



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Acting Commissioner

**FINAL DECISION**

**February 23, 2010 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2009-16

v.

Township of Vernon (Sussex)  
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection and a redaction index on December 29, 2009. Therefore, the Custodian timely complied with the Council’s December 22, 2009 Interim Order.
2. The GRC declines to conduct an *in camera* review of the Township Council’s executive session minutes dated August 14, 2008 requested by the Complainant. Pursuant to the Court orders provided to the GRC by the Custodian’s Counsel subsequent to the Council’s December 22, 2009 Interim Order, the redactions of these minutes have previously been mediated among the Custodian’s Counsel and Complainant’s Counsel as of May 2009<sup>1</sup>. In Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), in which the Court upheld Plaintiff’s denial of access to a requested record he already had in his possession at the time of the OPRA request, the Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. Therefore, the GRC views the Complainant’s persistence with this Denial of Access

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<sup>1</sup> The GRC assumes that the records with the mediated redactions were provided to the Complainant by May 2009 because the Court order directing such mediation was issued in March 2009 while the Court order directing the parties agree to reasonable attorney’s fees for the Complainant was issued in May 2009 – presumably after all records were provided with the mediated redactions.



Complaint after the exact record was previously provided to the Complainant with redactions specifically mediated between the parties' attorneys (as ordered by the Superior Court of New Jersey) an egregious waste of State resources for duplicative prosecution of this matter.

3. Although the Custodian failed to provide the Complainant with a detailed and lawful basis for each redaction in the Township Council's executive session minutes dated August 14, 2008, resulting in a legally insufficient response pursuant to N.J.S.A. 47:1A-5.g., the Custodian did provide the requested record with redactions as previously mediated among the Custodian's Counsel and Complainant's Counsel in May 2009 pursuant to Wolosky v. Township of Vernon and Robin Kline, Records Custodian, Docket No.:SSX-L-079-09, Superior Court of New Jersey, Sussex County (March 2009). 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.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved "the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. This is especially true given that the relief ultimately achieved was the result of a previously decided Court action<sup>2</sup> for which reasonable attorney's fees have already been awarded to the Complainant. Therefore, the Complainant is not a prevailing party entitled to a second award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008) for a duplicative resolution of this matter.

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.

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<sup>2</sup> Wolosky v. Township of Vernon and Robin Kline, Records Custodian, Docket No.:SSX-L-079-09, Superior Court of New Jersey, Sussex County (March 2009).

Final Decision Rendered by the  
Government Records Council  
On The 23<sup>rd</sup> Day of February, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: March 2, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-16**

v.

**Township of Vernon (Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Transcript of the most recent governing body executive session minutes that have been approved by the governing body.<sup>3</sup>

**Request Made:** December 2, 2008

**Response Made:** December 3, 2008 and December 15, 2008

**Custodian:** Robin R. Kline

**GRC Complaint Filed:** January 5, 2009<sup>4</sup>

**Records Submitted for *In Camera* Examination:** Township Council's executive session minutes dated August 14, 2008.

**Background**

**December 22, 2009**

Government Records Council's Interim Order. At the December 22, 2009 public meeting, the Government Records Council ("Council") considered the December 15, 2009 Executive Director's Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. Although the Custodian provided the Complainant with a written response to his OPRA request within the statutorily mandated seven (7) business days in which the Custodian granted access to redacted copies of the requested executive session minutes, the Custodian failed to provide the Complainant with a detailed and lawful basis for each redaction. As such, the Custodian's response to the Complainant's OPRA request is legally insufficient pursuant to N.J.S.A. 47:1A-5.g.

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<sup>1</sup> Represented by Jonathan E. McMeen, Esq., (Sparta, NJ) and Walter M. Luers, Esq., (Oxford, NJ).

<sup>2</sup> Represented by Michael D. Witt, Esq., of Chasan Leyner & Lamparello, P.C. (Secaucus, NJ).

<sup>3</sup> The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested record (Township Council's executive session minutes dated August 14, 2008) to determine the validity of the Custodian's assertion that the redacted portions constitute attorney-client privileged information and/or contract negotiations which are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #2 above), a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>7</sup>, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the Council's *in camera* review.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the outcome of the Council's *in camera* review.

#### **December 23, 2009**

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

#### **December 29, 2009**

Request for Stay from Custodian's Counsel. Counsel states that in its December 22, 2009 Interim Order, the Council ordered the Custodian to provide the GRC the August 14, 2008 Township Council's executive session minutes for an *in camera* review. Counsel further states that said minutes were the subject matter of a previously resolved Court action, Wolosky v. Township of Vernon and Robin Kline, Records Custodian, Docket No.: SSX-L-079-09 filed by the Complainant in January 2009<sup>8</sup> in the Superior Court of New Jersey, Sussex County. Specifically, Counsel states that in the Court action the Complainant sought access to executive session minutes from January 2003 through January 2009, including those from August 14, 2008. Finally, Counsel submits that the issues raised in this Denial of Access Complaint have been completely resolved by the mentioned Court action and that further action by the GRC is unnecessary. (Counsel enclosed copies of the Court orders of March 16, 2009 and May 6, 2009 in which the Court directed counsel for the parties to mediate regarding what should be redacted and disclosed in the requested minutes and the amount of reasonable attorney's fees to be paid to Complainant's Counsel, respectfully.)

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

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

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

<sup>8</sup> It should be noted that the Complainant also filed this Denial of Access Complaint with the GRC in January 2009.

**December 29, 2009**

Certification of the Custodian in response to the Council's Interim Order with the unredacted minutes from the executive session of the Township Council's meeting dated August 14, 2008.

The Custodian certifies that she is the Municipal Clerk and the Custodian of the Township of Vernon and that the record enclosed is the true and complete copy of the record requested by the Council for an *in camera* review pursuant to its December 22, 2009 Interim Order. The Custodian also certifies that she was not the Municipal Clerk at the time the executive session minutes were taken, nor did she prepare those minutes. The Custodian further certifies that she did not have any personal or professional knowledge nor history as to the matters contained in the minutes which would allow her to make a determination of whether or not a privilege exist. Accordingly, the Custodian certifies that the redaction of the minutes together with the privilege log previously provided to the Complainant and the GRC asserting the redacted portions of the minutes constitute attorney-client privileged information could only be prepared by legal counsel for the Township of Vernon.

Lastly, the Custodian certifies that it is her understanding that the privilege log provided with this certification was prepared by counsel for the Township of Vernon after consultation and mediation with counsel for Complainant, as ordered by the Superior Court of New Jersey, Sussex County, in the matter of Wolosky v. Township of Vernon, et al., Docket No.: SSX-L.079-09.

**January 4, 2009**

Letter from the Executive Director of the GRC to the Custodian's Counsel. The Executive Director acknowledges receipt of Counsel's request for a stay dated December 29, 2009. The Executive Director denies Counsel's request for stay because Counsel's reason for the need of a stay is not relevant to this Denial of Access Complaint. Specifically, the Executive Director informs Counsel that upon review of the court order Counsel enclosed with the request for stay<sup>9</sup> it appears that the Complainant's prior Court action was based on an OPRA request submitted to the Township of Vernon on January 15, 2009. However, the Executive Director clarifies that the OPRA request at issue in this Denial of Access Complaint is dated December 2, 2008. Further, the Executive Director states that while the same records may be at issue in both the court action and the GRC complaint, because the exact same OPRA requests are not at issue, the GRC retains the authority to adjudicate this matter.

**January 4, 2009**

E-mail from the Custodian's Counsel of Record to the GRC. The Custodian's Counsel of Record directs the GRC to remove him (Michael D. Witt, Esq.) from representation of the Custodian in this matter. Mr. Witt notes that the new attorney for the Custodian is John E. Ursin, Esq. and provides Mr. Ursin's contact information.

**January 4, 2009**

E-mail from the Complainant to the GRC. The Complainant directs the GRC to remove one of the two attorneys representing him in this Denial of Access Complaint from

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<sup>9</sup> Wolosky v. Township of Vernon and Robin Kline, Records Custodian, Docket No.:SSX-L-079-09, Superior Court of New Jersey, Sussex County (March 2009).

the record. Specifically, the Complainant removes Walter M. Luers, Esq. from representation in this matter.

### **February 3, 2010**

Letter from the Executive Director to the Custodian's Counsel. The Executive Director informs the Custodian's Counsel that the GRC rescinds its January 4, 2010 denial of the Township's request for a stay of the December 22, 2009 Interim Order. The Executive Director further states that the GRC is investigating this matter further.

### **Analysis**

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

At its December 22, 2009 public meeting, the Council determined that because the Custodian has asserted that the requested record (Township Council's executive session minutes dated August 14, 2008) were lawfully redacted because the redacted portions are exempt from disclosure as attorney-client privileged material and contract negotiations pursuant to N.J.S.A. 47:1A-1.1., the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the record at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested record to determine the validity of the Custodian's assertion that the redacted portions of the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted document, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* review. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on January 4, 2010.

The Custodian provided the GRC with a legal certification, the unredacted record requested for the *in camera* review and a redaction index on December 29, 2009. Therefore, the Custodian timely complied with the Council's December 22, 2009 Interim Order.

#### **Whether the Custodian unlawfully denied the Complainant access to the requested record?**

The GRC declines to conduct an *in camera* review of the Township Council's executive session minutes dated August 14, 2008 requested by the Complainant. Pursuant to the Court orders provided to the GRC by the Custodian's Counsel subsequent to the Council's December 22, 2009 Interim Order, the redactions of these minutes have previously been mediated among the Custodian's Counsel and Complainant's Counsel as of May 2009<sup>10</sup>. In Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), in which the Court upheld Plaintiff's denial of access to a requested record he already

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<sup>10</sup> The GRC assumes that the records with the mediated redactions were provided to the Complainant by May 2009 because the Court order directing such mediation was issued in March 2009 while the Court order directing the parties agree to reasonable attorney's fees for the Complainant was issued in May 2009 – presumably after all records were provided with the mediated redactions.

had in his possession at the time of the OPRA request, the Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. Therefore, the GRC views the Complainant's persistence with this Denial of Access Complaint after the exact record was previously provided to the Complainant with redactions specifically mediated between the parties' attorneys (as ordered by the Superior Court of New Jersey) duplicative prosecution of this matter.

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

OPRA states that:

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

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

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

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

Although the Custodian failed to provide the Complainant with a detailed and lawful basis for each redaction contained in the Township Council's executive session minutes dated August 14, 2008, resulting in a legally insufficient response pursuant to N.J.S.A. 47:1A-5.g., the Custodian did provide the requested record with redactions as previously mediated among the Custodian's Counsel and Complainant's Counsel in May 2009 pursuant to Wolosky v. Township of Vernon and Robin Kline, Records Custodian, Docket No.:SSX-L-079-09, Superior Court of New Jersey, Sussex County (March 2009). 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 (7<sup>th</sup> ed. 1999)). The court in Mason, *supra*, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).”

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.<sup>11</sup> Those changes expand

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<sup>11</sup> 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

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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).”

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

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

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

The Complainant filed this Denial of Access Complaint during January 2009 or the same month in which he filed a court action involving the same record requested on a later date from the request subject of this complaint. The Complainant was provided the requested record (the Township Council’s executive session minutes dated August 14, 2008) with redactions mediated between the Custodian’s Counsel and Complainant’s Counsel as of May 2009<sup>12</sup>. Therefore, GRC declines to perform an *in camera* review of the requested record (or order disclosure of that record with appropriate redactions) in accordance with Bart v. City of

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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.

<sup>12</sup> The GRC assumes that the records with the mediated redactions were provided to the Complainant by May 2009 because the Court order directing such mediation was issued in March 2009 while the Court order directing the parties agree to reasonable attorney’s fees for the Complainant was issued in May 2009 – presumably after all records were provided with the mediated redactions.

Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), in which the Court upheld Plaintiff's denial of access to a requested record he already had in his possession at the time of the OPRA request, because in that decision the Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. While it is clear that the Complainant did not have a copy of the requested record when he made such request, it is clear that the Complainant obtained a copy of the requested record with redactions mediated or sanctioned by his Counsel before this complainant was adjudicated on December 22, 2009 (when the Council rendered its Interim Order in this matter). Further, the Complainant's Counsel was already awarded reasonable attorney's fees pursuant to the Court action that resulted in the Complainant receiving the requested record with the mediated redactions.

Pursuant to Teeters, *supra*, the Complainant has not achieved "the desired result because this complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. This is especially true given that the relief ultimately achieved was the result of a previously decided Court action<sup>13</sup> for which reasonable attorney's fees have already been awarded to the Complainant. Therefore, the Complainant is not a prevailing party entitled to a second award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*, for a duplicative resolution of this matter.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection and a redaction index on December 29, 2009. Therefore, the Custodian timely complied with the Council's December 22, 2009 Interim Order.
2. The GRC declines to conduct an *in camera* review of the Township Council's executive session minutes dated August 14, 2008 requested by the Complainant. Pursuant to the Court orders provided to the GRC by the Custodian's Counsel subsequent to the Council's December 22, 2009 Interim Order, the redactions of these minutes have previously been mediated among the Custodian's Counsel and Complainant's Counsel as of May 2009<sup>14</sup>. In Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), in which the Court upheld Plaintiff's denial of access to a requested record he already had in his possession at the time of the OPRA request, the Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the

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<sup>13</sup> Wolosky v. Township of Vernon and Robin Kline, Records Custodian, Docket No.:SSX-L-079-09, Superior Court of New Jersey, Sussex County (March 2009).

<sup>14</sup> The GRC assumes that the records with the mediated redactions were provided to the Complainant by May 2009 because the Court order directing such mediation was issued in March 2009 while the Court order directing the parties agree to reasonable attorney's fees for the Complainant was issued in May 2009 – presumably after all records were provided with the mediated redactions.

complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. Therefore, the GRC views the Complainant's persistence with this Denial of Access Complaint after the exact record was previously provided to the Complainant with redactions specifically mediated between the parties' attorneys (as ordered by the Superior Court of New Jersey) an egregious waste of State resources for duplicative prosecution of this matter.

3. Although the Custodian failed to provide the Complainant with a detailed and lawful basis for each redaction in the Township Council's executive session minutes dated August 14, 2008, resulting in a legally insufficient response pursuant to N.J.S.A. 47:1A-5.g., the Custodian did provide the requested record with redactions as previously mediated among the Custodian's Counsel and Complainant's Counsel in May 2009 pursuant to Wolosky v. Township of Vernon and Robin Kline, Records Custodian, Docket No.:SSX-L-079-09, Superior Court of New Jersey, Sussex County (March 2009). 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.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved "the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. This is especially true given that the relief ultimately achieved was the result of a previously decided Court action<sup>15</sup> for which reasonable attorney's fees have already been awarded to the Complainant. Therefore, the Complainant is not a prevailing party entitled to a second award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008) for a duplicative resolution of this matter.

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

February 16, 2010

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<sup>15</sup> Wolosky v. Township of Vernon and Robin Kline, Records Custodian, Docket No.:SSX-L-079-09, Superior Court of New Jersey, Sussex County (March 2009).  
Jesse Wolosky v. Township of Vernon (Sussex), 2009-16 – Supplemental Findings and Recommendations of the Executive Director 11



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

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

INTERIM ORDER

December 22, 2009 Government Records Council Meeting

Jesse Wolosky  
Complainant

Complaint No. 2009-16

v.

Township of Vernon (Sussex)  
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the December 9, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian provided the Complainant with a written response to his OPRA request within the statutorily mandated seven (7) business days in which the Custodian granted access to redacted copies of the requested executive session minutes, the Custodian failed to provide the Complainant with a detailed and lawful basis for each redaction. As such, the Custodian’s response to the Complainant’s OPRA request is legally insufficient pursuant to N.J.S.A. 47:1A-5.g.
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested record (Township Council’s executive session minutes dated August 14, 2008) to determine the validity of the Custodian’s assertion that the redacted portions constitute attorney-client privileged information and/or contract negotiations which are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #2 above), a document**

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



or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>3</sup>, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the Council's *in camera* review.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the outcome of the Council's *in camera* review.

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

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: December 23, 2009**

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

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



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-16**

**v.**

**Township of Vernon (Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Transcript of the most recent governing body executive session minutes that have been approved by the governing body.<sup>3</sup>

**Request Made:** December 2, 2008

**Response Made:** December 3, 2008 and December 15, 2008

**Custodian:** Robin R. Kline

**GRC Complaint Filed:** January 5, 2009<sup>4</sup>

**Background**

**December 2, 2008**

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

**December 3, 2008**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1<sup>st</sup>) business day following receipt of such request. The Custodian states that she will make the requested records available as soon as her office receives them.

**December 3, 2008**

E-mail from Complainant to Custodian. The Complainant states that he will wait to receive the requested records.

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<sup>1</sup> Represented by Jonathan E. McMeen, Esq., (Sparta, NJ) and Walter M. Luers, Esq., (Oxford, NJ).

<sup>2</sup> Represented by Michael D. Witt, Esq., of Chasan Leyner & Lamparello, P.C. (Secaucus, NJ).

<sup>3</sup> The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

## **December 15, 2008**

Custodian's subsequent response to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following the Custodian's receipt of said request.<sup>5</sup> The Custodian states that she has attached the requested records to this e-mail.

## **January 5, 2009**

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

- Complainant's OPRA request dated December 2, 2008
- Custodian's response to the Complainant's OPRA request dated December 3, 2008
- E-mail from Complainant to Custodian dated December 3, 2008
- Custodian's subsequent response to the Complainant's OPRA request dated December 15, 2008

The Complainant states that he submitted his OPRA request on December 2, 2008 to receive executive session minutes either via e-mail or fax. The Complainant states that the Custodian responded via e-mail on the next business day informing him that she would provide the requested minutes as soon as she received them. The Complainant states that the Custodian responded via e-mail again on December 15, 2008 in which the Custodian provided the requested meeting minutes, which contained various redactions without any reference as to the basis for said redactions.

The Complainant asserts that the Custodian unlawfully denied access to the redacted portions of the executive session minutes because she failed to provide a detailed and lawful basis for each individual redaction. The Complainant states that instead, the Custodian noted on the top of the minutes that redactions constitute attorney-client privileged material, personnel matters, and contract negotiations.

The Complainant states that the Council has previously held that a custodian's response is legally insufficient under OPRA when the custodian fails to provide a written response setting forth a detailed and lawful basis for each redaction. *See Paff v. Borough of Lavallette*, GRC Complaint No. 2007-209 (June 2008 Interim Order); *Paff v. Township of Plainsboro*, GRC Complaint No. 2005-29 (July 2005); and *Schwarz v. NJ Department of Human Services*, GRC Complaint No. 2004-60 (February 2005).

Additionally, the Complainant states that custodians carry the burden of stating the specific basis for denying access and to "produce specific reliable evidence to meet a statutorily recognized basis for confidentiality." *Courier News v. Hunterdon County Prosecutor's Office*, 358 N.J. Super. 373, 382-83 (App. Div. 2003). The Complainant also states that custodians must explain their redactions in a manner that "will enable other parties to assess the applicability of the privilege or protection." *Paff v. New Jersey Department of Labor, Board of Review*, 379 N.J. Super. 346, 354-55 (App. Div. 2005). The Complainant states that in such cases, the court must perform an *in camera* review. *Hartz Mountain v. NJSEA*, 369 N.J. Super. 175, 183 (App. Div. 2004) ("we think it plain that under OPRA...the Court is obliged, when a claim of confidentiality or privilege is

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<sup>5</sup> The Custodian certified in her Statement of Information that Township offices are closed on Fridays. Jesse Wolosky v. Township of Vernon (Sussex), 2009-16 – Findings and Recommendations of the Executive Director

made by the public custodian of the record, to inspect the challenged document *in camera* to determine the validity of the claim”).

The Complainant asserts that the Council should either order the Custodian to produce unredacted copies of the executive session minutes, or submit said minutes to the Council for an *in camera* review along with a document index describing the specific legal basis for each redaction. Additionally, the Complainant contends that the Council should find the Custodian in violation of OPRA for failing to provide the specific lawful basis for the redactions at the time of the request, and award reasonable prevailing party’s fees pursuant to N.J.S.A. 47:1A-6.

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

**January 16, 2009**

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

**February 29, 2009**

Custodian’s SOI with the following attachments:

- Records responsive to the Complainant’s OPRA request, redacted
- Resolution No. 08-223 dated December 11, 2008 authorizing the release of executive session minutes to the public.

The Custodian certifies that she received the Complainant’s OPRA request on December 2, 2008. The Custodian certifies that she searched the executive session minutes and determined that the August 14, 2008 minutes were the most recently approved minutes by the governing body as to form. The Custodian certifies that said minutes were approved for public release by Resolution No. 223-08 on the evening of December 11, 2008. The Custodian certifies that she provided said minutes to the Complainant on the next business day, December 15, 2008, as Township offices are closed on Fridays.

As for the redactions made to the requested minutes, the Custodian provides the following index:

<b>General Nature Description of Redactions</b>	<b>Legal Basis for Redactions</b>
Sussex County Health Department re-stoning issues. Redacted attorney-client communications and contract negotiation matters.	Attorney-client privilege: <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9.a</u> ; <u>N.J.S.A. 10:4-12</u> . Contract negotiations; deliberative process: <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9.a</u> ; <u>N.J.S.A. 10:4-12</u> .
United Water Sewer Purchase contract. Redacted contract negotiation matters.	Contract negotiations; deliberative process: <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9.a</u> ; <u>N.J.S.A. 10:4-12</u> .
Health Department transfer to Sussex County contract. Redacted attorney-client communications and contract negotiation	Attorney-client privilege: <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9.a</u> ; <u>N.J.S.A. 10:4-12</u> . Contract negotiations; deliberative process:

matters.	<u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9.a</u> ; <u>N.J.S.A. 10:4-12</u> .
United Water Sewer Purchase contract. Redacted attorney-client communications and contract negotiation matters.	Attorney-client privilege: <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9.a</u> ; <u>N.J.S.A. 10:4-12</u> . Contract negotiations; deliberative process: <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9.a</u> ; <u>N.J.S.A. 10:4-12</u> .
Land Use Board Referendum. Redacted attorney-client communications.	Attorney-client privilege: <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9.a</u> ; <u>N.J.S.A. 10:4-12</u> .
United Water service contract. Redacted attorney-client communications and contract negotiation matters.	Attorney-client privilege: <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9.a</u> ; <u>N.J.S.A. 10:4-12</u> . Contract negotiations; deliberative process: <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9.a</u> ; <u>N.J.S.A. 10:4-12</u> .

Additionally, the Custodian certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”) executive session minutes must be maintained permanently.

### Analysis

#### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also states that:

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

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>6</sup>

Here, the Custodian certified that she received the Complainant’s OPRA request on December 2, 2008. Additionally, the Custodian certified that she provided the Complainant with the requested executive session minutes on December 15, 2008, the seventh (7<sup>th</sup>) business day following receipt of said request (the Custodian certified that Township offices are closed on Fridays). However, the Complainant states that the Custodian provided redacted copies of said minutes and failed to identify the specific legal basis for each redaction.

Therefore, although the Custodian provided the Complainant with a written response to his OPRA request within the statutorily mandated seven (7) business days in which the Custodian granted access to redacted copies of the requested executive session minutes, the Custodian failed to provide the Complainant with a detailed and lawful basis for each redaction. As such, the Custodian’s response to the Complainant’s OPRA request is legally insufficient pursuant to N.J.S.A. 47:1A-5.g.

However, in the Custodian’s SOI, the Custodian certified that the redacted portions of the executive session minutes are exempt from disclosure as attorney-client privileged information and/or contract negotiations pursuant to N.J.S.A. 47:1A-1.1.

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<sup>6</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC<sup>7</sup> in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

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

The court also stated that:

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

Further, the court stated that:

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

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the requested record (Township Council’s executive session minutes dated August 14, 2008) to determine the validity of the Custodian’s assertion that the redacted portions constitute attorney-client privileged information and/or contract negotiations which are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

**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?**

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 outcome of the Council’s *in camera* review.

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<sup>7</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).  
Jesse Wolosky v. Township of Vernon (Sussex), 2009-16 – Findings and Recommendations of the Executive Director

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

The Council defers analysis of whether the Complainant is a prevailing party pending the outcome of the Council’s *in camera* review.

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian provided the Complainant with a written response to his OPRA request within the statutorily mandated seven (7) business days in which the Custodian granted access to redacted copies of the requested executive session minutes, the Custodian failed to provide the Complainant with a detailed and lawful basis for each redaction. As such, the Custodian’s response to the Complainant’s OPRA request is legally insufficient pursuant to N.J.S.A. 47:1A-5.g.
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested record (Township Council’s executive session minutes dated August 14, 2008) to determine the validity of the Custodian’s assertion that the redacted portions constitute attorney-client privileged information and/or contract negotiations which are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>8</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #2 above), a document or redaction index<sup>9</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>10</sup>, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the Council’s *in camera* review.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the outcome of the Council’s *in camera* review.

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<sup>8</sup> The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>9</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>10</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Prepared By: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

December 9, 2009