Council's April 29, 2009 Interim Order?

At its April 29, 2009 public meeting, the Council determined that because the Custodian has asserted that the requested records were lawfully denied pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged information, the Council must determine whether the legal conclusion asserted by the Custodian is properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested records were properly denied.

⁵ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on May 8, 2009.

The Custodian provided the GRC with the requested records and the Custodian's certification reiterating that all the records are exempt from disclosure as attorney-client privileged information in compliance with the Council's April 29, 2009 Interim Order in a timely manner. Therefore, the Custodian complied with the Council's April 29, 2009 Interim Order.

Whether the Custodian unlawfully denied the Complainant access to the requested records?

The Custodian asserts that he lawfully denied the Complainant access to the requested records because said records are exempt from disclosure under OPRA. Specifically, in the Custodian's response to the records request and the Statement of Information, he asserts that the requested sick time calculation related to a settlement agreement between the Borough and the Complainant is exempt from disclosure as attorney-client privileged information that would give an advantage to adversarial litigants and as information generated on behalf of a public employee in connection with a complaint and/or grievance filed with the Borough which includes records of strategy or negotiating positions pursuant to N.J.S.A. 47:1A-1.1. Conversely, the Complainant asserts that the requested records are not exempt from disclosure under OPRA because the Custodian provided the calculations for other categories of leave time that were used for the settlement agreement without asserting these exemptions from disclosure.

OPRA excludes from the definition of a government record any record within the attorney client privilege. N.J.S.A. 47:1A-1.1. In New Jersey, protecting confidentiality within the attorney-client relationship has long been recognized by the courts. *See, e.g. Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18 (App. Div. 1989). In general, the attorney-client privilege renders as confidential communications between a lawyer and a client made in the course of that professional relationship. *See N.J.S.A. 2A: 84A-20 and Fellerman v. Bradley*, 99 N.J. 493, 498-99 (1985). Rule 504 (1) of the New Jersey Rules of Evidence provides that communications between a lawyer and client, "in the course of that relationship and in professional confidence, are privileged...." Such communications as discussion of litigation strategy, evaluation of liability, potential monetary exposure and settlement recommendations are considered privileged. The Press of Atlantic City v. Ocean County Joint Insurance Fund, 337 N.J. Super. 480, 487 (Law Div. 2000). Also confidential are mental impressions, legal conclusions, and opinions or theories of attorneys. In Re Environmental Ins. Actions, 259 N.J. Super. 308, 317 (App. Div. 1992).

The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system." Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 27-8 (App.Div.1989). The attorney-client privilege protects

communications between a lawyer and the client made in the course of that professional relationship, and particularly protects information which, if disclosed, would jeopardize the legal position of the client. N.J.S.A. 2A:84A-20; RPC 1.6. The New Jersey Supreme Court has observed that RPC 1.6 “expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client.” In re Advisory Opinion No. 544 of N.J. Sup. Court, 103 N.J. 399, 406 (1986).

Redaction of otherwise public documents is appropriate where protection of privileged or confidential subject matter is a concern. South Jersey Publishing Co., Inc. v. N. J. Expressway Authority, 124 N.J. 478, 488-9 (1991). Moreover, whether the matter contained in the requested documents pertains to pending or closed cases is important, because the need for confidentiality is greater in pending matters. Keddie v. Rutgers, State University, 148 N.J. 36, 54 (1997). Nevertheless, “[e]ven in closed cases. . .attorney work-product and documents containing legal strategies may be entitled to protection from disclosure.” *Id.*

Additionally, OPRA exempts from disclosure “information generated by or on behalf of public employers or public employees in connection ... with any grievance filed by or against an individual” pursuant to N.J.S.A. 47:1A-1.1.

The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination⁹
1	Three (3) e-mails dated 2/21/08 between Donald E.	E-mail discussions between the Custodian and the Borough	Custodian asserts that this record is exempt from disclosure as	This record is exempt from disclosure as attorney-client privileged

⁹ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

	Kazar and William T. Cooper, III (Borough Attorney) entitled: Accumulated Time Owed (1 page)	Attorney regarding the amount of time the Complainant is owed pursuant to the settlement agreement.	attorney-client privileged information and information generated on behalf of a public employee in connection with a complaint and/or grievance filed with the Borough.	information pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
2	Letter dated 3/4/08 of William T. Cooper, III (Borough Attorney) entitled: Robert Verry Settlement Agreement (3 pages)	Letter from the Borough Attorney containing legal advice, legal interpretations, and legal strategy.	Custodian asserts that this record is exempt from disclosure as attorney-client privileged information and information generated on behalf of a public employee in connection with a complaint and/or grievance filed with the Borough.	This record is exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
3	Letter from William T. Cooper, III (Borough Attorney) to Stacey L. Pilato (Borough Labor Attorney) dated 3/6/08 entitled: Borough of South Bound Brook – Chief Robert Verry (1 page)	Letter from the Borough Attorney to the Borough Labor Attorney discussing the legal issues of the settlement payment from the Borough to the Complainant.	Custodian asserts that this record is exempt from disclosure as attorney-client privileged information and information generated on behalf of a public employee in connection with a complaint	This record is exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

			and/or grievance filed with the Borough.	
4	Legal memo dated 3/10/08 from Eric Martin Bernstein (Borough Labor Attorney) to William T. Cooper, III (Borough Attorney) entitled: Borough of South Bound Brook and Chief Robert Verry (4 pages)	Letter from the Borough Labor Attorney containing legal advice, legal interpretations, and legal strategy.	Custodian asserts that this record is exempt from disclosure as attorney-client privileged information and information generated on behalf of a public employee in connection with a complaint and/or grievance filed with the Borough.	This record is exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
5	Executive Session Minutes dated 3/11/08	Minutes of the Borough's March 11, 2008 executive session.	Custodian asserts that this record is exempt from disclosure as attorney-client privileged information and information generated on behalf of a public employee in connection with a complaint and/or grievance filed with the Borough.	This record is <u>not</u> exempt from disclosure in its entirety. However, paragraphs 2 and 3 should be redacted as being exempt from disclosure according to the Open Public Meetings Act as a discussion for which a public body may exclude the public regarding any personnel matter. <u>N.J.S.A. 10:4-12.b.(8)</u> .

Thus, the Custodian unlawfully denied access to the requested executive minutes dated March 11, 2008 because only paragraphs 2 and 3 should be redacted as being exempt from disclosure according to the Open Public Meetings Act as a discussion for which a

public body may exclude the public regarding any personnel matter. N.J.S.A. 10:4-12.b.(8). The remainder of the record must be disclosed to the Complainant. The Custodian lawfully denied the Complainant access to the remainder of the requested records as such records are exempt from disclosure as attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1.

Whether the Custodian's delay in access to the requested records rises 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian provided the GRC with the requested records and the Custodian's certification reiterating that all the records are exempt from disclosure as attorney-client privileged material in compliance with the Council's April 29, 2009 Interim Order in a timely manner. Therefore, the Custodian complied with the Council's April 29, 2009 Interim Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director.**
3. The Custodian unlawfully denied access to the requested executive minutes dated March 11, 2008 because only paragraphs 2 and 3 should be redacted as being exempt from disclosure according to the Open Public Meetings Act as a discussion for which a public body may exclude the public regarding any personnel matter. N.J.S.A. 10:4-12.b.(8). The remainder of the record must be disclosed to the Complainant. The Custodian lawfully denied the Complainant access to the remainder of the requested records as such records are exempt from disclosure as attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1.
4. 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.

Prepared and
Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011¹⁰

¹⁰ This complaint was prepared for adjudication on October 21, 2009; however, said complaint was not adjudicated due to the Council's lack of quorum.



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

INTERIM ORDER

April 29, 2009 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No.2008-161

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the April 29, 2009 public meeting, the Government Records Council ("Council") considered the April 22, 2009 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 Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of all five (5) records responsive to the Complainant's May 3, 2008 OPRA request in order to determine the validity of the Custodian's assertion that the records constitute the exemptions cited by the Custodian pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



3. 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.

Interim Order Rendered by the
Government Records Council
On The 29th Day of April, 2009

Robin Berg Tabakin, Chairwoman
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: May 1, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2009 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2008-161

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: To inspect the Borough of South Bound Brook's sick time calculation related to a Settlement Agreement.³

Request Made: May 3, 2008

Response Made: May 12, 2008

Custodian: Donald E. Kazar

GRC Complaint Filed: July 29, 2008⁴

Background

May 3, 2008

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

May 12, 2008

Custodian Counsel's response to the OPRA request. Counsel responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that the requested calculation is not a public record as defined under OPRA. Further, Counsel states that the requested calculation is exempt from disclosure as attorney-client privileged information that would give an advantage to adversarial litigants and as information generated on behalf of a public employee in connection with a complaint and/or grievance filed with the Borough of South Bound Brook, which includes documents of strategy or negotiating positions.

July 29, 2008

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

¹ No legal representation listed on record.

² Represented by William T. Cooper, III, Esq., of Cooper & Cooper (Somerville, NJ).

³ The Settlement Agreement is between the Complainant and the Borough of South Bound Brook.

⁴ The GRC received the Denial of Access Complaint on said date.

- Complainant's OPRA request dated May 3, 2008.
- Letter from the Custodian's Counsel to the Complainant dated May 12, 2008.⁵

The Complainant states that he submitted an OPRA request to the Custodian on May 3, 2008. The Complainant states that Counsel responded in writing on May 12, 2008 denying access to the requested calculation, claiming that the calculation is not a public record because it is attorney-client privileged information that would give an advantage to adversarial litigants and was generated on behalf of a public employee who had filed a complaint and/or grievance against the Borough.

The Complainant argues that he made this request based on Counsel's letter to the Complainant dated March 17, 2008 in which Counsel refers to a calculation of the Complainant's payroll time by the Borough as part of a settlement agreement. The Complainant states that, in response to a previous OPRA request, he was provided with calculations for four (4) of the five (5) payroll categories: holiday hours, personal hours, comp hours and vacation hours. The Complainant contends that Counsel's denial of access to the requested sick time calculation is irrational because the cited exemptions in Counsel's May 12, 2008 written response would have applied to all five (5) categories instead of just one (1) category.

The Complainant did not agree to mediate this complaint.

August 6, 2008

Request for the Statement of Information sent to the Custodian.

August 13, 2008

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

- Complainant's OPRA request dated May 3, 2008.
- Letter from the Custodian's Counsel to the Complainant dated May 12, 2008.

The Custodian states that he received the Complainant's request on May 3, 2008. The Custodian certifies that five (5) records responsive to the Complainant's request for the Borough's sick time calculation were withheld based on advice of Counsel. The Custodian contends that the five (5) records, which include memoranda and meeting minutes, contain attorney's legal opinions and attorney-work product material. The Custodian states that the Complainant was informed of the reasons the records were being withheld in a letter from Counsel dated May 12, 2008.

The Custodian states that the Complainant's May 3, 2008 OPRA request was so broad and vague that providing records responsive would have included materials that would have fallen within several exemptions pursuant to OPRA. The Custodian argues that access to records No. 1 through No. 4 was denied based on attorney work product privilege.

⁵ The Complainant also attaches a previous request for records in which the Complainant requested the Borough's calculation of payroll time owed to the Complainant, including sick time. The calculation requested in this complaint was not provided as part of the response to this previous request.

Further, the Custodian argues that access to record No. 5 was denied based on the fact that the executive session meeting minutes from March 11, 2008 contained attorney-client privileged information and the Borough's assumption that legal proceedings with the Complainant were imminent. The Custodian also argues that disclosure would provide an unfair advantage to the Complainant and that the minutes included information generated on behalf of a public employee in connection with a grievance filed against the Borough which would expose the Borough's strategy and/or negotiation position.

Analysis

Whether the Custodian unlawfully denied access to the requested sick time calculation?

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 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.

The Custodian asserted in the SOI that five (5) records responsive to the Complainant's May 3, 2008 OPRA request for the Borough's sick time calculation exist, but that they are exempt from disclosure pursuant to OPRA. The Custodian states that records No. 1 through No. 4 were denied as attorney work product privilege. Further, the Custodian argued that record No. 5 is exempt from disclosure because the Executive

Session meeting minutes from March 11, 2008 contained attorney-client privileged material, the Borough assumed litigation with the Complainant was imminent, disclosure would have provided an unfair advantage to the Complainant and because the Executive Session meeting minutes contained information generated on behalf of a public employee in connection with a grievance filed against the Borough that would expose the Borough's strategy and negotiation position.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁶ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

“OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The court also stated that:

“[t]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of all five (5) records responsive to the Complainant's May 3, 2008 OPRA request in order to determine the validity of the Custodian's assertion that the records constitute the exemptions cited by the Custodian pursuant to N.J.S.A. 47:1A-1.1.

⁶ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). Robert A. Verry v. Borough of South Bound Brook (Somerset), 2008-161 – Findings and Recommendations of the Executive Director

Whether the Custodian's delay in access to the requested records rises 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of all five (5) records responsive to the Complainant's May 3, 2008 OPRA request in order to determine the validity of the Custodian's assertion that the records constitute the exemptions cited by the Custodian pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 1 above), a document or redaction index⁸, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁹, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. 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.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 22, 2009

⁷ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁸ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."