



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

February 24, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2008-254

v.

Township of Frankford (Sussex)
Custodian of Record

At the February 24, 2011 public meeting, the Government Records Council (“Council”) considered the February 17, 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, accepts the Administrative Law Judge’s Initial Decision dated February 10, 2011 in which the Judge approved the Settlement Agreement signed by the parties or their representatives and ordered the parties to comply with the settlement terms and determined that these proceedings be concluded.

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 24th Day of February, 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: February 28, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 24, 2011 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-254

v.

**Township of Frankford (Sussex)²
Custodian of Records**

Records Relevant to Complaint: The Complainant requests the following records to be sent either by e-mail or fax:

1. 2007 and 2008 financial disclosure forms for:
 - a. The three (3) current Township Committee members
 - b. The Township Administrator/Municipal Clerk
 - c. The Township Attorney
2. Local Government Officer Roster for 2007 and 2008
3. 2007 and 2008 fully executed professional services agreement between the Township and the Township Attorney
4. Township Administrator's resume when she applied for the job
5. 2007 and 2008 salary and health buyback for the Township Administrator
6. Township Committee work session minutes dated:
 - a. March 18, 2008
 - b. April 15, 2008
 - c. May 6, 2008
 - d. May 20, 2008
 - e. June 17, 2008
 - f. July 2008
 - g. August 2008
 - h. September 2008
7. 2007 and 2008 year end petty cash report
8. E-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell

Request Made: October 7, 2008

Response Made: October 8, 2008

Custodian: Patricia L. Bussow³

GRC Complaint Filed: November 3, 2008⁴

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

² Represented by Glenn C. Kienz, Esq., of Weiner Lesniak, LLP (Parsippany, NJ).

³ The Custodian at the time of the Complainant's OPRA request was Louanne Cular.

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

Background

February 23, 2010

Government Records Council's ("Council") Interim Order. At its February 23, 2010 public meeting, the Council considered the February 16, 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, found that:

1. Because the current Custodian provided the Complainant with the records identified in the Council's December 22, 2009 Interim Order with appropriate redactions, and provided the GRC with certified confirmation of compliance, all within the five (5) business days as ordered by the Council, the current Custodian has complied with the Council's December 22, 2009 Interim Order.
2. Although the original Custodian provided the Complainant with an insufficient response to his OPRA request, unlawfully denied access to e-mails in whole or in part, and violated N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide records by the Complainant's preferred method of delivery, there is no evidence in the record that suggests said violations of OPRA were intentional and deliberate, with knowledge of their wrongfulness. There is also no evidence in the record to contradict the original Custodian's certification that the records requested were available on October 8, 2008. Therefore, it is concluded that the original 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.
3. Although the current Custodian did not timely comply with Paragraphs 4 or 6 of the Council's November 4, 2009 Interim Order by providing the Council with all records set forth in Paragraphs 4 and 6 of the Order within five (5) business days of receiving the Council's Order or by November 16, 2009, because the current Custodian provided the Complainant with the records identified in the Council's December 22, 2009 Interim Order with appropriate redactions, and provided the GRC with certified confirmation of compliance, all within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's December 22, 2009 Interim Order. Therefore, it is concluded that the current 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.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's November 4, 2009 and December 22, 2009 Interim Orders, 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, because of the filing of this Denial of Access Complaint, the Custodian disclosed records that were initially denied and disclosed records

by the Complainant's preferred method of delivery. Further, the relief ultimately achieved had a basis in law. The original Custodian unlawfully denied access to all or portions of the requested e-mails, and failed to provide other records via the Complainant's preferred method of delivery when she had the capability to do so. 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.

March 1, 2010

Council's Interim Order distributed to the parties.

June 23, 2010

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

February 10, 2011

Administrative Law Judge's ("ALJ") Initial Decision.⁵ The ALJ **FINDS**:

1. "The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law."

As such, the ALJ **CONCLUDES** "that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded."

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Administrative Law Judge's Initial Decision dated February 10, 2011 in which the Judge approved the Settlement Agreement signed by the parties or their representatives and ordered the parties to comply with the settlement terms and determined that these proceedings be concluded.

⁵ OAL consolidated this complaint with Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-278 (February 2010) by Court Order on September 23, 2010.
Jesse Wolosky v. Township of Frankford (Sussex), 2008-254 – Supplemental Findings and Recommendations of the Executive Director

Prepared By: Dara Lownie
Communications Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 17, 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
Acting Commissioner

INTERIM ORDER

February 23, 2010 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2008-254

v.

Township of Frankford (Sussex)
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 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:

1. Because the current Custodian provided the Complainant with the records identified in the Council’s December 22, 2009 Interim Order with appropriate redactions, and provided the GRC with certified confirmation of compliance, all within the five (5) business days as ordered by the Council, the current Custodian has complied with the Council’s December 22, 2009 Interim Order.
2. Although the original Custodian provided the Complainant with an insufficient response to his OPRA request, unlawfully denied access to e-mails in whole or in part, and violated N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide records by the Complainant’s preferred method of delivery, there is no evidence in the record that suggests said violations of OPRA were intentional and deliberate, with knowledge of their wrongfulness. There is also no evidence in the record to contradict the original Custodian’s certification that the records requested were available on October 8, 2008. Therefore, it is concluded that the original 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.
3. Although the current Custodian did not timely comply with Paragraphs 4 or 6 of the Council’s November 4, 2009 Interim Order by providing the Council with all records set forth in Paragraphs 4 and 6 of the Order within five (5) business days of receiving the Council’s Order or by November 16, 2009, because the current Custodian provided the Complainant with the records identified in the Council’s



December 22, 2009 Interim Order with appropriate redactions, and provided the GRC with certified confirmation of compliance, all within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's December 22, 2009 Interim Order. Therefore, it is concluded that the current 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.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's November 4, 2009 and December 22, 2009 Interim Orders, 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, because of the filing of this Denial of Access Complaint, the Custodian disclosed records that were initially denied and disclosed records by the Complainant's preferred method of delivery. Further, the relief ultimately achieved had a basis in law. The original Custodian unlawfully denied access to all or portions of the requested e-mails, and failed to provide other records via the Complainant's preferred method of delivery when she had the capability to do so. 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 23rd Day of February, 2010

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: March 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 23, 2010 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-254

v.

**Township of Frankford (Sussex)²
Custodian of Records**

Records Relevant to Complaint: The Complainant requests the following records to be sent either by e-mail or fax:

1. 2007 and 2008 financial disclosure forms for:
 - a. The three (3) current Township Committee members
 - b. The Township Administrator/Municipal Clerk
 - c. The Township Attorney
2. Local Government Officer Roster for 2007 and 2008
3. 2007 and 2008 fully executed professional services agreement between the Township and the Township Attorney
4. Township Administrator's resume when she applied for the job
5. 2007 and 2008 salary and health buyback for the Township Administrator
6. Township Committee work session minutes dated:
 - a. March 18, 2008
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Request Made: October 7, 2008

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

² Represented by Glenn C. Kienz, Esq., of Weiner Lesniak, LLP (Parsippany, NJ).

³ The Custodian at the time of the Complainant's OPRA request was Louanne Cular.

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

Background

December 22, 2009

Government Records Council's ("Council") Interim Order. At its December 22, 2009 public meeting, the Council considered the December 11, 2009 *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, found that:

1. The Custodian has not timely complied with Paragraphs 4 or 6 of the Council's November 4, 2009 Interim Order by providing the Council with all records set forth in Paragraphs 4 and 6 of the Order within five (5) business days of receiving the Council's Order or by November 16, 2009.
2. The Custodian unlawfully denied access to the requested records because the letters attached to three (3) of the e-mails are not exempt from disclosure under the attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1 since they are letters from the Township Attorney to another attorney on behalf of the Clerk.
3. The Custodian also unlawfully denied access to the non-exempt portions of the otherwise attorney-client privileged e-mails because disclosure is required for the following e-mail lines: To, From, Date, Subject and opening/closing salutations as required by N.J.S.A. 47:1A-5.g.
4. **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 (also see paragraphs 2 and 3 above) 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 to the Executive Director.**

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> Examination⁵

⁵ **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 *Jesse Wolosky v. Township of Frankford (Sussex)*, 2008-254 – Supplemental Findings and Recommendations of the Executive Director 2

1	E-mail dated Tuesday, October 28, 2008 from pkoonce@benbrooklaw.com to blg@buzaklawgroup.com with copies to mlglaw@nac.net , rfornero@fornerofrancioso.com and clerk@frankfordtwp-nj.com with attachment (Letter dated October 28, 2008 from Kevin P. Benbrook, Esq. to Edward J. Buzak, Esq.)	E-mail regarding the Recall of Robert McDowell Committee v. Frankfort Township	Custodian denied access because she asserts the record is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	There is no text in this e-mail. However, the Custodian must disclose the following lines of the e-mail: (1) From: ... (2) Sent: ... (3) To: ... (4) Cc: ... (5) Subject. Additionally, the attachment is a letter from the Township Attorney to another attorney. This record is not exempt from disclosure because it is not attorney-client privileged since it is correspondence between attorneys and not between an attorney and his/her client. Therefore, the Custodian must disclose this record in its entirety to the Complainant.
2	E-mail dated Wednesday, October 22, 2008 from pkoonce@benbrooklaw.com to mlglaw@nac.net , with copies	E-mail regarding the Recall of Robert McDowell Committee v. Frankfort Township	Custodian denied access because she asserts the record is exempt from disclosure under the	There is no text in this e-mail. However, the Custodian must disclose the following lines of the e-mail: (1) From: ...

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.

	<p>to blg@buzaklawgroup.com, rfornero@fornarofrancioso.com and clerk@frankfordtwp-nj.com with attachment (Letter dated October 22, 2008 from Kevin P. Benbrook, Esq. to Robert B. Campbell, Esq.)</p>		<p>attorney-client privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p>	<p>(2) Sent: ... (3) To: ... (4) Cc: ... (5) Subject.</p> <p>Additionally, the attachment is a letter from the Township Attorney to another attorney. This record is not exempt from disclosure because it is not attorney-client privileged since it is correspondence between attorneys and not between an attorney and his/her client. Therefore, the Custodian must disclose this record in its entirety to the Complainant.</p>
3	<p>E-mail dated Monday, October 20, 2008 from pkoonce@benbrooklaw.com to rfornero@fornarofrancioso.com with copies to clerk@frankfordtwp-nj.com and blg@buzaklawgroup.com with attachment (Letter dated October 28, 2008 from Kevin P.</p>	<p>E-mail regarding the recall of Robert McDowell</p>	<p>Custodian denied access because she asserts the record is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p>	<p>There is no text in this e-mail. However, the Custodian must disclose the following lines of the e-mail: (1) From: ... (2) Sent: ... (3) To: ... (4) Cc: ... (5) Subject.</p> <p>Additionally, the attachment is a letter from the Township Attorney to another attorney. This record is not</p>

	Benbrook, Esq. to Richard D. Fornaro, Esq.)			exempt from disclosure because it is not attorney-client privileged since it is correspondence between attorneys and not between an attorney and his/her client. Therefore, the Custodian must disclose this record in its entirety to the Complainant.
4	E-mail dated Monday, July 21, 2008 from pkoonce@benbrooklaw.com to clerk@frankfordtwp-nj.com	E-mail regarding the recall of Robert McDowell	Custodian denied access because she asserts the record is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	The text of the e-mail is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> . because the attorney is providing advice to the clerk. However, the Custodian must disclose the following lines of the e-mail: (1) Subject: ... (2) From: ... (3) Date: ... (4) To: ... (5) Opening salutation (Clerk's name) (6) Closing salutation (Attorney's name).
5	E-mail dated Monday, April 3, 2008 from kbenbrook@benbrooklaw.com	E-mail regarding the recall	Custodian denied access because she asserts the record is	The text of the e-mail is exempt from disclosure under the attorney-client

	to clerk@frankfordtwp-nj.com		exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as it discusses strategy. However, the Custodian must disclose the following lines of the e-mail: (1) Subject: ... (2) From: ... (3) Date: ... (4) To: ... (5) Opening salutation (Clerk's name) (6) Closing salutation (Attorney's name)
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December 23, 2009

Council's Interim Order distributed to the parties.

December 29, 2009

E-mail from Custodian to Complainant. The Custodian states that in response to the Council's Interim Order dated December 22, 2009, she has attached the following records:

1. Email from pkoonce@benbrooklaw.com to blg@buzaklawgroup.com dated October 28, 2008 with attachment
2. Email from pkoonce@benbrooklaw.com to mlglaw@nac.net dated October 22, 2008 with attachment
3. Email from pkoonce@benbrooklaw.com to rforanaro@foranarofrancioso.com dated October 20, 2008 with attachment
4. Email from pkoonce@benbrooklaw.com to clerk@frankfordtwp-nj.com dated July 21, 2008 with redactions
5. Email from kbenbrook@benbrooklaw.com to clerk@frankfordtwp-nj.com dated April 3, 2008 with redactions

December 29, 2009

Custodian's response to the Council's Interim Order. The Custodian certifies that she is the Acting Municipal Clerk for the Township of Frankford. The Custodian certifies that the Custodian at the time of the Complainant's OPRA request and Denial of Access Complaint was Louanne Cular, who retired as of August 1, 2009. Additionally, the Custodian certifies that she provided the Complainant with all records identified in paragraph 4 of the Council's December 22, 2009 Interim Order in the medium requested

at no cost. The Custodian certifies that she provided said records to the Complainant on December 29, 2009.

January 4, 2010

E-mail from Complainant to GRC. The Complainant states that in the Custodian's submission to the GRC dated December 10, 2009, the document index indicates on ten (10) occasions that the requested records were available on October 8, 2008. The Complainant asserts that said information is incorrect.

January 5, 2010

E-mail from Custodian to GRC. The Custodian states that the index to which the Complainant refers was completed by the original Custodian. The current Custodian states that she provided the GRC with the information she had in her possession.

January 6, 2010

Letter from GRC to Custodian. The GRC states that the original Custodian, Ms. Louanne Cular, submitted a document index to the GRC regarding this Denial of Access Complaint on November 26, 2008. The GRC states that in said index, the original Custodian asserted that the records responsive to the Complainant's OPRA request were available on October 8, 2008. The GRC states that in an e-mail to the GRC dated January 4, 2010, the Complainant contended that said information is false.

Recognizing that the current Custodian was not the Custodian at the time the document index was first submitted to the GRC, the GRC requests that the Custodian provide a legal certification indicating, to the best of her knowledge, whether the records responsive to the Complainant's OPRA request dated October 7, 2008 were available for the Complainant to pick up on October 8, 2008.

January 12, 2010

Custodian's Certification. The current Custodian certifies that to the best of her knowledge, the records responsive to the Complainant's OPRA request dated October 7, 2008 were available for the Complainant to pick up on October 8, 2008.

Analysis

Whether the Custodian complied with the Council's December 22, 2009 Interim Order?

In its December 22, 2009 Interim Order, the Council directed the Custodian to disclose to the Complainant either all or portions of the following records pursuant to the Council's *in camera* examination of said records:

1. E-mail dated Tuesday, October 28, 2008 from pkoonce@benbrooklaw.com to blg@buzaklawgroup.com with copies to mlglaw@nac.net , rforano@fornarofrancioso.com and clerk@frankfordtwp-nj.com with attachment (Letter dated October 28, 2008 from Kevin P. Benbrook, Esq. to Edward J. Buzak, Esq.).

2. E-mail dated Wednesday, October 22, 2008 from pkoonce@benbrooklaw.com to mlglaw@nac.net, with copies to blg@buzaklawgroup.com, rformaro@fornarofrancioso.com and clerk@frankfordtwp-nj.com with attachment (Letter dated October 22, 2008 from Kevin P. Benbrook, Esq. to Robert B. Campbell, Esq.).
3. E-mail dated Monday, October 20, 2008 from pkoonce@benbrooklaw.com to rformaro@fornarofrancioso.com with copies to clerk@frankfordtwp-nj.com and blg@buzaklawgroup.com with attachment (Letter dated October 28, 2008 from Kevin P. Benbrook, Esq. to Richard D. Fomaro, Esq.).
4. E-mail dated Monday, July 21, 2008 from pkoonce@benbrooklaw.com to clerk@frankfordtwp-nj.com.
5. E-mail dated Monday, April 3, 2008 from kbenbrook@benbrooklaw.com to clerk@frankfordtwp-nj.com.

The Council directed the Custodian to provide said records to the Complainant within five (5) business days from receipt of said Order. The GRC distributed said Order to all parties on December 23, 2009. As such, the Custodian should have provided her response to the Council's Order by the close of business on December 31, 2009 (not counting December 25, 2009 as a business day due to the Christmas holiday).

On December 29, 2009, the current Custodian provided the GRC with a legal certification in which she certified that she provided to the Complainant the records listed above with appropriate redactions as detailed by the Council in its December 22, 2009 Interim Order. The Custodian also copied the GRC on her response to the Complainant dated December 29, 2009, wherein she provided said records to the Complainant. Upon the GRC's review of the Custodian's attachments to said e-mail, the Custodian properly redacted information pursuant to the Council's Interim Order.

Therefore, because the current Custodian provided the Complainant with the records identified in the Council's December 22, 2009 Interim Order with appropriate redactions, and provided the GRC with certified confirmation of compliance, all within the five (5) business days as ordered by the Council, the current Custodian has complied with the Council's December 22, 2009 Interim Order.

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

OPRA states that:

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

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

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

In the Council’s November 4, 2009 Interim Order, the Council held that the original Custodian’s written response to the Complainant’s request dated October 8, 2008 was insufficient pursuant to N.J.S.A. 47:1A-5.g. because she failed to specifically identify the records which were withheld from disclosure or do not exist. The Council also held that because the original Custodian certified that the records enumerated below did not exist at the time of the Complainant’s OPRA request, the Custodian would have borne her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian indicated that said records do not exist in her written response to the Complainant dated October 8, 2008.

- a. 2007 professional services agreement for Municipal Attorney Peter Laemers.
- b. 2007 and 2008 health buyback for Township Administrator.
- c. Workshop meeting minutes dated May 6, 2008, May 20, 2008, July 2008, August 2008, and September 2008.
- d. 2008 petty cash year end report.

Additionally, the Council ordered an *in camera* review, pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), of the requested e-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell to determine the validity of the Custodian’s assertion that the records constitute attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Council ultimately held that the original Custodian unlawfully denied access to the requested records because the letters attached to three (3) of the e-mails are not exempt from disclosure under the attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1 since they are letters from the Township Attorney to another attorney on behalf of the Clerk. The Council also held that the original Custodian also unlawfully denied access to the non-exempt portions of the otherwise attorney-client privileged e-mails because disclosure is required for the following e-mail lines: To, From, Date, Subject and opening/closing salutations as required by N.J.S.A. 47:1A-5.g.

Further, in the Council’s November 4, 2009 Interim Order, the Council held that although the original Custodian made the requested records enumerated below available to the Complainant, the Custodian violated OPRA at N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide said records to the Complainant by the Complainant’s preferred method of delivery, when the Custodian had the capability to convert the records to an electronic medium for e-mail delivery or make paper copies for facsimile delivery. See O’Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008) and Paff v. Borough of Sussex (Sussex), GRC Complaint No. 2008-38 (July 2008). The Council ordered the Custodian to disclose to the Complainant the records responsive to the Complainant’s OPRA request enumerated below by the method of

delivery requested by the Complainant, upon the Complainant's payment of the actual cost of duplicating the records pursuant to N.J.S.A. 47:1A-5.b., if there is any.⁶

- a. Financial Disclosure Statements for the years 2007 and 2008 for the three (3) current Township Committee Members: Robert McDowell, Paul Sutphen and William Hahn.
- b. Financial Disclosure Statements for the years 2007 and 2008 for Administrator/Municipal Clerk: Luanne Cular.
- c. Financial Disclosure Statements for the years 2007 and 2008 for Township Attorney: Peter J. Laemers (2007) and Kevin Benbrook (2008).
- d. Local Government Officer Rosters for 2007 and 2008.
- e. 2008 Professional Services Agreement for Municipal Attorney Kevin Benbrook.
- f. 2007 and 2008 salary resolutions and amendments.
- g. Workshop meeting minutes dated: March 18, 2008, April 15, 2008 and June 17, 2008.
- h. 2007 petty cash register.

After receiving the Council's November 4, 2009 Interim Order, the current custodian took over this complaint because the original custodian retired as of August 1, 2009. In the Council's December 22, 2009 Interim Order, the Council held that the current Custodian did not timely comply with Paragraphs 4 or 6 of the Council's November 4, 2009 Interim Order by providing the Council with all records set forth in Paragraphs 4 and 6 of the Order within five (5) business days of receiving the Council's Order or by November 16, 2009.

Also as previously stated, because the current Custodian provided the Complainant with the records identified in the Council's December 22, 2009 Interim Order with appropriate redactions, and provided the GRC with certified confirmation of compliance, all within the five (5) business days as ordered by the Council, the current Custodian has complied with the Council's December 22, 2009 Interim Order.

Moreover, although the Complainant asserts that the information provided in the original Custodian's document index wherein she indicated that the records responsive to the Complainant's OPRA request dated October 7, 2008 were available on October 8, 2008, the Complainant has not provided any credible evidence to contradict the original Custodian's certification. Furthermore, the current Custodian also provided a certification indicating that said records were available on October 8, 2008.

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

⁶ There is not likely any actual cost that may be justified for scanning and e-mail records.
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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 original Custodian provided the Complainant with an insufficient response to his OPRA request, unlawfully denied access to e-mails in whole or in part, and violated N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide records by the Complainant's preferred method of delivery, there is no evidence in the record that suggests said violations of OPRA were intentional and deliberate, with knowledge of their wrongfulness. There is also no evidence in the record to contradict the original Custodian's certification that the records requested were available on October 8, 2008. Therefore, it is concluded that the original 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.

Additionally, although the current Custodian did not timely comply with Paragraphs 4 or 6 of the Council's November 4, 2009 Interim Order by providing the Council with all records set forth in Paragraphs 4 and 6 of the Order within five (5) business days of receiving the Council's Order or by November 16, 2009, because the current Custodian provided the Complainant with the records identified in the Council's December 22, 2009 Interim Order with appropriate redactions, and provided the GRC with certified confirmation of compliance, all within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's December 22, 2009 Interim Order. Therefore, it is concluded that the current 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.

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 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.⁷ Those changes expand counsel fee awards under OPRA." 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)."

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight business days later, or one day beyond the statutory limit. *Id.* at 79. As a result, the Court shifted the burden to Hoboken to prove that the

⁷ The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

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 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 this instant complaint, the Complainant sought a finding from the Council that the Custodian violated OPRA by denying access to records, as well as failing to provide records by the preferred method of delivery requested. In its November 4, 2009 Interim Order, the Council directed the Custodian to disclose eight (8) requested items to the Complainant by the Complainant's preferred method of delivery. Additionally, in its December 22, 2009 Interim Order, the Council determined that the original Custodian unlawfully denied access to e-mails in whole or in part and ordered the current Custodian to disclose said e-mails to the Complainant.

Pursuant to Teeters, *supra*, and the Council's November 4, 2009 and December 22, 2009 Interim Orders, 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, because of the filing of this Denial of Access Complaint, the Custodian disclosed records that were initially denied and disclosed records by the Complainant's preferred method of delivery. Further, the relief ultimately achieved had a basis in law. The original Custodian unlawfully denied access to all or portions of the requested e-mails, and failed to provide other records via the Complainant's preferred method of delivery when she had the capability to do so. 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 current Custodian provided the Complainant with the records identified in the Council's December 22, 2009 Interim Order with appropriate redactions, and provided the GRC with certified confirmation of compliance, all within the five (5) business days as ordered by the Council, the current Custodian has complied with the Council's December 22, 2009 Interim Order.
2. Although the original Custodian provided the Complainant with an insufficient response to his OPRA request, unlawfully denied access to e-mails in whole or in part, and violated N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide records by the Complainant's preferred method of delivery, there is no evidence in the record that suggests said violations of OPRA were intentional and deliberate, with knowledge of their wrongfulness. There is also no evidence in

the record to contradict the original Custodian's certification that the records requested were available on October 8, 2008. Therefore, it is concluded that the original 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.

3. Although the current Custodian did not timely comply with Paragraphs 4 or 6 of the Council's November 4, 2009 Interim Order by providing the Council with all records set forth in Paragraphs 4 and 6 of the Order within five (5) business days of receiving the Council's Order or by November 16, 2009, because the current Custodian provided the Complainant with the records identified in the Council's December 22, 2009 Interim Order with appropriate redactions, and provided the GRC with certified confirmation of compliance, all within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's December 22, 2009 Interim Order. Therefore, it is concluded that the current 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.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's November 4, 2009 and December 22, 2009 Interim Orders, 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, because of the filing of this Denial of Access Complaint, the Custodian disclosed records that were initially denied and disclosed records by the Complainant's preferred method of delivery. Further, the relief ultimately achieved had a basis in law. The original Custodian unlawfully denied access to all or portions of the requested e-mails, and failed to provide other records via the Complainant's preferred method of delivery when she had the capability to do so. 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: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 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

Jesse Wolosky
Complainant

Complaint No. 2008-254

v.

Township of Frankford (Sussex)
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council ("Council") considered the December 11, 2009 *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 has not timely complied with Paragraphs 4 or 6 of the Council's November 4, 2009 Interim Order by providing the Council with all records set forth in Paragraphs 4 and 6 of the Order within five (5) business days of receiving the Council's Order or by November 16, 2009.
2. The Custodian unlawfully denied access to the requested records because the letters attached to three (3) of the e-mails are not exempt from disclosure under the attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1 since they are letters from the Township Attorney to another attorney on behalf of the Clerk.
3. The Custodian also unlawfully denied access to the non-exempt portions of the otherwise attorney-client privileged e-mails because disclosure is required for the following e-mail lines: To, From, Date, Subject and opening/closing salutations as required by N.J.S.A. 47:1A-5.g.
4. **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 (also see paragraphs 2 and 3 above) 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 to the Executive Director.**



Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the In Camera Examination¹
1	E-mail dated Tuesday, October 28, 2008 from pkoonce@benbrooklaw.com to blg@buzaklawgroup.com with copies to mlglaw@nac.net , rfornaro@fornarofrancioso.com and clerk@frankfordtwp-nj.com with attachment (Letter dated October 28, 2008 from Kevin P. Benbrook, Esq. to Edward J. Buzak, Esq.)	E-mail regarding the Recall of Robert McDowell Committee v. Frankfort Township	Custodian denied access because she asserts the record is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1.	There is no text in this e-mail. However, the Custodian must disclose the following lines of the e-mail: (1) From: ... (2) Sent: ... (3) To: ... (4) Cc: ... (5) Subject. Additionally, the attachment is a letter from the Township Attorney to another attorney. This record is not exempt from disclosure because it is not attorney-client privileged since it is correspondence between attorneys

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.

				and not between an attorney and his/her client. Therefore, the Custodian must disclose this record in its entirety to the Complainant.
2	E-mail dated Wednesday, October 22, 2008 from pkoonce@benbrooklaw.com to mlglaw@nac.net , with copies to blg@buzaklawgroup.com , rfornero@fornerofrancioso.com and clerk@frankfordtwp-nj.com with attachment (Letter dated October 22, 2008 from Kevin P. Benbrook, Esq. to Robert B. Campbell, Esq.)	E-mail regarding the Recall of Robert McDowell Committee v. Frankfort Township	Custodian denied access because she asserts the record is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	There is no text in this e-mail. However, the Custodian must disclose the following lines of the e-mail: (1) From: ... (2) Sent: ... (3) To: ... (4) Cc: ... (5) Subject. Additionally, the attachment is a letter from the Township Attorney to another attorney. This record is not exempt from disclosure because it is not attorney-client privileged since it is correspondence between attorneys and not between an attorney and his/her client. Therefore, the Custodian must disclose this record in its entirety to the Complainant.

3	E-mail dated Monday, October 20, 2008 from pkoonce@benbrooklaw.com to rfornero@fornerofrancioso.com with copies to clerk@frankfordtwp-nj.com and blg@buzaklawgroup.com with attachment (Letter dated October 28, 2008 from Kevin P. Benbrook, Esq. to Richard D. Fornaro, Esq.)	E-mail regarding the recall of Robert McDowell	Custodian denied access because she asserts the record is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	There is no text in this e-mail. However, the Custodian must disclose the following lines of the e-mail: (1) From: ... (2) Sent: ... (3) To: ... (4) Cc: ... (5) Subject. Additionally, the attachment is a letter from the Township Attorney to another attorney. This record is not exempt from disclosure because it is not attorney-client privileged since it is correspondence between attorneys and not between an attorney and his/her client. Therefore, the Custodian must disclose this record in its entirety to the Complainant.
4	E-mail dated Monday, July 21, 2008 from pkoonce@benbrooklaw.com to clerk@frankfordtwp-nj.com	E-mail regarding the recall of Robert McDowell	Custodian denied access because she asserts the record is exempt from disclosure under the attorney-client privilege	The text of the e-mail is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> because the attorney is providing advice

			pursuant to <u>N.J.S.A.</u> 47:1A-1.1.	to the clerk. However, the Custodian must disclose the following lines of the e-mail: (1) Subject: ... (2) From: ... (3) Date: ... (4) To: ... (5) Opening salutation (Clerk's name) (6) Closing salutation (Attorney's name).
5	E-mail dated Monday, April 3, 2008 from kbenbrook@benbrooklaw.com to clerk@frankfordtwp-nj.com	E-mail regarding the recall	Custodian denied access because she asserts the record is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1.	The text of the e-mail is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1. as it discusses strategy. However, the Custodian must disclose the following lines of the e-mail: (1) Subject: ... (2) From: ... (3) Date: ... (4) To: ... (5) Opening salutation (Clerk's name) (6) Closing salutation (Attorney's name)

Interim Order Rendered by the
Government Records Council
On The 22nd 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 23, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-254

v.

**Township of Frankford (Sussex)²
Custodian of Records**

Records Relevant to Complaint: The Complainant requests the following records to be sent either by e-mail or fax:

1. 2007 and 2008 financial disclosure forms for:
 - a. The three (3) current Township Committee members
 - b. The Township Administrator/Municipal Clerk
 - c. The Township Attorney
2. Local Government Officer Roster for 2007 and 2008
3. 2007 and 2008 fully executed professional services agreement between the Township and the Township Attorney
4. Township Administrator's resume when she applied for the job
5. 2007 and 2008 salary and health buyback for the Township Administrator
6. Township Committee work session minutes dated:
 - a. March 18, 2008
 - b. April 15, 2008
 - c. May 6, 2008
 - d. May 20, 2008
 - e. June 17, 2008
 - f. July 2008
 - g. August 2008
 - h. September 2008
7. 2007 and 2008 year end petty cash report
8. E-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell

Request Made: October 7, 2008

Response Made: October 8, 2008

Custodian: Louanne Cular

GRC Complaint Filed: November 3, 2008³

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

² Represented by Kevin P. Benbrook, Esq., of Benbrook & Benbrook, LLC (Clinton, NJ).

³ The GRC received the Denial of Access Complaint on said date.

Records Submitted for *In Camera* Examination: E-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell.

Background

November 4, 2009

Government Records Council's Interim Order. At the November 4, 2009 public meeting, the Government Records Council ("Council") considered the October 21, 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. The Custodian's written response to the Complainant's request dated October 8, 2008 is insufficient pursuant to N.J.S.A. 47:1A-5.g. because she failed to specifically identify the records which were withheld from disclosure or do not exist.
2. Because the Custodian in this complaint certified that the records enumerated below did not exist at the time of the Complainant's OPRA request, the Custodian would have borne her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian indicated that said records do not exist in her written response to the Complainant dated October 8, 2008.
 - a. 2007 professional services agreement for Municipal Attorney Peter Laemers.
 - b. 2007 and 2008 health buyback for Township Administrator.
 - c. Workshop meeting minutes dated May 6, 2008, May 20, 2008, July 2008, August 2008, and September 2008.
 - d. 2008 petty cash year end report.
3. 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 the requested e-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell to determine the validity of the Custodian's assertion that the records constitute attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (the requested e-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell), a document or redaction index⁵, as well as a legal**

⁴ 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.

⁵ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁶, that the documents provided are the document 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.

5. Although the Custodian made the requested records enumerated below available to the Complainant, the Custodian violated OPRA at N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide said records to the Complainant by the Complainant's preferred method of delivery, when the Custodian had the capability to convert the records to an electronic medium for e-mail delivery or make paper copies for facsimile delivery. See O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008) and Paff v. Borough of Sussex (Sussex), GRC Complaint No. 2008-38 (July 2008). Thus, the Custodian must disclose to the Complainant the records responsive to the Complainant's OPRA request enumerated below by the method of delivery requested by the Complainant, upon the Complainant's payment of the actual cost of duplicating the records pursuant to N.J.S.A. 47:1A-5.b., if there is any.⁷
 - a. Financial Disclosure Statements for the years 2007 and 2008 for the three (3) current Township Committee Members: Robert McDowell, Paul Sutphen and William Hahn.
 - b. Financial Disclosure Statements for the years 2007 and 2008 for Administrator/Municipal Clerk: Luanne Cular.
 - c. Financial Disclosure Statements for the years 2007 and 2008 for Township Attorney: Peter J. Laemers (2007) and Kevin Benbrook (2008).
 - d. Local Government Officer Rosters for 2007 and 2008.
 - e. 2008 Professional Services Agreement for Municipal Attorney Kevin Benbrook.
 - f. 2007 and 2008 salary resolutions and amendments.
 - g. Workshop meeting minutes dated: March 18, 2008, April 15, 2008 and June 17, 2008.
 - h. 2007 petty cash register.
6. **The Custodian shall comply with item # 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁸, to the Executive Director.**
7. 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 and the outcome of the Council's *in camera* review.

⁶ "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."

⁷ There is not likely any actual cost that may be justified for scanning and e-mail records.

⁸ "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. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order and the outcome of the Council's *in camera* review.

November 9, 2009

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

November 18, 2009⁹

Certification of the Custodian in response to the Council's Interim Order with the records requested for the *in camera* review and a redaction index. The Custodian certifies that she received the Council's November 4, 2009 Interim Order on November 9, 2009 via e-mail and on November 10, 2009 via regular mail. The Custodian also certifies that she is the current Custodian for the Township of Frankford, but that Louanne Cular was the Custodian at the time of the request subject of this complaint. Further, the current Custodian certifies that the records enclosed are the records requested by the Council in its November 4, 2009 Interim Order.

November 19, 2009

E-mail from the GRC to the Custodian. The GRC indicates that it is not in receipt of the Custodian's compliance with the Council's November 4, 2009 Interim Order.

November 19, 2009

E-mail from the Custodian to the GRC. The Custodian indicates that she sent her compliance to the Council's November 4, 2009 Interim Order on November 17, 2009 via FedEx and it was delivered to the GRC on November 18, 2009.

November 20, 2009

E-mail from the GRC to the Custodian. The GRC acknowledges receipt of the Custodian's compliance with the Council's November 4, 2009 Interim Order.

December 2, 2009

E-mail from the GRC to the Custodian. The GRC informs the Custodian that it is not in receipt of the Custodian's complete compliance with the Council's November 4, 2009 Interim Order because while the GRC has received the records for the *in camera* inspection (Item 4), the Custodian failed to provide a legal certification stating whether or not she complied with Item 6 of said Order. The GRC further informs the Custodian that failure to comply with Item 6 of the Interim Order may result in this complaint being adjudicated with only the information the GRC currently has on file.

December 2, 2009

E-mail from the Custodian to the GRC. The Custodian informs the GRC that she complied with Item 6 of the Interim Order via an e-mail to the Complainant (attaching all e-mails and attachments) on November 17, 2009. The Custodian further states that she did not see the requirement in the Interim Order that she provide proof of this transmittal to the Complainant.

⁹ This correspondence was dated November 17, 2009, however the GRC received it at a later date.
Jesse Wolosky v. Township of Frankford, 2008-254 – *In Camera* Findings and Recommendations of the Executive Director

December 2, 2009

E-mail from the Complainant to the GRC. The Complainant forwards an e-mail dated December 1, 2009 from the Complainant to the Custodian. In the forwarded e-mail, the Complainant informed the Custodian that some of the requested records ordered to be disclosed to the Complainant in Item 6 of the Council's Interim Order were not provided by the Custodian pursuant to said Order.

December 2, 2009

E-mail from the GRC to the Custodian. The GRC provides the Custodian with a copy of the Council's November 4, 2009 Interim Order which includes the specific requirement that the Custodian provide the Executive Director certified confirmation of compliance with the Interim Order (Items 4 and 6) in accordance with NJ Court Rules, R.1:4-4 within five (5) business days of receipt of the Interim Order.

December 10, 2009

E-mail from the Executive Director to the Custodian. The Executive Director informs the Custodian that the GRC is not yet in receipt of the Custodian's complete compliance with the Council's November 4, 2009 Interim Order. Further, the Executive Director directs the Custodian to provide such compliance with Item 6 of the Interim Order by the end of business on Friday, December 10, 2009.

December 10, 2009

E-mail from the Executive Director to the Complainant. The Executive Director asks the Complainant if he has received the missing records he requested and the GRC ordered the Custodian to provide to the Complainant in the Council's November 4, 2009 Interim Order Item 6.

December 10, 2009¹⁰

E-mail from the Custodian to the Executive Director. The Custodian certifies that on November 17, 2009 via e-mail she provided the Complainant will all records ordered by the Council in Item 6 of the Council's November 4, 2009 Interim Order. Additionally, the Custodian certifies that the records the Complainant asserts are still missing are not included in the Council's November 4, 2009 Interim Order.

Analysis**Whether the Custodian complied with the Council's November 4, 2009 Interim Order?**

At its November 4, 2009 public meeting, the Council determined that because the Custodian has asserted that the requested e-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell constitute attorney-client privileged information which are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, the Council must determine the validity of the Custodian's assertion. 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.

¹⁰ Additional correspondence was submitted to the GRC by the parties but is not relevant to the adjudication of this complaint.

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 November 16, 2009.

Additionally, the Council ordered the Custodian to disclose to the Complainant the records responsive to the Complainant's OPRA request enumerated in Item 5 by the method of delivery requested by the Complainant, upon the Complainant's payment of the actual cost of duplicating the records pursuant to N.J.S.A. 47:1A-5.b., if there is any. The Custodian was ordered comply with Item 5 within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹¹, to the Executive Director.

On November 18, 2009, the Custodian provided the GRC with a legal certification and the unredacted records (e-mails) requested for the *in camera* inspection and a redaction index. On December 10, 2009, the Custodian certified that she provided the Complainant will all records ordered by the Council in Item 6 of the Council's November 4, 2009 Interim Order. Therefore, the Custodian did not timely comply with either Items 4 or 6 of the Council's November 4, 2009 Interim Order within five (5) business days from receipt of such Order or by November 16, 2009.

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

The Custodian asserts that she lawfully denied the Complainant access to the requested e-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell because the records constitute attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

OPRA provides that "[a] government record shall not include the following information which is deemed to be confidential for the purposes [OPRA] ... any record within the attorney-client privilege ..."

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

¹¹ "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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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.*

The GRC conducted an *in camera* examination on the submitted record. 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> Examination¹²

¹² **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.

1	E-mail dated Tuesday, October 28, 2008 from pkoonce@benbrooklaw.com to blg@buzaklawgroup.com with copies to mlglaw@nac.net , rfornero@fornerofrancioso.com and clerk@frankfordtwp-nj.com with attachment (Letter dated October 28, 2008 from Kevin P. Benbrook, Esq. to Edward J. Buzak, Esq.)	E-mail regarding the Recall of Robert McDowell Committee v. Frankfort Township	Custodian denied access because she asserts the record is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	There is no text in this e-mail. However, the Custodian must disclose the following lines of the e-mail: (1) From: ... (2) Sent: ... (3) To: ... (4) Cc: ... (5) Subject. Additionally, the attachment is a letter from the Township Attorney to another attorney. This record is not exempt from disclosure because it is not attorney-client privileged since it is correspondence between attorneys and not between an attorney and his/her client. Therefore, the Custodian must disclose this record in its entirety to the Complainant.
2	E-mail dated Wednesday, October 22, 2008 from pkoonce@benbrooklaw.com to mlglaw@nac.net , with copies to blg@buzaklaw.com	E-mail regarding the Recall of Robert McDowell Committee v. Frankfort Township	Custodian denied access because she asserts the record is exempt from disclosure under the attorney-client privilege	There is no text in this e-mail. However, the Custodian must disclose the following lines of the e-mail: (1) From: ... (2) Sent: ... (3) To: ...

	<p>group.com, rfornero@fornero.francioso.com and clerk@frankfordtownship-nj.com with attachment (Letter dated October 22, 2008 from Kevin P. Benbrook, Esq. to Robert B. Campbell, Esq.)</p>		<p>pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p>	<p>(4) Cc: ... (5) Subject.</p> <p>Additionally, the attachment is a letter from the Township Attorney to another attorney. This record is not exempt from disclosure because it is not attorney-client privileged since it is correspondence between attorneys and not between an attorney and his/her client. Therefore, the Custodian must disclose this record in its entirety to the Complainant.</p>
3	<p>E-mail dated Monday, October 20, 2008 from pkoonce@benbrooklaw.com to rfornero@fornero.francioso.com with copies to clerk@frankfordtownship-nj.com and blg@buzaklawgroup.com with attachment (Letter dated October 28, 2008 from Kevin P. Benbrook, Esq. to Richard D.</p>	<p>E-mail regarding the recall of Robert McDowell</p>	<p>Custodian denied access because she asserts the record is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p>	<p>There is no text in this e-mail. However, the Custodian must disclose the following lines of the e-mail:</p> <p>(1) From: ... (2) Sent: ... (3) To: ... (4) Cc: ... (5) Subject.</p> <p>Additionally, the attachment is a letter from the Township Attorney to another attorney. This record is not exempt from disclosure because</p>

	Fornaro, Esq.)			it is not attorney-client privileged since it is correspondence between attorneys and not between an attorney and his/her client. Therefore, the Custodian must disclose this record in its entirety to the Complainant.
4	E-mail dated Monday, July 21, 2008 from pkoonce@benbrooklaw.com to clerk@frankfordwp-nj.com	E-mail regarding the recall of Robert McDowell	Custodian denied access because she asserts the record is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	The text of the e-mail is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> because the attorney is providing advice to the clerk. However, the Custodian must disclose the following lines of the e-mail: (1) Subject: ... (2) From: ... (3) Date: ... (4) To: ... (5) Opening salutation (Clerk's name) (6) Closing salutation (Attorney's name).
5	E-mail dated Monday, April 3, 2008 from kbenbrook@benbrooklaw.com to clerk@frankfordwp-nj.com	E-mail regarding the recall	Custodian denied access because she asserts the record is exempt from disclosure	The text of the e-mail is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-</u>

	dtwp-nj.com		under the attorney-client privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1.	1.1. as it discusses strategy. However, the Custodian must disclose the following lines of the e-mail: (1) Subject: ... (2) From: ... (3) Date: ... (4) To: ... (5) Opening salutation (Clerk's name) (6) Closing salutation (Attorney's name)
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Thus, the Custodian unlawfully denied access to the requested records because the letters attached to three (3) of the e-mails are not exempt from disclosure under the attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1 since they are letters from the Township Attorney to another attorney on behalf of the Clerk.

Further, the Custodian is in violation of OPRA for not disclosing those portions of the e-mails that are not exempt from disclosure. Specifically, OPRA provides that:

“... [i]f the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and *shall promptly permit access to the remainder of the record.*” (Emphasis added.)
N.J.S.A. 47:1A-5.g.

Therefore, the Custodian also unlawfully denied access to the non-exempt portions of the otherwise attorney-client privileged e-mails because disclosure is required for the following e-mail lines: To, From, Date, Subject and opening/closing salutations as required by N.J.S.A. 47:1A-5.g.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not timely complied with Paragraphs 4 or 6 of the Council's November 4, 2009 Interim Order by providing the Council with all records set forth in Paragraphs 4 and 6 of the Order within five (5) business days of receiving the Council's Order or by November 16, 2009.

2. The Custodian unlawfully denied access to the requested records because the letters attached to three (3) of the e-mails are not exempt from disclosure under the attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1 since they are letters from the Township Attorney to another attorney on behalf of the Clerk.
3. The Custodian also unlawfully denied access to the non-exempt portions of the otherwise attorney-client privileged e-mails because disclosure is required for the following e-mail lines: To, From, Date, Subject and opening/closing salutations as required by N.J.S.A. 47:1A-5.g.
4. **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 (also see paragraphs 2 and 3 above) 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 to the Executive Director.**

Prepared By: Catherine Starghill, Esq.
Executive Director

December 11, 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 4, 2009 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2008-254

v.

Township of Frankford (Sussex)
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 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. The Custodian’s written response to the Complainant’s request dated October 8, 2008 is insufficient pursuant to N.J.S.A. 47:1A-5.g. because she failed to specifically identify the records which were withheld from disclosure or do not exist.
2. Because the Custodian in this complaint certified that the records enumerated below did not exist at the time of the Complainant’s OPRA request, the Custodian would have borne her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian indicated that said records do not exist in her written response to the Complainant dated October 8, 2008.
 - a. 2007 professional services agreement for Municipal Attorney Peter Laemers.
 - b. 2007 and 2008 health buyback for Township Administrator.
 - c. Workshop meeting minutes dated May 6, 2008, May 20, 2008, July 2008, August 2008, and September 2008.
 - d. 2008 petty cash year end report.
3. 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 the requested e-mails between the Township Clerk and the Township Attorney



regarding the recall of Robert McDowell to determine the validity of the Custodian's assertion that the records constitute attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (the requested e-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell), 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 document 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.**

5. Although the Custodian made the requested records enumerated below available to the Complainant, the Custodian violated OPRA at N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide said records to the Complainant by the Complainant's preferred method of delivery, when the Custodian had the capability to convert the records to an electronic medium for e-mail delivery or make paper copies for facsimile delivery. See O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008) and Paff v. Borough of Sussex (Sussex), GRC Complaint No. 2008-38 (July 2008). Thus, the Custodian must disclose to the Complainant the records responsive to the Complainant's OPRA request enumerated below by the method of delivery requested by the Complainant, upon the Complainant's payment of the actual cost of duplicating the records pursuant to N.J.S.A. 47:1A-5.b., if there is any.⁴
 - a. Financial Disclosure Statements for the years 2007 and 2008 for the three (3) current Township Committee Members: Robert McDowell, Paul Sutphen and William Hahn.
 - b. Financial Disclosure Statements for the years 2007 and 2008 for Administrator/Municipal Clerk: Luanne Cular.
 - c. Financial Disclosure Statements for the years 2007 and 2008 for Township Attorney: Peter J. Laemers (2007) and Kevin Benbrook (2008).
 - d. Local Government Officer Rosters for 2007 and 2008.
 - e. 2008 Professional Services Agreement for Municipal Attorney Kevin Benbrook.
 - f. 2007 and 2008 salary resolutions and amendments.

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."

⁴ There is not likely any actual cost that may be justified for scanning and e-mail records.

- g. Workshop meeting minutes dated: March 18, 2008, April 15, 2008 and June 17, 2008.
 - h. 2007 petty cash register.
- 6. The Custodian shall comply with item # 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.**
7. 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 and the outcome of the Council's *in camera* review.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order and the outcome of the Council's *in camera* review.

Interim Order Rendered by the
Government Records Council
On The 4th 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.

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: November 9, 2009

⁵ "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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 4, 2009 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2008-254

v.

**Township of Frankford (Sussex)²
Custodian of Records**

Records Relevant to Complaint: The Complainant requests the following records to be sent either by e-mail or fax:

1. 2007 and 2008 financial disclosure forms for:
 - a. The three (3) current Township Committee members
 - b. The Township Administrator/Municipal Clerk
 - c. The Township Attorney
2. Local Government Officer Roster for 2007 and 2008
3. 2007 and 2008 fully executed professional services agreement between the Township and the Township Attorney
4. Township Administrator's resume when she applied for the job
5. 2007 and 2008 salary and health buyback for the Township Administrator
6. Township Committee work session minutes dated:
 - a. March 18, 2008
 - b. April 15, 2008
 - c. May 6, 2008
 - d. May 20, 2008
 - e. June 17, 2008
 - f. July 2008
 - g. August 2008
 - h. September 2008
7. 2007 and 2008 year end petty cash report
8. E-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell

Request Made: October 7, 2008

Response Made: October 8, 2008

Custodian: Luanne Cular

GRC Complaint Filed: November 3, 2008³

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

² Represented by Kevin P. Benbrook, Esq., of Benbrook & Benbrook, LLC (Clinton, NJ).

³ The GRC received the Denial of Access Complaint on said date.

Background

October 7, 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.

October 8, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that the Complainant's OPRA request exceeds 200 pages and thus the Custodian requires a \$35.00 deposit. The Custodian states that if she receives the Complainant's deposit in a timely manner, the requested records will be ready for pick up on October 17, 2008.⁴ Additionally, the Custodian states that the requested records are not available in e-mail or fax form.

October 9, 2008

Letter from Complainant to Custodian. The Complainant asserts that his OPRA request consists of a maximum of 72 pages not including the requested e-mails between the Township Clerk and the Township Attorney. The Complainant asks the Custodian how she calculated 200 pages of records responsive to his request. The Complainant also asks the Custodian why she cannot provide the requested records via e-mail or fax.

Additionally, the Complainant asserts that request items nos. 1-4 and 6 are already printed on paper and could be placed in a fax machine. The Complainant contends that request items nos. 5, 7, and 8 are records that are in electronic format and could be e-mailed.

October 21, 2008

E-mail from Deputy Municipal Clerk to Complainant. The Deputy Clerk states that because the Complainant's OPRA request was nearly identical to an OPRA request submitted by another requestor, the Township miscalculated the number of pages. The Deputy Clerk states that the Complainant's request encompasses 105 pages total, which costs \$34.25. The Deputy Clerk requests payment before she discloses the records to the Complainant.

October 30, 2008

E-mail from Complainant to Custodian. The Complainant states that he is still waiting for the Custodian to either e-mail or fax the records responsive to his OPRA request. The Complainant asks if the Custodian is denying his request.

October 30, 2008

E-mail from Custodian to Complainant. The Custodian states that she is not denying the Complainant's OPRA request. The Custodian states that she does not have the records available to e-mail, nor does she want to put original records through the fax machine. The Custodian states that her Deputy informed the Complainant of the copy fee for the records via e-mail dated October 21, 2008 which the Complainant ignored. The

⁴The seventh (7th) business day following the Custodian's receipt of the Complainant's OPRA request. Jesse Wolosky v. Township of Frankford (Sussex), 2008-254 – Findings and Recommendations of the Executive Director

Custodian states that the records are available in her office and have been since the day after the Complainant submitted his OPRA request.

November 3, 2008

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

- Complainant’s OPRA request dated October 7, 2008
- Custodian’s response to the Complainant’s OPRA request dated October 8, 2008
- Letter from Complainant to Custodian dated October 9, 2008
- E-mail from Deputy Municipal Clerk to Complainant dated October 21, 2008
- E-mail from Complainant to Custodian dated October 30, 2008
- E-mail from Custodian to Complainant dated October 30, 2008

The Complainant states that he submitted his OPRA request on October 7, 2008 and sought access to various records to be sent either by e-mail or fax. The Complainant states that the Custodian provided a written response to his request on the following business day in which she indicated that the requested records exceeded 200 pages, that a \$35.00 deposit was required and that the records were not available via e-mail or fax. The Complainant states that on October 9, 2008, he contacted the Custodian and inquired why she could not provide the records via e-mail since some records were already maintained electronically, and others in paper format could easily be faxed. The Complainant states that he received a written response from the Custodian’s Deputy on October 21, 2008 in which the Deputy corrected the number of pages responsive to the request. Additionally, the Complainant states that he contacted the Custodian on October 30, 2008 and indicated that he had not yet received the requested records via e-mail or fax, as requested. The Complainant states that the Custodian responded on the same day and indicated that she does not have the records available to e-mail, she does not want to put original records through the fax machine and copies of the records have been waiting in her office since the day after the Complainant submitted his OPRA request.

Further, the Complainant asserts that the Custodian violated N.J.S.A. 47:1A-5.g. pursuant to O’Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008) because she failed to acknowledge the Complainant’s preferred method of receipt of the requested records. Additionally, the Complainant contends that the Custodian violated N.J.S.A. 47:1A-5.g. pursuant to Paff v. Borough of Sussex (Sussex), GRC Complaint No. 2008-38 (July 2008) because she refused to send the requested records to the Complainant via e-mail or fax when she had the proper means to do so. The Complainant also asserts that the Custodian has denied him access to the requested records pursuant to N.J.S.A. 47:1A-5.d. by failing to provide said records via e-mail or fax. The Complainant claims that the Custodian has failed to bear her burden of proving why she cannot scan, fax or e-mail the requested records.

Additionally, the Complainant requests that the GRC: find that the Custodian violated OPRA by denying access to the requested records; find that the Custodian violated OPRA by not providing access to the requested records in the medium requested; determine whether the Custodian should be fined for knowingly and willfully

violating OPRA; and determine whether the Complainant is a prevailing party and entitled to an award of prevailing party attorney's fees.

Also, the Complainant does not agree to mediate this complaint.

November 11, 2008

Letter of Representation from Custodian's Counsel.

November 24, 2008

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

December 1, 2008

E-mail from GRC to Custodian's Counsel. The GRC grants an extension until the close of business on December 9, 2008 for Counsel to submit the Custodian's completed SOI.⁵

December 9, 2008⁶

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated October 7, 2008
- Custodian's response to the Complainant's OPRA request dated October 8, 2008
- Letter from Custodian to Complainant dated October 8, 2008⁷
- Letter from Complainant to Custodian dated October 9, 2008
- E-mail from Deputy Municipal Clerk to Complainant dated October 21, 2008
- E-mail from Complainant to Custodian dated October 30, 2008
- E-mail from Custodian to Complainant dated October 30, 2008

The Custodian certifies that she received the Complainant's OPRA request on October 7, 2008. The Custodian also certifies that she provided the Complainant with a written response to his request on October 8, 2008, as well as subsequent responses dated October 21, 2008 and October 30, 2008. The Custodian certifies that the records responsive to the Complainant's request have been available to be picked up since October 17, 2008.

Additionally, the Custodian provides the following document index regarding the records responsive to the Complainant's OPRA request:

⁵In response to Counsel's verbal request on said date.

⁶The GRC received the Custodian's SOI on said date; however, the Custodian's signature page is dated November 26, 2008.

⁷This letter appears to not have been sent to the Complainant but was prepared to be provided to the Complainant upon his receipt of the requested records.

<p>List of all records responsive to Complainant's OPRA request (include the number of pages for each record).</p>	<p>List the Records Retention Requirement and Disposition Schedule for each records responsive to the Complainant's OPRA request</p>	<p>List of all records provided to Complainant, in their <u>entirety</u> or <u>with redactions</u> (include the <u>date</u> such records were provided).</p>	<p>If records were disclosed with redactions, give a general nature description of the redactions.</p>	<p>If records were denied in their entirety, give a general nature description of the record.</p>	<p>List the legal explanation and statutory citation for the denial of access to records in their <u>entirety</u> or <u>with redactions</u>.</p>
<p>Financial Disclosure Statements for the years 2007 and 2008 for the three (3) current Township Committee Members (12 pages)</p>	<p>Must be retained by the agency for six (6) years</p>	<p>Financial Disclosure Statements for the years 2007 and 2008 for the three (3) current Township Committee Members: Robert McDowell, Paul Sutphen and William Hahn. Made available to Complainant on October 8, 2008 upon payment of the copying fee. Complainant has not yet submitted payment.</p>	<p>N/A</p>	<p>N/A</p>	<p>N/A</p>
<p>Local Government Ethics Law Financial Disclosure Statements for the years 2007 and 2008 for Administrator/Municipal Clerk (4 pages)</p>	<p>Must be retained by the agency for six (6) years</p>	<p>Local Government Ethics Law Financial Disclosure Statements for the years 2007 and 2008 for Administrator/Municipal Clerk: Luanne Cular. Made available to Complainant on October 8, 2008 upon payment of the copying fee. Complainant has not yet submitted payment.</p>	<p>N/A</p>	<p>N/A</p>	<p>N/A</p>
<p>Local Government Ethics Law Financial Disclosure Statements for the years 2007 and 2008 for Township Attorney (4 pages)</p>	<p>Must be retained by the agency for six (6) years</p>	<p>Local Government Ethics Law Financial Disclosure Statements for the years 2007 and 2008 for Township Attorney: Peter J. Laemers (2007) and</p>	<p>N/A</p>	<p>N/A</p>	<p>N/A</p>

		Kevin Benbrook (2008). Made available to Complainant on October 8, 2008 upon payment of the copying fee. Complainant has not yet submitted payment.			
Local Government Officer Rosters for 2007 and 2008 (7 pages)	Must be retained by the agency for six (6) years	Local Government Officer Rosters for 2007 and 2008. Made available to Complainant on October 8, 2008 upon payment of the copying fee. Complainant has not yet submitted payment.	N/A	N/A	N/A
2007 and 2008 Professional Services Agreement for Municipal Attorney (3 pages)	Must be retained by the agency for six (6) years after completion of contract	2008 Professional Services Agreement for Municipal Attorney Kevin Benbrook. Made available to Complainant on October 8, 2008 upon payment of the copying fee. Complainant has not yet submitted payment.	N/A	No agreement on file for 2007 attorney Peter Laemers	N/A
2007 and 2008 salary resolutions and amendments	Permanent	2007 and 2008 salary resolutions and amendments. Made available to Complainant on October 8, 2008 upon payment of the copying fee. Complainant has not yet submitted payment.	N/A	Township Administrator does not have a buyback	N/A
Township Committee Work Session minutes dated: March 18, 2008, April 15, 2008, May 6, 2008, May 20, 2008, June 17, 2008, July 2008, August 2008 and September 2008 (63 pages)	Permanent	Workshop meeting minutes dated: March 18, 2008, April 15, 2008 and June 17, 2008. Made available to Complainant on October 8, 2008 upon payment of the copying fee. Complainant has not yet submitted payment.	N/A	No workshop meetings held on May 6, 2008, May 20, 2008, July 2008, or August 2008. At the time of the Complainant's OPRA request, the September	N/A

				2008 minutes were not completed.	
2007 and 2008 year end petty cash report (5 pages)	Must be retained by the agency for six (6) years	2007 petty cash register. Made available to Complainant on October 8, 2008 upon payment of the copying fee. Complainant has not yet submitted payment.	N/A	2008 year end petty cash report cannot be provided until the end of 2008.	N/A
E-mails between Township Clerk and Township Attorney regarding the recall of Robert McDowell		None	N/A	E-mails between the Clerk and Attorney are attorney-client privilege	<u>N.J.S.A. 47:1A-1.1.</u> any record within the attorney-client privilege

December 9, 2008

Letter from Custodian’s Counsel to GRC. The Custodian’s Counsel states that the issue presented in this Denial of Access Complaint is whether OPRA mandates that the Custodian deliver the requested records by the Complainant’s preferred method of delivery. Counsel asserts that there is no such requirement contained in OPRA.

Counsel states that pursuant to N.J.S.A. 47:1A-5,⁸ a custodian must either grant access or deny access as soon as possible, but not later than seven (7) business days following the custodian’s receipt of the OPRA request. Counsel asserts that the Custodian in this complaint adhered to said time frame when she advised the Complainant that the records were available to be picked up. Counsel contends that it is not clear from the Complainant’s OPRA request whether he was seeking inspection or actual copies of the requested records. Counsel states that the Custodian interpreted the Complainant’s OPRA request to seek actual copies of the requested records. Counsel states that the Custodian informed the Complainant which records were available, which records did not exist, and the estimated copy cost.

Additionally, Counsel states that N.J.S.A. 47:1A-5.d. provides that a custodian shall “permit access to a government record and provide a copy thereof in the medium requested *if the public agency maintains the records in that medium*” (Emphasis added). Counsel states that OPRA defines a government record as paper, photographs, microfilm, data processed documents, and information stored or maintained electronically. Counsel asserts that a requestor has the right to access a government record in whatever medium said record is maintained by the public agency. Counsel contends that if a public agency maintains documents on microfilm, a requestor has the right to access said document in microfilm, but cannot access the same record as a paper copy.

⁸ N.J.S.A. 47:1A-5.i.

Further, Counsel states that OPRA is silent with respect to any requirement of a records custodian to provide records to a requestor pursuant to the requestor's preferred method of delivery. Counsel asserts that there is no statutory obligation for a custodian to comply with a request to fax or e-mail records responsive to an OPRA request. Counsel asserts that both fax and e-mail are not mediums for maintaining records, but rather a method of delivery. Additionally, Counsel states that OPRA is silent regarding any costs associated with supplying records via fax or e-mail. Counsel asserts that providing records via fax implies, at a minimum, telephone charges. Moreover, Counsel claims that there is no way to confirm the recipient of a fax or an e-mail.

Counsel also states that in O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), the Council held that a custodian must comply with a requestor's preferred method of receipt of records. Counsel suggests that the Council's decision is in error and contrary to the express statutory provisions of OPRA. However, Counsel asserts that if compliance with a requested method of delivery is the GRC's current legal interpretation of OPRA, such is contrary to the legal advice Counsel provided to the Custodian. Thus, Counsel contends that while the Custodian may have technically violated OPRA, she did not do so knowingly and willfully and should not be subject to a penalty.

December 15, 2008

The Complainant Counsel's response to the Custodian's SOI. The Complainant's Counsel states that the Custodian's Counsel asserted that the Complainant failed to identify in his OPRA request whether he sought inspection or copies of the requested records. The Complainant's Counsel states that the Complainant indicated on his OPRA request that the "requested medium for response and for records responsive to request" was in his "order of preference" to e-mail or fax. Additionally, the Complainant's Counsel contends that the Custodian's Counsel's assertion that OPRA does not require compliance with a request to fax or e-mail records to a requestor contradicts the Council's determination in O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008).

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or*

kept on file ... or that has been received in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA states that:

“[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...*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.” (Emphasis added). N.J.S.A. 47:1A-5.b.

OPRA further provides that:

“[a] custodian *shall permit access* to a government record and provide a copy thereof *in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian *shall either convert the record to the medium requested* or provide a copy in some other meaningful medium. If a request is for a record...require[es] a substantial amount of manipulation ... the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency...” (Emphasis added). N.J.S.A. 47:1A-5.d.

OPRA also provides that:

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

OPRA 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. Further, if a custodian is unable to

comply with a request for access to a government record, the custodian must indicate the specific basis in writing pursuant to N.J.S.A. 47:1A-5.g.

Here, the Complainant stated that he submitted his OPRA request on October 7, 2008 and sought access to various records via e-mail or fax. The Custodian certified that she provided the Complainant with a written response on October 8, 2008, the first business day following receipt of said request, in which the Custodian informed the Complainant that the requested records were not available in e-mail or fax form, but that he could pick up the records on October 17, 2008, the seventh (7th) business day, upon payment of a \$35.00 deposit for the cost of paper copies.

The Custodian's written response implies that she will provide access to all of the requested records. However, in the Custodian's SOI dated November 26, 2008, the Custodian certified that the following records do not exist:

1. 2007 professional services agreement for Municipal Attorney Peter Laemers
2. 2007 and 2008 health buyback for Township Administrator
3. Workshop meeting minutes dated May 6, 2008, May 20, 2008, July 2008, August 2008, September 2008⁹
4. 2008 petty cash year end report¹⁰

Additionally, the Custodian certified in her SOI that the requested e-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell are exempt from disclosure under the attorney-client privilege at N.J.S.A. 47:1A-1.1. The Custodian did not identify which records did not exist or were being withheld from disclosure in her written response to the Complainant dated October 8, 2008. The Custodian did include this information in another letter addressed to the Complainant dated October 8, 2008; however, it appears as though the Custodian did not actually provide said letter to the Complainant. Because in said letter the Custodian states that the requested records are enclosed and to date, the Custodian has not provided the Complainant access to any of the requested records. Thus, it appears as though the Custodian intended to provide the Complainant with her second written response dated October 8, 2008 when he picked up the records responsive to his request. Nevertheless, the Custodian failed to notify the Complainant in writing that some records responsive either do not exist or were being withheld from disclosure until the Complainant received the Custodian's SOI.

Therefore, the Custodian's written response to the Complainant's request dated October 8, 2008 is insufficient pursuant to N.J.S.A. 47:1A-5.g. because she failed to specifically identify the records which were withheld from disclosure or do not exist.

Additionally, in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the GRC held that the Custodian did not unlawfully deny access to he requested record because the Custodian certified that no records responsive existed.

⁹ The Custodian certified that the September 2008 minutes were not completed at the time of the Complainant's OPRA request.

¹⁰ The Custodian certified that the 2008 year end petty cash report cannot be created until the end of 2008. Jesse Wolosky v. Township of Frankford (Sussex), 2008-254 – Findings and Recommendations of the Executive Director

Similarly in this instant complaint, the Custodian certified that certain records requested do not exist. However, the Custodian failed to identify said records in her written response to the Complainant dated October 8, 2008.

Therefore, because the Custodian in this complaint certified that the records enumerated below did not exist at the time of the Complainant's OPRA request, the Custodian would have borne her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra, had the Custodian indicated that said records do not exist in her written response to the Complainant dated October 8, 2008.

1. 2007 professional services agreement for Municipal Attorney Peter Laemers.
2. 2007 and 2008 health buyback for Township Administrator.
3. Workshop meeting minutes dated May 6, 2008, May 20, 2008, July 2008, August 2008, and September 2008.
4. 2008 petty cash year end report.

Further, the Custodian asserts that the requested e-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell are exempt from disclosure under the attorney-client privilege at N.J.S.A. 47:1A-1.1.

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 GRC¹¹ 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

¹¹ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). Jesse Wolosky v. Township of Frankford (Sussex), 2008-254 – Findings and Recommendations of the Executive Director

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 the requested e-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell to determine the validity of the Custodian's assertion that the records constitute attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Next, the Council must address whether the Custodian unlawfully denied access by refusing to provide said records to the Complainant by the method of delivery requested. The Complainant stated in his OPRA request that he wished to receive the requested records either via e-mail or fax. In the Custodian's written response to the request dated October 8, 2008, the Custodian stated that the records were not available via either e-mail or fax. Additionally, in an e-mail to the Complainant dated October 30, 2008, the Custodian indicated that she does not want to put original records through the fax machine.

The Complainant asserts that the Custodian violated N.J.S.A. 47:1A-5.g. pursuant to O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008) because she failed to acknowledge the Complainant's preferred method of receipt of the requested records. Additionally, the Complainant contends that the Custodian violated N.J.S.A. 47:1A-5.g. pursuant to Paff v. Borough of Sussex (Sussex), GRC Complaint No. 2008-38 (July 2008) because she refused to send the requested records to the Complainant via e-mail or fax when she had the proper means to do so. The Complainant also asserts that the Custodian has denied him access to the requested records pursuant to N.J.S.A. 47:1A-5.d. by failing to provide said records via e-mail or fax. The Complainant claims that the Custodian has failed to bear her burden of proving why she cannot fax or scan to e-mail the requested records.

Further, the Custodian's Counsel argues that pursuant to N.J.S.A. 47:1A-5.d., a custodian is only required to provide the requested records by the preferred method of delivery requested if the public agency maintains said records in a medium which allows for delivery by the preferred method.¹² Counsel also contends that e-mail and fax are not mediums for maintaining records, but methods to deliver records. Counsel is correct that e-mail and fax are not mediums for maintaining records. It is evident that based on the Complainant's request to receive the records either via e-mail or fax, the records requested must be maintained in a medium which allows for the preferred method of delivery, i.e. records must be maintained or converted to electronic format to be e-mailed¹³ and records must be maintained in paper format or converted to paper to be

¹² Custodial agencies may deliver requested records via e-mail only when the records are maintained in an electronic format or if the agencies have scanning capabilities when the records are maintained in paper format.

¹³ Custodial agencies must have scanning capabilities to convert records maintained only in paper format to deliver them electronically via e-mail.

faxed. Since N.J.S.A. 47:1A-5.d. further states that if the custodian does not maintain the records in the medium requested, the custodian must convert the records to said medium, it is inherent that the records requested must be maintained or converted to a medium which allows for the preferred method of delivery. Thus, in this complaint, if the Custodian does not maintain any of the records responsive in an electronic medium, she is required to convert the records in order to provide them electronically via e-mail.

However, the Custodian's Counsel asserts that there is no statutory obligation for a custodian to comply with a request to fax or e-mail records responsive to an OPRA request. Counsel suggests that the Council's decision in O'Shea, supra, is in error and contrary to the express statutory provisions of OPRA.

In O'Shea, supra, the Complainant elaborated in his request that a preference of e-mailing the requested records over having to pay copying costs would be ideal. The Council held that "[a]ccording to language of N.J.S.A. 47:1A-5.g., the Custodian was given two ways to comply and should have, therefore, responded acknowledging the Complainant's preferences with a sufficient response for each." The Council further held that "[a]lthough the Custodian responded in writing granting access to Items No. 1 and No. 3 in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g."

Additionally, in Paff, supra, the Complainant requested that the records be provided by e-mail or facsimile, and the Custodian failed to address the method of delivery. The Council held that "while the Custodian may not have had the ability to scan and e-mail the requested record at the time of the request, the Custodian still had the ability to transmit documents via facsimile. Because the Custodian had the proper means to produce the requested paper record via facsimile, the Custodian has violated N.J.S.A. 47:1A-5.d."

Similarly, in this instant complaint, the Custodian did provide the Complainant with a written response in a timely manner and made the requested records available; however, the Custodian refused to provide said records to the Complainant via either e-mail or fax. The Custodian indicated that she does not have the records available to e-mail but does not state whether she has the capability to convert the requested records to an electronic medium and provide said records via e-mail. Further, the Custodian indicated that she does not wish to put original records through the fax machine.

In Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007), the Custodian refused to allow the Complainant to use a personal photocopier to copy the requested records. The Council held that:

"...where a custodian believes that the safety, integrity or confidentiality of a document requested pursuant to OPRA may be compromised, or where the custodian has concerns regarding the impact that use of a personal photocopier might have upon any aspect of the operations of the custodian's office, a custodian may, consistent with OPRA, refuse to

permit the use of a personal photocopier by a requestor. See, Moore [v. The Board of Chosen Freeholders of the County of Mercer, 39 N.J. 26 (1962)]; Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 141 (App. Div. 2006)(A municipality may insist upon using its own diskette, rather than allowing the requesting party to supply the diskette, in order to avoid the possibility that the municipality's computer system may be compromised by any outside party in copying Township Council meeting minutes from Township computers).”

While the use of a personal photocopier is not at issue in this instant complaint, the safety and integrity of original government records is at issue. It is not unreasonable for the Custodian in this complaint to want to protect the original records from potential destruction if put through the fax machine. However, there is nothing in OPRA that prohibits the Custodian from making copies of the requested records and putting the copies through the fax machine.

However, the Custodian’s Counsel asserts that OPRA does not address any fees associated with such delivery. Regarding fees, OPRA states that “[a] copy or copies of a government record may be purchased by any person 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.” N.J.S.A. 47:1A-5.b. Thus, if the Custodian is required to make copies of the requested records in order to send them to the Complainant via fax, the Custodian may charge the actual cost of producing said copies pursuant to N.J.S.A. 47:1A-5.b.

Therefore, although the Custodian made the requested records enumerated below available to the Complainant, the Custodian violated OPRA at N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide said records to the Complainant by the Complainant’s preferred method of delivery, when the Custodian had the capability to convert the records to an electronic medium for e-mail delivery or make paper copies for facsimile delivery. See O’Shea, *supra*, and Paff, *supra*. Thus, the Custodian must disclose to the Complainant the records responsive to the Complainant’s OPRA request enumerated below by the method of delivery requested by the Complainant, upon the Complainant’s payment of the actual cost of duplicating the records pursuant to N.J.S.A. 47:1A-5.b., if there is any.¹⁴

1. Financial Disclosure Statements for the years 2007 and 2008 for the three (3) current Township Committee Members: Robert McDowell, Paul Sutphen and William Hahn.
2. Financial Disclosure Statements for the years 2007 and 2008 for Administrator/Municipal Clerk: Luanne Cular.
3. Financial Disclosure Statements for the years 2007 and 2008 for Township Attorney: Peter J. Laemers (2007) and Kevin Benbrook (2008).
4. Local Government Officer Rosters for 2007 and 2008.
5. 2008 Professional Services Agreement for Municipal Attorney Kevin Benbrook.
6. 2007 and 2008 salary resolutions and amendments.

¹⁴ There is not likely any actual cost that may be justified for scanning and e-mail records.
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7. Workshop meeting minutes dated: March 18, 2008, April 15, 2008 and June 17, 2008.
8. 2007 petty cash register.

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 and the outcome of the Council's *in camera* review.

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 and the outcome of the Council's *in camera* review.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's written response to the Complainant's request dated October 8, 2008 is insufficient pursuant to N.J.S.A. 47:1A-5.g. because she failed to specifically identify the records which were withheld from disclosure or do not exist.
2. Because the Custodian in this complaint certified that the records enumerated below did not exist at the time of the Complainant's OPRA request, the Custodian would have borne her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian indicated that said records do not exist in her written response to the Complainant dated October 8, 2008.
 - a. 2007 professional services agreement for Municipal Attorney Peter Laemers.
 - b. 2007 and 2008 health buyback for Township Administrator.
 - c. Workshop meeting minutes dated May 6, 2008, May 20, 2008, July 2008, August 2008, and September 2008.
 - d. 2008 petty cash year end report.
3. 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 the requested e-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell to determine the validity of the

Custodian's assertion that the records constitute attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver¹⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (the requested e-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell), a document or redaction index¹⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁷, that the documents provided are the document 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.**

5. Although the Custodian made the requested records enumerated below available to the Complainant, the Custodian violated OPRA at N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide said records to the Complainant by the Complainant's preferred method of delivery, when the Custodian had the capability to convert the records to an electronic medium for e-mail delivery or make paper copies for facsimile delivery. See O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008) and Paff v. Borough of Sussex (Sussex), GRC Complaint No. 2008-38 (July 2008). Thus, the Custodian must disclose to the Complainant the records responsive to the Complainant's OPRA request enumerated below by the method of delivery requested by the Complainant, upon the Complainant's payment of the actual cost of duplicating the records pursuant to N.J.S.A. 47:1A-5.b., if there is any.¹⁸
 - a. Financial Disclosure Statements for the years 2007 and 2008 for the three (3) current Township Committee Members: Robert McDowell, Paul Sutphen and William Hahn.
 - b. Financial Disclosure Statements for the years 2007 and 2008 for Administrator/Municipal Clerk: Luanne Cular.
 - c. Financial Disclosure Statements for the years 2007 and 2008 for Township Attorney: Peter J. Laemers (2007) and Kevin Benbrook (2008).
 - d. Local Government Officer Rosters for 2007 and 2008.
 - e. 2008 Professional Services Agreement for Municipal Attorney Kevin Benbrook.
 - f. 2007 and 2008 salary resolutions and amendments.
 - g. Workshop meeting minutes dated: March 18, 2008, April 15, 2008 and June 17, 2008.
 - h. 2007 petty cash register.

¹⁵ 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.

¹⁶ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁷ "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."

¹⁸ There is not likely any actual cost that may be justified for scanning and e-mail records.

6. **The Custodian shall comply with item # 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹⁹, to the Executive Director.**
7. 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 and the outcome of the Council's *in camera* review.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order and the outcome of the Council's *in camera* review.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 21, 2009

¹⁹ "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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