



**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**

**October 26, 2010 Government Records Council Meeting**

Tom Coulter  
Complainant

Complaint No. 2008-220

v.

Township of Bridgewater (Somerset)  
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint should be dismissed because the Complainant’s Counsel voluntarily withdrew this complaint from consideration in an e-mail to the GRC dated October 7, 2010. 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 26<sup>th</sup> Day of October, 2010

Robin Berg Tabakin, Chair  
Government Records Council



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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: November 1, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
October 26, 2010 Council Meeting**

**Tom Coulter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-220**

v.

**Township of Bridgewater (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of an audio recording on a compact disc (“CD”) of the Township of Bridgewater (“Township”) public session meeting held on February 4, 2008.

**Request Made:** March 28, 2008

**Response Made:** March 31, 2008

**Custodian:** Linda Doyle

**GRC Complaint Filed:** October 2, 2008<sup>3</sup>

**Background**

**August 24, 2010**

Government Records Council’s (“Council”) Interim Order. At its August 24, 2010 public meeting, the Council considered the August 17, 2010 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:

“... because the Custodian has failed to establish in his motion for reconsideration of the Council’s December 22, 2009 Findings and Recommendations 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 in disposing of the complaint, 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

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

<sup>2</sup> Represented by Alan Bart Grant, Esq., of Mauro, Savo, Camerino & Grant, P.A. (Somerville, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees pursuant to the Council's December 22, 2009 Interim Order."

**August 27, 2010**

Council's Interim Order distributed to the parties.

**September 22, 2010**

E-mail from the Complainant's Counsel to the GRC. Counsel states that the parties have settled this matter and that this complaint will be withdrawn upon receipt of the agreed upon settlement amount.

**October 7, 2010**

E-mail from the Complainant's Counsel to the GRC. Counsel states that the terms of the settlement between the Complainant and the Township have been fulfilled. Counsel states that the Complainant hereby withdraws his complaint.

**Analysis**

No analysis is required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant's Counsel voluntarily withdrew this complaint from consideration in an e-mail to the GRC dated October 7, 2010. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

October 19, 2010



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**

**August 24, 2010 Government Records Council Meeting**

Tom Coulter  
Complainant

Complaint No. 2008-220

v.

Township of Bridgewater (Somerset)  
Custodian of Record

At the August 24, 2010 public meeting, the Government Records Council (“Council”) considered the August 17, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because the Custodian has failed to establish in his motion for reconsideration of the Council’s December 22, 2009 Findings and Recommendations 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 in disposing of the complaint, 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). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees pursuant to the Council’s December 22, 2009 Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 24<sup>th</sup> Day of August, 2010

Robin Berg Tabakin, Chair  
Government Records Council



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

Stacy Spera, Secretary  
Government Records Council

**Decision Distribution Date: August 27, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
August 24, 2010 Council Meeting**

**Tom Coulter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-220**

v.

**Township of Bridgewater (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of an audio recording on a compact disc (“CD”) of the Township of Bridgewater (“Township”) public session meeting held on February 4, 2008.

**Request Made:** March 28, 2008

**Response Made:** March 31, 2008

**Custodian:** Linda Doyle

**GRC Complaint Filed:** October 2, 2008<sup>3</sup>

**Background**

**December 22, 2009**

Government Records Council’s (“Council”) Interim Order. At its December 22, 2009 public meeting, the Council considered the December 9, 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, found that:

1. Because the Custodian’s Counsel provided a check in the amount of \$4.04, made payable to the Complainant, to the Complainant’s Counsel as required by the Council’s Interim Order, and because Deputy Clerk Herrera provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council’s Interim Order, the Custodian has complied with the Council’s November 18, 2009 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.b. by charging \$5.00 per CD of the requested CD of the audio recording of the public meeting dated February 4, 2008 and failed to bear her burden of proving that the charge represented the actual cost pursuant to N.J.S.A. 47:1A-6., because

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

<sup>2</sup> Represented by Alan Bart Grant, Esq., of Mauro, Savo, Camerino & Grant, P.A. (Somerville, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

the Custodian complied with the Council's Interim Order dated November 18, 2009, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's violation of N.J.S.A. 47:1A-5.b. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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. 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

### **December 29, 2009**

Council's Interim Order distributed to the parties.

### **January 7, 2010**

Custodian's Motion for Reconsideration of the Council's December 22, 2009 Interim Order attaching the following:

- Letter from the Custodian's Counsel to the GRC dated November 17, 2008.
- Letter from the Custodian's Counsel to the GRC dated February 12, 2009.
- Letter from the Custodian's Counsel to the GRC dated October 29, 2009.

The Custodian's Counsel requests that the GRC reconsider its December 22, 2009 Interim Order referring the complaint to the Office of Administrative Law ("OAL") for a determination of prevailing party attorney's fees pursuant to *N.J.A.C. 5:105-2.10*. Counsel asserts that this complaint should be reconsidered based on mistake and extraordinary circumstances.

Counsel argues that he specifically requests that the GRC address the only outstanding issue in this complaint: based on considerations of fairness, *i.e.*, should there be parameters imposed to govern the amount of counsel fees that should be awarded to the Complainant's Counsel, and if so, what should the parameters be and who should dictate them. Counsel contends there is a factual point in time after which work performed by the Complainant's Counsel should not be considered in determining reasonable attorney's fees. Counsel proposes that this factual point in time is no more



than forty-five (45) days after filing of the Denial of Access complaint, or November 17, 2008 in the instant complaint.

Counsel contends that the GRC's failure to consider this issue allows the Complainant's Counsel to abuse OPRA and the GRC in regards to the fee shifting provision, permits the GRC to avoid what should be a responsibility to take a proactive role under the facts of this complaint and punishes the Township whose only crime was an unintentional over charge of \$4.04.

Counsel argues that although the GRC decided the issue of the cost of the compact disc ("CD") at issue, whether the Custodian knowingly and willfully violated OPRA and whether the Complainant was a prevailing party entitled to reasonable attorney's fees, the GRC failed to address whether time restrictions should be imposed in determining what constitutes a reasonable fee. Counsel asserts that the GRC cannot simply decide on three (3) fairly clear cut issues and then refer the complaint to the OAL without any direction.

Counsel asserts that from the perspective of the Complainant and Complainant's Counsel, the real underlying issue in this complaint is the punishment of a municipality by maximizing counsel fees, which requires such municipality to spend an unnecessary amount of money in a matter that could have easily been resolved within thirty (30) days of the filing of a complaint. Counsel contends that in this matter, the Complainant's goal, *i.e.*, to expose the overcharge for a CD, was achieved the minute this complaint was filed. Counsel avers that he contacted the Complainant's Counsel in October, 2008 advising that the Township would reimburse the overcharge and would also agree to pay a reasonable attorney fee. Counsel argues that the Complainant's Counsel's fees would have been minimal at that point in time considering the work performed (legal research and filing of the complaint), and certainly would have been less than the fees sought after a year's time which could also include work performed during the OAL process.

Counsel contends that this matter could have been resolved had it not been for the Complainant Counsel's desire to abuse the fee shifting provision and the GRC's reluctance to actively curtail such from happening. Counsel asserts that it is not too late for the GRC to take a stance on issue raised by Counsel, which could in turn result in a settlement, thus avoiding referral to the OAL.

Counsel acknowledges that 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. Counsel asserts that the term "reasonable" begs the question of at what point does the considerations of fairness mandate that the Complainant's purpose has been achieved and the Complainant's Counsel's fees limited. Counsel states that in Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court stated that attorney's fees must be both reasonable and justified based on the premise that the "party's efforts are necessary and an important factor in obtaining the relief." (Citing Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 771 A.2d 1194 (2001)) *Id.* at 431.

Counsel asserts that the Complainant's Counsel argues that the Township would not have modified its fee schedule for a blank audio CD to the actual cost without the

filing of this complaint. Counsel contends that the Complainant's Counsel could have accomplished the same result simply by contacting the Township, without having to extract unreasonable prevailing party attorney's fees. Further, Counsel argues that the Complainant's Counsel could have shown interest in mediation by checking "yes" on the Denial of Access complaint form; however, mediation would not have allowed the Complainant's Counsel to achieve his real goal of unreasonable attorney's fees.

Counsel asserts that the GRC should not overlook the critical fact in this complaint that the Township had no intention of making a profit from an individual seeking government records nor was the Township attempting to impede the Complainant's rights under OPRA. Counsel asserts that the facts of this complaint are inapposite from the facts in Libertarian Party v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), where the Township of Edison sought to make a profit by charging \$55.00 for a CD; and O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (April 2008), in which a special service charge of \$31.50 for a CD was imposed.

Counsel reiterates that the GRC could have taken a more active role earlier in this complaint to curtail what Counsel perceives as an abuse of the fee shifting provision. Counsel acknowledges that if a complainant declines to mediate a complaint, then no mediation can occur. See N.J.S.A. 47:1A-7.e. and N.J.A.C. 5:105-2.5. Counsel contends that the facts of this complaint point to the conclusion that the GRC should have the power and discretion to order mediation. Counsel asserts that a simple conference call could have resolved the matter and limited the prevailing party's fees paid to the Complainant to a more reasonable amount.

Counsel states that OPRA, although containing provisions referencing mediation, also states that:

"... the council shall: act, to the maximum extent possible, at the convenience of the parties; utilize teleconferencing, faxing of documents, e-mail and similar forms of modern communication; and when in-person meetings are necessary, send representatives to meet with the parties at a location convenient to the parties." N.J.S.A. 47:1A-7.b.

Counsel argues that the complaint would have concluded many months ago had the GRC abided by this provision. Counsel reiterates that the Township acknowledged it had wrongly overcharged the Complainant for a CD copy and offered to pay reasonable attorney's fees; however, the Complainant's Counsel did not agree to settle. Counsel questions whether any positive purpose is served by not resolving the matter early on and if the GRC sends this complaint to OAL without defining the limited timeframe during which prevailing party attorney's fees may be considered.

Finally, Counsel contends that based upon the foregoing, the GRC should take into account the facts of this complaint and provide the intervention called for in N.J.S.A. 47:1A-7 by reconsidering the last remaining issue in this complaint: whether there should be parameters or time restrictions imposed to limit the timeframe within which reasonable attorney's fees should be determined by an Administrative Law Judge ("ALJ"). Counsel requests that the GRC direct the ALJ to limit his timeframe for

consideration of legal work to the outside date of November 17, 2008 for considering reasonable prevailing party attorney's fees (See attached dated November 17, 2008). Counsel argues that this limitation will breed fairness to prevail and avoid the abuse of OPRA's fee shifting provision present in this complaint.

### Analysis

#### **Whether the Complainant has met the required standard for reconsideration of the Council's December 22, 2009 Findings and Recommendations?**

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)*.

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).

Counsel requested in the Motion for Reconsideration that the GRC address the only outstanding issue in this complaint, *i.e.*, based on considerations of fairness, should there be parameters imposed to govern the amount of counsel fees that should be awarded to the Complainant's Counsel, and if so, what should the parameters be and who should dictate them. Counsel contended that there is a factual point in time after which work performed by the Complainant's Counsel should not be considered in determining reasonable attorney's fees.

In support of his Motion for Reconsideration, Counsel contends that the GRC's failure to consider this issue allows the Complainant's Counsel to abuse OPRA and the GRC in regards to the fee shifting provision, permits the GRC to avoid what should be a responsibility to take a proactive role under the facts of this complaint, and punishes the Township whose only crime was an unintentional over charge of \$4.04.

In the Council's December 22, 2009 Interim Order, the GRC found that the Custodian had complied with the Council's November 18, 2009 Interim Order (by refunding the Complainant the difference between the \$5.00 charge imposed and the actual cost of the CD provided, or \$4.04). Additionally, the Council held that:

“[p]ursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct.” *Id.* at 432. 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. 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.”

The GRC has consistently referred complaints to the OAL to hold a hearing for a determination of reasonable prevailing party attorney's fees. The Custodian Counsel's arguments in the Motion for Reconsideration are more properly submitted to the OAL as part of said hearing on a determination of the amount of reasonable attorney's fees to be awarded in this matter.

As the moving party, the Custodian 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 Custodian failed to do so. The Custodian has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing of the complaint. *See D'Atria, supra*.

Therefore, because the Custodian has failed to establish in his motion for reconsideration of the Council's December 22, 2009 Findings and Recommendations 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 in disposing of the complaint, 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). Thus, this complaint should be referred to the OAL pursuant to the Council's December 22, 2009 Interim Order.

Moreover, the Custodian's Counsel alleges that the Complainant's Counsel declined to mediate the complaint in order to pursue attorney's fees. The GRC notes that it is required to offer to the parties the option of mediating a Denial of Access Complaint pursuant to N.J.S.A. 47:1A-7.b., mediation is a strictly voluntary process and the GRC has no authority to require parties to engage in mediation. *See* Uniform Mediation Act (N.J.S.A. 2A:23C-1 et seq.).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Custodian has failed to establish in his motion for reconsideration of the Council's December 22, 2009 Findings and Recommendations 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 in disposing of the complaint, 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). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees pursuant to the Council's December 22, 2009 Interim Order.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

August 17, 2010



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

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

**INTERIM ORDER**

**December 22, 2009 Government Records Council Meeting**

Tom Coulter  
Complainant

Complaint No. 2008-220

v.

Township of Bridgewater (Somerset)  
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the December 9, 2009 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’s Counsel provided a check in the amount of \$4.04, made payable to the Complainant, to the Complainant’s Counsel as required by the Council’s Interim Order, and because Deputy Clerk Herrera provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council’s Interim Order, the Custodian has complied with the Council’s November 18, 2009 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.b. by charging \$5.00 per CD of the requested CD of the audio recording of the public meeting dated February 4, 2008 and failed to bear her burden of proving that the charge represented the actual cost pursuant to N.J.S.A. 47:1A-6., because the Custodian complied with the Council’s Interim Order dated November 18, 2009, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s violation of N.J.S.A. 47:1A-5.b. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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. 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees.

Interim Order Rendered by the  
Government Records Council  
On The 22<sup>nd</sup> Day of December, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: December 29, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
December 22, 2009 Council Meeting**

**Tom Coulter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-220**

v.

**Township of Bridgewater (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of an audio recording on a compact disc (“CD”) of the Township of Bridgewater (“Township”) public session meeting held on February 4, 2008.

**Request Made:** March 28, 2008

**Response Made:** March 31, 2008

**Custodian:** Linda Doyle

**GRC Complaint Filed:** October 2, 2008<sup>3</sup>

**Background**

**November 18, 2009**

Government Records Council’s (“Council”) Interim Order. At its November 18, 2009 public meeting, the Council considered the November 10, 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, found that:

1. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian’s charge of \$5.00 per CD of the requested CD of the audio recording of the public meeting dated February 4, 2008 is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. See also O’Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185. Further, the Custodian failed to bear her burden of proving that the charge was actual cost pursuant to N.J.S.A. 47:1A-6.

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

<sup>2</sup> Represented by Alan Bart Grant, Esq., of Mauro, Savo, Camerino & Grant, P.A. (Somerville, NJ)

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.



2. Pursuant to Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (January 2008), the Custodian shall refund to the Complainant the difference between the \$5.00 fee and the “actual cost” of \$0.96 (or \$4.04).
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>4</sup>, to the Executive Director.**
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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

**November 20, 2009**

Council’s Interim Order distributed to the parties.

**November 23, 2009**

Letter from the Custodian’s Counsel to the Complainant’s Counsel attaching a check in the amount of \$4.04. The Custodian’s Counsel states that pursuant to the Council’s November 18, 2009 Interim Order, enclosed is a check in the amount of \$4.04 made payable to the Complainant.

**November 23, 2009**

Deputy Municipal Clerk Hector Herrera’s (“Deputy Clerk Herrera”) response to the Council’s Interim Order attaching a letter from the Custodian’s Counsel to the Complainant’s Counsel with enclosure dated November 23, 2009.

Deputy Clerk Herrera certifies that he caused the Township of Bridgewater to issue a check in the amount of \$4.04, made payable to the Complainant. Deputy Clerk Herrera certifies that it is his understanding that the Custodian’s Counsel forwarded the check to the Complainant’s Counsel.<sup>5</sup>

**Analysis**

**Whether the Custodian complied with the Council’s November 18, 2009 Interim Order?**

The Council’s November 18, 2009 Interim Order specifically directed the Custodian to refund to the Complainant the difference between the \$5.00 fee and the

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<sup>4</sup> "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."

<sup>5</sup> The Complainant’s Counsel acknowledged receipt of Custodian Counsel’s letter and attached check on November 24, 2009.

“actual cost” of \$0.96 (or \$4.04) for the requested CD of the audio recording of the public meeting dated February 4, 2008. 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.

On November 23, 2009, the Custodian’s Counsel sent a letter to the Complainant’s Counsel attaching a check payable to the Complainant in the amount of \$4.04. Deputy Clerk Herrera simultaneously provided legal certification of compliance with the Council’s Interim Order to the GRC and the Complainant’s Counsel on November 23, 2009, or the first (1<sup>st</sup>) business day following receipt of said Order.

Therefore, because the Custodian’s Counsel provided a check in the amount of \$4.04, made payable to the Complainant, to the Complainant’s Counsel as required by the Council’s Interim Order, and because the Deputy Clerk Herrera provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council’s Interim Order, the Custodian has complied with the Council’s November 18, 2009 Interim Order.

**Whether the Custodian’s copy cost of the CD exceeding actual cost in violation of OPRA 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 violated N.J.S.A. 47:1A-5.b. by charging \$5.00 for the requested CD of the audio recording of the public meeting dated February 4, 2008 and failed to bear her burden of proving that the charge represented the actual cost of the record pursuant to N.J.S.A. 47:1A-6., because the Custodian complied with the Council's Interim Orders dated November 18, 2009, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's violation of N.J.S.A. 47:1A-5.b. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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

OPRA provides that:

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

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

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

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

In Teeters, the complainant appealed from a final decision of the 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)). The court in Buckhannon stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). 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)."

In the instant complaint, the Custodian responded to the Complainant's March 28, 2008 OPRA request granting access to a CD copy of a Township public session meeting held on February 4, 2008 for a fee of \$5.00. The Complainant filed a Denial of Access Complaint on October 2, 2008. In the Denial of Access Complaint, the Complainant's Counsel requested that the GRC order the Custodian to refund the Complainant the difference of the \$5.00 charge paid by the Complainant and the "actual cost" of duplication.

In its November 18, 2009 Interim Order, the GRC determined that the Custodian failed to bear her burden of proving that the proposed fee of \$5.00 for a CD of the Township's public meeting represented the actual cost. Further, the GRC ordered the Custodian to provide a refund in the amount of \$4.04 to the Complainant: the amount represents the difference between what the Complainant paid and what Deputy Clerk Herrera certified to be the actual cost to provide a CD to a requestor (\$0.96). Deputy Clerk Herrera certified on November 23, 2009 that a check in the amount of \$4.04 was sent to the Complainant's Counsel in compliance with the Council's November 18, 2009 Interim Order.

Therefore, pursuant to Teeters, *supra*, 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. 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.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian's Counsel provided a check in the amount of \$4.04, made payable to the Complainant, to the Complainant's Counsel as required by the Council's Interim Order, and because Deputy Clerk Herrera provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's November 18, 2009 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.b. by charging \$5.00 per CD of the requested CD of the audio recording of the public meeting dated February 4, 2008 and failed to bear her burden of proving that the charge represented the actual cost pursuant to N.J.S.A. 47:1A-6., because the Custodian complied with the Council's Interim Order dated November 18, 2009, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's violation of N.J.S.A. 47:1A-5.b. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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. 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

December 9, 2009



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

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

**INTERIM ORDER**

**November 18, 2009 Government Records Council Meeting**

Tom Coulter  
Complainant

Complaint No. 2008-220

v.

Township of Bridgewater (Somerset)  
Custodian of Record

At the November 18, 2009 public meeting, the Government Records Council ("Council") considered the November 10, 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 Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian's charge of \$5.00 per CD of the requested CD of the audio recording of the public meeting dated February 4, 2008 is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. *See also* O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185. Further, the Custodian failed to bear her burden of proving that the charge was actual cost pursuant to N.J.S.A. 47:1A-6.
2. Pursuant to Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (January 2008), the Custodian shall refund to the Complainant the difference between the \$5.00 fee and the "actual cost" of \$0.96 (or \$4.04).
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>1</sup>, to the Executive Director.**

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<sup>1</sup> "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."



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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 18<sup>th</sup> Day of November, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: November 20, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 18, 2009 Council Meeting**

**Tom Coulter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-220**

**v.**

**Township of Bridgewater (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of an audio recording on a compact disc (“CD”) of the Township of Bridgewater (“Township”) public session meeting held on February 4, 2008.

**Request Made:** March 28, 2008

**Response Made:** March 31, 2008

**Custodian:** Linda Doyle

**GRC Complaint Filed:** October 2, 2008<sup>3</sup>

**Background**

**March 28, 2008**

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

**March 31, 2008**

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the second (2<sup>nd</sup>) business day following receipt of such request. The Custodian grants access to the requested record for a fee of \$5.00.

**October 2, 2008**

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

- Complainant’s OPRA request dated March 28, 2008.
- Township of Bridgewater receipt in the amount of \$5.00 dated March 31, 2008 and a photocopy of the CD provided to the Complainant.

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

<sup>2</sup> Represented by Alan Bart Grant, Esq., of Mauro, Savo, Camerino & Grant, P.A. (Somerville, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.



The Complainant's Counsel states that the Complainant submitted a request to the Township on March 28, 2008. Counsel states that the Complainant was provided a CD copy of the requested record for a fee of \$5.00 on March 31, 2008.<sup>4</sup>

Counsel avers that this complaint was filed because the Township failed to charge the "actual cost" of producing a CD to the Complainant. Counsel asserts that the claim made is similar to that of O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008); however, there are some minor distinguishing factors between the two complaints:

1. In O'Shea, *supra*, the record at issue was an audiotape, as opposed to a CD in this complaint;
2. In O'Shea, *supra*, the Custodian proposed a fee of \$10.00 to provide the record, as opposed to \$5.00 in this complaint;
3. In O'Shea, *supra*, the Complainant refused to pay the proposed fee before filing his complaint, as opposed to the Complainant's payment of the proposed fee in this complaint.

Counsel states that OPRA limits the cost of a record to "the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy" pursuant to N.J.S.A. 47:1A-5.b. Counsel avers that this provision of OPRA authorizes a special service charge only where:

"a request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) requiring a substantial amount of manipulation or programming of information technology..." N.J.S.A. 47:1A-5.d.

Counsel contends that the Custodian failed to offer any evidence to prove that any of the three (3) conditions above exist in providing a CD to the Complainant. Counsel argues that, to the contrary, the production of a CD in response to the Complainant's OPRA request appears to have been easier in the instant complaint than in O'Shea, *supra*.<sup>5</sup>

Further, Counsel argues that the Complainant's payment of the proposed \$5.00 fee does not deprive him of the right to challenge the fee. Counsel asserts that if the Council limited a requestor's ability to challenge an unreasonable fee after it has been paid, the Council will have essentially eliminated a requestor's legal right to challenge an

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<sup>4</sup> Counsel states that pursuant to N.J.A.C. 5:105-1.1(b), actions before the Council shall be governed by the Uniform Administrative Procedures Rules, N.J.A.C. 1:1 et seq., to the extent that they are not in conflict with the rules that specifically govern Council proceedings. Further, Counsel states that the Uniform Administrative Procedures Rules, specifically N.J.A.C. 1:1-15.2, permits the Council to take official notice of judicially noticeable facts as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence. Counsel requests that the GRC take official notice of the fact that blank, generic CDs of the type furnished to the Complainant cost in the area of \$0.30 to \$0.35 each. Counsel states that this fact is supported by a simple internet search of retailers who sell CDs.

<sup>5</sup> In O'Shea, *supra*, the audiotapes maintained by the Madison Public School District were in half speed format and needed to be converted to full speed format in order to be played. Counsel contends that there is no evidence that conversion was needed in the instant complaint.

unreasonable charge in the face of the requestor's need to obtain the requested records urgently enough that they paid the fee under duress.

Counsel requests the following relief:

1. A determination that the Township violated OPRA by charging \$5.00 for the CD, which is more than the "actual cost" incurred;
2. A determination ordering the Custodian to charge a reasonable fee for CDs that does not exceed the "actual cost" of duplication;
3. A determination ordering the Custodian to refund the Complainant the difference of the \$5.00 charge paid by the Complainant and the "actual cost" of duplication;
4. A determination that the Complainant is a prevailing party in this matter and is entitled to prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

**October 10, 2008**

Request for the Statement of Information ("SOI") sent to the Custodian.

**October 17, 2008**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated March 28, 2008.
- Township of Bridgewater receipt in the amount of \$5.00 dated March 31, 2008 and a photocopy of the CD provided to the Complainant.
- Examples of the cost of blank CD's.
- Ordinance Amending Chapter 94 regarding fee for providing information on diskette.

The Custodian certifies that no records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").<sup>6</sup>

The Custodian's Counsel states that the Custodian received the Complainant's OPRA request on March 28, 2008. Counsel states that the Custodian provided access to the requested CD on March 31, 2008 for a fee of \$5.00.

Counsel contends that this complaint was unnecessarily filed. Counsel contends that the Complainant never objected to the \$5.00 fee or stated to the Custodian that said fee was not warranted under OPRA. Counsel asserts that the Complainant could have simply contested the fee charged for the record at the time it was charged and the Township would have refunded a portion of the Complainant's money and amended its fee ordinance.

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<sup>6</sup>The Custodian does not certify to the search conducted, only that the requested record was provided within thirty (30) days.

Counsel contends that the instant complaint is not a case of a highly excessive charge as was the case in Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) or about a special service charge assessed as in O’Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008).<sup>7</sup>

Counsel requests that the GRC consider the following:

The record requested was provided

Counsel contends that this complaint is distinguishable from other similar complaints because the record responsive was provided at a fee that the Complainant paid, signifying that he had no issue with the fee at the time the record was provided.

Counsel states the court held in Libertarian, supra, that:

“[t]he imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication ... [i]t is also beyond dispute that the actual cost of the diskette is far less than [\$55.00]. Thus, the only discernible rationale for the fee is to discourage the public from requesting the information in this format.” *Id.* at \_.

Counsel avers that the court’s decision was based on the legal principle that a public agency cannot use the cost of reproduction to attempt to effectively preclude a citizen from his/her right to access under OPRA. Counsel contends that the instant complaint is not about ensuring that the Complainant receives the record for a reasonable fee, but about unfairly punishing the Township. Further, Counsel argues that the filing of this complaint does not advance the goals of OPRA because the Complainant obtained the record requested.

Reasonableness of the fee

Counsel states that OPRA provides that:

“[a] copy ... of a government record may be purchased ... upon payment of the actual cost of duplicating the record. The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record but shall not include the cost of labor or other overhead expenses associated with making the copy...” (Emphasis added.) N.J.S.A. 47:1A-5.b.

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<sup>7</sup> Counsel also requests that the GRC take notice that a CD can cost anywhere from \$0.30 to over \$1.00 depending on the quality, amount, etc. and provides examples of the varying costs from the internet. Tom Coulter v. Township of Bridgewater (Somerset), 2008-220 – Findings and Recommendations of the Executive Director

Counsel avers that a \$55.00 fee for a CD and that charging a special service charge to burn a CD is clearly unreasonable, as was found in Libertarian Party, *supra*; however, neither situation is analogous to the instant complaint.

Counsel contends that most municipalities in the state charge \$5.00 for a CD, which will likely not preclude any requestors from receiving a CD as a result. Further, Counsel argues that the Complainant Counsel's assertion that blank CD's can be as cheap as \$0.30 or \$0.35 does not accurately portray the variety of costs for CD's in the current marketplace. Counsel avers that additional research may show that the costs of some CD's may exceed \$1.00 and even approach \$5.00.

#### The fee does not impede the goals of OPRA

Counsel avers that, as stated in Libertarian Party, *supra*, an excessive or unreasonable fee has a "chilling effect" on the quick and easy access of a government record. Counsel asserts that the proposed fee of \$5.00 for a CD did not impede access to the Complainant in the instant complaint because he received the record three (3) days after the Custodian received the request and did not dispute the fee at the time.

#### The imposition of prevailing party attorney's fees not warranted

Counsel states that OPRA provides that a requestor who prevails in any proceeding shall be entitled to reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6; however, Counsel questions whether the Complainant actually "prevailed" when a complaint before the GRC was unnecessary to achieve the requested result. Additionally, Counsel questions whether OPRA was intended to provide attorney's fees in a situation where a complaint before the GRC is unnecessary and obviously only instituted to punish the Township and provide financial remuneration to the Complainant's Counsel.

Counsel states that in Teeters v. Division of Youth and Family Services, 387 N.J. Super. 423 (App. Div. 2006), the court stated that:

"[t]he first prong requires that the litigant seeking fees establish that the lawsuit was closely related to securing the relief obtained; a fee awarded is justified *if the party's efforts are a necessary and important factor in obtaining the relief.*" (Emphasis added.)

Counsel argues that this complaint was not needed for the Complainant to dispute the proposed fee for duplication of a CD. Counsel also contends that there must be a line drawn between the proper and improper use of the fee shifting provision. Counsel re-asserts that the instant complaint is nothing more than an abuse of OPRA.

#### Complainant's complaint is barred by the doctrines of waiver, estoppel and laches

Counsel contends that the Complainant received the record for the proposed fee approximately six (6) months ago and failed to object to the \$5.00 charge at any time prior to the filing of this complaint in October, 2008. Counsel contends that the Complainant is barred from filing this complaint under the doctrines of estoppel and

laches. Additionally, Counsel argues that the Complainant is barred from filing this complaint by the equity doctrine of “unclean hands.”

Counsel states that waiver is the voluntary and intentional relinquishment of a known right, the intent of which does not need to be stated expressly, provided the circumstances clearly show that the party know of the right and then abandoned it either by design or indifference. *See* W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958) *and* Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961).

Counsel states that estoppel is an equitable doctrine founded in fundamental duty of fair dealing imposed by law and is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment. *See* Casamasino v. City of Jersey City, 158 N.J. 333, 354 (1999) *and* Mattia v. northern Ins. Co. of New York, 35 N.J. Super. 503, 510 (App. Div. 1955). Counsel states that the doctrine is invoked in “the interests of justice, morality and common fairness.” *See* Palatine I v. Planning Bd., 133 N.J. 546, 560 (1993)(quoting Gruber v. Mayor of Raritan Township, 39 N.J. 1, 13 (1962)).

Counsel states that laches is a doctrine invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party. *See* In. Re: Kietur, 332 N.J. Super. 18, 28 (App. Div. 2000). Counsel avers that the time constraints for the application of laches “are not fixed but are characteristically flexible.” Lavin v. Bd. Of Educ., 90 N.J. 145, 151 (1982). Further, Counsel avers that the key factors to be considered in deciding whether to apply the doctrine are the length of the delay, the reasons for the delay and the “changing conditions of either or both parties during the delay.” *Id.* at 520. Counsel avers that the core equitable concern in applying laches is whether a party has been harmed by the delay. *Id.* at 519-520.

Counsel requests the following relief:

1. A determination dismissing the instant complaint before the GRC;
2. A determination that the Complainant is not a prevailing party in this matter and not entitled to prevailing party attorney’s fees pursuant to N.J.S.A. 47:1A-6.
3. As an alternative, the conducting of a hearing on the following factual and legal issues:
  - a. The range of charges for CD’s;
  - b. A determination as to whether the municipality or requestor should determine which CD’s should be purchased and provided;
  - c. A determination as to whether the \$5.00 fee imposed by the Township acted to deny or impede access to government records;
  - d. A determination as to whether the filing of the instant complaint was necessary and an important factor in obtaining a \$4.65 refund and an amendment to the Township ordinance fee schedule.<sup>8</sup>

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<sup>8</sup> 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.  
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### **July 28, 2009**

E-mail from the GRC to the Custodian's Counsel. The GRC requests that the Custodian legally certify to the following:

1. The date and method of the Custodian's response to the Complainant's OPRA request; and
2. The actual cost of blank CDs purchased by the Township at the time of the Complainant's request.

The GRC states that the Custodian must provide the requested legal certification with any supporting documentation to the GRC by close of business on July 29, 2009.

### **July 29, 2009**

E-mail from the GRC to the Complainant's Counsel. The GRC states that this e-mail serves as notification that the GRC is granting an extension until August 14, 2009 to submit the requested legal certification.

### **August 11, 2009**

Legal certification of Mr. Hector Herrera ("Mr. Herrera"), Deputy Municipal Clerk attaching the following:

- Memorandum from Ms. Grace Cucinello ("Ms. Cucinello"), employee at Township Clerk's Office, to the Custodian with Ms. Cucinello's notes thereon.
- Township of Bridgewater voucher for CD spindle and CD envelopes in the amount of \$48.23.

Mr. Herrera certifies that Ms. Cucinello contacted the Complainant via telephone on March 31, 2008 advising that the requested record was prepared for pickup.

Additionally, Mr. Herrera certifies that the Township uses WB Mason as the vendor for purchasing CDs, from which a spindle of fifty (50) CDs costs \$41.33 per spindle. Mr. Herrera certifies that the cost per CD is \$0.826. Mr. Herrera further certifies that an additional cost per CD envelope, included with every purchase of CDs, brings the total actual cost of providing a CD to \$0.9646.<sup>9</sup>

### **Analysis**

#### **Whether the Custodian violated OPRA by charging \$5.00 per CD instead of the actual cost of duplicating the requested records?**

OPRA provides that:

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

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<sup>9</sup> 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.  
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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.

OPRA sets forth the amount to be charged for a government record in printed form. Specifically, OPRA states:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the *actual cost* of duplicating the record.

Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following:

- First page to tenth page, \$0.75 per page;
- Eleventh page to twentieth page, \$0.50 per page;
- All pages over twenty, \$0.25 per page.

*The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section.* If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.” (Emphasis added). N.J.S.A. 47:1A-5.b.

The Complainant's Counsel contends that the Custodian's charge of \$5.00 per CD of an audio recording of the Township's public session meeting dated February 4, 2008 violates OPRA because said charge is greater than the actual cost of duplicating the records.

While OPRA provides that paper copies of government records may be obtained upon payment of the actual cost of duplication not to exceed the enumerated rates of \$0.75/0.50/0.25 per page (N.J.S.A. 47:1A-5.b.), the Act does not provide explicit copy rates for any other medium. N.J.S.A. 47:1A-5.b. goes on to state that the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy.

Thus, it appears that the Legislature included the central theme throughout OPRA that duplication cost should equal actual cost and when actual cost cannot be applied, the duplication cost should be reasonable. See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006).

In Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Township of Edison charged \$55.00 for a computer diskette containing Township Council meeting minutes. The plaintiff asserted that the fee was excessive and not related to the actual cost of duplicating the record. The defendant argued that the plaintiff's assertion is moot because the fee was never imposed and the requested records were available on the Township's website free of charge. The court held that "...the appeal is not moot, and the \$55 fee established by the Township of Edison for duplicating the minutes of the Township Council meeting onto a computer diskette is unreasonable and unsanctioned by explicit provisions of OPRA." The court stated that:

"[i]n adopting OPRA, the Legislature made clear that 'government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public's right of access.' N.J.S.A. 47:1A-1. The imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication. N.J.S.A. 47:1A-5.b."

The court also stated that "...although plaintiffs have obtained access to the actual records requested, the legal question remains viable, because it is clearly capable of repetition. See New Jersey Div. of Youth & Family Servs. v. J.B., 120 N.J. 112, 118-19, 576 A.2d 261 (1990)." Further, the court stated that "...the fee imposed by the Township of Edison creates an unreasonable burden upon plaintiff's right of access and is not rationally related to the actual cost of reproducing the records."



Additionally, in Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), the court addressed the issue of the cost of providing copies of requested records to a requestor. The plaintiffs argued that if custodians could set a per page copy fee, arguably custodians could set a rate that would deter the public from requesting records. The court stated that “[w]here the public right to know would thus be impaired the public official should calculate his charge on the basis of actual costs. Ordinarily there should be no charge for labor.” *Id.* at 31.

Further, in Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the court cited Moore, *supra*, by stating that “[w]hen copies of public records are purchased under the common law right of access doctrine, the public officer may charge only the actual cost of copying, which ordinarily should not include a charge for labor... Thus, the fees allowable under the common law doctrine are consistent with those allowable under OPRA.” 376 N.J. Super. At 279.

In this complaint, the Complainant requested a CD of an audio recording of the Township’s public meeting dated February 4, 2008. The Custodian responded granting access to the requested CD at a fee of \$5.00 per CD. Mr. Herrera later certified that the “actual cost” of each CD (including a CD envelope) was only \$0.96.

Therefore, pursuant to Spaulding, *supra*, Libertarian Party of Central New Jersey, *supra*, Moore, *supra*, and Dugan, *supra*, the Custodian’s charge of \$5.00 per CD of the requested CD of the audio recording of the public meeting dated February 4, 2008 is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. *See also* O’Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185. Further, the Custodian failed to bear her burden of proving that the charge was actual cost pursuant to N.J.S.A. 47:1A-6.

Additionally, the Complainant’s Counsel requests that the GRC order that the Township refund the difference of the \$5.00 fee that the Complainant paid and the “actual cost” of the CD.

In Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (January 2008), the Custodian charged the Complainant, in addition to copying costs, a \$60.00 special service charge to provide council meeting minutes spanning an eleven (11) month period. The Complainant paid the estimated charge (which was based on an ordinance authorized a special service charge of \$20.00 an hour) and subsequently filed a Denial of Access Complaint. After reviewing the evidence of record, the Council invalidated the special service charge of \$60.00 and ordered that:

“... the Custodian shall charge the Complainant a special service charge of one (1) hour of the Custodian’s hourly rate in addition to the copying cost. The Custodian shall refund to the Complainant the amount paid over and above this amount and shall submit proof thereof to the Council consistent with the Council’s Interim Order herein.”

In the instant complaint, the Custodian’s charge of \$5.00 for a CD has been invalidated. In the Denial of Access Complaint, the Complainant’s Counsel requested

that the GRC order the Township to refund the difference between the fee paid and the “actual cost” of the requested CD.

Although Janney, supra, refers to a custodian charging an invalid special service charge, that complaint is instructive in the instant complaint. The crux of the GRC’s position in Janney, supra, related to the Custodian’s failure to impose a reasonable special service charge. In that complaint, the GRC ordered the Custodian to refund money to the Complainant because the special service charge was found to be unreasonable. In this complaint, the GRC has found the Custodian’s fee of \$5.00 for a CD violates OPRA because it is not the actual cost. Subsequently, Mr. Herrera certified that the “actual cost” of one CD (with CD envelope) costs \$0.96. Therefore, pursuant to Janney, supra, the Custodian shall refund to the Complainant the difference between the \$5.00 fee and the “actual cost” of \$0.96 (or \$4.04).

Finally, the Custodian’s Counsel asserts several reasons why this complaint is frivolous and should be dismissed. Specifically, Counsel contends that the Complainant never contested the fee before the filing of this complaint and in fact paid such fee, notes that most municipalities charge \$5.00 for a CD which does not impede a requestor’s right to access afforded under OPRA and states that the record was provided to the Complainant. However, case law of both the Superior Court and the GRC has long affirmed that “*actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy.*” (Emphasis Added.) N.J.S.A. 47:1A-5.b. Therefore, Counsel’s assertions in the instant complaint are moot.

**Whether the Custodian’s copy cost of the CD exceeding actual cost in violation of OPRA 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.

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

The Council defers analysis of whether the Complainant is a prevailing party 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 Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian’s charge of \$5.00 per CD of the requested CD of the audio recording of the public meeting dated

February 4, 2008 is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. *See also O'Shea v. Madison Public School District (Morris)*, GRC Complaint No. 2007-185. Further, the Custodian failed to bear her burden of proving that the charge was actual cost pursuant to N.J.S.A. 47:1A-6.

2. Pursuant to Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (January 2008), the Custodian shall refund to the Complainant the difference between the \$5.00 fee and the "actual cost" of \$0.96 (or \$4.04).
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>10</sup>, to the Executive Director.**
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.
5. The Council defers analysis of whether the Complainant is a prevailing party 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

November 10, 2009

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<sup>10</sup> "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."  
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