



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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Commissioner*

**FINAL DECISION**

**March 29, 2011 Government Records Council Meeting**

John Paff  
Complainant  
v.  
County of Camden  
Custodian of Record

Complaint No. 2009-25

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 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 this complaint should be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law, via letter from his legal counsel dated March 17, 2011, on the basis that all terms of the settlement have been reached by the parties. 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 29<sup>th</sup> Day of March, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: April 1, 2011**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**John Paff<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-25**

v.

**County of Camden<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of the records enumerated below in the following order of preference: e-mail; fax; regular mail (whichever is the least expensive):

1. Settlement agreement entered into on or about March 26, 2007 in Mark Alexander v. County of Camden, Federal Civil Case No. 1:06cv5767 (JED).
2. If the County contends that the record requested in item 1 is exempt from disclosure, a copy of any court order that seals or otherwise makes the settlement agreement confidential.
3. The most recent version of the Camden County Code of Ethics in a text file, word processing file, or a non-scanned PDF file.
4. The non-exempt portion of the most recently issued Advisory Opinion of the Camden County Ethics Board.
5. The minutes of the most recent public meeting held by the Camden County Ethics Board.
6. The minutes of the most recent executive session held by the Camden County Ethics Board.
7. The resolution authorizing the executive session (for which minutes are requested in item 6 above).
8. The most recent finding by the Camden County Ethics Board that a county officer or employee violated the provisions of the ethics code.
9. The most recent financial disclosure form filed by each of the present members of the Camden County Ethics Board.

**Request Made:** December 27, 2008

**Response Made:** December 29, 2008

**Custodian:** Maria Efstratiades

**GRC Complaint Filed:** January 13, 2009<sup>3</sup>

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

<sup>2</sup> Represented by Howard L. Goldberg, Assistant County Counsel (Camden, NJ).

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

## Background

### **April 8, 2010**

Government Records Council's ("Council") Interim 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 and the Complainant have complied with the Council's January 26, 2010 Interim Order because:
  - a. the Custodian's Counsel made the exact amount of the fee available to the Complainant within three (3) business days from receipt of the Council's Interim Order;
  - b. the Complainant's Counsel delivered to the Custodian's Counsel within five (5) business days from receipt of the Council's Interim Order a statement declining to purchase the record, but stated that the version of the Code of Ethics provided by the Custodian on January 28, 2010 appeared to be responsive to the Complainant's OPRA request; and
  - c. the Custodian and the Custodian's Counsel provided legal certifications to the GRC's Executive Director within seven (7) business days from receipt of the Council's Interim Order indicating that the Custodian provided the Code of Ethics to the Complainant at no cost, that the Custodian's Counsel provided the exact amount of fees associated with providing said record to the Complainant, and that the Complainant, within five (5) business days from receipt of the Council's Interim Order, declined to pay said fees, but stated that the version of the Code of Ethics provided by the Custodian on January 28, 2010 appeared to be responsive to the Complainant's OPRA request.
2. Although the Custodian placed an unreasonable limitation on the Complainant's access to government records, failed to bear her burden of proving a lawful denial of access to the requested settlement agreement and failed to provide the Code of Ethics in the medium requested, there is no evidence in the record that suggests the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness. 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian provided the Complainant with a written response to his OPRA request in which the Custodian granted access to some records requested and denied access to others on the basis that said records do not exist five (5) business days after the filing of this complaint. The Custodian also provided access to the requested Code of Ethics in the medium requested as

ordered by the Council on January 26, 2010. 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 placed an unreasonable limitation on the Complainant's access to government records by refusing to fulfill the Complainant's OPRA request until he submitted separate OPRA request forms. Custodians must also provide requested records in the medium requested pursuant to N.J.S.A. 47:1A-5.d. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

**April 12, 2010**

Council's Interim Order distributed to the parties.

**June 30, 2010**

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

**March 17, 2011**

Letter from Complainant's Counsel to Administrative Law Judge. Counsel states that all terms of the settlement between the parties have been fulfilled. As such, Counsel states that the Complainant withdraws this complaint.

**Analysis**

No analysis required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law, via letter from his legal counsel dated March 17, 2011, on the basis that all terms of the settlement have been reached by the parties. No further adjudication is required.

Prepared By: Dara Lownie  
Communications Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

March 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**

John Paff  
Complainant

Complaint No. 2009-25

v.

County of Camden  
Custodian of Record

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 and the Complainant have complied with the Council’s January 26, 2010 Interim Order because:
  - a. the Custodian’s Counsel made the exact amount of the fee available to the Complainant within three (3) business days from receipt of the Council’s Interim Order;
  - b. the Complainant’s Counsel delivered to the Custodian’s Counsel within five (5) business days from receipt of the Council’s Interim Order a statement declining to purchase the record, but stated that the version of the Code of Ethics provided by the Custodian on January 28, 2010 appeared to be responsive to the Complainant’s OPRA request; and
  - c. the Custodian and the Custodian’s Counsel provided legal certifications to the GRC’s Executive Director within seven (7) business days from receipt of the Council’s Interim Order indicating that the Custodian provided the Code of Ethics to the Complainant at no cost, that the Custodian’s Counsel provided the exact amount of fees associated with providing said record to the Complainant, and that the Complainant, within five (5) business days from receipt of the Council’s Interim Order, declined to pay said fees, but stated that the version of the Code of Ethics provided by the Custodian on January 28, 2010 appeared to be responsive to the Complainant’s OPRA request.



2. Although the Custodian placed an unreasonable limitation on the Complainant's access to government records, failed to bear her burden of proving a lawful denial of access to the requested settlement agreement and failed to provide the Code of Ethics in the medium requested, there is no evidence in the record that suggests the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness. 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.
  
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian provided the Complainant with a written response to his OPRA request in which the Custodian granted access to some records requested and denied access to others on the basis that said records do not exist five (5) business days after the filing of this complaint. The Custodian also provided access to the requested Code of Ethics in the medium requested as ordered by the Council on January 26, 2010. 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 placed an unreasonable limitation on the Complainant's access to government records by refusing to fulfill the Complainant's OPRA request until he submitted separate OPRA request forms. Custodians must also provide requested records in the medium requested pursuant to N.J.S.A. 47:1A-5.d. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the  
Government Records Council  
On The 8<sup>th</sup> Day of April, 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: April 12, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**John Paff<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2009-25**

v.

**County of Camden<sup>2</sup>**  
**Custodian of Records**

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1. Settlement agreement entered into on or about March 26, 2007 in Mark Alexander v. County of Camden, Federal Civil Case No. 1:06cv5767 (JEI).
2. If the County contends that the record requested in item 1 is exempt from disclosure, a copy of any court order that seals or otherwise makes the settlement agreement confidential.
3. The most recent version of the Camden County Code of Ethics in a text file, word processing file, or a non-scanned PDF file.
4. The non-exempt portion of the most recently issued Advisory Opinion of the Camden County Ethics Board.
5. The minutes of the most recent public meeting held by the Camden County Ethics Board.
6. The minutes of the most recent executive session held by the Camden County Ethics Board.
7. The resolution authorizing the executive session (for which minutes are requested in item 6 above).
8. The most recent finding by the Camden County Ethics Board that a county officer or employee violated the provisions of the ethics code.
9. The most recent financial disclosure form filed by each of the present members of the Camden County Ethics Board.

**Request Made:** December 27, 2008

**Response Made:** December 29, 2008

**Custodian:** Maria Efstratiades

**GRC Complaint Filed:** January 13, 2009<sup>3</sup>

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

<sup>2</sup> Represented by Howard L. Goldberg, Assistant County Counsel (Camden, NJ).

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



## Background

### **January 26, 2010**

Government Records Council's ("Council") Interim Order. At its January 26, 2010 public meeting, the 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, found that:

1. The Custodian's refusal to fulfill the Complainant's OPRA request until the Complainant submitted each request on a separate OPRA request form is an unreasonable limitation on access pursuant to N.J.S.A. 47:1A-1, Kushner v. Township of West Milford, GRC Complaint No. 2004-111 (October 2004), Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007), and Anonymous v. Long Hill Township Board of Education (Morris), GRC Complaint No. 2008-192 (November 2009).
2. Because the Custodian certified that there are no records responsive to the Complainant's request for a settlement agreement, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the statutorily mandated seven (7) business days pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). However, because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days that no specific settlement agreement exists, the Custodian's response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1-A-5.g.
3. Because the Custodian failed to provide the Complainant with the requested Code of Ethics in the medium requested, the Custodian violated N.J.S.A. 47:1A-5.d. As such, the Custodian must disclose to the Complainant the requested Code of Ethics in the medium requested pursuant to N.J.S.A. 47:1A-5.d.
4. **The Custodian shall calculate the appropriate fee in accordance with item # 3 above and shall make the exact amount of the fee available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Complainant shall comply with item # 3 above within five (5) business days from receipt of the Council's Interim Order by delivering to the Custodian (a) payment of the appropriate fee, or (b) a statement declining to purchase the record. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the record pursuant to N.J.S.A. 47:1A-5.b. Within seven (7) business days from receipt of the Council's Interim Oder, the Custodian shall provide the Executive Director a statement with regards to the Complainant's willingness or refusal to purchase the requested record, the amount of the copy fee and confirmation that the record was so**

**provided to the Complainant, if applicable. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.**

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied of access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to an award of reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

**January 27, 2010**

Council's Interim Order distributed to the parties.

**January 28, 2010**

E-mail from Custodian to Complainant and GRC. The Custodian attaches an electronic copy of the requested Code of Ethics and provides such to the Complainant and to the GRC.

**February 1, 2010**

E-mail from GRC to Custodian. The GRC re-sends the text of items no. 3-4 of the Council's Interim Order dated January 26, 2010. The GRC states that for clarification purposes, since the GRC disseminated the Council's Interim Order on January 27, 2010, the third (3<sup>rd</sup>) business day discussed in the Interim Order is February 2, 2010. The GRC states that the fifth (5<sup>th</sup>) business day is February 4, 2010 and the seventh (7<sup>th</sup>) business day is February 8, 2010. The GRC reminds the Custodian that her response to the Executive Director must be in the form of a legal certification pursuant to N.J. Court Rule 1:4-4.

**February 1, 2010**

Custodian's Certification. The Custodian certifies that she contacted Dave Sampieri, Director of the Office of Information Technology, to inquire as to the medium conversion required to provide the requested Code of Ethics to the Complainant in the medium requested. The Custodian certifies that she received an e-mailed response from the Mr. Sampieri<sup>4</sup> containing the Code of Ethics in Microsoft Word format which Mr. Sampieri advised constitutes a "word processing file" as was requested by the Complainant. The Custodian certifies that she provided said record to the Complainant via e-mail dated January 28, 2010 rather than a statement of the costs to create said record.

**February 1, 2010**

E-mail from Custodian's Counsel to Complainant's Counsel. The Custodian's Counsel states that the Custodian provided the Complainant with a copy of the requested Code of Ethics in word processing format via e-mail dated January 28, 2010. Counsel states that pursuant to the terms of the Council's Interim Order, the Custodian was to

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<sup>4</sup>The Custodian attaches said e-mail dated January 27, 2010 to her certification.  
John Paff v. County of Camden, 2009-25 – Supplemental Findings and Recommendations of the Executive Director

advise the Complainant of the cost to convert said record. Counsel states that the County discovered that it could complete the conversion itself and thus provided said record to the Complainant. Counsel states that there was no cost associated with said conversion.

However, Counsel states that if the record provided does not accurately meet the terms of the Complainant's request for a "text file, word processing file or non-scanned PDF file," the record will have to be re-typed. Counsel states that said record is approximately 30 pages long and is estimated to take 4-6 hours to re-type at \$16.17 per hour (starting salary for Clerk Typist). Counsel states that the cost would be between \$64.68 and \$97.02.

#### **February 4, 2010**

E-mail from Complainant's Counsel to Custodian's Counsel. The Complainant's Counsel states that he has received the County's cost estimate to provide the requested Code of Ethics and states that the Complainant declines to pay said cost. However, the Complainant's Counsel states that the version of the Code of Ethics the Custodian provided via e-mail on January 28, 2010 appears to be responsive to the Complainant's OPRA request.

#### **February 4, 2010**

Custodian Counsel's Certification. Counsel certifies that he is responding to the Council's Interim Order because the Custodian is on vacation. Counsel states that the Custodian provided the Complainant with a copy of the Code of Ethics via e-mail on January 28, 2010 in a format the Custodian believed to be compliant with the Complainant's request. Counsel certifies that he e-mailed the Complainant's Counsel on February 1, 2010 and advised that there is no cost associated with the record provided by the Custodian on January 28, 2010. Counsel certifies that he also informed the Complainant's Counsel of the cost associated with re-typing the requested record. Counsel certifies that he received an e-mail from the Complainant's Counsel dated February 4, 2010 declining to pay the costs enumerated in the Custodian Counsel's e-mail dated February 1, 2010 and stating that the record provided by the Custodian on January 28, 2010 appeared to be responsive to the Complainant's OPRA request.

### **Analysis**

#### **Whether the Custodian and the Complainant complied with the Council's January 26, 2010 Interim Order?**

The Council's Interim Order dated January 26, 2010 directed the Custodian to disclose the requested Code of Ethics to the Complainant in the medium requested pursuant to N.J.S.A. 47:1A-5.d. The Complainant requested said record as a text file, word processing file, or non-scanned PDF.

The Council's Interim Order specifically required the Custodian to provide the Complainant with the cost of the medium conversion within three (3) business days from receipt of said Order, or by February 2, 2010. The Custodian's Counsel provided the Complainant's Counsel with a cost estimate to re-type the Code of Ethics via e-mail dated February 1, 2010. The Custodian's Counsel also advised the Complainant's

Counsel that there was no fee associated with providing the Code of Ethics in electronic format on January 28, 2010.

Next, the Council's Interim Order required the Complainant to notify the Custodian whether he was willing to pay the copy fee within five (5) business days from receipt of the Council's Interim Order, or by February 4, 2010. On said date the Complainant's Counsel e-mailed the Custodian's Counsel to decline the fees assessed to re-type the Code of Ethics, but indicated that the version of said record provided by the Custodian on January 28, 2010 appeared to be responsive to the Complainant's request.

Additionally, the Council's Interim Order required the Custodian to provide a legal certification to the GRC's Executive Director regarding the Complainant's willingness to pay the conversion fees, the amount of said fees, and whether the Custodian provided the Code of Ethics to the Complainant, within seven (7) business days from receipt of said Order, or by February 8, 2010. On February 1, 2010, the Custodian certified that she provided the requested Code of Ethics to the Complainant via e-mail dated January 28, 2010 rather than a statement of the costs to create said record. Also, on February 4, 2010, the Custodian's Counsel certified that he e-mailed the Complainant's Counsel on February 1, 2010 and advised that there is no cost associated with the record provided by the Custodian on January 28, 2010. Counsel certified that he also informed the Complainant's Counsel of the cost associated with re-typing the requested record. Counsel certified that he received an e-mail from the Complainant's Counsel dated February 4, 2010 declining to pay the costs enumerated in the Custodian Counsel's e-mail dated February 1, 2010 and stating that the record provided by the Custodian on January 28, 2010 appeared to be responsive to the Complainant's OPRA request.

Therefore, the Custodian and the Complainant have complied with the Council's January 26, 2010 Interim Order because:

- a. the Custodian's Counsel made the exact amount of the fee available to the Complainant within three (3) business days from receipt of the Council's Interim Order;
- b. the Complainant's Counsel delivered to the Custodian's Counsel within five (5) business days from receipt of the Council's Interim Order a statement declining to purchase the record, but stated that the version of the Code of Ethics provided by the Custodian on January 28, 2010 appeared to be responsive to the Complainant's OPRA request; and
- c. the Custodian and the Custodian's Counsel provided legal certifications to the GRC's Executive Director within seven (7) business days from receipt of the Council's Interim Order indicating that the Custodian provided the Code of Ethics to the Complainant at no cost, that the Custodian's Counsel provided the exact amount of fees associated with providing said record to the Complainant, and that the Complainant, within five (5) business days from receipt of the Council's Interim Order, declined to pay said fees, but stated that the version of the Code of Ethics provided by the Custodian on January 28, 2010 appeared to be responsive to the Complainant's OPRA request.

**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?**

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.

The Custodian in this complaint responded to the Complainant’s OPRA request on the same date she received said request and refused to fulfill said request until the Complainant submitted separate OPRA request forms to request multiple records relating to various subject matters. The Council held that the Custodian’s refusal to fulfill the Complainant’s OPRA request until the Complainant submitted each request on a separate OPRA request form is an unreasonable limitation on access pursuant to N.J.S.A. 47:1A-1, Kushner v. Township of West Milford, GRC Complaint No. 2004-111 (October 2004), Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007), and Anonymous v. Long Hill Township Board of Education (Morris), GRC Complaint No. 2008-192 (November 2009).

Additionally, following the filing of this Denial of Access Complaint the Custodian provided the Complainant with a subsequent response to his OPRA request in which the Custodian provided access to some records requested and denied access to others on the basis that said records do not exist. However, in said subsequent response to the Complainant, the Custodian failed to inform the Complainant that the requested settlement agreement does not exist. As such, the Custodian did not bear her burden of proving a lawful denial of access to said records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Further, the Custodian failed to provide the requested Code of Ethics to the Complainant in the medium requested and thus violated N.J.S.A. 47:1A-5.d. As such, the Council ordered the Custodian to disclose said record to the Complainant upon the Complainant’s agreement to pay the appropriate fees. As stated above, the Custodian complied with the Council’s Interim Order.

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

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“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 placed an unreasonable limitation on the Complainant’s access to government records, failed to bear her burden of proving a lawful denial of access to the requested settlement agreement and failed to provide the Code of Ethics in the medium requested, there is no evidence in the record that suggests the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness. 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 OPRA, N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The

records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

As the New Jersey Supreme Court noted in Mason, Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). "But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes." 196 N.J. at 73 (citations omitted).

The Mason Court then examined the catalyst theory within the context of New Jersey law, stating that:

"New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief,"

*Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. See also North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); see also Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.



The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon . . . ." *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.<sup>5</sup> Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" Singer v. State, 95 N.J. 487, 495, cert denied (1984)."

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

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<sup>5</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 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 this instant complaint, the Complainant initially filed this Denial of Access Complaint on January 13, 2009 because the Custodian refused to fulfill his OPRA request until the Complainant resubmitted it with one (1) request per subject/individual per OPRA request form. Five (5) business days after the filing of this Denial of Access Complaint, the Custodian provided the Complainant with a written response to his OPRA request in which the Custodian granted access to some records requested and denied access to others on the basis that said records do not exist. Additionally, in the Custodian's SOI dated January 23, 2009, the Custodian certified that she provided the Complainant with said subsequent response after determining that the records should be provided to the Complainant without separate OPRA requests being filed. Further, the Council ordered the Custodian to disclose to the Complainant the requested Code of Ethics in the medium requested pursuant to N.J.S.A. 47:1A-5.d. As previously stated, the Custodian complied with said Order.

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 Custodian provided the Complainant with a written response to his OPRA request in which the Custodian granted access to some records requested and denied access to others on the basis that said records do not exist five (5) business days after the filing of this complaint. The Custodian also provided access to the requested Code of Ethics in the medium requested as ordered by the Council on January 26, 2010. 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 placed an unreasonable limitation on the Complainant's access to government records by refusing to fulfill the Complainant's OPRA request until he submitted separate OPRA request forms. Custodians must also provide requested records in the medium requested pursuant to N.J.S.A. 47:1A-5.d. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian and the Complainant have complied with the Council's January 26, 2010 Interim Order because:
  - a. the Custodian's Counsel made the exact amount of the fee available to the Complainant within three (3) business days from receipt of the Council's Interim Order;
  - b. the Complainant's Counsel delivered to the Custodian's Counsel within five (5) business days from receipt of the Council's Interim Order a statement declining to purchase the record, but stated that the version of the Code of Ethics provided by the Custodian on January 28, 2010 appeared to be responsive to the Complainant's OPRA request; and

- c. the Custodian and the Custodian's Counsel provided legal certifications to the GRC's Executive Director within seven (7) business days from receipt of the Council's Interim Order indicating that the Custodian provided the Code of Ethics to the Complainant at no cost, that the Custodian's Counsel provided the exact amount of fees associated with providing said record to the Complainant, and that the Complainant, within five (5) business days from receipt of the Council's Interim Order, declined to pay said fees, but stated that the version of the Code of Ethics provided by the Custodian on January 28, 2010 appeared to be responsive to the Complainant's OPRA request.
2. Although the Custodian placed an unreasonable limitation on the Complainant's access to government records, failed to bear her burden of proving a lawful denial of access to the requested settlement agreement and failed to provide the Code of Ethics in the medium requested, there is no evidence in the record that suggests the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness. 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian provided the Complainant with a written response to his OPRA request in which the Custodian granted access to some records requested and denied access to others on the basis that said records do not exist five (5) business days after the filing of this complaint. The Custodian also provided access to the requested Code of Ethics in the medium requested as ordered by the Council on January 26, 2010. 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 placed an unreasonable limitation on the Complainant's access to government records by refusing to fulfill the Complainant's OPRA request until he submitted separate OPRA request forms. Custodians must also provide requested records in the medium requested pursuant to N.J.S.A. 47:1A-5.d. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 1, 2010



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

**INTERIM ORDER**

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

John Paff  
Complainant

Complaint No. 2009-25

v.  
County of Camden  
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 amended findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s refusal to fulfill the Complainant’s OPRA request until the Complainant submitted each request on a separate OPRA request form is an unreasonable limitation on access pursuant to N.J.S.A. 47:1A-1, Kushner v. Township of West Milford, GRC Complaint No. 2004-111 (October 2004), Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007), and Anonymous v. Long Hill Township Board of Education (Morris), GRC Complaint No. 2008-192 (November 2009).
2. Because the Custodian certified that here are no records responsive to the Complainant’s request for a settlement agreement, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the statutorily mandated seven (7) business days pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). However, because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days that no specific settlement agreement exists, the Custodian’s response to the Complainant’s OPRA request is insufficient pursuant to N.J.S.A. 47:1-A-5.g.
3. Because the Custodian failed to provide the Complainant with the requested Code of Ethics in the medium requested, the Custodian violated N.J.S.A. 47:1A-5.d. As such, the Custodian must disclose to the Complainant the requested Code of Ethics in the medium requested pursuant to N.J.S.A. 47:1A-5.d.
4. **The Custodian shall calculate the appropriate fee in accordance with item # 3 above and shall make the exact amount of the fee available to the Complainant**



**within three (3) business days from receipt of the Council's Interim Order. The Complainant shall comply with item # 3 above within five (5) business days from receipt of the Council's Interim Order by delivering to the Custodian (a) payment of the appropriate fee, or (b) a statement declining to purchase the record. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the record pursuant to N.J.S.A. 47:1A-5.b. Within seven (7) business days from receipt of the Council's Interim Order, the Custodian shall provide the Executive Director a statement with regards to the Complainant's willingness or refusal to purchase the requested record, the amount of the copy fee and confirmation that the record was so provided to the Complainant, if applicable. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.**

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied of access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to an award of reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Interim Order 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 27, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**John Paff<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-25**

v.

**County of Camden<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of the records enumerated below in the following order of preference: e-mail; fax; regular mail (whichever is the least expensive):

1. Settlement agreement entered into on or about March 26, 2007 in Mark Alexander v. County of Camden, Federal Civil Case No. 1:06cv5767 (JEL).
2. If the County contends that the record requested in item 1 is exempt from disclosure, a copy of any court order that seals or otherwise makes the settlement agreement confidential.
3. The most recent version of the Camden County Code of Ethics in a text file, word processing file, or a non-scanned PDF file.
4. The non-exempt portion of the most recently issued Advisory Opinion of the Camden County Ethics Board.
5. The minutes of the most recent public meeting held by the Camden County Ethics Board.
6. The minutes of the most recent executive session held by the Camden County Ethics Board.
7. The resolution authorizing the executive session (for which minutes are requested in item 6 above).
8. The most recent finding by the Camden County Ethics Board that a county officer or employee violated the provisions of the ethics code.
9. The most recent financial disclosure form filed by each of the present members of the Camden County Ethics Board.

**Request Made:** December 27, 2008

**Response Made:** December 29, 2008

**Custodian:** Maria Efstratiades

**GRC Complaint Filed:** January 13, 2009<sup>3</sup>

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

<sup>2</sup> Represented by Howard L. Goldberg, Assistant County Counsel.

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

## **Background**

### **December 27, 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 29, 2008**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same day the Custodian receives said request.<sup>4</sup> The Custodian states that in order to fulfill the Complainant's OPRA request, the Complainant must make only one (1) specific request per subject/individual per OPRA request form.

### **January 13, 2009**

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

- Complainant's OPRA request dated December 27, 2008
- Custodian's response to the Complainant's OPRA request dated December 29, 2008

The Complainant states that he submitted his OPRA request form to the Custodian on December 27, 2008. The Complainant states that the Custodian responded on December 29, 2008 in which the Custodian requested that the Complainant make only one (1) specific request per subject/individual per OPRA request form. The Complainant states that he did not receive any additional response from the Custodian during the statutorily mandated seven (7) business day response time.

The Complainant asserts that the Custodian's apparent position is that the Custodian was not obligated to honor the Complainant's OPRA request because it sought records pertaining to more than one (1) subject. The Complainant contends that OPRA does not prohibit a requestor from seeking access to various government records on one (1) OPRA request form.

Additionally, the Complainant states that even if the County adopted this policy of requiring separate OPRA request forms, such a policy is legally invalid as preempted by OPRA. The Complainant states that the doctrine of state "preemption is a judicially created principle based on the proposition that a municipality, which is an agent of the State, cannot act contrary to the State." Overlook Terrace Management Corp. v. Rent Control Bd. Of W. New York, 71 N.J. 451, 461 (1976). The Complainant asserts that although it is a judicially devised standard, the doctrine of state preemption turns upon the intention of the Legislature. The Complainant states that if the court determined that the Legislature intended "its own actions, whether it exhausts the field or touches only part of it, to be exclusive," then it will conclude that the State has preempted the field, thereby debarring any municipal action. State v. Ulesky, 54 N.J. 26, 29 (1969).

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<sup>4</sup> The Custodian certifies in her Statement of Information dated January 23, 2009 that she received the Complainant's OPRA request on December 29, 2009.



The Complainant states that in Overlook, *supra*, the court listed the following five (5) questions for consideration in determining applicability of preemption:

1. Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the Legislature has permitted or does the ordinance permit what the Legislature has forbidden)?
2. Was the state law intended, expressly or impliedly, to be exclusive in the field?
3. Does the subject matter reflect a need for uniformity?
4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand ‘as an obstacle to the accomplishment and execution of the full purposes and objectives’ of the Legislature? Overlook, 71 N.J. at 461-62 (citations omitted).

The Complainant states that question 1 is commonly referred to as conflict preemption. The Complainant asserts that the County’s requirement for requestors to submit separate OPRA request forms when seeking access to various records conflicts with OPRA’s “swift timeline.” Mason v. Hoboken, 196 N.J. 51, 57 (2008). The Complainant states that unlike its predecessor, the Right to Know Law, OPRA requires a “rapid” response from a public agency so that citizens obtain “swift” access to public records. *Id.* at 69. The Complainant states that OPRA requires a custodian to respond to an OPRA request as soon as possible but not later than seven (7) business days. N.J.S.A. 47:1A-5.i.

Additionally, regarding question 2, the Complainant claims that the legislative intent that the state law be exclusive in the field is evident from the nature of OPRA as a balance of competing policy considerations and OPRA’s exclusion of municipal ordinances as a source of record exemptions. The Complainant contends that if the County were permitted to require requestors to submit separate OPRA request forms when various records are requested, such a burden would disrupt the balance that the Legislature created between the public’s right to quick access to government records and the government agency’s administrative concerns. The Complainant asserts that the Legislature clearly intended to preclude municipalities from making access to public records more difficult, as the County’s policy does.

Further, regarding question 3, subject matter’s need for uniformity, the Complainant contends that the public’s right of access to government records is based on the fundamental nature of democracy, wherein the people are sovereign, not royalty. The Complainant states that the people must know what the government is doing in order to exercise their sovereignty. As such, the Complainant asserts that OPRA must be applied uniformly throughout the state. The Complainant contends that different municipalities cannot use different public record access procedures because the public’s right of access to public records does not differ in different municipalities.

The Complainant also contends that under Overlook question 4, OPRA is a state scheme so comprehensive that it precludes municipal supplementation. Specifically, the Complainant states that the court in Mason, *supra*, recognized that OPRA is a comprehensive framework that contains purpose, definitions, exemptions, detailed

procedures for requesting and disclosing records, procedures for enforcement, duties and procedures of the GRC and penalties for violations.

Regarding question 5, the Complainant contends that the County's requirement stands as an obstacle to the Legislature's objective in enacting OPRA because it burdens requestors with having to complete and submit additional paperwork in order to gain access to different categories of government records.

The Complainant states that the Council has effectively followed these principles. Specifically, in Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007), the Council held that a records custodian who required requestors to fill out one OPRA request form per request "failed to adhere to the spirit of the law by forcing the Complainant to fill out a separate OPRA request form for each record requested." The Complainant also states that the Council held that a custodian's requirement that a requestor complete additional request forms for internal tracking "placed an undue burden on the Complainant" and violated OPRA.

Moreover, the Complainant requests the following relief from the Council:

1. A declaration that the County's policy of requiring requestors to complete and submit separate OPRA request forms for each category of records sought is preempted by OPRA and is thus invalid;
2. A declaration that the County's policy is illegal and violates OPRA pursuant to Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007);
3. Ordering the Custodian to honor the Complainant's OPRA request and provide the requested records
4. Award the Complainant reasonable prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

### **January 16, 2009**

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

### **January 20, 2009**

Letter from Custodian to Complainant. The Custodian provides the following responses to the Complainant's itemized OPRA request:

- Item no. 1 – 1 page responsive enclosed
- Item no. 2 – no records responsive because record responsive to item no. 1 provided.
- Item no. 3 – 23 pages responsive enclosed
- Item no. 4 – 1 page responsive enclosed
- Item no. 5 – 2 pages responsive enclosed
- Item no. 6 – no records responsive because all meetings of the Camden County Ethics Board are open to the public.
- Item no. 7 – no records responsive because all meetings of the Camden County Ethics Board are open to the public.

- Item no. 8 – no records found.
- Item no. 9 – 8 pages responsive enclosed

### **January 23, 2009**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated December 27, 2008
- Custodian's response to the Complainant's OPRA request dated December 29, 2008

The Custodian certifies that she received the Complainant's OPRA request on December 29, 2008. The Custodian certifies that she returned the Complainant's OPRA request on said date because the request contained errors that needed to be addressed. The Custodian certifies that she provided the records responsive to the Complainant on January 20, 2009 and waived the copying fee after determining that the records should be provided to the Complainant without separate OPRA requests being filed. Specifically, the Custodian certifies that she provided the Complainant with the following records:

- Stipulation of dismissal – 1 page
- Camden County Code of Ethics – 23 pages
- Most recent Advisory Opinion – 1 page
- Ethics Board meeting minutes – 2 pages
- Financial Disclosure forms – 8 pages

The Custodian also certifies that there are no records responsive to the following requests:

- Court order that seals or otherwise makes the settlement agreement confidential
- Executive session minutes of the Ethics Board
- Executive session resolutions
- Most recent finding by the Ethics Board that a county employee or officer violated the Ethics policy.

Additionally, the Custodian certifies that no records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

### **February 23, 2009**

Complainant's amended Denial of Access Complaint. The Complainant states that he filed this Denial of Access Complaint via e-mail on January 13, 2009. The Complainant states that on January 20, 2009, the Custodian provided some records responsive to the Complainant's OPRA request which is the subject of this Denial of Access Complaint. The Complainant states that item no. 1 of this OPRA request sought access to a copy of the settlement agreement regarding Mark Alexander v. County of Camden, Federal Civil Case No. 1:06cv5767 (JEI); however, the Custodian provided a copy of the stipulation of dismissal which is a different record than the one requested.

The Complainant also states that he requested a copy of the most recent version of the Camden County Code of Ethics in a text file, a word processing file, or a non-scanned PDF file; however, the Custodian provided access to said record in hard copy. The Complainant asserts that the Custodian should have provided “an explanation of why the records could not be converted or the cost of conversion for providing the records in the requested [electronic] medium.” Paff v. City of Perth Amboy, GRC Complaint No. 2004-58 (October 2004).

Additionally, the Complainant amends his requested relief from the Council to the following:

- A declaration that the County’s policy of requiring requestors to complete and submit separate OPRA request forms for each category of records sought is preempted by OPRA and is thus invalid;
- A declaration that the County’s policy is illegal and violates OPRA pursuant to Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007);
- An order directing the Custodian to honor the Complainant’s OPRA request and provide the requested records;
- A declaration that the County’s failure to provide a copy of the Ethics Code in the medium requested or state the costs of conversion violated OPRA;
- An order compelling the Custodian to provide a copy of the Ethics Code in the medium requested;
- A declaration that the County denied access to the Alexander settlement agreement;
- An order compelling the Custodian to provide a copy of the Alexander settlement agreement; and
- An award of reasonable prevailing party attorney’s fee pursuant to N.J.S.A. 47:1A-6.

### **November 13, 2009**

Letter from GRC to Custodian’s Counsel. The GRC requests a legal certification from the Custodian indicating whether the County was in possession of the requested settlement agreement at the time of the Complainant’s OPRA request, and if so, whether the County is still in possession of said settlement agreement.

### **November 17, 2009**

Custodian’s Certification. The Custodian certifies that on or about December 27, 2008 she received the Complainant’s OPRA request for a copy of the settlement agreement between the County and Mr. Alexander in the case of Mark Alexander v. County of Camden. The Custodian certifies that in response to said request, she provided the Complainant with a copy of the Stipulation of Dismissal. The Custodian certifies that Assistant County Counsel Howard L. Goldberg advised her that he reviewed the entire file for the Alexander matter and also contacted the office of the plaintiff’s attorney in the case and determined that no “settlement agreement” was written or entered into by the parties and the plaintiff stipulated to the dismissal of the County having determined that the County had no liability. As such, the Custodian certifies that there are no records responsive to the Complainant’s request for a settlement agreement.

Additionally, the Custodian certifies that the most recent copy of the Camden County Code of Ethics is from 1995 and is not maintained in a text file, word processing file or non-scanned PDF file. As such, the Custodian certifies that there are no records responsive to this portion of the Complainant's OPRA request other than the hard copy already provided to him.

### **December 21, 2009**

Letter from Complainant's Counsel to GRC. The Complainant's Counsel states that this Denial of Access Complaint was filed on the basis that the Custodian denied the Complainant access to the requested settlement agreement in the case of Mark Alexander v. County of Camden. Counsel states that based on the certifications provided by the Custodian, it is clear that the stipulation of dismissal, identified by the Custodian as responsive to the Complainant's request, is itself the settlement agreement. Counsel states that this appears to be a case in which there is no separate, formal settlement agreement.<sup>5</sup>

### **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 further provides that:

"[a] custodian *shall permit access* to a government record and provide a copy thereof *in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian *shall either convert the record to the medium requested* or provide a copy in some other meaningful medium. If a request is for a record...require[es] a substantial amount of manipulation ... the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor

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<sup>5</sup> Counsel also re-states facts and arguments previously presented to the GRC.  
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cost of personnel providing the service, that is actually incurred by the agency...” (Emphasis added). N.J.S.A. 47:1A-5.d.

OPRA also provides that:

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

OPRA further 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.

In this complaint, the Custodian certified that she received the Complainant’s OPRA request on December 29, 2008. The Custodian also certified that she provided the Complainant with a written response to said request on the same date in which the Custodian indicated that she could not fulfill the Complainant’s OPRA request until he re-submitted said request making only one (1) specific request per subject/individual per OPRA request form.

The Council recently addressed a similar situation in Anonymous v. Long Hill Township Board of Education (Morris), GRC Complaint No. 2008-192 (November 2009). In said complaint, the Custodian refused to release the additional requested records until the Complainant submitted his requests on separate OPRA request forms. The Council held that “OPRA is silent regarding how many individual request items may be submitted on one (1) OPRA request form” and thus looked to prior GRC decisions and court cases for more guidance on the issue.

Specifically, in Kushner v. Township of West Milford, GRC Complaint No. 2004-111 (October 2004), the Complainant made an OPRA request for certain records and was told that the Township was developing a protocol for the release of records of that type. Four (4) months after the Complainant's OPRA request, the Custodian sent the Complainant a request form for the records and a release of liability form to be completed. The Council found that the Township erred in handling the request and determined that the Township did not provide any basis in law or fact that the special request form and release of liability were permitted under OPRA.

Additionally, in Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007), the Complainant submitted three (3) separate OPRA requests, as required by the Custodian, for access to construction files. The Complainant alleged that the Office of the Construction Official required him to complete another form titled "Records Review Request Form." The Council held that:

"[a]s in Kushner, *supra*, the Custodian has failed to provide a basis in law or fact that requires requestors to fill out separate forms for each record requested. Likewise, there is nothing in OPRA which allows a Custodian's internal agency practice to inhibit a requestor's access to government records. See Renna v. County of Union, GRC Complaint 2004-136 (August 2005). The Custodian has failed to adhere to the spirit of the law by forcing the Complainant to fill out a separate OPRA request form for each record requested."

Further, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Custodian failed to address each request item in his response to the Complainant's OPRA request. The Council held that:

"[a]lthough the Custodian responded in writing to the Complainant's August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g."

However, the New Jersey Superior Court has provided more clarification as to what constitutes a reasonable OPRA request. In New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the Appellate Division determined that a five (5) page, thirty nine (39) paragraph OPRA request for records bore no resemblance to the record request envisioned by the Legislature, which is one submitted on a form that "provide[s] space for . . . a *brief description of the record sought.*" N.J.S.A. 47:1A-5.f. (Emphasis added.)

Regarding a similar voluminous records request in Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), the Council ruled that based upon the Appellate Division's decision in New Jersey Builders Association, *supra*, the Complainant's voluminous request – a thirteen (13) paragraph request for numerous records, was not a valid OPRA request because it bears no resemblance to the record request envisioned by the Legislature, which is one

submitted on a form that “provide[s] space for ... a brief description of the record sought.”

Further, in Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007), the Council held that “based upon the Appellate Division’s decision in New Jersey Builders Association, *supra*, the Complainant’s voluminous October 30, 2006 OPRA request, a seven (7) page, fifty nine (59) paragraph request for numerous records spanning twelve (12) years, may not be a valid OPRA request because it seems to bear no resemblance to the record request envisioned by the Legislature, which is one submitted on a form that ‘provide[s] space for . . . a brief description of the record sought.’ *Id.* at 179.”

In this instant complaint, the Complainant sought access to nine (9) request items on one (1) OPRA request form: a settlement agreement, a court order, a Code of Ethics, an Advisory Opinion, two (2) sets of meeting minutes, a resolution, a finding of the Ethics Board, and financial disclosure forms. The Complainant’s request does not meet the voluminous nature of the OPRA requests addressed in New Jersey Builders Association, *supra*, Vessio, *supra*, or Caggiano, *supra*. Thus, it is not unreasonable in this instance for a requestor to seek access to nine (9) records on one (1) OPRA request form. Additionally, OPRA provides that “any limitations on the right of access ...shall be construed in favor of the public's right of access.” N.J.S.A. 47:1A-1. In this instance, requiring the Complainant to submit a separate OPRA request form for each record requested does not further the public’s right of access. Quite the opposite, this practice provides a road block for a requestor to gain access to government records.

Therefore, the Custodian’s refusal to fulfill the Complainant’s OPRA request until the Complainant submitted each request on a separate OPRA request form is an unreasonable limitation on access pursuant to N.J.S.A. 47:1A-1, Kushner, *supra*, Dittrich, *supra*, and Anonymous, *supra*.

However, the Custodian provided the Complainant with a subsequent response to his OPRA request on January 20, 2009. The Custodian certified that she provided the following records to the Complainant:

- Stipulation of dismissal – 1 page
- Camden County Code of Ethics – 23 pages
- Most recent Advisory Opinion – 1 page
- Ethics Board meeting minutes – 2 pages
- Financial Disclosure forms – 8 pages

The Custodian also certified that there are no records responsive to the following requests:

- Court order that seals or otherwise makes the settlement agreement confidential
- Executive session minutes of the Ethics Board
- Executive session resolutions
- Most recent finding by the Ethics Board that a county employee or officer violated the Ethics policy.



However, the Complainant states that item no. 1 of his OPRA request sought access to a copy of the settlement agreement regarding Mark Alexander v. County of Camden, Federal Civil Case No. 1:06cv5767 (JEI); however, the Custodian provided a copy of the stipulation of dismissal which is a different record than the one requested. In a subsequent certification dated November 17, 2009, the Custodian certified that Assistant County Counsel Howard L. Goldberg advised her that he reviewed the entire file for the Alexander matter and also contacted the office of the plaintiff's attorney in the case and determined that no "settlement agreement" was written or entered into by the parties and the plaintiff stipulated to the dismissal of the County having determined that the County had no liability. As such, the Custodian certified that there are no records responsive to the Complainant's request for a settlement agreement. The Complainant's Counsel acknowledged in a letter to the GRC dated December 21, 2009 that it appears as though the requested settlement agreement exists in the form of the stipulation of dismissal.

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 Council determined that, because the Custodian certified that no records responsive to the request existed, the Custodian did not unlawfully deny access to the requested records.

However, in this instant complaint, the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days that there are no records responsive to his request for a settlement agreement. Although the Complainant's Counsel acknowledged that the stipulation of dismissal appears to be the settlement agreement, the Custodian was still obligated to inform the Complainant that no separate settlement agreement exists.

Therefore, because the Custodian certified that there are no records responsive to the Complainant's request for a settlement agreement, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the statutorily mandated seven (7) business days pursuant to Pusterhofer, supra. However, because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven business days that no specific settlement agreement exists, the Custodian's response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1-A-5.g.

Additionally, the Complainant states that he requested a copy of the most recent version of the Camden County Code of Ethics in a text file, a word processing file, or a non-scanned PDF file; however, the Custodian provided access to said record in hard copy. The Complainant asserts that the Custodian should have provided "an explanation of why the records could not be converted or the cost of conversion for providing the records in the requested [electronic] medium." Paff v. City of Perth Amboy, GRC Complaint No. 2004-58 (October 2004).

The Custodian certified that the most recent copy of the Camden County Code of Ethics is from 1995 and is not maintained in a text file, word processing file or non-scanned PDF file. As such, the Custodian certified that there are no records responsive to this portion of the Complainant's OPRA request other than the hard copy already provided to him.

Regarding various mediums, OPRA provides that:

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

The GRC interprets the last sentence to mean a medium which is meaningful to the requestor since all limitations on access shall be construed in favor of the public pursuant to N.J.S.A. 47:1A-1. In this instance, a paper copy of the Code of Ethics is not meaningful to the Complainant. The Complainant wants an electronic copy of said record and is willing to pay for any reproduction costs associated with making an electronic copy of said record, as evidenced in his amended Denial of Access Complaint.

OPRA allows public agencies to charge special service charges for medium conversion. Specifically, OPRA states that:

“[i]f a request is for a record:

1. in a medium not routinely used by the agency;
2. not routinely developed or maintained by an agency; or
3. requiring a substantial amount of manipulation or programming of information technology,

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, in this instance since the Custodian certified that she does not maintain the Code of Ethics in the medium requested by the Complainant, the Custodian may charge, in addition to the actual cost of duplication, a special charge based on the actual cost for an outside vendor to complete the medium conversion.

For example, in O'Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009) the Complainant requested a copy of an audio recording and the Custodian charged the Complainant \$10.00 for the duplication. The Complainant objected to the fee asserting that it was excessive. However, the Custodian

certified that the Board of Education did not possess the capability to complete the duplication in-house and provided the GRC with a cost estimate from outside vendors which charged \$2.49 for the audiotape and \$7.99 for the duplication. The Council held that:

“[b]ecause the Custodian has certified that the Pine Hill Board of Education lacks the equipment necessary to fulfill the OPRA request, and because the vendor invoice submitted by the Custodian is reasonable and based on the cost to be incurred by the agency, and because the Complainant has failed to submit any credible evidence that the vendor invoice submitted by the agency is unreasonable, the proposed estimate of \$10.48 for duplication is reasonable and consistent with N.J.S.A. 47:1A-5.c.”

Similarly in this instant complaint, because the Custodian certified that she did not maintain the requested record in the medium requested, the Custodian should have sought an estimate from an outside vendor regarding the cost to convert the requested Code of Ethics to the medium requested. Once the Custodian received said estimate, the Custodian should have provided the estimate to the Complainant prior to the cost being incurred pursuant to N.J.S.A. 47:1A-5.c. The Complainant would have had the opportunity to review and object to the charge. If the Complainant agreed to pay the special service charge estimated by the outside vendor and provided to the Complainant by the Custodian, the duplication could have commenced. However, the Custodian in this complaint failed to seek any estimate from an outside vendor regarding the medium conversion and provided the Complainant access to the requested record in hard copy.

Therefore, because the Custodian failed to provide the Complainant with the requested Code of Ethics in the medium requested, the Custodian violated N.J.S.A. 47:1A-5.d. As such, the Custodian must disclose to the Complainant the requested Code of Ethics in the medium requested pursuant to N.J.S.A. 47:1A-5.d.

**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 of access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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

The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to an award of reasonable attorney’s fees pending the Custodian’s compliance with the Council’s Interim Order.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's refusal to fulfill the Complainant's OPRA request until the Complainant submitted each request on a separate OPRA request form is an unreasonable limitation on access pursuant to N.J.S.A. 47:1A-1, Kushner v. Township of West Milford, GRC Complaint No. 2004-111 (October 2004), Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007), and Anonymous v. Long Hill Township Board of Education (Morris), GRC Complaint No. 2008-192 (November 2009).
2. Because the Custodian certified that there are no records responsive to the Complainant's request for a settlement agreement, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the statutorily mandated seven (7) business days pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). However, because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days that no specific settlement agreement exists, the Custodian's response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1-A-5.g.
3. Because the Custodian failed to provide the Complainant with the requested Code of Ethics in the medium requested, the Custodian violated N.J.S.A. 47:1A-5.d. As such, the Custodian must disclose to the Complainant the requested Code of Ethics in the medium requested pursuant to N.J.S.A. 47:1A-5.d.
4. **The Custodian shall calculate the appropriate fee in accordance with item # 3 above and shall make the exact amount of the fee available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Complainant shall comply with item # 3 above within five (5) business days from receipt of the Council's Interim Order by delivering to the Custodian (a) payment of the appropriate fee, or (b) a statement declining to purchase the record. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the record pursuant to N.J.S.A. 47:1A-5.b. Within seven (7) business days from receipt of the Council's Interim Order, the Custodian shall provide the Executive Director a statement with regards to the Complainant's willingness or refusal to purchase the requested record, the amount of the copy fee and confirmation that the record was so provided to the Complainant, if applicable. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.**

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied of access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to an award of reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Dara Lownie  
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Approved By: Catherine Starghill, Esq.  
Executive Director

January 19, 2010