



**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*

**FINAL DECISION**

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

Jesse Wolosky  
Complainant

Complaint No. 2009-23

v.

Borough of Branchville (Sussex)  
Custodian of Record

At the January 26, 2010 public meeting, the Government Records Council (“Council”) considered the January 19, 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, finds that:

1. Because the Custodian certified that no records responsive to Request Item No. 1 exist and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied access to the records requested in Request Item No. 1 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Because the Custodian provided access to the records requested within the seven (7) business days mandated by OPRA, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to N.J.S.A. 47:1A-5.i., N.J.S.A. 47:1A-5.g., and N.J.S.A. 47:1A-6.
3. Because there were no records responsive to Request Item No. 1 and the Custodian disclosed the record responsive to Request Item No. 2 seventeen (17) business days prior to the filing of this Denial of Access Complaint at no charge, the filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian’s conduct. Therefore, pursuant to 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), the Complainant is not a “prevailing party” entitled to an award of reasonable attorney’s fees.



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

Final Decision Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of January, 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: January 29, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2009-23**

v.

**Borough of Branchville (Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:<sup>3</sup>**

1. Audio recording of the last regular public meeting of the governing body;
2. Transcript (hard copy) of the most recently approved Borough of Branchville executive session minutes.<sup>4</sup>

**Request Made:** December 2, 2008

**Response Made:** December 8, 2008

**Custodian:** Kathryn Leissler

**GRC Complaint Filed:** January 6, 2009<sup>5</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 8, 2008**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4<sup>th</sup>) business day following receipt of such request. The Custodian states that because the Borough of Branchville ("Borough") does not make audio recordings of their public meetings, she has included the printed meeting minutes for the last meeting of the governing body of the Borough of Branchville. The Custodian states that she also included the most recently approved executive session minutes in response to Request Item No. 2.

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

<sup>2</sup> Represented by Richard Valenti, Esq. (Newton, NJ).

<sup>3</sup> The Complainant requested access to additional records that are not the subject of this complaint.

<sup>4</sup> The Complainant indicated on the OPRA request form that his preferred methods of delivery were by pick up, fax, and e-mail.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

**December 9, 2008**

E-mail from the Custodian to the Complainant. The Custodian states that she left the Complainant a voicemail message stating that the records responsive to this OPRA request were ready for pickup. The Custodian further states that she has also faxed the records to the Complainant as indicated in the request.

**December 10, 2008**

E-mail from the Complainant to the Custodian. The Complainant confirms that he has received the Custodian's December 9, 2008 e-mail. The Complainant acknowledges receipt of the printed minutes from the last regular public meeting. However, the Complainant states that he only requested the audio recording of the last regular public meeting, not the printed minutes. The Complainant further states that he has not received the executive session minutes that are responsive to Request Item No. 2. The Complainant states that because he did not request paper copies, the \$3.75 copying fee that the Custodian assessed is invalid.<sup>6</sup> The Complainant requests that the Custodian follow the instructions set forth in his OPRA request and provide the responsive records by fax or e-mail.

**December 10, 2008**

E-mail from the Custodian to the Complainant. The Custodian states that the Borough does not audio-record its meetings. The Custodian states that she informed the Complainant of this fact in the December 9, 2008 fax wherein she provided the Complainant with a copy of the printed meeting minutes. In regards to Request Item No. 2, the Custodian states that she will obtain an estimate on the cost to convert the executive session minutes.<sup>7</sup>

**December 11, 2008**

E-mail from the Complainant to the Custodian. The Complainant states that he only wanted the audio recording of the last public meeting and the Custodian need not have provided the Complainant with the printed minutes from that last regular public meeting but simply informed him that the Borough does not record its meetings. The Complainant states that he has not received the executive session minutes responsive to Request Item No. 2. The Complaint requests that the Custodian provide the executive session minutes via fax or e-mail.

**December 11, 2008**

E-mail from the Custodian to the Complainant. The Custodian states that the executive session minutes responsive to Request Item No. 2 were faxed to the Complainant in the packet accompanying the Custodian's cover letter dated December 8, 2008. The Custodian states that the minutes consist of one (1) page. The Custodian requests that the Complainant let her know if he would like the minutes re-sent.

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<sup>6</sup> The Custodian certifies in the SOI that because the Complainant selected pick up as one of his preferred delivery methods, she included the copying fee for paper copies in the December 9, 2008 fax cover letter to the Complainant.

<sup>7</sup> The Custodian certifies in the SOI that the executive session minutes only exist in paper form and that she was unable to scan the minutes because the Borough does not have a scanner.

## **December 11, 2008**

E-mail from the Complainant to the Custodian. The Complainant states that Request Item No. 1 is fulfilled. The Complainant also states that in regards to Request Item No. 2, the fax cover letter dated December 8, 2008 indicated that there would be 26 pages. However, the Complainant states that he only received 23 pages. The Complainant requests that the Custodian re-send only those pages that are a part of the most recently approved executive session meeting minutes.<sup>8</sup>

## **January 6, 2009**

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

- Complainant’s OPRA request dated December 2, 2008;
- Letter from the Custodian to the Complainant dated December 8, 2008;
- E-mail from the Custodian to the Complainant dated December 9, 2008;
- E-mail from the Complainant to the Custodian dated December 10, 2008;
- E-mail from the Custodian to the Complainant dated December 10, 2008;
- E-mail from the Complainant to the Custodian dated December 11, 2008;
- E-mail from the Custodian to the Complainant dated December 11, 2008;
- E-mail from the Complainant to the Custodian dated December 11, 2008.

The Complainant states that he submitted his OPRA request on December 2, 2008 via fax on an official OPRA request form. The Complainant states that he requested that the Custodian e-mail or fax those records responsive to his request. The Complainant further states that when the Custodian responded to his request, the Custodian assessed a fee of \$3.75 for the copies made. The Complainant also states that while the executive session minutes were not attached to the December 8, 2008 letter, the Custodian eventually faxed them on December 11, 2008. The Complainant states that the Custodian failed to respond to his inquiry regarding the \$3.75 copying fee. The Complainant asserts that the fee is invalid because the Custodian was not required to make paper copies to fulfill his request.

The Complainant states that facsimile was the medium requested. The Complainant asserts that the Custodian was only required to send the requested records via facsimile. The Complainant argues that absent extraordinary circumstances, actual cost is limited to the cost of materials used to make the copy, excluding labor and overhead. Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26, 31 (1962) (labor not included in actual cost under New Jersey common law); Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271, 280 (App. Div. 2005) (fees allowed under OPRA consistent with fees allowed under the Common Law Right of Access); Libertarian Party of Central New Jersey v. Murphy 384 N.J. Super. 136, 141 n.1 (App. Div. 2006) (direct cost of copying not appropriate standard); O'Shea v. Madison Public School District, GRC Complaint No. 2007-185 (December 2008); O'Shea v. Township of Vernon, GRC Complaint No. 2007-207 (April 30, 2008). The Complainant argues that

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<sup>8</sup> The Complainant states in the Denial of Access Complaint that the Custodian faxed executive session meeting minutes on December 11, 2008.

because the Custodian was not obligated to make a paper copy of the records requested, the actual cost of duplication is zero.

Based on the foregoing, the Complainant requests that the GRC:

- (1) find that the Custodian violated OPRA by attempting to charge a fee for faxing; and
- (2) find that the Complainant is a prevailing party entitled to an award of reasonable attorneys fees pursuant to N.J.S.A. 47: 1 A-6.

The Complainant does not agree to mediate this complaint.

### **January 20, 2009**

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

### **January 23, 2009**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated December 2, 2008;
- Letter from the Custodian to the Complainant dated December 8, 2008;
- E-mail from the Custodian to the Complainant dated December 9, 2008.

The Custodian certifies that the Complainant submitted an OPRA request on December 2, 2008 via fax. The Custodian certifies that she responded to the Complainant’s OPRA request on December 8, 2008 in a letter attaching the responsive records to Request Items Nos. 1 and 2. The Custodian certifies that the Complainant indicated that he would like the records e-mailed, faxed or made available for pick-up. The Custodian further certifies that Request Items Nos. 1 and No. 2 were only available in hard copy. The Custodian certifies that she was unable to scan the minutes because the Borough does not have a scanner.

The Custodian certifies that she called the Complainant at 10:50 a.m. on December 8, 2008 to inform him that his request was ready for pick up. The Custodian further certifies that the Complainant did not return her phone call. The Custodian also certifies that on December 9, 2008, she faxed the most recently approved minutes from the Borough’s regular public meeting and executive session. The Custodian certifies that because the Complainant selected pick up as one of his preferred delivery methods, she included the copying fee for paper copies in the December 9, 2008 fax cover letter to the Complainant. The Custodian certifies that the executive session minutes were attached to the original fax on December 9, 2008 and that the requested copying fees were never collected. The Custodian further certifies that the copy fee was mentioned only once in the December 9, 2008 fax cover letter.

## **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 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.

#### Request Item No. 1 for the audio recording of the last regular public meeting of the governing body

The Custodian responded in writing to the Complainant’s OPRA request on the fourth (4<sup>th</sup>) business day stating that she had enclosed the printed meeting minutes for the last public meeting because the Borough does not make audio recordings of their public meetings. The Custodian also certified in the SOI that the Borough does not record their public meetings.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant’s request existed. The GRC determined the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Because the Custodian in the complaint currently before the Council certified that no records responsive to Request Item No. 1 exist and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied

access to the records requested in Request Item No. 1 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Request Item No. 2 for transcript (hard copy) of the most recently approved Borough of Branchville executive session minutes

The Custodian certified that she faxed the requested executive session minutes responsive to the Complainant's request to him on December 9, 2008. The Complainant later informed the Custodian that he had not received the executive session minutes. The Complainant stated that he only received 23 pages of the 26 pages faxed on December 9, 2009 and requested that the Custodian fax the executive session minutes once more. The Complainant states that the Custodian faxed the executive session minutes on December 11, 2009.

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.

The evidence of record reveals that the Custodian attempted to provide the Complainant access to the executive session minutes on December 9, 2009. However, the Complainant only received part of the facsimile transmission. Once the Complainant clearly indicated to the Custodian that he had not received the executive session minutes in full, the Custodian re-sent the minutes on December 11, 2009, the seventh (7<sup>th</sup>) business day following receipt of the Complainant's request.

Therefore, because the Custodian provided access to the records requested within the seven (7) business day response time mandated by OPRA, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to N.J.S.A. 47:1A-5.i., N.J.S.A. 47:1A-5.g., and N.J.S.A. 47:1A-6.

Although the Custodian initially indicated on the December 9, 2009 fax to the Complainant that a copying fee of \$3.75 was required, the Custodian provided access to the records requested via facsimile transmission without collecting the fee. Therefore, because the Custodian did not deny the Complainant access to the records requested based on the Complainant's refusal to pay the fee, the fee issue as raised by the Complainant is moot.

**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)."

The Custodian has certified that no records responsive to Request Item No. 1 exist. Although the Custodian initially indicated on the December 9, 2009 fax to the Complainant that a copying fee of \$3.75 was required, the Custodian provided access to Request Item No. 2 via facsimile transmission without collecting the fee.

Because there were no records responsive to Request Item No. 1 and the Custodian disclosed the record responsive to Request Item No. 2 seventeen (17) business days prior to the filing of this Denial of Access Complaint at no charge, the filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct. Therefore, pursuant to Teeters, *supra* and Mason, *supra*, the Complainant is not a "prevailing party" entitled to an award of reasonable attorney's fees.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified that no records responsive to Request Item No. 1 exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied access to the records requested in Request Item No. 1 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Because the Custodian provided access to the records requested within the seven (7) business days mandated by OPRA, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to N.J.S.A. 47:1A-5.i., N.J.S.A. 47:1A-5.g., and N.J.S.A. 47:1A-6.
3. Because there were no records responsive to Request Item No. 1 and the Custodian disclosed the record responsive to Request Item No. 2 seventeen (17) business days prior to the filing of this Denial of Access Complaint at no charge, the filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct. Therefore, pursuant to 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), the Complainant is not a "prevailing party" entitled to an award of reasonable attorney's fees.

Prepared By: Sherin Keys, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

January 19, 2010