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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

April 25, 2012 Government Records Council Meeting

Gayle Ann Livecchia
Complainant
v.
Borough of Mount Arlington (Morris)
Custodian of Record

Complaint No. 2008-80

At the April 25, 2012 public meeting, the Government Records Council ("Council") considered the April 18, 2012 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, dismisses this complaint pursuant to the executed Stipulation of Settlement provided to the GRC on March 20, 2012 (via Custodian's Counsel) because the parties have settled this matter. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 25th Day of April, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: April 27, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
April 25, 2012 Council Meeting

Gayle Ann Livecchia[1] **GRC Complaint No. 2008-80**
Complainant

v.

Borough of Mount Arlington (Morris)[2]
Custodian of Records

Records Relevant to Complaint:

November 19, 2007 OPRA request

Cell phone bills for October and September 2007, including itemized list of phone calls, for all Borough of Mount Arlington ("Mt. Arlington") employees.

December 17, 2007 OPRA requests[3]

1. Receipts from 2002 to the present for Holiday Inn Express Hotel and Marriott Hotel.[4]
2. Audio tape of December 10, 2007 council meeting.

Requests Made: November 19, 2007 and December 17, 2007,
Responses Made: November 27, 2007 and December 27, 2007
Custodian: Linda DeSantis
GRC Complaint Filed: April 18, 2008[5]

Background

November 29, 2011

Government Records Council's ("Council") Interim Order. At its November 29, 2011 public meeting, the Council considered the November 22, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian failed to bear her burden of proof that the redactions made to the requested cell phone bills were authorized by law as required by N.J.S.A. 47:1A-5.g. Moreover, the Custodian failed to articulate a basis for the need to keep the

[1] Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).
[2] Represented by Levi Kool, Esq., of O'Donnell McCord, PC (Morristown, NJ); previously represented by Thomas A. Segreto, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).
[3] The Complainant filed two (2) separate OPRA requests on December 17, 2007.
[4] The Complainant included addresses for both hotels.
[5] The GRC received the Denial of Access Complaint on said date.

cities and states of the destination of cell phone calls confidential, as required by the common law pursuant to North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9 (1992). *See* Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 865 (App. Div. Mar. 31, 2008). Additionally, the Custodian's charge of $5.00 each for two audio recordings of the requested meeting minutes was unreasonable and in violation of N.J.S.A. 47:1A-5.b., and the Custodian failed to provide the required refund of $8.42 to the Complainant within five (5) business days of the Council's April 8, 2010 Interim Order, as required by such Interim Order. However, the Custodian eventually provided the required refund to the Complainant on August 27, 2010, although she failed to provide certified confirmation of same to the Executive Director, and the Custodian provided the requested records to the Complainant as ordered by the Superior Court of New Jersey, Appellate Division, and the Custodian did not unlawfully deny the Complainant access to the requested receipts from 2002 to the present for Holiday Inn Express Hotel and Marriott Hotel because such request was invalid under OPRA pursuant to MAG Entertainment LLC. v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009) and Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007) because it would have required the Custodian to conduct research. Therefore, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

2. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006)the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Appellate Division affirmed the Order of the Council that the Custodian provide the Complainant with copies of the requested cell phone bills containing the city and state of the locations of calls received from Borough-issued cell phones. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because the Custodian unlawfully denied access to the requested cell phone bills containing the city and state of the locations of calls received from Borough-issued cell phones. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, adjudicated concurrently herewith, an enhancement of the lodestar fee is not appropriate in

this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

December 1, 2011

Council's Interim Order distributed to the parties.

March 9, 2012

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

March 20, 2012

Letter from the Custodian's Counsel to the GRC attaching a Stipulation of Settlement.[6] Counsel requests that this complaint be withdrawn from the OAL and marked settled pursuant to the attached Stipulation of Settlement.

March 26, 2012

Letter from the Custodian's Counsel to the GRC with the following attachments:

- Letter from the Custodian's Counsel to the GRC dated March 20, 2011.
- Letter from the Custodian's Counsel to the GRC dated March 26, 2011.
- Executed Stipulation of Settlement.

Counsel states that the Borough is in receipt of correspondence transmitting the instant complaint to the OAL. Counsel states that he previously forwarded to the GRC a copy of the executed Stipulation of Settlement on March 20, 2012. Counsel requests that the GRC acknowledge receipt of the Stipulation of Settlement and withdraw the matter from the OAL.

March 26, 2012

Letter from the GRC to the Honorable Jeffery A. Gerson, Administrative Law Judge, with the following attachments:

- Letter from the Custodian's Counsel to the GRC dated March 20, 2011.
- Letter from the Custodian's Counsel to the GRC dated March 26, 2011.
- Executed Stipulation of Settlement.

The GRC states that the parties have settled the instant complaint and this complaint should be removed from the OAL pursuant to the attached settlement agreement. The GRC states that it will adjudicate the matter further in accordance with the settlement and parties' compliance with the Council's November 29, 2011 Interim Order.

[6] The Stipulation of Settlement was executed by the Complainant's Counsel on February 23, 2012 and executed by the Custodian's Counsel on March 15, 2012.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss this complaint pursuant to the executed Stipulation of Settlement provided to the GRC on March 20, 2012 (via Custodian's Counsel) because the parties have settled this matter. Therefore, no further adjudication is required.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

April 18, 2012

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

November 29, 2011 Government Records Council Meeting

Gayle Ann Livecchia
Complainant
v.
Borough of Mount Arlington (Morris)
Custodian of Record

Complaint No. 2008-80

At the November 29, 2011 public meeting, the Government Records Council ("Council") considered the November 22, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian failed to bear her burden of proof that the redactions made to the requested cell phone bills were authorized by law as required by N.J.S.A. 47:1A-5.g. Moreover, the Custodian failed to articulate a basis for the need to keep the cities and states of the destination of cell phone calls confidential, as required by the common law pursuant to North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9 (1992). *See* Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 865 (App.Div. Mar. 31, 2008). Additionally, the Custodian's charge of $5.00 each for two audio recordings of the requested meeting minutes was unreasonable and in violation of N.J.S.A. 47:1A-5.b., and the Custodian failed to provide the required refund of $8.42 to the Complainant within five (5) business days of the Council's April 8, 2010 Interim Order, as required by such Interim Order. However, the Custodian eventually provided the required refund to the Complainant on August 27, 2010, although she failed to provide certified confirmation of same to the Executive Director, and the Custodian provided the requested records to the Complainant as ordered by the Superior Court of New Jersey, Appellate Division, and the Custodian did not unlawfully deny the Complainant access to the requested receipts from 2002 to the present for Holiday Inn Express Hotel and Marriott Hotel because such request was invalid under OPRA pursuant to MAG Entertainment LLC. v. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009) and Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007) because it would have required the Custodian to conduct research. Therefore, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful

violation of OPRA and unreasonable denial of access under the totality of the circumstances.

2. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006)the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id*. at 432. Specifically, the Appellate Division affirmed the Order of the Council that the Custodian provide the Complainant with copies of the requested cell phone bills containing the city and state of the locations of calls received from Borough-issued cell phones. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because the Custodian unlawfully denied access to the requested cell phone bills containing the city and state of the locations of calls received from Borough-issued cell phones. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, adjudicated concurrently herewith, an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 29th Day of November, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 1, 2011

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
November 29, 2011 Council Meeting

Gayle Ann Livecchia[1] **GRC Complaint No. 2008-80**
Complainant

v.

Borough of Mount Arlington (Morris)[2]
Custodian of Records

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December 17, 2007 OPRA requests[3]

1. Receipts from 2002 to the present for Holiday Inn Express Hotel and Marriott Hotel.[4]
2. Audio tape of December 10, 2007 council meeting.

Requests Made: November 19, 2007 and December 17, 2007,
Responses Made: November 27, 2007 and December 27, 2007
Custodian: Linda DeSantis
GRC Complaint Filed: April 18, 2008[5]

Background

April 8, 2010

Government Records Council's ("Council") Decision and Order. At its April 8, 2010 public meeting, the Council considered the April 1, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has failed to bear her burden of proof that the redactions made to the requested cell phone bills were authorized by law as required by N.J.S.A. 47:1A-5.g. Moreover, the Custodian has failed to articulate a basis for the need to keep the cities and states of the destination of cell phone calls confidential, as

[1] Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Oxford, NJ).
[2] Represented by Levi Kool, Esq., of O'Donnell McCord, PC (Morristown, NJ); previously represented by Thomas A. Segreto, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).
[3] The Complainant filed two (2) separate OPRA requests on December 17, 2007.
[4] The Complainant included addresses for both hotels.
[5] The GRC received the Denial of Access Complaint on said date.

required by the common law pursuant to North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9 (1992). *See* Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 865 (App.Div. Mar. 31, 2008).

2. The Custodian has failed to show that the Council's November 19, 2009 Order regarding the disclosure of the city and state of calls made on Borough-issued cell phones is (1) based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence, as required by In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

3. The Custodian has failed to show that the Council's November 19, 2009 Order regarding the actual costs of reproducing the requested audiotape is (1) based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence, as required by In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

4. Because the Custodian has failed to meet the required standard for reconsideration of the Council's November 18, 2009 Interim Order, the Custodian's Motion for Reconsideration of the Council's November 19, 2009 Interim Order is denied.

5. **The Custodian must disclose to the Complainant copies of the requested cell phone bills with the city and state of the location of the cell phone calls unredacted, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005),[6] to the Executive Director, within five (5) business days of receipt of this Order.**

6. Because the Custodian certified that the actual cost of each audiotape which was necessary to reproduce the meeting minutes requested by the Complainant, and because the evidence of record indicates that two audiotapes were required to reproduce the requested meeting minutes, the Custodian shall refund to the Complainant the difference between the $10.00 copying fee the Complainant was charged and the $1.58 which was the actual cost of the audiotapes, or $8.42.

7. **The Custodian shall comply with Paragraph #6 above, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules,**

[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."

1969 R. 1:4-4 (2005),[7] to the Executive Director, within five (5) business days of receipt of this Order.

8. 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.

9. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 pending the Custodian's compliance with the Council's Interim Order.

April 13, 2010

Council's Decision and Order distributed to the parties.

April 20, 2010

E-mail from Custodian's Counsel to the GRC. Counsel requests an extension of time to comply with the Council's Interim Order in order to discuss the Council's Order with the Custodian.

April 20, 2010

E-mail from the GRC to Custodian's Counsel. The GRC grants Counsel an extension of five (5) business days.

April 26, 2010

E-mail from Custodian's Counsel to the GRC. Counsel requests an additional extension of time to May 7, 2010 in order to afford the governing body an opportunity to assess the direction of this litigation.

April 26, 2010

E-mail from Complainant's Counsel to the GRC. Complainant's Counsel objects to any extension of time that may be granted to Custodian's Counsel.

April 27, 2010

Letter from the Executive Director of the GRC to Custodian's Counsel. The Executive Director denies Counsel's request for an additional extension of time in which to comply with the Council's Interim Order.

April 27, 2010

E-mail from Custodian's Counsel to the GRC attaching a brief in support of a motion for a stay of the Council's Interim Order dated April 8, 2010 pending appeal.

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

June 2, 2010

Custodian's Notice of Appeal. The Custodian's Counsel files an appeal of the Council's April 8, 2010 Interim Order with the Superior Court of New Jersey, Appellate Division.

June 15, 2010

Letter from the Executive Director of the GRC to Custodian's Counsel. The Executive Director grants Counsel's request for a stay of the Council's Interim Order dated April 8, 2010 pending appeal and states that the stay will extend until such time as the Appellate Division makes a ruling or you withdraw the appeal from Superior Court.

July 13, 2011

The Superior Court of New Jersey, Appellate Division, issues its decision in the appeal, affirms the order of the Council and holds that:

> "[W]hen limiting a public record request, OPRA's emphasis on access mandates the public entity clearly demonstrate a claim of privacy in all redacted information. Here, in balancing these countervailing interests, the Borough has failed to show that the destination location of the calls made by municipal employees triggers a protected privacy right, similar to that sheltering the release of telephone numbers or names of persons called. Accordingly, OPRA's presumption favoring public access to the call location information prevails[.] ... Accordingly, we conclude the GRC properly ordered the Borough to release the cell phone records, redacting only the numbers called. ... the evidence in the record sustains the GRC's determination that the Borough failed to prove the fee charged reasonably reflected its actual cost. Accordingly, we will not disturb its order requiring reimbursement."

August 22, 2010

Letter from Complainant's Counsel to Custodian's Counsel. Complainant's Counsel states that On July 13, 2011, the Appellate Division issued its written opinion that affirmed the GRC's disclosure order. Counsel states that the Custodian has not served a petition for certification to the New Jersey Supreme Court and that the time to do so has passed. Counsel also states that on August 17, 2011, the Appellate Division awarded Counsel $6,500 for work on the appeal. Counsel therefore demands that:

1. The Custodian immediately comply with the Council's Interim Order dated April 8, 2010; and
2. Immediately pay the Complainant's Counsel $6,500.

September 1, 2011

Letter from the Executive Director of the GRC to Custodian's Counsel. The Executive Director states that because the Appellate Division issued its written opinion affirming the Council's Interim Order dated April 8, 2010 on July 13, 2011, and because the Borough has not served a petition for certification to the Supreme Court and the time to do so has passed, the Council's Order referenced above is no longer stayed. The Executive Director further states that the Borough must disclose to the Complainant

copies of the requested cell phone bills with the city and state of the location of the cell phone calls unredacted within five (5) business days of receipt of this letter.

September 12, 2011

E-mail from Custodian's Counsel to the Executive Director, attaching a copy of the cover-letter sent to Complainant's Counsel dated September 8, 2011, enclosing the documents requested, narrowly redacted in accordance with the rulings of the Government Records Council and the Appellate Division. Custodian's Counsel also states that as Ordered by the Appellate Division, the Borough has provided Complainant's Counsel a check in the amount of $6500.00 in full payment of his attorney fees. Custodian's Counsel states that having fully complied with the findings of the Government Records Council and the Appellate Division, this matter is fully resolved.

September 13, 2011

E-mail from Complainant's Counsel to the GRC, attaching a copy of a letter to Custodian's Counsel dated September 13, 2011. In said letter, Complainant's Counsel states that although the Borough provided the requested records and paid the attorney fees ordered by the Appellate Division, the Council deferred the issue of whether the Complainant is a prevailing party entitled to an award of prevailing party attorney fees pursuant to N.J.S.A. 47:1A-6 pending the Custodian's compliance with the Council's Interim Order dated April 8, 2010. Counsel states that when the Council makes such decision, Counsel will seek an award of such fees.

October 31, 2011

E-mail from the GRC to Complainant's Counsel. The GRC asks Counsel to confirm whether he received the refund of $8.42 which the Council's April 8, 2010 Interim Order required the Borough of Mount Arlington to pay to the Complainant in this matter.

October 31, 2011

E-mail from Complainant's Counsel to the GRC. Counsel states that the Borough refunded the required $8.42 to Counsel, which Counsel then forwarded to the Complainant.

November 1, 2011

E-mail from the GRC to Complainant's Counsel. The GRC asks the date that the Borough provided the refund required by the Council in the Interim Order.

November 1, 2011

E-mail from Complainant's Counsel to the GRC. Complainant's Counsel states that the Borough provided the required refund on August 27, 2010.

Analysis

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

OPRA states that:

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

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

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

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

In the matter before the Council, the Complainant filed a Denial of Access Complaint on April 18, 2008 alleging that she was unlawfully denied access to cell phone bills from October and September 2007 for all Borough employees containing the city and state of the telephone numbers called. After the filing of this Denial of Access Complaint and the issuance of the Council's April 8, 2010 Interim Order, the Council ordered the Custodian to release the requested records with appropriate redactions and to refund to the Complainant the difference between the $10.00 copying fee the Complainant was charged and the $1.58 which was the actual cost of the audiotapes, or $8.42, within five (5) business days from receipt of the Interim Order. The Custodian subsequently filed an appeal of the Council's Interim Order with the Superior Court of New Jersey, Appellate Division. On July 13, 2011 the Appellate Division affirmed the Council's April 8, 2010 Interim Order in its entirety. On September 12, 2011, the Custodian provided the requested records to the Complainant.[8] On November 1, 2011,

[8] The GRC notes that the Custodian failed to provide certified confirmation of compliance with the Council's Interim Order dated April 8, 2010, to the Executive Director, in accordance with N.J. Court Rules, 1969 R. 1:4-4 (2005).

Complainant's Counsel confirmed that the Borough refunded the required $8.42 to the Complainant on August 27, 2010.

The Custodian failed to bear her burden of proof that the redactions made to the requested cell phone bills were authorized by law as required by N.J.S.A. 47:1A-5.g. Moreover, the Custodian failed to articulate a basis for the need to keep the cities and states of the destination of cell phone calls confidential, as required by the common law pursuant to North Jersey Newspapers, *supra*. *See* Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 865 (App.Div. Mar. 31, 2008). Additionally, the Custodian's charge of $5.00 each for two audio recordings of the requested meeting minutes was unreasonable and in violation of N.J.S.A. 47:1A-5.b., and the Custodian failed to provide the required refund of $8.42 to the Complainant within five (5) business days of the Council's April 8, 2010 Interim Order, as required by such Interim Order. However, the Custodian eventually provided the required refund to the Complainant on August 27, 2010, although she failed to provide certified confirmation of same to the Executive Director, and the Custodian provided the requested records to the Complainant as ordered by the Superior Court of New Jersey, Appellate Division, and the Custodian did not unlawfully deny the Complainant access to the requested receipts from 2002 to the present for Holiday Inn Express Hotel and Marriott Hotel because such request was invalid under OPRA pursuant to MAG Entertainment LLC. v. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009) and Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007) because it would have required the Custodian to conduct research. Therefore, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a "prevailing party" if he/she achieves the desired result because the

complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

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

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra,* at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999). The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.' Singer v. State, 95 N.J. 487, 495, cert denied (1984)."

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.[9] 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)."

[9] 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.

In the instant complaint, the Complainant filed a Denial of Access Complaint on April 18, 2008, alleging that she was unlawfully denied access to cell phone bills from October and September 2007 for all Borough employees containing the city and state of the telephone numbers called. After the filing of this Denial of Access Complaint and the issuance of the Council's April 8, 2010 Interim Order, the Council ordered the Custodian to release the requested records with appropriate redactions and to provide a refund of $8.42 within five (5) business days from receipt of the Interim Order. The Custodian filed an appeal of the Council's Interim Order with the Superior Court of New Jersey, Appellate Division; on July 13, 2011 the Appellate Division affirmed the Council's April 8, 2010 Interim Order in its entirety. On September 12, 2011, the Custodian provided the requested records to the Complainant.[10] On November 1, 2011, Complainant's Counsel confirmed to the GRC that the Custodian refunded the $8.42 overcharge on August 27, 2010.

Therefore, pursuant to Teeters, *supra*, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id*. at 432. Specifically, the Appellate Division affirmed the Order of the Council that the Custodian provide the Complainant with copies of the requested cell phone bills containing the city and state of the locations of calls received from Borough-issued cell phones. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because the Custodian unlawfully denied access to the requested cell phone bills containing the city and state of the locations of calls received from Borough-issued cell phones. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, adjudicated concurrently herewith, an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to bear her burden of proof that the redactions made to the requested cell phone bills were authorized by law as required by N.J.S.A. 47:1A-5.g. Moreover, the Custodian failed to articulate a basis for the need to keep the

[10] However, as noted above, it is unclear from the record whether the Custodian has provided the required $8.42 refund to the Complainant.

cities and states of the destination of cell phone calls confidential, as required by the common law pursuant to North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9 (1992). *See* Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 865 (App.Div. Mar. 31, 2008). Additionally, the Custodian's charge of $5.00 each for two audio recordings of the requested meeting minutes was unreasonable and in violation of N.J.S.A. 47:1A-5.b., and the Custodian failed to provide the required refund of $8.42 to the Complainant within five (5) business days of the Council's April 8, 2010 Interim Order, as required by such Interim Order. However, the Custodian eventually provided the required refund to the Complainant on August 27, 2010, although she failed to provide certified confirmation of same to the Executive Director, and the Custodian provided the requested records to the Complainant as ordered by the Superior Court of New Jersey, Appellate Division, and the Custodian did not unlawfully deny the Complainant access to the requested receipts from 2002 to the present for Holiday Inn Express Hotel and Marriott Hotel because such request was invalid under OPRA pursuant to MAG Entertainment LLC. v. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009) and Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007) because it would have required the Custodian to conduct research. Therefore, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

2. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006)the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Appellate Division affirmed the Order of the Council that the Custodian provide the Complainant with copies of the requested cell phone bills containing the city and state of the locations of calls received from Borough-issued cell phones. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because the Custodian unlawfully denied access to the requested cell phone bills containing the city and state of the locations of calls received from Borough-issued cell phones. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, adjudicated concurrently herewith, an enhancement of the lodestar fee is not appropriate in

this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

November 22, 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

April 8, 2010 Government Records Council Meeting

Gayle Ann Livecchia
Complainant
v.
Borough of Mount Arlington (Morris)
Custodian of Record

Complaint No. 2008-80

At the April 8, 2010 public meeting, the Government Records Council ("Council") considered the April 1, 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. The Custodian has failed to bear her burden of proof that the redactions made to the requested cell phone bills were authorized by law as required by N.J.S.A. 47:1A-5.g. Moreover, the Custodian has failed to articulate a basis for the need to keep the cities and states of the destination of cell phone calls confidential, as required by the common law pursuant to North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9 (1992). *See* Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 865 (App.Div. Mar. 31, 2008).

2. The Custodian has failed to show that the Council's November 19, 2009 Order regarding the disclosure of the city and state of calls made on Borough-issued cell phones is (1) based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence, as required by In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

3. The Custodian has failed to show that the Council's November 19, 2009 Order regarding the actual costs of reproducing the requested audiotape is (1) based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence, as required by In The Matter Of The Petition Of Comcast

Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

4. Because the Custodian has failed to meet the required standard for reconsideration of the Council's November 18, 2009 Interim Order, the Custodian's Motion for Reconsideration of the Council's November 19, 2009 Interim Order is denied.

5. **The Custodian must disclose to the Complainant copies of the requested cell phone bills with the city and state of the location of the cell phone calls unredacted, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005),[1] to the Executive Director, within five (5) business days of receipt of this Order.**

6. Because the Custodian certified that the actual cost of each audiotape which was necessary to reproduce the meeting minutes requested by the Complainant, and because the evidence of record indicates that two audiotapes were required to reproduce the requested meeting minutes, the Custodian shall refund to the Complainant the difference between the $10.00 copying fee the Complainant was charged and the $1.58 which was the actual cost of the audiotapes, or $8.42.

7. **The Custodian shall comply with Paragraph #6 above, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005),[2] to the Executive Director, within five (5) business days of receipt of this Order.**

8. 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.

9. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 8th Day of April, 2010

[1] "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."
[2] "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."

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynne A. Lack, Secretary
Government Records Council

Decision Distribution Date: April 13, 2010

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
April 8, 2010 Council Meeting

Gayle Ann Livecchia[1] **GRC Complaint No. 2008-80**
Complainant

v.

Borough of Mount Arlington (Morris)[2]
Custodian of Records

Records Relevant to Complaint:
November 19, 2007 OPRA request

Cell phone bills for October and September 2007, including itemized list of phone calls, for all Borough of Mount Arlington ("Mt. Arlington") employees.

December 17, 2007 OPRA requests[3]

1. Receipts from 2002 to the present for Holiday Inn Express Hotel and Marriott Hotel.[4]
2. Audio tape of December 10, 2007 council meeting.

Requests Made: November 19, 2007 and December 17, 2007,
Responses Made: November 27, 2007 and December 27, 2007
Custodian: Linda DeSantis
GRC Complaint Filed: April 18, 2008[5]

Background

November 18, 2009

Government Records Council's ("Council") Interim Order. At its November 18, 2009 public meeting, the Council considered the November 10, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because no privacy issues can be implicated by the disclosure of a generic city and state without any personal identifiers such as a telephone number, the Custodian's redaction of the city and state of the location of cell phone calls from the requested cell phone bills violated N.J.S.A. 47:1A-5.g.

[1] Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Oxford, NJ).
[2] Represented by Thomas A. Segreto, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).
[3] The Complainant filed two (2) separate OPRA requests on December 17, 2007.
[4] The Complainant included addresses for both hotels.
[5] The GRC received the Denial of Access Complaint on said date.

2. **The Custodian must disclose to the Complainant copies of the requested cell phone bills with the city and state of the location of the cell phone calls unredacted, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005),[6] to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**

3. Because the Complainant's request [for "receipts from 2002 to the present for Holiday Inn Express Hotel and Marriott Hotel"] would require the Custodian to conduct research, the request is invalid pursuant to MAG Entertainment LLC. v. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), and Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009.

4. Pursuant to N.J.S.A. 47:1A-5.b and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian must charge the actual cost of duplicating the audiotapes. As such, the Custodian's charge of $5.00 each for two audio recordings of the requested meeting minutes is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must therefore charge the actual cost of the audiotapes and shall not include the cost of labor or other overhead expenses associated with making the copy; to the extent that the actual cost of duplication of such audiotapes is less than the $5.00 per tape charged by the Custodian, the Custodian must refund the difference.

5. **The Custodian must provide to the Council a certification of the actual costs associated with duplication of an audiotape, excluding labor or other overhead expenses associated with making the copy, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**

6. Based on the Appellate Division's decision in Windish v. Mount Arlington Board of Education, 2007 N.J. Super. Unpub. Lexis 228, the Custodian in the matter before the Council properly charged the Complainant the enumerated copying rates set forth at N.J.S.A. 47:1A-5.b.

7. It is reasonable for a custodian to charge a requestor the actual postage cost associated with delivering records by mail. The Custodian in the matter before the Council must charge *actual* postage cost not anticipated postage cost associated with delivery by mail of the requested records. The Custodian must also provide the GRC a certified confirmation of the actual postage cost.

[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."

8. **The Custodian must provide to the Council a certification of the actual postage costs associated with delivery by mail of the request records, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**

9. 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.

10. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 pending the Custodian's compliance with the Council's Interim Order.

November 20, 2009

Council's Interim Order distributed to the parties.

November 23, 2009

Telephone call from Jacqueline Gioso on behalf of Custodian's Counsel. Ms. Gioso seeks an extension of time until December 8, 2009 for the Custodian to submit the certification required by the Council's November 18, 2009 Interim Order.

November 23, 2009

Telephone call from the GRC to Jacqueline Gioso. The GRC grants the request for an extension of time to December 8, 2009 for the Custodian to submit the certification required by the Council's November 18, 2009 Interim Order.

November 25, 2009

Letter from Jacqueline Gioso to the GRC. Ms. Gioso confirms that an extension of time to December 8, 2009 to respond to the Council's Interim Order dated November 18, 2009 has been granted.

December 8, 2009

Letter from Custodian's Counsel to the GRC attaching a Supplemental Certification of the Custodian, Request for Stay and a Request for Reconsideration of the Council's November 18, 2009 Interim Order.

The Custodian certifies that she is the Municipal Clerk of the Borough of Mount Arlington. The Custodian further certifies that by letter dated December 27, 2007, Tina Mayer, Assistant to the Borough Clerk, under the Custodian's direction advised the Complainant that the cost associated with the production of a copy of the requested audiotapes was $5.00 per tape for a total of $10.00. The Custodian certifies that the Complainant made no objection to the proposed cost of producing the audiotapes. The Custodian certifies that the Complainant paid the quoted charge without reservation of rights as to any objection to the charge. The Custodian certifies that, accordingly, no denial of access to the requested records occurred.

The Custodian certifies that pursuant to § 4-25 of the Code of the Borough of Mount Arlington, the Municipal Governing Body adopted a regulation prescribing a fee for certain classified documents. The Custodian further certifies that subsection D of § 4-25 of the Code of the Borough of Mount Arlington specifically identifies a charge for a duplication of videotapes and/or audiotapes or similar as constituting an extraordinary duplication process and assessed a charge of $5.00 per copy. The Custodian also certifies that said ordinance was in existence at the time of the OPRA request which is the subject of this Denial of Access complaint.

The Custodian certifies that in its November 18, 2009 Interim Order, the Council required the Custodian to provide the GRC with a certification as to the "actual costs associated with the duplication of an audiotape, excluding labor or overhead expenses associated with making the copy and simultaneously provide certified confirmation of compliance…" within five (5) business days of the Council's Order. The Custodian certifies that the Borough, in adopting its fee ordinance for duplication of audiotapes, was not endeavoring to charge a premium for audiotapes, but to recoup its actual costs as best as it could estimate within a reasonable degree of accuracy, in consideration of the anticipated volume of OPRA requests.

The Custodian also certifies that prior to the Complainant's OPRA request and other similar OPRA requests for audiotapes, the Borough did not have equipment to duplicate the recording of the minutes. The Custodian certifies that the Borough was required to purchase an audiotape duplicating machine which was used exclusively to duplicate audiotapes. The Custodian further certifies that the "actual costs" associated with the duplication of audiotapes, "excluding labor or overhead expenses associated with making the copy" at the time of the Complainant's OPRA request for same is difficult to calculate because the Borough would need to know the cost of the tape, the cost of electricity per kilowatt hour and the cost of the specially purchased machine on a pro rata basis in order to properly calculate the actual costs.

The Custodian certifies that at the time of the Complainant's OPRA request, the $5.00 per tape copying fee charged to the Complainant was the Borough's best estimation of the reasonable actual costs. The Custodian further certifies that at no time were labor or overhead costs ever factored into the $5.00 audiotape charge.

The Custodian certifies that the destinations of the calls that were redacted from the requested cell phone bills do not relate to the issue of whether the cell phones were used for the personal benefit of Borough personnel, whether Borough personnel were using minutes beyond what was authorized by the cell phone plans, or whether the Borough personnel were using the cell phones to conduct personal business during working hours.

The Custodian also certifies that, with regard to the aspect of the OPRA complaint regarding redaction of call destinations, the reason the Complainant sought the requested cell phone bills, as articulated by her attorney, was because the Complainant "was suspicious that Borough Personnel were either using the cell phones for their personal benefit, were using minutes beyond what was authorized by the cell phone plans, or were using the cell phones to conduct personal business during working hours (or a

combination of the three. The Custodian certifies that the aspects of the telephone bills which were redacted were the cell phone numbers and the destination of the calls which do not relate at all to the stated reason for the request to disclose the redacted call destinations.

The Custodian certifies that in redacting the cell phone call destinations, the Borough reasonably relied upon the decision of the Appellate Division in Gannett News Partners LLC v. County of Middlesex, 379 N.J. Super. 205, 216 (App. Div. 2005), which incorporated the language of North Jersey Newspapers Co. v. Passaic County Board of Chosen Freeholders, 127 N.J. 2, (1992), which held that " a person's privacy interest includes 'the people and places one calls on the telephone, no less than the resulting conversation.' Thus, a person's expectation of privacy extends to telephone toll billing records."

The Custodian argues that although the Complainant's Counsel asserts that the Gannett decision is distinguishable from the instant matter, the Custodian will rely upon the legal argument advanced by the Custodian's Counsel with regard to this issue. The Custodian contends that the Supreme Court in North Jersey analyzed the privacy issue associated with cell phone billing records. The Custodian argues that although North Jersey was decided under the Right to Know Law, the principles of privacy transcend the differences between OPRA and the Right to Know Law. The Custodian argues that in fact, the Appellate Division in Gannett specifically adopted the analysis of North Jersey with regard to the redaction of such records on the basis of the privacy analysis. The Custodian asserts that both cases remain good law and have not been overturned or questioned with regard to the privacy analysis contained therein. The Custodian further argues that in North Jersey, the Court stated clearly and unequivocally that "[w]e need not debate whether the legislature could require such disclosure under the guarantees provided by the New Jersey Constitution. As we explained in State v. Mollica,[7] … a person's privacy interest includes 'the people and places one calls on a telephone, no less than the resulting conversations. … Thus, a person's expectation of privacy extends to telephone toll billing records… This expectation of privacy is rooted in a strong legislative tradition of protecting the privacy of telephone communications.[8]" The Custodian asserts that the Borough and the Custodian adopt the privacy interest analysis of the New Jersey Supreme Court.

The Custodian also certifies that, with regard to the actual costs of postage, no charge was made to the Complainant. The Custodian certifies that the postage identified in the response was anticipated and based upon the First Class weight of the response package, including two (2) audiotapes and the weight of the documents responsive to the request. The Custodian certifies that the cost was to be based upon the appropriate postage as identified by the U.S. Postal Service per the weight of the package. The Custodian certifies that it should be clear that no charge was made to the Complainant for postage because the Complainant appeared in the municipal building and picked up the package.

[7] Citations omitted.
[8] Citations omitted.

The Custodian requests that the Council reconsider its Interim Order regarding the redaction of cell phone call destinations from the requested October and September 2007 cell phone bills, as well as the charge for the production of audiotapes. The Custodian asserts that mistake and extraordinary circumstances require the Council's reconsideration of its November 18, 2009 Interim Order.

The Custodian also requests a stay of the Council's November 18, 2009 Interim Order. The Custodian asserts that pursuant to *N.J.A.C.* 5:105-2.12(f), the irreparable harm posed by the application of the Interim Order is the Borough and Custodian's reliance on the New Jersey Supreme Court decision and the adverse implications of a finding from the GRC that there was a violation of OPRA. The Custodian contends that the request for reconsideration would be moot if she were required to produce the records in unredacted fashion and, moreover, that requiring the Custodian to disclose the unredacted records would effectively deny the Borough and Custodian access to the judicial system and impinge upon their ability to rely upon precedential caselaw.

The Custodian argues that the Borough's reliance upon the Supreme Court's holding as to privacy interests in call destinations makes the likelihood of success on the merits a virtual certainty. The Custodian also argues that the harm to others if a stay of the Council's November 18, 2009 Interim Order is not granted is also clear in that the taxpayers of the Borough of Mount Arlington are exposed to potential liability because of the GRC's decision that a violation of OPRA occurred, and if the documents are produced in unredacted fashion, the Borough may not continue to rely on the Supreme Court decisions.

The Custodian further argues that the public interest is clear that a municipality should be entitled to rely on the holdings of the New Jersey Supreme Court when the issue is wholly on all fours with a present factual scenario. The Custodian asserts that in the context of OPRA, while municipalities are held to a high standard given the public's right to access government records, a municipality must also have the right to rely on precedential caselaw articulating what information in a given record is redactable on the basis of privacy as determined by the New Jersey Supreme Court.

The Custodian asserts that the GRC's decision with regard to the redaction of the destination of cell phone calls is directly opposed to the New Jersey Supreme Court's statement in North Jersey Newspapers Co. v. Passaic County Bd. Of Chosen Freeholders, 127 N.J. 9 (1992) that:

> "[a] person's privacy interest includes 'the people and places one calls on a telephone, no less than the resulting conversations.' Thus, a person's expectation of privacy extends to telephone toll-billing records." *Id.* at ___.

The Custodian contends that although North Jersey was decided under the Right to Know Law which preceded OPRA, the Supreme Court fully analyzed this issue in the context of "privacy interest." The Custodian asserts that the North Jersey Court fully recited its rationale in that decision and that the Gannett decision amplifies the North Jersey decision and marries the analysis to OPRA. The Custodian states that she is under

no obligation to expand upon the analysis of the New Jersey Supreme Court and, further, states that the GRC as an administrative agency cannot decline to follow the express ruling of the New Jersey Supreme Court. The Custodian contends that only the New Jersey Supreme Court can overrule itself on this issue. The Custodian states that, accordingly, the GRC's decision regarding the nonexistence of a privacy interest in the disclosure of call destination on cell phone bills is contrary to the holding of the New Jersey Supreme Court and is therefore "palpably incorrect, irrational and fails to take into consideration and appreciate the significance of probative, competent evidence which was properly redacted pursuant to controlling case law."

The Custodian contends that the GRC erred in attempting to utilize a balancing analysis, because nothing about the destination relates to the Complainant's "suspicion" that Borough personnel were either using the cell phone for their personal benefit, were using minutes beyond what was authorized by the cell phone plans, or were using the cell phones to conduct personal business during working hours or a combination of the three. The Custodian notes that the Complainant did not make a common law right to access request for the cell phone records, and further notes that never before her complaint did the Complainant articulate that the destinations of the calls relate to the issue of whether the cell phones were used for the personal benefit of Borough employees, utilized minutes beyond what was authorized by the cell phone plans, or were used to conduct personal business during working hours. The Custodian contends that the articulated reason for the information does not rationally relate to the information requested and aside from the reasons identified above, the GRC failed to articulate any analysis of how the Complainant's reason for requesting the record relates to the information requested to justify compelling the production of the information.

The Custodian argues that, while she disagrees with the GRC even analyzing the issues from a balancing perspective, unless there is a logical nexus between the reason for the request and the compulsion to provide the information in unredacted fashion, the GRC's order would be arbitrary and capricious. The Custodian contends that courts have repeatedly recognized that administrative agency decisions can be overturned if there is a showing that the decision was "arbitrary, capricious or unreasonable or it was not supported by substantial credible evidence in the record as a whole." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 304 (App. Div. 1993); Walcott v. City of Plainfield, 282 N.J.Super, 121, 129 (App. Div. 1995).

The Custodian asserts that in regards to an agency's interpretation of statutes, the New Jersey Supreme Court held as follows in IMO New Jersey Turnpike Authority v. American Federation of State, County and Municipal Employees, Council 73, 150 N.J. 331 (1997):

> "[w]e have consistently accorded "substantial deference to the interpretation of the agency charged with enforcing an act." Merin v. Maglaki, 126 N.J. 430, 436-37 (1992). An agency's interpretation prevails unless "plainly unreasonable." *Ibid.* (citing Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 327 (1984)); cf. Greenwood v. State Police Training Center, 127 N.J. 500, 513 (1992) (reiterating that agencies "have no superior ability to resolve purely legal questions," and that courts are

> not bound by agency's resolution of legal issue). Our caselaw establishes, however, that if an agency's statutory interpretation is contrary to the statutory language, or if the agency's interpretation undermines the Legislature's intent, no deference is required. *See* GE Solid State, Inc. v. Director, Div. of Taxation, 132 N.J. 298, 306-07 (1993); In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 450 (1992). Clear legislative intent cannot be trumped by countervailing administrative practices. Airwork Serv. Div. v. Director, Div. of Taxation, 97 N.J. 290, 296 (1984), *cert. denied*, 471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278 (1985). Furthermore, an administrative agency may not interpret a statute to give it greater effect than its statutory language permits. *See* Kingsley v. Hawthorne Fabrics, Inc., 41 N.J. 521, 528 (1964); *see also* Service Armament Co. v. Hyland, 70 N.J. 550, 563, 362 A.2d 13 (1976) ("[A]n administrative interpretation which attempts to add to a statute something which is not there can furnish no sustenance to the enactment.")." 150 N.J. at 351-52.

Moreover, the Custodian states that in Marc Sherman v. Citibank (South Dakota) NA, 143 N.J. 35 (1995), the Court held the following with regard to agency interpretation of statutes:

> "'It is emphatically the province and duty of the judicial department to say what the law is.' Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803). Statutory construction is ultimately a judicial function. *See, e.g.*, SEC v. Sloan, 436 U.S. 103, 118, 98 S. Ct. 1702, 1712, 56 L. Ed. 2d 148, 161 (1978); Federal Maritime Comm. v. Seatrain Lines, Inc., 411 U.S. 726, 745-46, 93 S. Ct. 1773, 1784-85, 36 L. Ed. 2d 620, 633-34 (1973). Indeed, 'one of the Judiciary's characteristic roles is to interpret statutes.' Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230, 106 S. Ct. 2860, 2866, 92 L. Ed. 2d 166, 179 (1986). Accordingly, the Supreme Court in Chevron, *supra*, did not state that silence or ambiguity in a statute automatically requires a court to delegate its entire interpretive responsibility to an agency, especially when an agency's interpretation is contrary to the purpose of the statute or inconsistent. *See* West v. Bowen, 879 F.2d 1122, 1138 (3d Cir.1989) (Mansmann, J., concurring and dissenting)." 143 N.J. at 37-38.

With regard to the issue of the duplication of audiotapes and the actual cost thereof, the Custodian states that N.J.S.A. 47:1A-5.g. provides that:

> "in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance. The requestor shall have the opportunity to review and object to the charge prior to it being incurred."

The Custodian contends that in the instant case, prior to OPRA requests for audiotapes, the Borough did not have equipment to duplicate recordings of meeting minutes. The Custodian argues that the actual cost of duplication is not merely the cost of the tape itself, but the expenses associated with the machine to duplicate the recording on to an

audiotape and the electrical costs to operate the machine itself. The Custodian contends that the difficulty of a small municipality such as Mount Arlington,[9] in ascertaining actual costs of duplication was recognized by the GRC and the Appellate Division in Windish v. Borough of Mount Arlington BOE, 2007 N.J. Super. Unpub. Lexis 228.[10] The Custodian contends that the GRC should apply the same common sense approach to analyzing the existing ordinance and its allocation of $5.00 per audiotape for duplication. The Custodian asserts that in adopting its fee ordinance, the Borough was not endeavoring to charge a premium for audiotapes, but was trying to recoup its actual costs as best as it could estimate within a reasonable degree of accuracy in consideration of the anticipated volume of OPRA requests.

The Custodian asserts that the copying charge should not be considered excessive and with regard to the interpretation of "actual cost" the GRC should apply "the golden rule of statutory interpretation" adopted by the Supreme Court of New Jersey in Dickinson v. Fund for Support of Free Public School, 95 N.J. 65 (1983), that the unreasonableness of a particular result arising from the selection of one among several possible alternative interpretations strongly militates in favor or the adoption of an interpretation that embraces a reasonable result. 2A Sutherland, Statutory Construction § 45.12 at 37 (4 ed. Sands 1973); Clifton v. Passaic Cty. Bd. of Taxation, 28 N.J. 411, 421 (1958) ("A construction 'calling for unreasonable results will be avoided where reasonable results consistent with the indicated purpose of the act as a whole are equally possible,'" quoting Elizabeth Federal Savings & Loan Ass'n v. Howell, 24 N.J. 488, 508 (1957)); *see* Kervick v. Bontempo, 29 N.J. 469 (1959).

The Custodian contends that the GRC should also take into consideration that the Borough has since revised its ordinance to lower the costs of the tape and has acquired more advanced equipment to produce audio CDs instead of antiquated audiotapes. The Custodian asserts that what was not objected to in the initial request and only stated in the Denial of Access complaint will not occur again. The Custodian further asserts that it would be impossible for a small municipality to state the actual hard costs associated with the production of the tape years after it was produced. The Custodian finally asserts that the $5.00 per audiotape copying fee in the ordinance was authorized by N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. and represented the best approximation of the actual charge to the Borough for producing audiotapes to the public.

December 17, 2009

Letter from Complainant's Counsel to the GRC. Complainant's Counsel objects to the Custodian's request for a stay and request for reconsideration.

Complainant's Counsel asserts that the Custodian's requests should be denied. Complainant's Counsel contends that the Custodian has not represented to the GRC that it intends to appeal the GRC's Interim Order dated November 18, 2009. Complainant's Counsel further contends that a stay must be denied absent such a representation. Complainant's Counsel asserts that none of the four (4) factors to be considered in

[9] The Custodian contends that Mount Arlington has a population of 4,663 according to the most recent federal decennial (2000) census.

[10] The Custodian attached a copy of the Windish decision to her moving papers.

granting a stay have been met. Custodian's Counsel further asserts that the first factor, clear likelihood of success on the merits, has not been met because the Custodian's legal arguments have no merit. Complainant's Counsel also argues that the Custodian's request for a stay is frivolous because not only has the Custodian provided no basis for charging $5.00 for audio recordings, but the Borough amended its ordinance to reduce its copying charges of audiotapes and CDs/DVDs from $5.00 to $0.65 and $0.60 respectively. Complainant's Counsel argues that the Custodian cannot reasonably claim that it has a clear likelihood of success when it has already reduced its copying charges for audio recordings.

Complainant's Counsel asserts that the Custodian has failed to represent that it intends to appeal the Council's Interim Order to the Appellate Division, and that any such appeal is unlikely to succeed because the Appellate Division has usually deferred to the GRC's expertise in enforcing OPRA.[11]

Complainant's Counsel argues that there is no danger of irreparable harm regarding the Council's Interim Order concerning audio recordings. Complainant's Counsel asserts that the GRC's Interim Order requires the Custodian to determine the actual cost of copying audio recordings, and if the actual cost is in excess of $5.00, to refund the difference to the Complainant. Complainant's Counsel further asserts that the Custodian charged the Complainant $10.00 for the audio recordings at issue; therefore, the maximum exposure to the Custodian regarding the refund is $10.00

Complainant's Counsel contends that, with regard to the redacted telephone billing records, the Council has ordered the Custodian to disclose the cities and states of the calls that were made. Complainant's Counsel further asserts that, despite the fact that the Custodian herself has submitted a certification, the Custodian does not state what privacy interests are implicated when a Borough employee places a personal call during normal business hours on a cell phone paid for by the Borough. Complainant's Counsel states that the Custodian has articulated no specific, irreparable hard that will result if the cities and states of the cell phone calls are revealed. Complainant's Counsel further states that absent evidence that there will be any irreparable harm; this factor weighs in favor of the Complainant.

Complainant's Counsel further contends that, regarding the third factor (the harm to others if the stay is not granted), there is no evidence that any third person would be harmed if a stay were not issued.

Complainant's Counsel also argues that, the fourth factor, the public interest, clearly weighs in favor of no stay. Complainant's Counsel asserts that the public's interest is in disclosure of public records, and notes that the OPRA request in this matter was filed in November 2007. Complainant's Counsel further asserts that the public interest is harmed when it takes years to gain access to public records, and further delays will harm that public interest.

[11] Citations omitted.

Complainant's Counsel also asserts that the Custodian's request for reconsideration merely re-argues the legal points that have already been fully argued by the parties. Complainant's Counsel further asserts that rather than base its request on any mistake or extraordinary circumstance, the Custodian merely re-argues the same points that the GRC has already considered and rejected.

Complainant's Counsel asserts that the Custodian has made no effort to distinguish the instant matter from the long line of cases decided by the Council in which it was determined that copies of audio recordings must be provided to the public at actual cost, which is the cost of purchasing the tape, CD or DVD used to make the recording, unless a special service charge is warranted.[12] Complainant's Counsel further asserts that the instant case is distinguishable from the case of Windish v. Borough of Mount Arlington BOE, 2007 N.J. Super. Unpub. Lexis 228, cited by the Custodian. Complainant's Counsel states that in Windish, the GRC deferred to the statutory framework of costs for making paper copies set forth in OPRA. Complainant's Counsel further states that, in the current case, the statutory framework for making copies of records other than those in paper format is actual cost.

Complainant's Counsel asserts that the Custodian's argument that its $5.00 charge was reasonable makes no sense in light of the fact that afterwards Mount Arlington reduced its charge for audiotapes from $5.00 to less than $1.00. Complainant's Counsel further asserts that if the current charge represents a reasonable estimation of costs, the prior charge was *per se* unreasonable.

Finally, Complainant's Counsel asserts that the cases cited and discussed by the Custodian regarding the redaction of the cell phone billing records do not compel a result different from the one already rendered by the Council. Complainant's Counsel observes that none of the authority cited by the Custodian is new; all of the cases discussed by the Custodian were previously cited by the Custodian in prior submissions. Complainant's Counsel asserts that all of the cases cited by the Custodian are distinguishable from the instant matter.

Complainant's Counsel states that North Jersey Newspapers v. Passaic County Board of Chosen Freeholders, 127 N.J. 9 (1992), does not prohibit the disclosure of cities and states that public officials call but instead recognized that whether telephone records should be disclosed is an inquiry that must be made on a case by case basis. Complainant's Counsel states that State v. Mollica, 114 N.J. 329 (1989) is clearly distinguishable because that case concerned whether guests at a hotel had a reasonable expectation of privacy in telephone calls made from hotel rooms, while the instant matter concerns telephone calls made by a public official during business hours, using a telephone paid for with public funds.

Complainant's Counsel therefore urges the GRC to deny the Custodian's request for reconsideration.

[12] Citations omitted.

January 4, 2010

Letter from Custodian's Counsel to the GRC attaching a Supplemental Certification of the Custodian. Custodian's Counsel submits a supplemental certification as to actual costs for the production of the audiotape. Custodian's Counsel states that the Borough continues to maintain that the actual hard cost for the audiotape is impracticable to calculate because of the fluctuating costs of electricity, however, based upon the costs of the equipment and the audio tape, the Custodian has endeavored to provide an analysis of the actual cost to produce the audiotape at the time of the request.

The Custodian certifies that prior to the Complainant's OPRA request and other similar OPRA requests for audiotapes, the Borough did not have equipment to duplicate the recording of the minutes. The Custodian certifies that the Borough was required to purchase an audiotape duplicating machine which was exclusively used to duplicate audiotapes. The Custodian further certifies that the "actual costs" associated with the duplication of audiotapes at the time of the request for same, excluding labor or overhead expenses associated with making the copy, is difficult to calculate because the Custodian would need to know the cost of the tape, the cost of electricity per kilowatt hour and the cost of the specially purchased machine on a pro rata basis to properly calculate the actual costs. The Custodian certifies that at the time of the Complainant's OPRA request, the $5.00 charge per tape was the Borough's best estimation of the reasonable actual costs. The Custodian certifies that at no time was labor or overhead costs factored into the $5.00 audiotape charge.

The Custodian further certifies that while it is impossible and/or impracticable for the Borough to provide an exact recitation of the actual costs of duplicating an audiotape at the time the Complainant's OPRA request was pending, the Custodian pulled the invoice for the tapes themselves, as well as the purchase order for the equipment which was necessary to purchase to fulfill the OPRA requests for audiotapes, and further, has pulled the OPRA requests for audiotapes during the time frame from the time the Borough purchased the audio duplicating equipment until the Borough acquired the new duplicating equipment which duplicates the audio recordings of the meetings onto a CD-ROM.

The Custodian certifies that the actual cost of the tape itself is $0.79 per tape. The Custodian further certifies that the actual cost of the equipment per OPRA request is divided by the number of OPRA requests received is $129.99 divided by 13 OPRA requests, for a per tape cost of $9.99. The Custodian certifies that she cannot calculate the cost of electricity to operate the duplication equipment. The Custodian certifies that the actual cost to duplicate each tape therefore appears to be $10.78, exclusive of electrical costs.

The Custodian certifies that the Borough did in fact reduce the fee for tapes and CDs, but not because the governing body thought the $5.00 per tape charge was excessive or unreasonable.

January 11, 2010

Letter from Complainant's Counsel to the GRC. Complainant's Counsel objects to the Custodian's submission of the Certification dated December 22, 2009 to the extent that the Custodian's certification includes the cost of audio duplicating equipment.

Complainant's Counsel asserts that if the Borough or the Custodian has reviewed legal precedent regarding what constitutes "actual cost" they would have noted that the term does not include labor or overhead. Complainant's Counsel further asserts that labor or overhead is only considered if the duplication of a government record warrants a special service charge. Complainant's Counsel notes that the GRC has previously stated that "the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy." Livecchia v. Borough of Mount Arlington, GRC Complaint No. 2008-80 (November 2009).

Complainant's Counsel contends that the GRC has already concluded that the $5.00 charge for the audiotapes exceeded the Borough's actual cost and therefore violated OPRA. The Complainant's Counsel argues that the Custodian is now certifying that the actual cost of one audiotape exceeds a charge that the GRC has already determined violates the law.

Complainant's Counsel contends that the Custodian's calculation exceeds the $5.00 charge previously assessed because she has incorporated the cost of purchasing audio equipment. Complainant's Counsel asserts that courts and the GRC have repeatedly held that the cost of duplicating records other than paper copies should be the actual cost of duplicating the record, less labor and overhead. *See, e.g.*, Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006); Renna v. Township of Warren, GRC Complaint No. 2008-40 (April 2009); Coulter v. Township of Bridgewater, GRC Complaint No. 2008-220 (November 2009); Wolosky v. Township of Frankford, GRC Complaint No. 2008-278 (December 2009). Complainant's Counsel contends that the Custodian is inflating the actual cost of making copies of CDs because they are incorporating the cost of the machine the Township bought to make the recordings. Complainant's Counsel argues that in no other case decided by the GRC involving audio recordings has the GRC included the purchase cost of the equipment necessary to make the copies. Complainant's Counsel contends this cost represents an overhead expense, which is not to be considered part of "actual costs" pursuant to statute and caselaw. Complainant's Counsel requests that the GRC disregard the Custodian's certification in this regard.

Complainant's Counsel further requests that, if the GRC should accept the argument that the actual cost of reproducing the requested records should include the cost to the Custodian of purchasing copying equipment, the Custodian's reasoning for calculating such charges is fatally flawed. Complainant's Counsel asserts that the Custodian divided the cost of the copying equipment by the number of OPRA requests received, not by the number of tapes actually copied. Complainant's Counsel notes that the Complainant requested two (2) tapes in her OPRA request, not one (1). Complainant's Counsel also states, that if this method were used to calculate costs, then either future OPRA requestors would be overcharged as more copies were made or the

Custodian would have to recalculate the cost upon receiving every OPRA request. Finally, Complainant's Counsel contends that if the request were recalculated, the Borough would charge future requestors less than past requestors for the same thing, which would be unfair.

Complainant's Counsel requests that the GRC therefore reject the Custodian's certified charge of $10.78 and asserts that the actual cost is at most $.79.

February 9, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC requests that the Custodian complete a Balancing Test Chart regarding the privacy interests alleged in the requested records and return same to the GRC within five (5) business days.

February 9, 2010

E-mail from the GRC to the Complainant's Counsel. The GRC requests that the Complainant complete a Balancing Test Chart regarding the need for the requested records and return same to the GRC within five (5) business days.

February 9, 2010

E-mail from Custodian's Counsel to the GRC. Custodian's Counsel states that he is unsure in what context the GRC is requesting the completion of the Balancing Test Chart. Custodian's Counsel asserts that if said chart is being requested in the context of the cell phone records, the Doe v Poritz analysis is not germane; Custodian's Counsel contends that the Supreme Court has already determined that call locations of cell phone records are confidential and exempt from disclosure under privacy laws. Custodian's Counsel asserts that this is a matter of precedential case law and fully expounded in the Custodian's brief in support of the motion for reconsideration.

Custodian's Counsel argues that the Court has never ruled that the privacy interests attached to cell phone numbers and call locations should be analyzed on a case by case basis and further argues that no Court has questioned the holdings of the Court decisions regarding cell phone numbers and call locations.

Custodian's Counsel asserts that, in the context of OPRA, a Custodian of Records must be able to rely upon precedential case law in the administration of the law. Custodian's Counsel contends that if review of such records is done on a case by case basis, the promptness expected under OPRA would be compromised and there would be a lack of uniformity in the administration of the law.

Custodian's Counsel requests that the GRC advise in what context this chart is requested. If the chart concerns the requested cell phone records, Custodian's Counsel states that to have the custodian provide this analysis during the pendency of the motion for reconsideration is prejudicial in that the Custodian did not articulate any fact specific reasons for the redaction in the same vein as the Doe v Poritz matter; Custodian's Counsel asserts that this issue is a matter of law which must be decided by the GRC prior to this analysis. Custodian's Counsel requests that the Council first decide the motion for reconsideration and if it agrees that the Supreme Court has already addressed this issue, the issue as it relates to the cell records should be concluded.

February 16, 2010

E-mail from Complainant's Counsel, attaching the Balancing Test Chart completed by the Complainant. The Complainant responded to the GRC's February 9, 2010 inquiry as follows:

Need for Access Questions	**Complainant's Response**
1. Why do you need the requested record(s) or information?	It is my belief that the Borough provided cell phones to Borough employees, which are used for personal use, without reimbursement. IRS code states that government employees who use the phones for personal use are to reimburse the municipality, yet no evidence of reimbursement exists. Calls to locations clearly not within the scope of business and during non-business hours would support claims of personal use of government cell phones. Also, the one billing statement where such information was provided indicated that the borough administrator was not at her duty station during work hours. Many of the calls originated in the Chatham/Florham Park area, which is her place of residence. Destination city/state information would provide information that this person is not at her specified duty station, even though she is submitting pay records indicating that she was working during that time. Per a prior OPRA request, the Borough does not have a work at home policy.
2. How important is the requested record(s) or information to you?	Without the destination cities and states it is impossible to prove that illegal use of the phone existed. It is suspected that this pattern of abuse has continued or if the administrator has continued to claim that she is working, when cell phone records indicate that she is at home.
3. Do you plan to redistribute the requested record(s) or information?	No.
4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?	No.

February 16, 2010

E-mail from Custodian's Counsel to the GRC. Custodian's Counsel states that he has received Complainant's Counsel's response to the request for a Doe v Poritz privacy inquiry. Custodian's Counsel states that he has not yet received a response to his e-mail regarding whether the Borough is still required to provide the response in light of the

myriad New Jersey Supreme Court decisions regarding privacy which are cited in the North Jersey and Gannet decisions.

February 16, 2010

E-mail from the GRC to Custodian's Counsel. The GRC states that the GRC continues to require the responses to the Balancing test chart requested on February 9, 2010. The GRC requests that Custodian's Counsel provide such responses by February 17, 2010.

February 17, 2010[13]

E-mail from Custodian's Counsel to the GRC, attaching the Balancing Test Chart completed by the Custodian. The Custodian responded to the GRC's February 9, 2010 inquiry as follows.

The Custodian asserts that, as to the issue regarding cell phone records, the information redacted from the records was done based upon privacy laws as analyzed by the New Jersey Supreme Court, both pre- and post-OPRA. The Custodian contends that the issue is a matter of law; in fact, the Gannett decision is both post-OPRA and post-Doe v Poritz. The Custodian contends that the information redacted is the exact information which the New Jersey Supreme Court has explicitly ruled is protected by the rights to privacy. The Custodian further contends that the Borough made no independent analysis of the privacy interests associated with the call location. The Custodian asks that the GRC apply the applicable law which is on all fours with the facts of the case at bar.

Factors for Consideration in Balancing Test	**Custodian's Response**
1. The type of record(s) requested.	Cell phone billing records.
2. The information the requested records do or might contain.	Information was provided but redacted per Gannett New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) and North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9 (1992), which provided: "A] person's privacy interest includes "the people **and places** one calls on a telephone, no less than the resulting conversations." Thus, a person's expectation of privacy extends to telephone toll-billing records." (emphasis added)
3. The potential harm in	In North Jersey at 18, the Court stated in clear and

[13] Custodian's Counsel asserted that the GRC required the completed Balancing Test Chart on February 18, 2010, rather than February 17, 2010 as asserted in the GRC's February 16, 2010 e-mail. However, in calculating the five (5) business day submission period, which began to run on February 10, 2010, the GRC counted Friday, February 12, 2010 (Lincoln's Birthday) as a business day but did not count Monday, February 15 (President's Day) as a business day. The five (5) business day time period therefore elapsed on Wednesday February 17, 2010.

any subsequent non-consensual disclosure of the requested records.	unequivocal terms: "We need not debate whether the legislature could require such disclosure under the guarantees provided by the New Jersey Constitution. As we explained in State v Mollica, 114 N.J. 329 (1989), **a person's privacy interests includes "the people and places one calls on a telephone, no less than the resulting conversations."** *Id*. at 344. Thus a person's expectation of privacy extends to telephone toll billing records. *Id*. at 341-42. That expectation of privacy is rooted in a strong legislative tradition of protecting the privacy of telephone communications. State v Minter 116 N.J. 269, 276(1989)." (emphasis added). The Borough and custodian adopt the privacy interest analysis of the Supreme Court.
4. The injury from disclosure to the relationship in which the requested record was generated.	In North Jersey at 18, the Court stated in clear and unequivocal terms: "We need not debate whether the legislature could require such disclosure under the guarantees provided by the New Jersey Constitution. As we explained in State v Mollica, 114 N.J. 329 (1989), **a person's privacy interests includes "the people and places one calls on a telephone, no less than the resulting conversations."** *Id*. at 344. Thus a person's expectation of privacy extends to telephone toll billing records. *Id*. at 341-42. That expectation of privacy is rooted in a strong legislative tradition of protecting the privacy of telephone communications. State v Minter 116 N.J. 269, 276 (1989)." (emphasis added). The Borough and Custodian adopt the privacy interest analysis of the Supreme Court.
5. The adequacy of safeguards to prevent unauthorized disclosure.	Information was provided but redacted per Gannett New Jersey Partners LP v. County of Middlesex, 379 N.J. Super 205, (App. Div. 2005) and North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9 (1992), which provided: "A] person's privacy interest includes "the people **and places** one calls on a telephone, no less than the resulting conversations." Thus, a person's expectation of privacy extends to telephone toll-billing records." (emphasis added).
6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.	In North Jersey at 18, the Court stated in clear and unequivocal terms: "We need not debate whether the legislature could require such disclosure under the guarantees provided by the New Jersey Constitution. As we explained in State v Mollica, 114 N.J. 329 (1989), **a person's privacy interests includes "the people and places one calls on a telephone, no less than the resulting**

	conversations." *Id*. at 344. Thus a person's expectation of privacy extends to telephone toll billing records. Id. at 341-42. That expectation of privacy is rooted in a strong legislative tradition of protecting the privacy of telephone communications. State v Minter 116 N.J. 269, 276(1989)." (emphasis added) The Borough and custodian adopt the privacy interest analysis of the Supreme Court.

Analysis

Whether the Custodian has met the required standard for reconsideration of the Council's November 18, 2009 Interim Order?

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

Applicable case law holds that:

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

The Custodian requested that the Council reconsider its Interim Order regarding the redaction of cell phone call destinations from the requested October and September 2007 cell phone bills, as well as the charge for the reproduction of audiotapes requested by the Complainant. The Custodian asserted that mistake and extraordinary circumstances require the Council's reconsideration of its November 18, 2009 Interim Order.

In support of the motion for reconsideration, the Custodian argued that the GRC's decision with regard to the redaction of the destination of cell phone calls contravenes the New Jersey Supreme Court's decision in North Jersey Newspapers Co. v. Passaic County Bd. Of Chosen Freeholders, 127 N.J. 9 (1992). The Custodian contended that this decision grants absolute privacy to telephone records. The Custodian argued that the GRC's decision regarding the nonexistence of a privacy interest in the disclosure of call destination on cell phone bills is contrary to the holding of the New Jersey Supreme Court and is therefore "palpably incorrect, irrational and fails to take into consideration and appreciate the significance of probative, competent evidence which was properly redacted pursuant to controlling case law."

Further, the Custodian contended that the GRC erred in attempting to utilize a balancing analysis, because nothing about the destination of a cell phone call relates to the Complainant's "suspicion" that Borough personnel were either using the cell phone for their personal benefit, were using minutes beyond what was authorized by the cell phone plans, or were using the cell phones to conduct personal business during working hours, or a combination of the three. The Custodian noted that the Complainant did not make a common law right to access request for the cell phone records and further noted that never before her complaint did the Complainant articulate that the destinations of the calls relate to the issue of whether the cell phones were used for the personal benefit of Borough employees, utilized minutes beyond what was authorized by the cell phone plans, or were used to conduct personal business during working hours. The Custodian contended that the articulated reason for the information does not rationally relate to the information requested and, aside from the reasons identified above, the GRC failed to articulate any analysis of how the Complainant's reason for requesting the record relates to the information requested to justify compelling the production of the information.

The Custodian argues that, while she disagrees with the GRC even analyzing the issues from a balancing perspective, unless there is a logical nexus between the reason for the request and the necessity to provide unredacted records, the GRC's order would be arbitrary and capricious. The Custodian contends that courts have repeatedly recognized that administrative agency decisions can be overturned if there is a showing that the decision was "arbitrary, capricious or unreasonable or it was not supported by substantial credible evidence in the record as a whole." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 304 (App. Div. 1993); Walcott v. City of Plainfield, 282 N.J.Super, 121, 129 (App. Div. 1995).

With regard to the issue of the duplication of audiotapes and the actual cost thereof, the Custodian stated that N.J.S.A. 47:1A-5.g. provides that:

> "in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance. The requestor shall have the opportunity to review and object to the charge prior to it being incurred."

The Custodian contended that the Borough did not have equipment to duplicate the recordings of the meeting minutes requested by the Complainant prior to this OPRA request for audiotapes. The Custodian argued that the actual cost of duplication is not

merely the cost of the tape itself, but the expenses associated with the machine to duplicate the recording on an audiotape, as well as the electrical costs to operate the machine itself. The Custodian contended that the difficulty of a small municipality such as Mount Arlington,[14] in ascertaining actual costs of duplication was recognized by both the GRC and the Appellate Division in Windish v. Borough of Mount Arlington BOE, 2007 N.J. Super. Unpub. Lexis 228. The Custodian contended that the GRC should apply the same common sense approach to analyzing the existing ordinance and its allocation of $5.00 per audiotape for duplication. The Custodian asserted that in adopting its fee ordinance, the Borough was not endeavoring to charge a premium for audiotapes, but to recoup its actual costs as best as it could estimate within a reasonable degree of accuracy, in consideration of the anticipated volume of OPRA requests.

In its November 18, 2009, Interim Order, the Council discussed North Jersey Newspapers v. Passaic County Board of Chosen Freeholders, 127 N.J. 9 (1992), the case cited by the Custodian in support of the motion for reconsideration. The Council noted that in a prior GRC decision, Jeffery Smith v. New Jersey Department of Corrections, GRC Complaint 2004-163 (June 2005), the Council found that the redaction of itemized telephone numbers contained in the cellular telephone billing records satisfies the need for confidentiality pursuant to North Jersey Newspapers, finding that the need for confidentiality of the record and the privacy issues involved in the records request implicated weighed heavier than the public's interest in access to sufficient information to enable the public to understand and evaluate the reasonableness of a public official's actions. The Council therefore determined that because no privacy issues can be implicated by the disclosure of a generic city and state without any personal identifiers such as a telephone number, the Custodian's redaction of the city and state of the location of cell phone calls from the requested cell phone bills violated N.J.S.A. 47:1A-5.g..

The Custodian mischaracterizes the holding of the New Jersey Supreme Court in North Jersey Newspapers and her reliance on this case in support of her contention that the redactions made to the requested cell phone records were appropriate is misplaced.[15]

In North Jersey Newspapers, the New Jersey Supreme Court addressed the public's right of access to telephone toll-billing records under the Right-to-Know Law, N.J.S.A. *47:1A-1* to -4. The plaintiff requested copies of itemized telephone bills for the Passaic County Board of Chosen Freeholders' office- and car-phone lines for March, April, and May 1990. *Id.* at 11-12. For certain types of calls, notably long-distance and car-phone calls, those telephone bills included the telephone number called; the date, time, and length of the call; and the charge for the call. The defendant denied the request,

[14] The Custodian contends that Mt. Arlington has a population of 4,663 according to the most recent federal decennial (2000) census.

[15] In her OPRA request dated November 19, 2007, the Complainant requested cell phone bills for October and September 2007, including itemized list of phone calls, for all Borough of Mount Arlington ("Mt. Arlington") employees. The Custodian redacted the cell phone numbers and destinations of the phone calls from the requested cell phone bills. The Complainant has not disputed the Custodian's redactions of the phone numbers called, but contends that the Custodian improperly redacted the "destination" of the calls, which show the city and state to which the calls were made.

contending that although the Right-to-Know Law governed the total amounts of the bills, the law did not apply to itemization of the bills. *Id.* at 12.

Upon review, the New Jersey Supreme Court noted that the documents that the plaintiff sought were itemized telephone bills for long-distance and car-phone calls. Included in those bills were the telephone numbers called by the Freeholders. The Court noted that "[t]he question is whether those itemized bills constitute records "required by law to be made, maintained or kept." *Obviously, no law explicitly requires the public body to make a record of telephone numbers called by public officials*; otherwise, the local calls, which are not recorded, would have to be recorded as well." [Emphasis added]. *Id.* at 14.

The Court further noted that:

> "Our common-law standards provide a balanced consideration of the public need for the numbers called and the need for confidentiality. *See* Loigman v. Kimmelman, 102 N.J. 98, 505 A.2d 958 (1986). We assume that the primary concern is the misuse of public funds. *One problem with unrestricted access to the telephone numbers called is the disclosure not only of the record of the public official's calls but, inferentially, the identity of those who have called the official.* Phone calls made to the public official's office will usually be returned, and in the case of car phones, incoming numbers are always recorded." [Emphasis added]. 179 N.J. at 16-17.

The Court recognized that various problems with the disclosure of the identity of such callers included direct conflict with an express legislative policy or the needs of government, such as the disclosure of the identity of one reporting child abuse to a Division of Youth and Family Services caseworker, which is implicitly forbidden at N.J.S.A. 9:6-8.10a, or disclosure of the identity of a neighbor calling to complain of an ordinance violation. *Id.* at 17. The Court also noted that the "official information" privilege seems to protect sensitive communications by public officials, such as "when, for example, a mayor might need to call a city council member from an opposing political party on a most highly sensitive community issue to enlist that person's support; or times when a mayor might need to call a community activist to calm troubled waters, without causing disruption that might result from appearing to negotiate with a dissident who may, at the moment, be perceived as a lawbreaker." *Id.* at 17.

However, the Court also clearly stated that:

> "[i]f determining the identity of callers becomes necessary to prevent possible misuse of public funds (for example, if a public official is conducting a private business at public expense), a court may require preliminary disclosure to it of the identity of the persons called and the public nature of the calls. *See* Loigman, *supra*, 102 N.J. at 112-13, 505 A.2d 958." 179 N.J. at 17.

In the context of the specific request by North Jersey Newspapers for itemized telephone bills for the Passaic County Board of Chosen Freeholders' office- and car-phone lines, the New Jersey Supreme Court determined that:

> "almost everything necessary to evaluate the actions of the government official is concededly available: the amount of the telephone bills, the names of the persons who have incurred the bills, and a comparison of the bills with prior expenditures. That information will apprise the public of governmental waste without requiring inferential disclosure of the identity of the neighbor who had called to complain of a zoning violation, or the neighbor who had called to report a terrible case of child abuse, or of the community member reputed to oppose the official who called to make peace." *Id.* at 18.

In doing so, the Court recognized that "[s]ufficient knowledge must be afforded to the public to empower it to evaluate public officials' use or misuse of public telephones. That knowledge can be obtained without unnecessary disclosure of the identity of persons called." *Id.* at 20. However, the Court noted that "[t]he identity of the persons called may be disclosed upon a showing of public need that outweighs the privacy interests involved." *Id*. at 19.

The Court therefore held that the Right-to-Know Law does not provide an unqualified right of access to the telephone toll-billing records of a public body that would disclose the identity of the parties called; rather, the Court directed that the telephone toll-billing records of a public body be made available after a showing that the public need for the identity of the parties called outweighs the governmental policies of confidentiality in telephone communications and of executive privilege. *Id.* at 11.

Custodian's reliance on North Jersey Newspapers is therefore misplaced. North Jersey Newspapers stands for the proposition that information which would disclose an individual's identity in connection with a call to or from a public agency *can* be disclosed *after a showing that the public's need* ***for the identity of the parties called*** *outweighs the governmental policies* of confidentiality in telephone communications and of executive privilege. In the matter now before the Council, the specific identity of individuals called by Borough of Mount Arlington employees (i.e., the telephone numbers) is not at issue.

Similarly, State v. Mollica, 114 N.J. 329 (1989), also cited by the Custodian in support of the redactions made to the requested cell phone records herein, is clearly distinguishable from the instant matter because Mollica concerned the reasonable expectation of privacy hotel guests had in telephone calls made from hotel rooms, while the matter currently before the Council concerns cell phone calls made by a public official during business hours, using a cell phone paid for with public funds.

The Custodian argues that disclosure of the city and state to which calls were made by Borough of Mount Arlington employees should be confidential because this information discloses the identity of the individuals who received such calls, in contravention of the New Jersey Supreme Court's holding in North Jersey Newspapers. However, in none of the Custodian's submissions to the GRC before or after the

Council's November 18, 2009 Interim Order does she elucidate how disclosure of the city and state to which calls were placed reveals the specific identity of callers to or constituents of the Borough of Mount Arlington when the telephone numbers to such individuals have been redacted.

The Custodian also argues that unless there is a logical nexus between the reason for the request and the compulsion to provide the city and state of calls made on Borough-issued cell phones, the GRC's Interim Order would be arbitrary and capricious. The Custodian contends that the Complainant's articulated reason for the records requested, which the Custodian characterizes as the Complainant's "suspicion" that Borough personnel were either using the cell phone for their personal benefit, were using minutes beyond what was authorized by the cell phone plans, or were using the cell phones to conduct personal business during working hours, or a combination of the three, does not rationally relate to the information requested. Furthermore, the Custodian asserts that the GRC failed to articulate any analysis of how the Complainant's reason for requesting the record relates to the information requested to justify compelling the production of the information.

In the Denial of Access Complaint, the Complainant argued that Mt. Arlington employees have no legitimate privacy interest in the location of the cities and states if Mt. Arlington employees are calling on Mt. Arlington-issued and Mt. Arlington-financed cell phones. The Complainant argued that the destination of the calls made cannot by itself be used to track down or identify any individual; therefore, there is no risk of harassment or unwanted contact.

In opposition to the Custodian's request for Reconsideration, the Complainant has stated that she requires the locations called by Borough employees because she believes that the Borough provided cell phones to Borough employees, which are used for personal calls without reimbursement to the Borough. Moreover, the Complainant has asserted that it is impossible to ascertain whether improper use of the Borough-issued cell phones has occurred without the city and state, because calls to locations clearly not within the scope of business and during non-business hours would support claims of personal use of government cell phones. Finally, the Complainant has indicated that, based on documents received, she believes that the Borough Administrator has used the Borough-issued cell phone for personal calls while she has been absent from work.

The Custodian has certified that she reasonably relied upon the decision of the Appellate Division in the case of Gannett New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205, 216 (App. Div. 2005) which she claims held that "[a] person's privacy interest includes the people and places one calls on the telephone, no less than the resulting conversation." The Custodian argued that a person's expectation of privacy extends to telephone billing records. However, the Custodian has not submitted any evidence or any argument as to how the disclosure of the city and state of calls made on Borough-issued cell phones implicates the identity of the individuals called by Borough employees.

In Gannett, the Appellate Division upheld on privacy grounds the non-disclosure of telephone billing records of a county administrator on which telephone numbers were

not redacted. However, the Appellate Division later distinguished Gannett in Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 865 (App.Div. Mar. 31, 2008). There, the Appellate Division reversed the trial court's dismissal of plaintiff's claims regarding redaction of the billing records the City gave to plaintiff, which did not include details showing the numbers called by employees. Because the City did not explain why its redactions were authorized by law, as required by N.J.S.A. 47:1A-5.g., or articulate a basis for its need to keep the redacted information confidential, as required by the common law under North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9, 16-18 (1992), the Appellate Division remanded those claims for further consideration.

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

When privacy interests in otherwise disclosable government records are at issue, the New Jersey Supreme Court has stated that the following factors should be considered:

1. The type of record requested;

2. The information it does or might contain;

3. The potential for harm in any subsequent nonconsensual disclosure;

4. The injury from disclosure to the relationship in which the record was generated;

5. The adequacy of safeguards to prevent unauthorized disclosure;

6. The degree of need for access;

7. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access. Doe v. Poritz, 142 N.J. 1, 87-88 (1995).

The foregoing criteria was applied accordingly by the Court in exercising its discretion as to whether the privacy interests of individuals named in summonses are outweighed by any factors militating in favor of disclosure of the addresses.

In the case before the Council, the GRC asked the Complainant the following questions to ascertain the degree of need for access from the Complainant:

Need for Access Questions	**Complainant's Response**
1. Why do you need the requested record(s) or information?	It is my belief that the Borough provided cell phones to Borough employees, which are used for personal use, without reimbursement. IRS code states that government employees who use the phones for personal use are to reimburse the municipality, yet no evidence of

	reimbursement exists. Calls to locations clearly not within the scope of business and during non-business hours would support claims of personal use of government cell phones. Also, the one billing statement where such information was provided indicated that the borough administrator was not at her duty station during work hours. Many of the calls originated in the Chatham/Florham Park area, which is her place of residence. Destination city/state information would provide information that this person is not at her specified duty station, even though she is submitting pay records indicating that she was working during that time. Per a prior OPRA request, the Borough does not have a work at home policy.
2. How important is the requested record(s) or information to you?	Without the destination cities and states it is impossible to prove that illegal use of the phone existed. It is suspected that this pattern of abuse has continued or if the administrator has continued to claim that she is working, when cell phone records indicate that she is at home.
3. Do you plan to redistribute the requested record(s) or information?	No.
4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?	No.

The GRC also asked the following questions of the Custodian:

Factors for Consideration in Balancing Test	**Custodian's Response**
1. The type of record(s) requested.	Cell phone billing records.
2. The information the requested records do or might contain.	Information was provided but redacted per Gannett New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) and North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9 (1992), which provided: "A] person's privacy interest includes "the people **and places** one calls on a telephone, no less than the resulting conversations." Thus, a person's expectation of privacy extends to telephone toll-

	billing records." (emphasis added)
3. The potential harm in any subsequent non-consensual disclosure of the requested records.	In North Jersey at 18, the Court stated in clear and unequivocal terms: "We need not debate whether the legislature could require such disclosure under the guarantees provided by the New Jersey Constitution. As we explained in State v Mollica, 114 N.J. 329 (1989), **a person's privacy interests includes "the people and places one calls on a telephone, no less than the resulting conversations."** *Id*. at 344. Thus a person's expectation of privacy extends to telephone toll billing records. *Id*. at 341-42. That expectation of privacy is rooted in a strong legislative tradition of protecting the privacy of telephone communications. State v Minter 116 N.J. 269, 276(1989)." (emphasis added). The Borough and custodian adopt the privacy interest analysis of the Supreme Court.
4. The injury from disclosure to the relationship in which the requested record was generated.	In North Jersey at 18, the Court stated in clear and unequivocal terms: "We need not debate whether the legislature could require such disclosure under the guarantees provided by the New Jersey Constitution. As we explained in State v Mollica, 114 N.J. 329 (1989), **a person's privacy interests includes "the people and places one calls on a telephone, no less than the resulting conversations."** *Id*. at 344. Thus a person's expectation of privacy extends to telephone toll billing records. *Id*. at 341-42. That expectation of privacy is rooted in a strong legislative tradition of protecting the privacy of telephone communications. State v Minter 116 N.J. 269, 276 (1989)." (emphasis added). The Borough and Custodian adopt the privacy interest analysis of the Supreme Court.
5. The adequacy of safeguards to prevent unauthorized disclosure.	Information was provided but redacted per Gannett New Jersey Partners LP v. County of Middlesex, 379 N.J. Super 205, (App. Div. 2005) and North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9 (1992), which provided: "A] person's privacy interest includes "the people **and places** one calls on a telephone, no less than the resulting conversations." Thus, a person's expectation of privacy extends to telephone toll-billing records." (emphasis added).
6. Whether there is an express statutory mandate, articulated public policy or other	In North Jersey at 18, the Court stated in clear and unequivocal terms: "We need not debate whether the legislature could require such disclosure under the guarantees provided by the New Jersey Constitution. As we

recognized public interest militating toward access.	explained in State v Mollica, 114 N.J. 329 (1989), **a person's privacy interests includes "the people and places one calls on a telephone, no less than the resulting conversations."** *Id*. at 344. Thus a person's expectation of privacy extends to telephone toll billing records. Id. at 341-42. That expectation of privacy is rooted in a strong legislative tradition of protecting the privacy of telephone communications. State v Minter 116 N.J. 269, 276(1989)." (emphasis added) The Borough and custodian adopt the privacy interest analysis of the Supreme Court.

In the matter before the Council, the Complainant has stated that she requires bills for Borough-issued cell phones which show the city and state to which calls were made in order to ascertain whether such cell phones are being used by Borough employees for personal calls for which the Borough is not reimbursed. The Complainant has not disputed the redaction of cell phone numbers called. As in Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 865 (App.Div. Mar. 31, 2008), the Custodian failed to submit any evidence, either during the consideration of this matter initially or during this Reconsideration, to explain why its redactions of the city and state to which calls were made were authorized by law, as required by N.J.S.A. 47:1A-5.g., or articulate a basis for its need to keep the redacted information confidential, as required by the common law pursuant to North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9, 16-18 (1992).

The Custodian's arguments that the Appellate Division's decision in North Jersey Newspapers is dispositive of this matter are erroneous; as previously stated *supra*, North Jersey Newspapers applies only to the disclosure of the *identity* of recipients of calls from public officials, and permits the disclosure of same when a showing has been made that the public need for the information outweighs the government interest in non-disclosure. In the instant matter, the Complainant does not dispute the redaction from the requested cell phone bills of the phone numbers called, but seeks disclosure of the city and state of the destination of such calls to establish whether publicly-issued cell phones are being used by public employees for personal matters without reimbursement. The Custodian in this matter has failed to submit any evidence to show how disclosure of the city and state to which cell phone calls were made improperly discloses the identity of the individuals called.

The Custodian has, therefore, failed to bear her burden of proof that the redactions made to the requested cell phone bills were authorized by law as required by N.J.S.A. 47:1A-5.g. Moreover, the Custodian has failed to articulate a basis for the need to keep the cities and states of the destination of cell phone calls confidential, as required by the common law pursuant to North Jersey Newspapers, *supra*. *See* Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 865 (App.Div. Mar. 31, 2008).

Further, the Custodian has failed to show that the Council's November 19, 2009 Order regarding the disclosure of the city and state of calls made on Borough-issued cell phones is (1) based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of

probative, competent evidence, as required by In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). The Custodian has mischaracterized the holdings of the cases she cites in support of this contention; neither North Jersey Newspapers Co. v. Passaic County Bd. Of Chosen Freeholders, 127 N.J. 9 (1992) nor State v Mollica, 114 N.J. 329 (1989), contain blanket prohibitions against the disclosure of the city and state of calls made on publicly-owned telephones. To the contrary, North Jersey Newspapers stands for the proposition that information which would disclose an individual's identity in connection with a call to or from a public agency can be disclosed after a showing that the public need *for the identity of the parties called* outweighs the governmental policies of confidentiality in telephone communications and of executive privilege. State v. Mollica is simply inapplicable to the instant matter, inasmuch as none of the facts are similar to the matter currently before the Council.

Moreover, the Custodian has failed to show that the Council ignored the significance of probative competent evidence, because the Custodian has failed to explain why its redactions of the city and state to which calls were made were authorized by law, as required by N.J.S.A. 47:1A-5.g., or articulate a basis for its need to keep the redacted information confidential, as required by the common law, North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9, 16-18, 601 A.2d 693 (1992).

The Custodian has therefore failed to show that the Council's November 19, 2009 Order regarding the disclosure of the city and state of calls made on Borough-issued cell phones is (1) based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence as required by In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

With regard to the issue of copying costs of the requested audio tape of the December 10, 2007 council meeting, in support of her motion for Reconsideration the Custodian certified that pursuant to § 4-25 of the Code of the Borough of Mount Arlington, the Municipal Governing Body adopted a regulation prescribing a fee for certain classified documents. The Custodian further certified that subsection D of § 4-25 of the Code of the Borough of Mount Arlington specifically identifies a charge for a duplication of videotapes and/or audiotapes or similar as constituting an extraordinary duplication process and assessed a charge of $5.00 per copy. The Custodian also certified that said ordinance was in existence at the time of the OPRA request which is the subject of this Denial of Access complaint.[16]

[16] The Custodian also previously submitted this evidence to the GRC in the Statement of Information on May 22, 2008.

The Custodian certified that in its November 18, 2009 Interim Order, the Council required the Custodian to provide the GRC with a certification as to the "actual costs associated with the duplication of an audiotape, excluding labor or overhead expenses associated with making the copy and simultaneously provide certified confirmation of compliance…" within five (5) business days of the Council's Order. The Custodian certified that the Borough, in adopting its fee ordinance for duplication of audiotapes, was not endeavoring to charge a premium for audiotapes, but to recoup its actual costs as best as it could estimate within a reasonable degree of accuracy, in consideration of the anticipated volume of OPRA requests.

The Custodian also certified that prior to the Complainant's OPRA request and other like OPRA requests for audiotapes, the Borough did not have equipment to duplicate the recording of the minutes. The Custodian certified that the Borough was required to purchase an audiotape duplicating machine which was exclusively used to duplicate audiotapes. The Custodian further certified that the "actual costs" associated with the duplication of audiotapes, "excluding labor or overhead expenses associated with making the copy" at the time of the Complainant's OPRA request for same is difficult to calculate because to properly calculate the actual costs the Borough would need to know the cost of the tape, the cost of electricity per kilowatt hour and the cost of the specially purchased machine on a pro rata basis.

The Custodian certified that at the time of the Complainant's OPRA request, the $5.00 per tape copying fee charged to the Complainant was the Borough's best estimation of the reasonable actual costs. The Custodian further certified that at no time was labor or overhead costs ever factored into the $5.00 audiotape charge.

Finally, the Custodian certified that the actual cost of each tape necessary to reproduce the meeting minutes requested by the Complainant was $.79, and further certified that since the inception of this case, the Borough has adopted an ordinance setting copying charges for audiotapes at $0.65 and copying charges for CDs and DVDs at $0.60.

The Custodian's certification erroneously asserts that "to properly calculate the actual costs the Borough would need to know the cost of the tape, the cost of electricity per kilowatt hour and the cost of the specially purchased machine on a pro rata basis." Only the actual cost of the tape is a required element of the copying charge under OPRA pursuant to Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006). Specifically, the cost of electricity and the duplication equipment is overhead cost. Moreover, the Custodian certified that the actual cost of each audiotape necessary to reproduce the meeting minutes requested by the Complainant was $.79, not the $5.00 per tape the Complainant was charged.

Thus, the Custodian has failed to show that the Council's November 19, 2009 Order regarding the actual costs of reproducing the requested audiotape is (1) based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence, as required by In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And

Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, *supra.*

Because the Custodian has failed to meet the required standard for reconsideration of the Council's November 18, 2009 Interim Order, the Custodian's Motion for Reconsideration of the Council's November 19, 2009 Interim Order is denied.

Because the Custodian certified that the actual cost of each audiotape which was necessary to reproduce the meeting minutes requested by the Complainant, and because the evidence of record indicates that two audiotapes were required to reproduce the requested meeting minutes, the Custodian shall refund to the Complainant the difference between the $10.00 copying fee the Complainant was charged and the $1.58 which was the actual cost of the audiotapes, or $8.42.

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 Order in this matter.

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

The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 pending the Custodian's compliance with the Council's Order in this matter

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has failed to bear her burden of proof that the redactions made to the requested cell phone bills were authorized by law as required by N.J.S.A. 47:1A-5.g. Moreover, the Custodian has failed to articulate a basis for the need to keep the cities and states of the destination of cell phone calls confidential, as required by the common law pursuant to North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9 (1992). *See* Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 865 (App.Div. Mar. 31, 2008).

2. The Custodian has failed to show that the Council's November 19, 2009 Order regarding the disclosure of the city and state of calls made on Borough-issued cell phones is (1) based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence, as required by In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A

Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

3. The Custodian has failed to show that the Council's November 19, 2009 Order regarding the actual costs of reproducing the requested audiotape is (1) based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence, as required by In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

4. Because the Custodian has failed to meet the required standard for reconsideration of the Council's November 18, 2009 Interim Order, the Custodian's Motion for Reconsideration of the Council's November 19, 2009 Interim Order is denied.

5. **The Custodian must disclose to the Complainant copies of the requested cell phone bills with the city and state of the location of the cell phone calls unredacted, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005),[17] to the Executive Director, within five (5) business days of receipt of this Order.**

6. Because the Custodian certified that the actual cost of each audiotape which was necessary to reproduce the meeting minutes requested by the Complainant, and because the evidence of record indicates that two audiotapes were required to reproduce the requested meeting minutes, the Custodian shall refund to the Complainant the difference between the $10.00 copying fee the Complainant was charged and the $1.58 which was the actual cost of the audiotapes, or $8.42.

7. **The Custodian shall comply with Paragraph #6 above, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005),[18] to the Executive Director, within five (5) business days of receipt of this Order.**

8. 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.

9. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 pending the Custodian's compliance with the Council's Interim Order.

[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] "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."

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

April 1, 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

November 18, 2009 Government Records Council Meeting

Gayle Ann Livecchia
Complainant
v.
Borough of Mount Arlington (Morris)
Custodian of Record

Complaint No. 2008-80

At the November 18, 2009 public meeting, the Government Records Council ("Council") considered the November 10, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because no privacy issues can be implicated by the disclosure of a generic city and state without any personal identifiers such as a telephone number, the Custodian's redaction of the city and state of the location of cell phone calls from the requested cell phone bills violated N.J.S.A. 47:1A-5.g.

2. **The Custodian must disclose to the Complainant copies of the requested cell phone bills with the city and state of the location of the cell phone calls unredacted, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005),[1] to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**

3. Because the Complainant's request would require the Custodian to conduct research, the request is invalid pursuant to MAG Entertainment LLC. v. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), and Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009.

[1] "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. Pursuant to N.J.S.A. 47:1A-5.b and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian must charge the actual cost of duplicating the audiotapes. As such, the Custodian's charge of $5.00 each for two audio recordings of the requested meeting minutes is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must therefore charge the actual cost of the audiotapes and shall not include the cost of labor or other overhead expenses associated with making the copy; to the extent that the actual cost of duplication of such audiotapes is less than the $5.00 per tape charged by the Custodian, the Custodian must refund the difference.

5. **The Custodian must provide to the Council a certification of the actual costs associated with duplication of an audiotape, excluding labor or other overhead expenses associated with making the copy, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**

6. Based on the Appellate Division's decision in Windish v. Mount Arlington Board of Education, 2007 N.J. Super. Unpub. Lexis 228, the Custodian in the matter before the Council properly charged the Complainant the enumerated copying rates set forth at N.J.S.A. 47:1A-5.b.

7. It is reasonable for a custodian to charge a requestor the actual postage cost associated with delivering records by mail. The Custodian in the matter before the Council must charge *actual* postage cost not anticipated postage cost associated with delivery by mail of the requested records. The Custodian must also provide the GRC a certified confirmation of the actual postage cost.

8. **The Custodian must provide to the Council a certification of the actual postage costs associated with delivery by mail of the request records, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**

9. 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.

10. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 18th 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.

Harlynne A. Lack, Secretary
Government Records Council

Decision Distribution Date: November 20, 2009

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

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

Gayle Ann Livecchia[1] **GRC Complaint No. 2008-80**
Complainant

v.

Borough of Mount Arlington (Morris)[2]
Custodian of Records

Records Relevant to Complaint:
November 19, 2007 OPRA request
Cell phone bills for October and September 2007, including itemized list of phone calls, for all Borough of Mount Arlington ("Mt. Arlington") employees.

December 17, 2007 OPRA requests[3]
1. Receipts from 2002 to the present for Holiday Inn Express Hotel and Marriott Hotel.[4]
2. Audio tape of December 10, 2007 council meeting.

Requests Made: November 19, 2007 and December 17, 2007,
Responses Made: November 27, 2007 and December 27, 2007
Custodian: Linda DeSantis
GRC Complaint Filed: April 18, 2008[5]

Background

November 19, 2007
Complainant's first Open Public Records Act ("OPRA"). The Complainant requests the records relevant to this OPRA request on an official OPRA request form.

November 27, 2007
Custodian's response to the first OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6^{th}) business day following receipt of such request. The Custodian states that she received the records request on November 19, 2007. The Custodian states that the requested cell phone bills comprise ninety-two (92) pages. The Custodian also states that this record is available for the Complainant's on site inspection and a copy of the phone records may be purchased at a cost of $0.75 per page for the first ten (10) pages, $0.50 per page for the second ten (10)

[1] Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Oxford, NJ).
[2] Represented by Thomas A. Segreto, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).
[3] The Complainant filed two (2) separate OPRA requests on December 17, 2007.
[4] The Complainant included addresses for both hotels.
[5] The GRC received the Denial of Access Complaint on said date.

pages, and $0.25 per page for each page thereafter. The Custodian further states that the phone numbers and destinations of the phone calls have been redacted because such information has been found to be non-disclosable to the public pursuant to OPRA and subsequent case law. The Custodian also states that if the Complainant would like the Custodian to mail the records, the anticipated postage cost is $5.00.

December 17, 2007

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

December 17, 2007

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

December 27, 2007

Custodian's response to the Complainant's second OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that access to the requested record is denied because the request for receipts from 2002 to the present for the Holiday Inn Express Hotel and Marriot Hotel is overbroad and unclear.

December 27, 2007

Custodian's response to the Complainant's third OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that access to audio tapes of the December 10, 2007 council meeting is granted. The Custodian further states that the cost for copies of the audio tapes is $10.00 ($5.00 per tape). The Custodian also states that if the Complainant would like the audio tapes mailed, the anticipated postage is $1.48. The Custodian states that the Complainant may contact the office if the Complainant would like to schedule an appointment to listen to the audio tapes or to have them mailed.

February 7, 2008

Letter from the Complainant's Counsel to the Custodian. The Complainant's Counsel states that regarding the Complainant's first OPRA request, municipalities cannot assert blanket exemptions. The Complainant's Counsel asserts that Mt. Arlington must cite the specific statute and the specific cases that support the exemption from disclosure of the requested records pursuant to Schwarz v. N.J. Dep't of Human Services, GRC Complaint No. 2004-60; see also N.J. Builders Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166, 179 (App. Div. 2007).

Regarding the Complainant's second OPRA request, the Complainant's Counsel states that the request for receipts for Mt. Arlington employees who have stayed at the Holiday Inn Express Hotel and Marriott Hotel is sufficiently specific. The Complainant's Counsel also states that if the receipts are not produced, the Complainant will file a complaint with the Government Records Council.

The Complainant's Counsel states that as to the Complainant's third OPRA request, the Custodian quoted a copying fee of $5.00 per audio tape. The Complainant's Counsel states that OPRA requires the Custodian to charge the actual cost of copies. N.J.S.A. 47:1A-5.b. The Complainant further states that "actual cost" does not include overhead, the cost of reproduction equipment, postage, delivery confirmation, or labor. The Complainant's Counsel states that under New Jersey common law and OPRA, labor is not included in calculating actual cost. Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26, 31 (1962); Dugan v. Camden County Clerk Offices, 376 N.J. Super. 271, 280 (App. Div. 2005) (fees allowed under OPRA consistent with fees allowed under the Common Law Right of Access) and N.J.S.A. 47:1A-5.b. The Complainant's Counsel states that $5.00 seems expensive for a single audio tape when tapes retail for less than $1.00. The Complainant's Counsel argues that Mt. Arlington appears to be adding a surcharge which is not the appropriate standard pursuant to Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 141 (App. Div. 2006).

March 6, 2008

Letter from Complainant's Counsel to Custodian's Counsel. The Complainant's Counsel states that regarding the Complainant's first OPRA request, the Custodian's Counsel agreed to review the redaction of the cell phone bills and determine whether the cell phone bills were properly redacted. The Complainant's Counsel requests production of the records with the "location" information unredacted before March 10, 2008 which is the next public meeting date for Mt. Arlington.

Regarding the Complainant's second OPRA request, the Complainant's Counsel states that the request for receipts for Mt. Arlington employees who have stayed at the Holiday Inn Express and Marriott Hotels is still outstanding. The Complainant's Counsel states that to date neither the Complainant nor the Complainant's Counsel has been updated as to the status of this request. The Complainant's Counsel requests production of the records prior to March 10, 2008.

Regarding the Complainant's third OPRA request, the Complainant's Counsel states that the Custodian's Counsel has advised that Mt. Arlington reduced the cost of audio tapes from $5.00 to the actual cost.

March 17, 2008

Letter from the Custodian's Counsel to the Complainant. Regarding the Complainant's first OPRA request involving the redaction of the cell phone bills of Mt. Arlington employees using a Mt. Arlington provided cell phone, the Custodian's Counsel states that OPRA expressly preserves exemptions arising from judicial case law pursuant to N.J.S.A. 47:1A-9.b. The Custodian's Counsel argues that in North Jersey Newspapers v. Passaic County Board of Chosen Freeholders, 127 N.J. 9 (1992), the court held that there is no right of access to telephone billing records under the prior Right to Know Law. The Custodian's Counsel further argues that "a person's privacy interest includes the people and places one calls on the telephone." See Gannett New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205, 216 (App. Div. 2005), citing to North Jersey Newspapers v. Passaic County Board of Chosen Freeholders, *supra*, at 16-18.

The Custodian's Counsel states that regarding the Complainant's second OPRA request for receipts for the Holiday Inn Express and the other hotels named in the request, Mt. Arlington approves these expense claims at a public meeting each month. The Custodian's Counsel states that this broad and unclear request will require a time consuming search of all bills paid for the period in question because the Complainant has not identified specific employees or Mt. Arlington officials for whom such bills are requested.

Regarding the Complainant's third OPRA request, Custodian's Counsel states that the Custodian charged a $5.00 fee which was set by ordinance for duplicating audio tapes. The Custodian's Counsel states that Mt. Arlington adopted an ordinance reducing the cost for duplication of tapes in accordance with the schedule in the ordinance.

April 18, 2008

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

- OPRA request dated December 17, 2007;
- OPRA request dated December 17, 2007;
- Response to OPRA request dated December 27, 2007;
- Response to OPRA request dated December 27, 2007;
- Redacted telephone bills (two-page sample);
- Letter from the Complainant's Counsel to the Custodian dated February 7, 2008
- Letter from the Complainant's Counsel to the Custodian's Counsel dated March 6, 2008.
- Letter from the Custodian's Counsel to the Complainant's Counsel dated March 17, 2008.

The Complainant states that Mt. Arlington produced twenty-six (26) pages of telephone bills in response to the Complainant's first OPRA request. The Complainant states that she requested the cell phone bills because she was suspicious that Mt. Arlington employees were either using the cell phones for their personal benefit, using minutes beyond what was authorized by the cell phone plans, or using the cell phones to conduct personal business during working hours (or a combination of the three). The Complainant states that the Custodian correctly redacted the telephone numbers that were called. The Complainant states that the Custodian improperly redacted the "destination" of the calls, which show the city and state to which the calls were made. The Complainant states that Mt. Arlington employees have no legitimate privacy interest in the location of the cities and states if Mt. Arlington employees are calling on Mt. Arlington-issued and Mt. Arlington-financed cell phones. The Complainant argues that the destination of the calls cannot be used to track down or identify any individual; therefore, there is no risk of harassment or unwanted contact.

The Complainant argues that the case of Gannett New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205, 216 (App. Div. 2005) is distinguishable from the instant matter. The Complainant argues that Gannett relied on a holding in North Jersey Newspapers v. Passaic County Board. of Chosen Freeholders, 127 N.J. 9 (1992), which applied the now-repealed Right to Know Law. The Complainant states that, rather

than apply a broad, sweeping rule that finds that the destinations of calls are always confidential, the GRC should conduct a balancing test to determine whether the Complainant's need for the records is outweighed by any privacy concerns. The Complainant states that her need for the information outweighs any privacy concerns.

The Complainant states that in an attempt to determine how often and at what expense public employees have been lodged at local hotels, on December 17, 2007, the Complainant requested receipts from 2002 to the present for the Holiday Inn Express Hotel and the Marriott Hotel. The Complainant states that the Custodian denied the request because the request was considered broad and unclear. The Complainant states that the second OPRA request is not overbroad. The Complainant argues that the second OPRA request requires the Custodian to "search" for records, but not perform "research." Donato v. Township of Union, GRC Complaint No. 182 (February 2007). The Complainant further argues that the Donato analysis should be applied in this case.

Regarding the Complainant's third OPRA request, the Complainant states that the Custodian violated OPRA when she failed to charge the actual copying cost for the requested audio tapes. The Complainant states that the Custodian charged a predetermined fee for the audio tapes. The Complainant argues that such fees for copies of audio tapes are clearly illegal when those fees do not reflect actual costs or when the fees represent a predetermined special service charge pursuant to O'Shea v. Madison Public Schools, GRC Complaint No. 2007-185 (February 2008) and O'Shea v. Vernon, GRC Complaint No. 2007-207 (March 2008).

The Complainant requests that the GRC find that the Custodian violated OPRA and unlawfully denied access to records requested when she failed to charge the actual copying cost for copies of audio tapes; denied access to the requested hotel receipts; and redacted the destinations from the requested cell phone bills. The Complainant further requests that the GRC order the Custodian to: refund the difference between the fees paid for the audio tapes and the actual copying cost; provide the requested hotel receipts; and provide a properly redacted copy of the cell phone bills. Lastly, the Complainant requests that the GRC award the Complainant attorney's fees as provided by N.J.S.A. 47:1A-6.

The Complainant did not agree to mediate this complaint.

May 7, 2008

Request for the Statement of Information sent to the Custodian.

May 13, 2008

E-mail from the Custodian to the GRC. The Custodian requests an extension of the filing deadline for the Statement of Information.

May 14, 2008

E-mail from the GRC to the Custodian. The GRC grants the Custodian's request for an extension, thereby extending the filing deadline to May 22, 2008.

May 22, 2008[6]

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

- OPRA request dated November 19, 2007;
- Response to OPRA request dated November 27, 2007;
- OPRA request dated December 17, 2007;
- OPRA request dated December 17, 2007;
- Response to OPRA request dated December 27, 2007;
- Response to OPRA request dated December 27, 2007;
- Redacted telephone bills;
- Copy of Mt. Arlington Ordinance §4-25.

Regarding the Complainant's first OPRA request, the Custodian certifies that she reasonably relied upon the decision of the Appellate Division in the case of Gannett New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205, 216 (App. Div. 2005) which held that "[a] person's privacy interest includes the people and places one calls on the telephone, no less than the resulting conversation." The Complainant argues that a person's expectation of privacy extends to telephone billing records.

Regarding the Complainant's second OPRA request, the Custodian states that the request was broad and unclear because the request did not specify information such as the name of the individual, Mt. Arlington employee, or a specific date for the receipts requested. The Custodian certifies that she requested that the Complainant narrow the request. The Custodian argues that according to the holding in MAG Entertainment LLC v. Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), OPRA does not require a records custodian to conduct research among its records for a complainant and correlate data from various government records in the custodian's possession. The Custodian further argues that, under MAG, OPRA does not countenance open ended searches of an agency's files. The Custodian also argues that the Garnett court held that OPRA requires a party requesting access to a public record to specifically describe the record sought.

The Custodian certifies that, in accordance with the GRC's decision in Cody v. Middleton Township Public Schools, GRC Complaint No. 2005-98 (December 2006), the Custodian offered a reasonable solution to the Complainant when she presented the Complainant with the opportunity to specify the specific government record sought. The Custodian certifies that the Complainant failed to respond to the Custodian's request to narrow the scope of the Complainant's second OPRA request. The Custodian certifies that the Complainant's lack of response inhibited the Custodian's ability to respond to the request.

The Custodian argues that an OPRA request for receipts may necessarily implicate a review of myriad records and without a context for the request, would require research on the part of the Custodian. The Custodian states that in Donato v. Township of Union, GRC Complaint No. 182 (February 2007), the GRC held that pursuant to

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

MAG, the Custodian is only obligated to search her files to find identifiable government records listed in the complainant's OPRA request.

The Custodian states that the Donato case addressed accident reports for a ten (10) day period. The Custodian states that the Complainant herein seeks a copy of "receipts" from 2002 to present for Holiday Inn Express Hotel and Marriott Hotel. The Custodian certifies that this request is a research project that encompasses five (5) to six (6) years of records given the lack of context for the request as specified above. The Custodian certifies that she would have to conduct research for government records which may be identified as expenses, reimbursements, any of which are applicable to any and all Borough officials and employees as well as various functions in which Mt. Arlington may have been involved. The Custodian certifies that "receipts" could also pertain to accommodations, food service, and any other services which may be offered by the identified entities.

The Custodian states that she is more than willing to provide the Complainant with identifiable governmental records. The Custodian states that for the above reasons, the Custodian did not unlawfully deny the Complainant access to the records requested.

The Custodian certifies that she advised the Complainant that the cost to produce a copy of the audio tapes from the December 10, 2007 council meeting was $5.00 per tape for a total of $10.00. The Custodian certifies that pursuant to N.J.S.A. 47:1A-5.c., the Complainant failed to object to the copying fee at the time of the request. The Custodian certifies that the Complainant paid the copying fee without reserving any right to object to the charge. The Custodian argues that accordingly there was no denial of access to the Complainant's third OPRA request.

The Custodian argues that N.J.S.A. 47:1A-5.b. provides in relevant part 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 Custodian also argues that under N.J.S.A. 40:49-1, an "ordinance" means and includes "any act or regulation of the Governing Body of any municipality required to be reduced to writing and read at more than one meeting thereof and published."

The Complainant states that pursuant to §4-25 of the Code of Mt. Arlington, the governing body adopted a regulation prescribing a fee for copying certain documents. The Complainant argues that subsection D of §4-25 of the Code of Mt. Arlington specifically identifies duplication of video tapes, audio tapes or similar media as constituting an extraordinary duplication process and assesses a fee of $5.00 per copy. The Complainant states that said ordinance was in existence at the time of the OPRA request and has not been the subject of an action in lieu of prerogative writs challenging the validity thereof.

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.

OPRA also provides:

"a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency." 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 provides that:

"Immediate access ordinarily shall be granted to budgets, *bills*, vouchers, contracts…." (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA further provides that:

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

OPRA also 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 reminder of the record…*" (Emphasis added.) 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.

November 19, 2007 OPRA request for cell phone bills for October and September 2007

The Custodian responded to the Complainant's OPRA request on the sixth (6^{th}) business day after receipt thereof granting access to the requested cell phone bills in redacted form.[7] The Complainant contends that the Custodian improperly redacted the destination of the calls, which show the city and state to which the calls were made. The Custodian argues that "a person's privacy interest includes the people and places one calls on the telephone." Gannett New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205, 216 (App. Div. 2005). The Complainant contends that Mt. Arlington employees have no legitimate privacy interest in the cities and states called by them if such employees are using Mt. Arlington-issued and Mt. Arlington-financed cell phones. The Complainant argues that the destination of the calls cannot be used to track or identify any individual, therefore, there is no risk of harassment or unwanted contact. The Complainant also argues that the holding of Gannett is distinguishable from the instant matter and suggests that, rather than apply a broad, sweeping rule that finds that the destinations of calls are always confidential, the GRC should conduct a balancing test to determine whether the Complainant's need for the records is outweighed by any privacy concerns. The Complainant states that her need for the unredacted telephone bills outweighs any privacy concerns.

In a prior GRC decision, Jeffery Smith v. New Jersey Department of Corrections, GRC Complaint 2004-163 (June 2005), the Council found that the redaction of itemized telephone numbers contained in the cellular telephone billing records satisfies the need

[7] Because there is no dispute that the requested cell phone bills required redaction of the telephone numbers called, which redaction necessarily required review of the requested records and evaluation of the information contained therein, the GRC declines to find that the Custodian violated N.J.S.A. 47:1A-5.e. which requires immediate access to bills.

for confidentiality pursuant to North Jersey Newspapers Company v. Passaic County Board of Chosen Freeholders, 127 N.J. 9 (1992). The Council found that the need for confidentiality of the record and the privacy issues involved in the records request implicated weighed heavier than the public's interest in access to sufficient information to enable the public to understand and evaluate the reasonableness of a public official's actions.

In the complaint now before the GRC, the Custodian redacted from the requested cell phone bills not only the telephone numbers called, but also the city and state of the recipient of the calls. No privacy issues can be implicated by the disclosure of a generic city and state, without any personal identifiers such as a telephone number. The Custodian has, therefore, violated N.J.S.A. 47:1A-5.g..

Because no privacy issues can be implicated by the disclosure of a generic city and state without any personal identifiers such as a telephone number, the Custodian's redaction of the city and state of the location of cell phone calls from the requested cell phone bills violated N.J.S.A. 47:1A-5.g..

December 17, 2007 OPRA request for receipts from 2002 to the present for Holiday Inn Express Hotel and Marriott Hotel

The Custodian responded to the Complainant's OPRA request on the seventh (7th) business day denying the Complainant's OPRA request for receipts from 2002 to the present for the Holiday Inn Express Hotel and Marriot Hotel on the basis that said request was overbroad and unclear. The Custodian states that Mt. Arlington approves these claims for payment at a public meeting each month. The Custodian states that this OPRA request would require a search of every bill paid from 2002 to 2007.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.' N.J.S.A. 47:1A-1.*" (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),[8] the Superior Court references MAG in that the Court held that a Complainant must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."[9]

[8] Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

[9] As stated in Bent, *supra*.

Moreover, in Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009), the court stated that:

> "The Act [OPRA] does not, however, require custodians of government records to undertake research for a Complainant. The Complainant must identify the records sought with specificity. The request may not be a broad, generic description of documents that requires the custodian to search the agency's files and "analyze, compile and collate" the requested information." (citing MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005)).

Additionally, in Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), the GRC held that:

> "Pursuant to MAG, the Custodian is obligated to ***search*** her files to find the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to ***research*** her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word ***search*** is defined as "to go or look through carefully in order to find something missing or lost. The word ***research***, on the other hand, means "a close and careful study to find new facts or information." (Emphasis added.)

The request in the complaint currently before the Council is invalid because the Custodian would be required to conduct research to fulfill the request and pursuant to Donato, *supra*, a custodian is not obligated to conduct research to fulfill an OPRA request. The Complainant seeks access to hotel receipts for two (2) hotels for a six (6) year period. The Custodian certified that given the broad and general nature of the Complainant's request, she would have to research five (5) to six (6) years of the agency's records to obtain records possibly responsive to the request. The Custodian further certified that her research would also include records which may be recognized as expenses or reimbursements. The Custodian also certified that "receipts" could also pertain to accommodations, food service, and other hotel services. While the Complainant's request identifies a type of record and a specific time period, the Complainant's request is so broad that the Custodian would have to examine every government record in the Custodian's possession that relates to a monetary expenditure by Mt. Arlington. Pursuant to Bent, *supra*, "a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."

Therefore, because the Complainant's request would require the Custodian to conduct research, the request is invalid pursuant to MAG Entertainment LLC. v. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), Donato v. Township of Union,

GRC Complaint No. 2005-182 (January 2007), and Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009.

Whether the Custodian violated OPRA by charging the copy costs enumerated in the Township's ordinance rather than the actual cost of duplicating the requested records?

Audiotapes

The Custodian granted access to the requested audio tapes of the December 10, 2007 council meeting at a cost of $10.00 ($5.00 per tape). The Custodian has certified that the copying costs are set by Borough ordinance, which states that duplication of audiotapes requires an extraordinary expenditure of time and effort and sets a per-tape fee of $5.00 per tape. The Custodian certified that the Complainant failed to make an N.J.S.A. 47:1A-5.c. objection to the copying fee at the time of the request. The Custodian also certified that the Complainant paid the copying fee without reserving any right to object to the charge. The Custodian argued that, accordingly, there was no denial of access to the Complainant's third OPRA request.

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

> "[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the *actual cost* of duplicating the record.
>
> Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following:
>
> - First page to tenth page, $0.75 per page;
> - Eleventh page to twentieth page, $0.50 per page;
> - All pages over twenty, $0.25 per page.
>
> *The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section.* If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record." (Emphasis added). N.J.S.A. 47:1A-5.b.

OPRA also states that:

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

The Complainant contends that the Custodian's charge of $10.00 for two audio recordings of the Township Council's meeting minutes dated December 10, 2007 violates OPRA because said charge is in excess of the actual cost of duplicating the records. The Custodian states that the Borough passed an ordinance which sets the fees for copies of sound recordings at $5.00 per audio tape.

While OPRA provides that paper copies of government records may be obtained upon payment of the actual cost of duplication not to exceed the enumerated rates of $0.75/0.50/0.25 per page (N.J.S.A. 47:1A-5.b.), the Act does not provide explicit copy rates for any other medium. N.J.S.A. 47:1A-5.b. goes on to state that the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy. Additionally, OPRA provides that when a request for a record in a medium not routinely used by an agency, not routinely developed or maintained by an agency, or requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the *actual cost of duplication*, a special 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 or attributable to the agency for the programming, clerical, and supervisory assistance required, or both. N.J.S.A. 47:1A-5.d.

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

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

> "[i]n adopting OPRA, the Legislature made clear that 'government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the

> public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public's right of access.' *N.J.S.A. 47:1A-1*. The imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication. *N.J.S.A. 47:1A-5b.*"

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

In this complaint, the Complainant requested an audio recording of meeting minutes. The Complainant's request does not require a substantial amount of manipulation or programming of information technology pursuant to N.J.S.A. 47:1A-5.d..

Therefore, pursuant to N.J.S.A. 47:1A-5.b. and Libertarian Party of Central New Jersey, *supra*, the Custodian must charge the actual cost of duplicating the requested records. As such, the Custodian's charge of $5.00 each for two audio recordings of the requested meeting minutes is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must therefore charge the actual cost of the audiotapes and shall not include the cost of labor or other overhead expenses associated with making the copy; to the extent that the actual cost of duplication of such audiotapes is less than the $5.00 per tape charged by the Custodian, the Custodian must refund the difference.

Paper Copies

The evidence of record indicates that the Custodian offered 92 pages of cell phone bills to the Complainant at a cost of $0.75 per page for the first ten (10) pages, $0.50 per page for the second ten (10) pages, and $0.25 per page for each page thereafter. These rates are consistent with the enumerated copying rates set forth at N.J.S.A. 47:1A-5.b.

As noted by the Appellate Division in the unpublished decision of Windish v. Mount Arlington Board of Education, 2007 N.J. Super. Unpub. Lexis 228, the Legislature intended that, as a general rule, public agencies should charge requestors the actual cost of duplication of paper copies, exclusive of the costs of labor or overhead. Notwithstanding this general rule, however, the Appellate Division stated that "small public bodies… have limited equipment and resources[.]" *Id*.. Because of this, "[i]n some cases, … the most efficient approach is to allow small public agencies the right to charge the specific monetary amounts contained in the second sentence of the statute without undertaking onerous determinations of their actual costs." *Id.* The Appellate Division therefore upheld the GRC's determination that the Borough of Mount Arlington properly charged the plaintiff in Windish the duplication rates set forth in OPRA rather than the actual costs of duplication of the requested records. *Id.*

Based on the Appellate Division's decision in Windish v. Mount Arlington Board of Education, 2007 N.J. Super. Unpub. Lexis 228, the Custodian in the matter before the Council properly charged the Complainant the enumerated copying rates set forth at N.J.S.A. 47:1A-5.b. if for no other reason than because the custodial agency at issue in this complaint is the exact agency in the Windish, *supra*, decision.

Postage Cost

The Custodian has assessed an anticipated postage cost for providing the records to the Complainant. In the Custodian's November 27, 2007 response to the first (1st) OPRA request (dated November 19, 2007), he stated that the anticipated postage cost is $5.00. Subsequently, in the Custodian's December 27, 2007 response to the third (3rd) OPRA request (dated December 17, 2007), he stated that the anticipated postage cost is $1.48.

OPRA provides 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.:" [Emphasis added] N.J.S.A. 47:1A-5.b.[10]

The assessment of actual postage costs by a custodian for the delivery of requested records via mail is reasonable. *See* Constantine v. Township of Bass River, 406 N.J.Super. 305, 313 (App. Div. 2009); *see also* N.J.S.A. 39:4-131 (permitting the assessment of $1 per page administrative costs for requests for motor vehicle accident reports not made in person).

Therefore, it is reasonable for a custodian to charge a requestor the actual postage cost associated with delivering records by mail. The Custodian in the matter before the Council must charge *actual* postage cost not anticipated postage cost associated with delivery by mail of the requested records. The Custodian must also provide the GRC a certified confirmation of the actual postage cost.

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.

[10] OPRA goes on to set forth a range of maximum allowable duplication fees.

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

The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because no privacy issues can be implicated by the disclosure of a generic city and state without any personal identifiers such as a telephone number, the Custodian's redaction of the city and state of the location of cell phone calls from the requested cell phone bills violated N.J.S.A. 47:1A-5.g.

2. **The Custodian must disclose to the Complainant copies of the requested cell phone bills with the city and state of the location of the cell phone calls unredacted, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005),[11] to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**

3. Because the Complainant's request would require the Custodian to conduct research, the request is invalid pursuant to MAG Entertainment LLC. v. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), and Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009.

4. Pursuant to N.J.S.A. 47:1A-5.b and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian must charge the actual cost of duplicating the audiotapes. As such, the Custodian's charge of $5.00 each for two audio recordings of the requested meeting minutes is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must therefore charge the actual cost of the audiotapes and shall not include the cost of labor or other overhead expenses associated with making the copy; to the extent that the actual cost of duplication of such audiotapes is less than the $5.00 per tape charged by the Custodian, the Custodian must refund the difference.

5. **The Custodian must provide to the Council a certification of the actual costs associated with duplication of an audiotape, excluding labor or other overhead expenses associated with making the copy, and simultaneously provide certified confirmation of compliance, pursuant to**

[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."

N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.

6. Based on the Appellate Division's decision in Windish v. Mount Arlington Board of Education, 2007 N.J. Super. Unpub. Lexis 228, the Custodian in the matter before the Council properly charged the Complainant the enumerated copying rates set forth at N.J.S.A. 47:1A-5.b.

7. It is reasonable for a custodian to charge a requestor the actual postage cost associated with delivering records by mail. The Custodian in the matter before the Council must charge *actual* postage cost not anticipated postage cost associated with delivery by mail of the requested records. The Custodian must also provide the GRC a certified confirmation of the actual postage cost.

8. **The Custodian must provide to the Council a certification of the actual postage costs associated with delivery by mail of the request records, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**

9. 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.

10. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 10, 2009