



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

September 27, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2009-26

v.

County of Sussex Board of Chosen Freeholders
Custodian of Record

At the September 27, 2011 public meeting, the Government Records Council (“Council”) considered the September 20, 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, adopts the Initial Decision of Administrative Law Judge Leslie Z. Celentano dated September 6, 2011 finding that the parties in this case voluntarily agreed to settle this matter. Therefore, no further action is required on the part of Council.

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 27th Day of September, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: October 3, 2011



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 27, 2011 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-26

v.

**County of Sussex, Board of Chosen
Freeholders²
Custodian of Records**

Records Relevant to Complaint: November 25, 2008 executive session minutes.³

Request Made: January 5, 2009

Response Made: January 8, 2009

Custodian: Elaine Morgan

GRC Complaint Filed: January 13, 2009⁴

Background

June 29, 2010

Government Records Council's ("Council") Interim Order. At its June 29, 2010 public meeting, the Council considered the June 22, 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. Because the Custodian amended the Board of Freeholders' OPRA request form as required by the Council's February 23, 2010 Interim Order, and because the Custodian did so and provided certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of said Interim Order, the Custodian has complied with the Council's February 23, 2010 Interim Order.
2. The Custodian has failed to establish that the GRC's decision that "[b]ecause the Board of Chosen Freeholders approved the November 25, 2008 executive session minutes on December 17, 2008, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable

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

² Represented by Dennis R. McConnell, Esq, of McConnell, Lenard & Campbell (Stanhope, NJ).

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

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

- pursuant to N.J.S.A. 47:1A-1.1 and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6[,]” was 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996).
3. The Custodian has failed to establish that the GRC’s decision that “the Custodian shall amend the Board of Freeholder’s official OPRA request form to include the remainder of the applicable provisions of OPRA” was 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996).
 4. Although the Custodian failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes, she provided the Complainant with a copy of said records on January 15, 2009 and complied with the Council’s February 23, 2010 Interim Order on the second (2nd) business day following the issuance of said Order. 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.
 5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council’s February 23, 2010 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. 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.

July 12, 2010

Council’s Interim Order distributed to the parties.

September 2, 2010

Complaint transmitted to the Office of Administrative Law.

September 6, 2011

Administrative Law Judge (“ALJ”) Leslie Z. Celentano’s Initial Decision. Upon review of the record and settlement by the parties, the ALJ found that the parties have voluntarily agreed to settle this case, which fully disposes of all issues in controversy. Specifically, the ALJ **FINDS**:

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

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

Analysis

No analysis is needed at this time. The ALJ found that the parties in this case voluntarily agreed to settle this matter at the OAL. Therefore, the Council should adopt the Initial Decision of the ALJ and no further action is required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council adopt the Initial Decision of Administrative Law Judge Leslie Z. Celentano dated September 6, 2011 finding that the parties in this case voluntarily agreed to settle this matter. Therefore, no further action is required on the part of Council.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

September 20, 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
Commissioner

INTERIM ORDER

June 29, 2010 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2009-26

v.

County of Sussex, Board of Chosen Freeholders
Custodian of Record

At the June 29, 2010 public meeting, the Government Records Council ("Council") considered the June 22, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian amended the Board of Freeholders' OPRA request form as required by the Council's February 23, 2010 Interim Order, and because the Custodian did so and provided certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of said Interim Order, the Custodian has complied with the Council's February 23, 2010 Interim Order.
2. The Custodian has failed to establish that the GRC's decision that "[b]ecause the Board of Chosen Freeholders approved the November 25, 2008 executive session minutes on December 17, 2008, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6[.]" was 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. See Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996).
3. The Custodian has failed to establish that the GRC's decision that "the Custodian shall amend the Board of Freeholder's official OPRA request form to include the remainder of the applicable provisions of OPRA" was 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. See Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996).



4. Although the Custodian failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes, she provided the Complainant with a copy of said records on January 15, 2009 and complied with the Council's February 23, 2010 Interim Order on the second (2nd) business day following the issuance of said Order. 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.
5. Pursuant to *Teeters v. DYFS*, 387 N.J. Super. 423 (App. Div. 2006), and the Council's February 23, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to *Mason v. City of Hoboken and City Clerk of the City of Hoboken*, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. 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.

Interim Order Rendered by the
Government Records Council
On The 29th Day of June, 2010

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: July 12, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 29, 2010 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-26

v.

**County of Sussex, Board of Chosen Freeholders²
Custodian of Records**

Records Relevant to Complaint: November 25, 2008 executive session minutes.³

Request Made: January 5, 2009

Response Made: January 8, 2009

Custodian: Elaine Morgan

GRC Complaint Filed: January 13, 2009⁴

Background

February 23, 2010⁵

Government Records Council's ("Council") Interim Order. At its February 23, 2010 public meeting, the Council considered the February 16, 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. Because the Board of Chosen Freeholders approved the November 25, 2008 executive session minutes on December 17, 2008, said minutes no longer constituted advisory, consultative or deliberative ("ACD") material at the time of the Complainant's request and were therefore disclosable pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.

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

² Represented by Dennis R. McConnell, Esq, of McConnell, Lenard & Campbell (Stanhope, NJ).

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

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

⁵ Because the Custodian certified that a copy of the November 25, 2008 executive session minutes requested by the Complainant were e-mailed to the Complainant on January 15, 2009, the Council declined to order disclosure of said record.

2. Pursuant to O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian shall amend the Board of Freeholder’s official OPRA request form to include the remainder of the applicable provisions of OPRA.
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Paragraph 2 of these Findings and Recommendations set forth above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005)⁶ to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

March 1, 2010

Council’s Interim Order distributed to the parties.

March 3, 2010

Custodian’s response to the Council’s Interim Order. Two (2) business days after the issuance of the Council’s Interim Order dated February 23, 2010, the Custodian certifies that pursuant to the Council’s Interim Order, attached is a copy of the new official OPRA records request form adopted by the Sussex County Board of Chosen Freeholders (“Board”). The Custodian certifies that this records request form has also been downloaded on the County’s website, www.sussex.nj.us.

March 11, 2010

Custodian’s request for reconsideration.⁷ The Custodian’s Counsel submits a letter brief in which he requests reconsideration of the Council’s February 23, 2010 Interim Order.

The Custodian’s Counsel states that on February 23, 2010, the Council voted to adopt the Findings and Recommendations of the Executive Director and issue an Interim Order which was distributed to the parties on March 1, 2010. The Custodian requests that the GRC reconsider the following two (2) substantive issues.

Findings and Recommendations Item No. 1 – Executive session meeting minutes

The Custodian’s Counsel states that the GRC determined that:

⁶ “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”

⁷ The Custodian’s Counsel did not include the GRC’s request for reconsideration form as part of this submission.

“[b]ecause the Board of Chosen Freeholders approved the November 25, 2008 executive session minutes on December 17, 2008, said minutes no longer constituted advisory, consultative or deliberative (“ACD”) material at the time of the Complainant’s request and were therefore disclosable pursuant to N.J.S.A. 47:1A-1.1, and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.”

The Custodian states that the Council based its determination on the fact that the Custodian advised the Complainant that the requested minutes had been approved by the Board as to content and completeness, but a determination as to whether the minutes were no longer exempt from disclosure pursuant to provisions within the Open Public Meetings Act (“OPMA”) had not been made at the time of the Complainant’s OPRA request. The Custodian argues that this determination was supposed to be made by the Board nine (9) days after the submission of the OPRA request, or January 14, 2009. The Custodian states that he responded to the OPRA request advising the Complainant that he would receive the records following the January 14, 2009 meeting. The Custodian states that the Board determined at that meeting that inasmuch as the requested minutes were approved for content and completeness, said record no longer constituted ACD material. The Custodian states that the Custodian subsequently released said minutes on January 15, 2009.

The Custodian asserts that the Council did not base its determination on the arguments submitted by the Custodian in the Statement of Information (“SOI”). The Custodian further asserts that the Custodian did not dispute the fact that once a draft document is approved by a governing body (as to content), said record is no longer considered ACD in nature but falls within the definition of a government record under OPRA. The Custodian contends that the Custodian asserted that the requested minutes were deemed to be confidential pursuant to OPMA. The Custodian further contends that the GRC failed to rule upon this argument in its decision.

The Custodian requests that because the Council failed to rule on the issue of whether the record was exempt from disclosure under OPMA, the GRC reconsider conclusion No. 1 of the February 23, 2010 Interim Order and issue an opinion that the Custodian properly withheld the executive session minutes for only so long as was reasonably necessary for the Board to determine whether the exemptions contained in OPMA still applied to the requested minutes. The Custodian argues that because disclosure of the requested record occurred nine (9) days after the Complainant’s request, as per the Custodian’s written response advising to such, no violation of OPRA occurred.

The Custodian states that the Council’s February 23, 2010 Interim Order contains a lengthy analysis of the ACD exemption. *See* Wolosky v. County of Sussex, Board of Chosen Freeholders, GRC Complaint No. 2009-26 (February 2010), page 6 through page 8. The Custodian’s Counsel notes that the GRC cited to Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004), which stated that, “inter-agency or intra-agency advisory, consultative, or deliberative material” is not

included within the definition of a government record. N.J.S.A. 47: 1A-1 .1.” Further, the Custodian states that the GRC’s analysis cites to several federal and out-of-state cases supporting the proposition that draft documents of a public agency fall within the deliberative process privilege. The Custodian argues that the Board did not claim the minutes were draft documents not subject to disclosure as ACD material, but rather that the minutes were confidential under OPMA. The Custodian states that the SOI contained the following argument:

“The Appellate Division has addressed this issue and has confirmed that OPRA must be reconciled with [OPMA] to the extent that the County must formally determine that the circumstances that justified conducting a closed executive session are no longer a concern prior to releasing the closed session minutes under an OPRA request.

‘Moreover, the treatment of the executive session notes for purposes of OPRA must be considered in light of [OPMA], pursuant to which the agency is permitted to go into executive session. N.J.S.A. 10:4-12.b. As the Court recognized in Atlantic City, supra (citation omitted), OPMA permits an agency to go into closed or executive session to discuss matters which the Legislature has determined as matter of policy agencies have a legitimate need to discuss privately. There include certain personnel matter and contract negotiations. N.J.S.A. 10:4-12.b(4) and (8). OPRA dovetails with OPMA by exempting documents on these subjects from disclosure as public records. N.J.S.A. 47:1A-1.1.; N.J.S.A. 47:1A-9.

Under OPMA, the Board is required to keep minutes of its executive sessions, and must “promptly” release the notes to the public “unless full disclosure would subvert the purpose of the particular exception” that justified the closed session in the first place. Payton v. N.J. Tpk. Auth., 148 N.J. 524, 557 (1997) (quoting N.J.S.A. 10:4-14). O’Shea v. West Milford Township Bd. of Educ., 391 N.J. Super. 534, (App. Div. 2007).” Custodian’s SOI, pg. 5.

The Custodian states that in Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997), the Supreme Court acknowledged that the release of minutes of an executive session meeting conducted pursuant to OPMA entails a balancing of the continued need for confidentiality against the right of the public’s need for access. The Custodian states that in Payton, the court recognized that they should be released “promptly” unless disclosure would subvert the purpose of OPMA exemptions. The Custodian avers that implicit in a governmental agency’s requirement to balance the continued need for confidentiality against the right of the public’s need for access is the chance for said agency to be afforded the opportunity to do so:

“[a]lthough our discussion of the Act in South Jersey Publishing addressed one particular exception to the general requirement of conducting public meetings (the personnel exemption), *we perceive its reasoning to extend to all of the Act’s exceptions.* In other words, if a public body legitimately

conducts a meeting in closed session under any of the exceptions enumerated in N.J.S.A. 10:4-12.b., it nevertheless must make the minutes of that meeting “promptly available to the public” unless full disclosure would subvert the purpose of the particular exception. If disclosure would subvert the purpose of an exception, then the subversion must be balanced against the applicant’s interest in disclosure.” (Emphasis added.) *Id.* at 556-557. *See also O’Shea v. West Milford Board of Education*, 391 N.J. Super. 534, 540-541 (App. Div. 2007).

The Custodian argues that the determination as to the disclosure of confidential executive session minutes is a different process than approval for accuracy and content. The Custodian further argues that the Board’s secondary approval process in this matter is a generally accepted practice. The Custodian also argues that the process is basically set forth in the “Local Government” section of the “New Jersey Practice” treatise, which advises how to approve such minutes for accuracy while maintaining their confidentiality:

“[i]n many local agencies, minutes of executive sessions, even if taken, are not formally approved. For obvious reasons, formal approval at or relatively near to the time of their taking is desirable. The next question, of course, is *how to approve minutes which have not yet been released to the public*. The answer would appear to be that draft minutes should be circulated to the members of the body marked “confidential” and, at any open session of the body, a motion may be made to approve the minutes of the executive session. If there is to be any significant discussion, the meeting can go briefly into executive session to discuss changes in such minutes. If not, however, the minutes can be approved on the record in an open session.” (Emphasis added.) 34 NJPRAC § 11:9 *Local Government Law*, Michael A. Pane, Chapter 11: Public Meetings.

The Custodian states that the GRC previously acknowledged that OPMA exemptions apply to OPRA and that public agencies should be afforded the opportunity to consult with legal counsel when determining whether executive session meeting minutes containing information otherwise exempt from disclosure could be released:

“OPRA provides that government records are subject to public access unless exempt from access by statute. N.J.S.A. 47:1A-1, -5.”

The Open Public Meetings Act, N.J.S.A. 10:4-12 provides, “[e]xcept as provided by subsection b. of this section, all meetings of public bodies shall be open to the public at all times.”... Since the available evidence shows that the government record in question concerns a discussion of anticipated litigation, the Council is legally justified in finding that the government record is confidential under OPRA by statute, specifically, the Open Public Meetings Act, N.J.S.A. 10:4-12(b)7. For this reason, the Complaint should be dismissed.” N.D. v. Rumson Fair-Haven Board of Education, GRC Complaint No. 2003-56 (December 2003).

“[OPMA] provides at N.J.S.A. 10:4-12(a) that all meetings of public bodies shall be open to the public at all times, with certain exceptions set forth in N.J.S.A. 10:4-12(b). Section 12(b) of OPMA permits public bodies, upon adoption of a resolution, to go into "closed" or "executive" session from which the public is excluded in order to discuss certain topics described in the statute. The purpose of the closed session provision is to encourage frank and independent discussion. One of the reasons OPMA authorizes closed sessions is to discuss "any pending or anticipated litigation or contract negotiation...which the public body is, or may become a party." This includes any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise ethical duties as a lawyer.

... The Township attorney has now advised the Council that the Board reconsidered the closed session minutes of its September 6, 2000 meeting at its annual organizational meeting on January 6, 2003 and has approved release of those minutes. There is no indication that the Board conferred with counsel prior to issuing its November 6, 2002 resolution but likely did consult counsel at the annual organizational meeting at which it approved release of these minutes.

Since the Board's assessment of "potential litigation" is, at best, uninformed without advice of counsel, the Executive Director is unwilling to conclude that the Board's November 6, 2002 decision to keep the minutes of its September 6, 2000 meeting closed was unreasonable "under the totality of the circumstances." However, the Director suggests that the Council warn the Board that in the future such decisions on records sought in OPRA requests should not be taken in the absence of formal attorney advice.” Moore v. Township of Washington (Bergen), GRC Complaint No. 2002-72 (January 2003).

The Custodian requests that, based on the foregoing, the GRC reconsider and reverse its determination that the Custodian failed to bear her burden of proving a lawful denial of access to the requested meeting minutes pursuant to N.J.S.A. 47:1A-6.

Findings and Recommendations Item No. 2 – OPRA form amendments

The Custodian requests that the GRC reconsider Item No. 2 of the February 23, 2010 Interim Order, which ordered the Custodian to amend the County’s OPRA request form. The Custodian argues that the form previously used by the County of Sussex⁸ included a paragraph, similar to the paragraph discussed in O’Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (May 2010), which reads as follows:

“[t]he term ‘public records’ generally includes those records determined to be public in accordance with P.L. 2001 c. 404. The term does not include

⁸ Counsel notes that the form has since been amended pursuant to the Council’s February 23, 2010 Interim Order.

employee personnel files, police investigation records, public assistance files, or other matters in which there is a right of privacy or confidentiality or which is specifically exempted by law.” (Emphasis added).

The Custodian asserts that the GRC’s February 23, 2010 Interim Order reiterates the findings in O’Shea, holding that the County’s form “provides misinformation regarding the accessibility of said records, *in essence*, denying the requestor access to the records.” (Emphasis added.) *Id.* at pg. 9. The Custodian avers that the crux of the GRC’s holding is that a requestor may be deterred from submitting an OPRA request for certain records because the form provides misinformation regarding whether such records are accessible; therefore resulting in a de facto denial of access. The Custodian argues that there is no evidence in the record indicating that the language on the Board’s form resulted in an actual denial or is even related to the record requested in the instant complaint.

The Custodian states that, similar to O’Shea, the GRC acknowledged on page 5 of the Findings and Recommendations that the Custodian argues in the SOI that the Complainant’s allegations regarding the form do not amount to a complaint as set forth in *N.J.A.C. 5:105-1.3.*, rather, the Complainant’s assertions in this regard more closely resemble an inquiry. The Custodian also notes that the Custodian argued that the form issue was beyond the Council’s authority to “order” the Custodian to revise the request form (which Custodian states the GRC observed in its Interim Order) and asserts that the GRC should have rendered an advisory opinion instead of ordering the Custodian to amend the request form. The Custodian argues that rendering an advisory opinion would comply with the GRC’s statutory authority and would avoid frivolous complaints brought against public agencies solely to obtain an award of prevailing party attorney’s fees where no actual denial of access has occurred.

The Custodian contends that Council’s Interim Order failed to address the challenge to its jurisdiction made by the Custodian in the instant complaint as well as in O’Shea. The Custodian contends that the challenge in both complaints was based on the GRC’s statutory duty to “...receive, hear, review and adjudicate a complaint filed by any person *concerning a denial of access to a government record* by a records custodian;” (Emphasis added.) N.J.S.A. 47:1A-7.b. Additionally, the Custodian states the GRC’s promulgated regulations define a complaint as:

“a denial of access complaint submitted to the Council on a form authorized by the Council *in which a requestor claims that a custodian has unlawfully denied the requestor access to a government record.*” (Emphasis added.) *N.J.A.C. 5:105-1.3.*

The Custodian reiterates that there is no evidence in the record to establish that an actual denial of access occurred in this complaint as a result of the OPRA request form; therefore, no “complaint” regarding this issue exists pursuant to *N.J.A.C. 5:105-1.3.* The Custodian reiterates that even though the Custodian provided an argument regarding this portion of the Complainant’s alleged complaint, the GRC did not address such. The Custodian contends that the GRC was obligated to address this issue because doing so would have provided the Custodian with a clearer picture of the GRC’s decision. The Custodian argues that addressing this issue would have also enabled the Custodian to

make a more informed decision regarding whether to appeal the February 23, 2010 Interim Order.

The Custodian states that in administrative law, the general principle guiding appellate review is based on a determination of whether the administrative agency's decision was arbitrary and capricious in nature and not supported by substantial evidence in the record. The Custodian argues that when an agency's interpretation of its controlling statute is part of the appellate challenge, the reviewing court is not bound to simply deciding whether the agency's decision is arbitrary and capricious. Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973). The Custodian argues that this is because the reviewing court has a responsibility to ensure that an administrative agency's actions do not exceed its statutory limits. Saint Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 15 (2005).

In closing, the Custodian contends that the GRC had an obligation to respond to each of the Custodian's arguments so that a meaningful decision regarding an appeal could be made. The Custodian contends that this would have also created a more complete record for the Court if the Board appealed the GRC's decision. Based on the foregoing, the Custodian requests that the GRC reconsider its February 23, 2010 Interim Order to address (1) the Complainant's argument that the requested meeting minutes were exempt pursuant to OPMA; and (2) whether the GRC has the authority to order a public agency to amend the official OPRA request form as opposed to issuing an advisory opinion. The Custodian adds that if the GRC believes it has the authority to do so, then it should set forth an argument specifically stating how the Complainant's allegations in this regard met the definition of a "complaint" pursuant to *N.J.A.C. 5:105-1.3*

March 17, 2010

Letter from Complainant's Counsel to the GRC. The Complainant's Counsel objects to the Custodian's motion for reconsideration of the Council's February 23, 2010 Interim Order.

The Complainant's Counsel first notes that the GRC's February 23, 2010 Interim Order required that the Board amend its OPRA request form. The Complainant's Counsel states that to date, certified confirmation of such has not been received from the Board.

Second, the Complainant's Counsel notes that he has not been served with a copy of any completed reconsideration form made available by the GRC for such. The Complainant's Counsel argues that if this form has not been completed and submitted with the Custodian Counsel's legal brief, then such reconsideration has not been properly filed with the GRC.

Third, the Complainant's Counsel argues that the Custodian's Counsel has not set forth any basis for the GRC to reconsider its February 23, 2010 Interim Order. The Complainant's Counsel states that the GRC and case law have set forth an applicable

standard for reconsideration:⁹ “applicable case law holds that [a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” White v. William Patterson University, GRC Complaint No. 2008-216 (August 2009)(quoting D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Counsel argues that a request for reconsideration:

“... should be utilized only for those cases which fall into a narrow corridor in which either (1) the court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent evidence.” Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)(quoting D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)(Internal quotation marks omitted).

The Complainant’s Counsel asserts that the Custodian’s Counsel has not met this stringent standard. The Complainant’s Counsel contends that the Custodian’s Counsel fails to discuss how the requested reconsideration fits within the established standard; rather, the Custodian’s Counsel appears to merely disagree with the GRC’s findings. The Complainant’s Counsel addresses the two (2) issues raised by the Custodian in the request for reconsideration as follows.

Findings and Recommendations Item No. 1 – Executive session meeting minutes

The Complainant contends that the Custodian argues that approved minutes do not need to be provided in response to an OPRA request until the public body has an opportunity to review the minutes for privileged material; however, this is inapposite to the provisions of OPRA. The Complainant states that under OPRA, a custodian must respond to OPRA requests granting access within seven (7) business days following receipt of said request. N.J.S.A. 47:1A-5i. and Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (June 2008). The Complainant asserts that once executive session minutes are approved by a governing body, such minutes become public records. The Complainant notes that there is no evidence in the record to suggest that the Custodian was not able to redact the minutes so as to comply in a timely manner with the Complainant’s OPRA request.

The Complainant asserts that the Custodian’s arguments actually support a conclusion that the requested records should have been provided to the Complainant. The Complainant argues that the Custodian’s citation to 34 NJPRAC § 11:9 *Local Government Law*, Michael A. Pane, Chapter 11: Public Meetings in support of the Board’s procedure regarding a second approval for the requested minutes is actually consistent with the GRC’s Interim Order. The Complainant contends that a plain reading of the material quoted by the Custodian shows that the procedure set forth applies to draft minutes:

⁹ Counsel notes that *N.J.A.C. 5:105-2.10* sets forth the procedure for requests for reconsideration; however, it is silent as to the standard.
Jesse Wolosky v. County of Sussex, Board of Chosen Freeholders, 2009-26 – Supplemental Findings and Recommendations of the Executive Director 9

“[t]he answer would appear to be that *draft minutes* should be circulated to the members of the body marked “confidential” and, at any open session of the body, a motion may be made to approve the minutes of the executive session.” (Emphasis added.) *Id.*

The Complainant asserts that Custodian ignores the fact that the procedure set forth in the excerpt specifically applies to draft minutes, when in fact the minutes at issue in the instant complaint were already approved and therefore no longer constituted “draft” minutes.

Additionally, the Complainant argues that Moore v. Township of Washington (Bergen), GRC Complaint No. 2002-72 (January 2003) does not support the motion for reconsideration. The Complainant asserts that the GRC’s final decision in Moore is silent as to whether the minutes sought had previously been approved by the governing body. The Complainant argues that since rendering its decision in Moore, the GRC has more fully developed a body of law regarding the process for releasing executive session minutes. The Complainant states that in Wolosky v. Vernon Township Board of Education (Sussex), GRC Complaint No. 2009-57 (February 2010), the GRC ultimately held that once meeting minutes are approved, they are available to the public for disclosure under OPRA (with appropriate redactions where applicable). The Complainant argues that based on the foregoing, the GRC should decline the Custodian’s request for reconsideration of this issue.

Findings and Recommendations Item No. 2 – OPRA form amendments

The Complainant states that GRC precedent clearly holds that if an OPRA request form contains misleading or incomplete information, such circumstance constitutes a denial of access and a violation of OPRA. *See O’Shea v. Township of West Milford (Passaic)*, GRC Complaint No. 2007-237 (May 2010) *and Wolosky v. Vernon Township Board of Education (Sussex)*, GRC Complaint No. 2009-57 (February 2010). The Complainant argues that there is no reason to deviate from this precedent. The Complainant contends that the foregoing decisions are well-grounded in the GRC’s statutory obligation to enforce OPRA.

The Complainant states that for the foregoing reasons, the GRC should deny the Board’s request for reconsideration.

March 18, 2010

Letter from the Custodian’s Counsel to the GRC attaching the following:

- Completed request for reconsideration form.
- Letter brief submitted by the Custodian’s Counsel dated March 11, 2010.
- Custodian’s response to the Council’s February 23, 2010 Interim Order dated March 3, 2010.

The Custodian’s Counsel states that he is in receipt of the Complainant’s Counsel’s objections to the Board’s request for reconsideration.

First, the Custodian's Counsel notes that the Complainant argues that the Custodian has not certified to her compliance with GRC's February 23, 2010 Interim Order. The Custodian's Counsel states that attached is the Custodian's March 3, 2010 certification attesting that pursuant to the Council's Interim Order, attached is a copy of the new official OPRA records request form adopted by the Sussex County Board of Chosen Freeholders ("Board"), which form has also been downloaded on the County's website.¹⁰

Second, the Custodian's Counsel disputes the Complainant's argument that this request for reconsideration has been improperly filed with the GRC because the Board neglected to submit the GRC's request for reconsideration form as part of the Custodian Counsel's letter brief submitted on March 11, 2010. The Custodian's Counsel contends that the Complainant is attempting to elevate the requirement of the reconsideration form over the substance of the legal arguments presented. The Custodian's Counsel states that the reconsideration form was inadvertently omitted from the letter brief dated March 11, 2010; however, the completed form attached is respectfully submitted for the Council's consideration.¹¹

The Custodian's Counsel also disputes the Complainant's contention that the Board's request for reconsideration is "merely based upon dissatisfaction with a decision." The Custodian's Counsel observes the Complainant's notation that a request for reconsideration is appropriate where "the court has expressed its decision based upon a palpably incorrect or irrational basis..." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)(quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)(Internal quotation marks omitted). The Custodian's Counsel contends that the request for reconsideration very clearly indicates that the basis for the Custodian's request for reconsideration is based upon its belief that the GRC mistakenly decided the matter based on a defense not raised by the Custodian. Moreover, the Custodian's Counsel argues that the GRC failed to even address the Custodian's arguments. The Custodian's Counsel asserts that it is disingenuous for the Complainant to characterize the Board's argument as a mere dissatisfaction with the Council's February 23, 2010 Interim Order.

The Custodian's Counsel next disputes the Complainant's argument that the Custodian should not have an opportunity to confer with the Board's attorney, nor should the Board have an opportunity to formally convene in order to determine whether the need for confidentiality pursuant to OPMA still exists. The Custodian's Counsel asserts that the Complainant's argument in this regard is contrary to the cases previously cited by the Complainant in the request for reconsideration. The Custodian's Counsel states that in Paff v. Perth Amboy City Council, 2005 WL 4014435, Unreported (App. Div. 2006), the court held that the city council was not required to disclose minutes of proceedings that were protected by the attorney-client privilege exception to OPRA. The Custodian's

¹⁰ The Custodian's Counsel notes that complying with the GRC's Interim Order was not a prerequisite for filing a request for reconsideration.

¹¹ The Custodian's Counsel notes that the omission of the reconsideration form did not deter the Complainant's Counsel from filing objections to the request for reconsideration.

Counsel states that the court contemplated the role of executive session minutes and confidentiality as follows:

“[i]f the public body meets in a private session under OPMA, the minutes of such meeting will generally be made promptly available for the public. N.J.S.A. 10:4-14, unless disclosure of any materials would "subvert the purpose of [a] particular exception," such as the attorney-client privilege. Payton v. New Jersey Tpk. Transit Auth., 148 N.J. 524, 557, 691 A.2d 321 (1997). In Payton, the Supreme Court noted that if disclosure subverts the purpose of an exemption then the court must balance the subversion against the applicant's desire for the information. *Ibid.* The court will then determine whether total suppression of the information is necessary or the mere redaction of certain information will suffice. *Ibid.* However, "the public body legitimately may meet with its attorney in closed session . . . [and] the minutes, part or all of which may constitute work-product . . . may be appropriately suppressed or redacted." *Id.* at 558." *Id.* at pg. 3.

The Custodian's Counsel further contends that the Complainant misconstrued the excerpt from 34 NJPRAC § 11:9 *Local Government Law*, Michael A. Pane, Chapter 11: Public Meetings. The Custodian's Counsel argues that the excerpt was provided to demonstrate that local governmental agencies habitually approved draft meeting minutes for accuracy and content while at the same time preserving their confidentiality, which is the factual basis of this complaint.¹² The Custodian's Counsel argues that the Board was not approving the minutes as if they were "draft minutes," rather, the Board was utilizing an established process to balance the need for confidentiality against the public's need for access. The Custodian's Counsel contends that this process is entirely consistent with the Appellant Division cases cited and no violation of OPRA has occurred.

The Custodian's Counsel also disputes the Complainant's allegation that GRC precedent regarding the OPRA request form is clear. The Custodian's Counsel contends that the Board stands by its request for the GRC to address whether the form's language can amount to a denial of access sufficient to support a complaint as defined in *N.J.A.C.* 5:105-1.3. The Custodian's Counsel reiterates that the GRC's jurisdiction under OPRA limits it to an advisory opinion to all custodians and does not permit the GRC to issue an individual order to a custodian to amend the request form. Additionally, the Custodian's Counsel argues that the omission from the Board's OPRA request form of the exceptions to the confidentiality of personnel records under N.J.S.A. 47:1A-10 had nothing to do with the Complainant's request for executive session minutes. The Custodian's Counsel argues that the fact that the Complainant's Counsel used a similar argument regarding

¹² The Custodian's Counsel reiterates that the Board approved the requested minutes prior to receipt of the Complainant's OPRA request, but had yet to ascertain whether the need for confidentiality had passed. The Custodian's Counsel states that the Complainant was advised that the minutes would be provided in following a Board meeting on January 14, 2009. The Custodian's Counsel states that on January 15, 2009, unredacted (as opposed to redacted) minutes were provided to the Complainant because the board decided that the need for confidentiality had passed.

OPRA request forms in another complaint suggests that the argument was raised in the instant matter solely to obtain an award of prevailing party attorney's fees.¹³

The Custodian's Counsel reiterates that the GRC should issue an advisory opinion because it is likely that other custodians are using an OPRA request form similar to that utilized by the Board prior to this complaint. Further, the Custodian's Counsel contends that request for reconsideration of this issue is appropriate because the GRC has an obligation to respond to the challenge of its jurisdiction under OPRA.

The Custodian's Counsel requests that, based on the foregoing, the GRC reconsider the two (2) issues identified above and determine that the Custodian has borne her burden of proving a lawful denial and that the Custodian was advised, not ordered, to amend the OPRA request form.

Analysis

Whether the Custodian complied with the Council's February 23, 2010 Interim Order?

The Council's February 23, 2010 Interim Order required the Custodian to amend the Board of Freeholders' official OPRA request form to include the remainder of the applicable provisions of OPRA and to provide certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of the Council's Interim Order. The Council issued its Interim Order on March 1, 2010. The Custodian provided certified confirmation of compliance with the Council's Interim Order on March 3, 2010, two (2) business days after the issuance of the Council's Interim Order.

The Council's review of the OPRA request form adopted by the Sussex County Board of Freeholders indicates that said form is identical to the GRC's model OPRA records request form, edited to show the appropriate contact information for the Sussex County Board of Freeholders.

Because the Custodian amended the Board of Freeholders' OPRA request form as required by the Council's February 23, 2010 Interim Order, and because the Custodian did so and provided certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of said Interim Order, the Custodian has complied with the Council's February 23, 2010 Interim Order.

Whether the Complainant has met the required standard for reconsideration of the Council's February 23, 2010 Interim Order?

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

¹³ The Custodian's Counsel argues the awarding prevailing party attorney's fees for issues that did not involve an actual denial of access was not the intent of the fee shifting provision of OPRA. *Jesse Wolosky v. County of Sussex, Board of Chosen Freeholders, 2009-26 – Supplemental Findings and Recommendations of the Executive Director* 13

business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

Applicable case law holds that:

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

In support of his motion for reconsideration, the Custodian’s Counsel asserted that the Council did not base its determination on the arguments submitted by the Custodian in the Statement of Information (“SOI”). The Custodian’s Counsel asserted that the Custodian did not dispute the fact that once a draft document is approved by a governing body (as to content), said record is no longer considered ACD in nature but falls within the definition of a government record under OPRA; instead, the Custodian asserted that the requested minutes were deemed to be confidential pursuant to OPMA. The Custodian’s Counsel averred that the GRC failed to rule upon this argument in its decision. Moreover, the Custodian’s counsel contended that in its February 23, 2010 Interim Order, the Council failed to rule on the issue of whether the requested record, a copy of meeting minutes dated November 25, 2008, was exempt from disclosure under OPMA, and the GRC should therefore reconsider conclusion No. 1 of the February 23, 2010 Interim Order and issue an opinion that the Custodian properly withheld the executive session minutes for only so long as was reasonably necessary for the Board to determine whether the exemptions contained in OPMA still applied to the requested minutes.

The Custodian’s Counsel also asserted that, in the absence of evidence that the request form’s lack of the exemptions for personnel records actually resulted in an actual denial of access, the form issue was beyond the Council’s authority to adjudicate and the Council should have rendered an advisory opinion instead of ordering the Custodian to amend the request form. The Custodian’s Counsel further argued that rendering an advisory opinion would comply with the GRC’s statutory authority and would avoid

frivolous complaints brought against public agencies solely to obtain an award of prevailing party attorney's fees where no actual denial of access has occurred.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*.

Initially, the GRC notes that the Background section of the Council's February 23, 2010 Interim Order contains at the entry for January 26, 2009 a recitation of the allegations made in the Custodian's SOI, including the Custodian's allegation that OPRA must be reconciled with the Open Public Meetings Act to the extent that the Board of Chosen Freeholders must formally determine that the circumstances that justified conducting a closed executive session are no longer a concern prior to releasing the closed session minutes under an OPRA request. *Payton v. N.J. Tpk. Auth.*, 148 N.J. 524, 557 (1997) (quoting N.J.S.A. 10:4-14). *O'Shea v. West Milford Township Bd. of Educ.*, 391 N.J. Super. 534, (App. Div. 2007). The GRC specifically noted Custodian's argument in the SOI that although the requested executive meeting minutes were approved as to their accuracy and content at the time of the Complainant's request, pursuant to *O'Shea, supra*, said minutes were not disclosable until after the minutes were approved for release by the Board of Chosen Freeholders.

In the matter before the Council, the Custodian argues that although the meeting minutes requested by the Complainant were approved for accuracy and content by the governing body at the time of the Complainant's OPRA request, those minutes had not yet been approved for release to the public by the Board of Chosen Freeholders and, moreover, that this two-part approval process is required by OPMA. The Custodian also argues that OPMA exempts from disclosure meeting minutes which have been approved for accuracy but not confidentiality until such time as the governing body renders its approval that such minutes no longer contain confidential matters.

Custodian's Counsel cites *New Jersey Practice (Local Government Law Vol 35A)*, Thomson-West (4th Ed.) 2007, by Michael A. Pane, Esquire, as legal authority in support of his contention that the two-tiered approval process of governing body meeting minutes is required by OPMA. However, this publication is not dispositive legal authority but appears to be a practical treatise containing discussions relating to the practice of local government law.¹⁴ Thus, a brief recapitulation of OPMA, N.J.S.A. §§ 10:4-6 to -21, and its applicability to the disclosure of governing body meeting minutes under OPRA may be both useful and instructive.

OPMA creates a strong presumption of access to the meetings of public bodies, allowing the public to view all meetings at which any business affecting the public is discussed or acted upon in any way. *Burnett v. Gloucester County Bd. of Chosen Freeholders*, 409 N.J. Super. 219, 232-33 (App. Div. 2009). To this end, OPMA must be liberally construed in favor of openness, N.J.S.A. § 10:4-21, and any exception from the full public disclosure mandated by the statute is to be strictly construed. *Ibid*. When

¹⁴ See <http://www.amazon.com/New-Jersey-Practice-Local-Government/dp/B003DV9V9O>.

considering whether a violation of OPMA has occurred, strict adherence to the letter of the law is required. *Id.*

Moreover, the Appellate Division has recognized that public access to meetings conducted pursuant to OPMA is tempered by certain enumerated circumstances under which the presumption of openness is rebutted. *Burnett, supra*, at 232-33. The nine areas of exception under OPMA include legally confidential situations, matters affecting the receipt of federal funds, an individual's private data, collective bargaining negotiations, purchase of realty or investment information and decisions that could adversely affect the outcome if made public, sensitive public safety data, pending litigation, contract negotiations, employment, and certain deliberations following a public hearing involving imposition of civil penalties or suspensions of licenses of specific persons. *N.J.S.A.* 10:4-12(b)(1) to (9). *Burnett, supra*, at 233. Thus, discussions in closed sessions are permitted when public deliberation of the subject would endanger the public interest or cause an unwarranted invasion of personal privacy or other individual rights. *Id.*

Public bodies must keep a record of all meetings, including closed session meetings at which confidential matters are discussed. OPMA provides:

“Each public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, **which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with [Section 10:4-12].**” *N.J.S.A.* 10:4-14 [Emphasis added].

Draft minutes are prepared as part of the process of producing minutes of a meeting of a public body that was held pursuant to OPMA. The GRC does not have the statutory authority to adjudicate violations of the OPMA; *see N.J.S.A.* 10:4-17; *N.J.S.A.* 47:1A-7.b. However, to the extent that OPMA provides exemptions to the disclosure of government records which are otherwise subject to disclosure under OPRA, those exemptions are recognized by OPRA pursuant to *N.J.S.A.* 47:1A-9.a. and *N.J.S.A.* 47:1A-9.b.

As the GRC noted in its February 23, 2010 Interim Order, draft documents are advisory, consultative and deliberative communications. OPRA expressly provides that “inter-agency or intra-agency advisory, consultative, or deliberative material” is not included within the definition of a government record. *N.J.S.A.* 47: 1A-1.1. Thus, draft meeting minutes are not disclosable pursuant to OPRA if they have not yet been approved by the public body. However, where minutes of a meeting of a public body that was held pursuant to OPMA have been approved by that governing body, such minutes are no longer considered draft and, therefore, are no longer ACD material; minutes which have been approved must therefore be promptly made available to the public. *See Dina Parave-Fogg v. Lower Alloways Creek Township*, GRC Complaint No. 2006-51 (August 2006); *Wolosky v. Vernon Township Board of Education*, GRC Complainant No. 2009-57 (December 2009);

This is not, however, inconsistent with OPMA's requirement that certain matters discussed by public bodies in closed session not be disclosed; minutes which are approved for accuracy by a governing body and which contain references to those matters enumerated at N.J.S.A. § 10:4-12(b)(1) to (9) may be redacted to protect such matters prior to disclosure. As the GRC noted at page 7 of its February 23, 2010 Interim Order in the instant matter, "[a]lthough properly approved executive session minutes are disclosable, pursuant to N.J.S.A. 47:1A-5, g., custodians may redact from the minutes those discussions that require confidentiality because the matters discussed therein are unresolved or still pending."

As the Appellate Division has observed:

"[T]he treatment of the executive session notes for purposes of OPRA must be considered in light of the Open Public Meetings Act (OPMA), pursuant to which the agency is permitted to go into executive session. N.J.S.A. 10:4-12b. As the Court recognized in Atlantic City Convention Center Authority v. South Jersey Publishing Co., 135 N.J. 53, 63-64 (1994), OPMA permits an agency to go into closed or executive session to discuss matters which the Legislature has determined as matter of policy agencies have a legitimate need to discuss privately. These include certain personnel matters and contract negotiations. N.J.S.A. 10:4-12b(4) and (8). OPRA dovetails with OPMA by exempting documents on these subjects from disclosure as public records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9.

Under OPMA, the Board is required to keep minutes of its executive sessions, and must "promptly" release the notes to the public "unless full disclosure would subvert the purpose of the particular exception" that justified the closed session in the first place. Payton v. N.J. Tpk. Auth., 148 N.J. 524, 557 (1997) (quoting N.J.S.A. 10:4-14). However, particularly with respect to minutes of a closed session, the Board's determination as to what information to include in the minutes is itself a policy decision. The minutes of executive sessions are typically general enough to avoid disclosure of the kind of "free and frank exchange of views among the members" that OPMA intended to protect. Atl. City, supra, 135 N.J. at 68. *See also* S. Jersey Publ'g Co. v. N.J. Expressway Auth., 124 N.J. 478, 493-94 (1991)." O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534, 540 (App.Div. 2007).

Thus, because the executive session meeting minutes requested by the Complainant were approved by the governing body at the time of the Complainant's OPRA request, such minutes were no longer draft or ACD material and were therefore subject to disclosure pursuant to OPRA. However, any confidential matters subject to N.J.S.A. 10:4-12(b)(1) to (9) which were not yet resolved at the time of the Complainant's OPRA request should have been redacted from the requested executive session minutes prior to disclosure, as was previously determined by the Council.

The Custodian certified in the SOI that the November 25, 2008 executive session minutes (which the Complainant requested on January 5, 2009) were in fact approved for

release by the Board on January 14, 2009, and further certified that these minutes were e-mailed to the Complainant on January 15, 2009. The Council notes that OPRA requires a custodian of a government record to grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request. N.J.S.A. 47:1A-5.i. The two-step approval process utilized by the Board in the instant matter unnecessarily and unlawfully delayed access to the records requested by the Complainant herein. Moreover, as noted above, it is clear from a reading of OPRA that redaction of material from public records is legislatively recognized and sanctioned. For example, N.J.S.A. 47:1A-5.g. states in pertinent part:

“If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to *P.L.* 1963, *c.* 73 (*C.* 47:1A-1, et seq.) . . . the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5.g.

Thus, OPRA allows redaction of government records in order to avoid disclosure of confidential information from records such as executive session meeting minutes. The mere fact that executive session meeting minutes may contain confidential information does not form a lawful basis under OPRA for a custodian to deny a requestor access to the entire record.

Moreover, OPRA makes no provision for the Board to approve the release of government records; the custodian of records is responsible for the disclosure of government records under OPRA. *See, e.g.,* Courier Post v. Lenape Regional High School Dist., 360 N.J. Super. 191, 197 (Law Div. 2002)(holding that the responsibility of identifying exempt material and redacting or excising it falls squarely on the custodian of the records sought to be inspected). Moreover, as the Courier Post court determined, “[t]he process of review and redaction cannot be used to frustrate the goal of [N.J.S.A. 47:1A-5.g.] to ‘promptly permit access to the remainder of the record.’ Redaction of privileged or confidential data cannot cause the release of otherwise public information to be placed in a straight jacket.” *Id.* at 206; *see also* Borough of Paramus v. Ian Shore, ___ N.J. Super. ___, Docket No. BER-L-8240-08 (Law Div. 2009)(holding that, although it is not unreasonable for the Borough clerk to seek the Borough attorney’s counsel, it appears inconsistent with OPRA to mandate attorney oversight on all non-routine OPRA matters, where the same would cause unnecessary delay to many requestors). Thus, the Custodian should have released the executive session meeting minutes requested by the Complainant at the time of the OPRA request, with redactions as necessary to protect any material which was confidential pursuant to N.J.S.A. 10:4-12(b)(1) to (9). *See, e.g.,* Courier Post, *supra*.

The Custodian has therefore failed to establish that the GRC’s decision that “[b]ecause the Board of Chosen Freeholders approved the November 25, 2008 executive session minutes on December 17, 2008, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant’s request and were therefore disclosable pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon

Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6[.]” was 1) based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra.*

In the request for reconsideration, the Custodian also asserted that, regarding revisions to the Board’s OPRA request form, it was beyond the Council’s authority to “order” the Custodian to revise the request form and the GRC should have instead rendered an advisory opinion. The Custodian contended that the GRC must address whether the form’s language can amount to a denial of access sufficient to support a complaint as defined in *N.J.A.C. 5:105-1.3*. The Custodian’s Counsel contended that the GRC’s jurisdiction under OPRA limits it to an advisory opinion to all custodians and does not permit the GRC to issue an individual order to a custodian to amend the request form. Additionally, the Custodian’s Counsel argued that the omission from the Board’s OPRA request form of the exceptions to the confidentiality of personnel records under N.J.S.A. 47:1A-10 had nothing to do with the Complainant’s request for executive session minutes. The Custodian’s Counsel argued that the fact that the Complainant’s Counsel used a similar argument regarding OPRA request forms in another complaint suggests that the argument was raised in the instant matter solely to obtain an award of prevailing party attorney’s fees.

The Council’s February 23, 2010 Interim Order required the Custodian to amend the Board of Freeholder’s official OPRA request form to include the remainder of the applicable provisions of OPRA.

Pursuant to N.J.S.A. 47:1A-7.b., the Council shall, among other duties:

- “° receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- ° issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public[.]”

In the instant matter, the Complainant’s Denial of Access Complaint raised two (2) issues: first, the Complainant disputed the Custodian’s denial of access to the requested executive session meeting minutes; second, the Complainant asserted that the Board’s OPRA request form contained false or misleading information about OPRA because the form contained the statement that public records “[do] not include personnel files” or “public investigation files.”

The issue of the accuracy of the Board’s OPRA request form was therefore presented to the Council as part of a larger complaint involving a denial of access to requested records. Pursuant to N.J.S.A. 47:1A-7.b., the Council has statutory authority to “receive, hear and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian.” The Council therefore had

jurisdiction to adjudicate the issue of the accuracy of the Board's OPRA request form under the statutory authority conferred upon it by the Legislature to adjudicate denial of access complaints. *See, O'Shea v. Twp of West Milford (Passaic)*, GRC Complaint No. 2007-237 (May 2010). The issue of whether the Council has the authority to adjudicate whether a public agency's OPRA request form is accurate, in the absence of a complaint alleging any other issue pertaining to a denial of access to a government record, is not properly before the Council at this time.¹⁵

Therefore, the Custodian has failed to establish that the GRC's decision that "the Custodian shall amend the Board of Freeholder's official OPRA request form to include the remainder of the applicable provisions of OPRA" was 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*.

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.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive

¹⁵ Moreover, the Council notes that the Custodian's contention that the accuracy issues inherent in the Board's OPRA request form were more appropriately addressed via an Advisory Opinion is inconsistent with the Appellate Division's decision in Renna v. County of Union, 407 N.J. Super. 230 (App.Div. 2009). There, the Appellate Division implied that the authority of the GRC to issue Advisory Opinions was limited to determinations regarding the disclosability of specific government records. *Id.* at 236-37.

element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996)).

Although the Custodian failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes, she provided the Complainant with a copy of said records on January 15, 2009 and complied with the Council's February 23, 2010 Interim Order on the second (2nd) business day following the issuance of said Order. 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 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

"New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also North Bergen Rex Transport v. TLC*, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

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

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

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

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel

noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon" *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases. OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.¹⁶ 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.

In the matter before the Council, the evidence of record shows that the Complainant filed the Denial of Access Complaint with the GRC on January 13, 2009.¹⁷

¹⁶ 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.

¹⁷ The GRC notes that the Council's February 23, 2010 Interim Order in this matter contained a typographical error in the background entry memorializing the filing of the Denial of Access Complaint, although the header indicating the filing date of the Denial of Access Complaint was correct. Although the background entry notes that the Denial of Access Complaint was filed on January 16, 2009, the evidence of record clearly shows that the GRC received and docketed said complaint on January 13, 2009.

The evidence of record further indicates that Custodian provided the Complainant with a copy of the requested executive session meeting minutes on January 15, 2009.¹⁸ Moreover, because the Complainant asserted in the Denial of Access Complaint that the Board's OPRA request form contained inaccuracies regarding the disclosability of certain records under OPRA, and because the Custodian provided a certification two (2) business days after the issuance of the Council's Interim Order dated February 23, 2010, that the Board adopted a new official OPRA records request form consistent with the Council's Interim Order, it appears that a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Further, the relief ultimately achieved had a basis in law.

Therefore, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's February 23, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian amended the Board of Freeholders' OPRA request form as required by the Council's February 23, 2010 Interim Order, and because the Custodian did so and provided certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of said Interim Order, the Custodian has complied with the Council's February 23, 2010 Interim Order.
2. The Custodian has failed to establish that the GRC's decision that "[b]ecause the Board of Chosen Freeholders approved the November 25, 2008 executive session minutes on December 17, 2008, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6[.]" was 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the

¹⁸ The Custodian certified to this in the Statement of Information filed with the GRC on January 26, 2009. Jesse Wolosky v. County of Sussex, Board of Chosen Freeholders, 2009-26 – Supplemental Findings and Recommendations of the Executive Director 25

- significance of probative, competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996).
3. The Custodian has failed to establish that the GRC's decision that "the Custodian shall amend the Board of Freeholder's official OPRA request form to include the remainder of the applicable provisions of OPRA" was 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996).
 4. Although the Custodian failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes, she provided the Complainant with a copy of said records on January 15, 2009 and complied with the Council's February 23, 2010 Interim Order on the second (2nd) business day following the issuance of said Order. 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.
 5. Pursuant to *Teeters v. DYFS*, 387 N.J. Super. 423 (App. Div. 2006), and the Council's February 23, 2010 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to *Mason v. City of Hoboken and City Clerk of the City of Hoboken*, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. 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.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

June 22, 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

LORI GRIFA
Acting Commissioner

INTERIM ORDER

February 23, 2010 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2009-26

v.

County of Sussex, Board of Chosen Freeholders
Custodian of Record

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

1. Because the Board of Chosen Freeholders approved the November 25, 2008 executive session minutes on December 17, 2008, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant’s request and were therefore disclosable pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.
2. Pursuant to O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian shall amend the Board of Freeholder’s official OPRA request form to include the remainder of the applicable provisions of OPRA.
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Paragraph 2 of these Findings and Recommendations set forth above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005)¹ to the Executive Director.**

¹ “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”



4. **The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.**

5. **The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.**

Interim Order Rendered by the
Government Records Council
On The 23rd Day of February, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: March 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-26

v.

**County of Sussex, Board of Chosen Freeholders²
Custodian of Records**

Records Relevant to Complaint: November 25, 2008 executive session minutes.³

Request Made: January 5, 2009

Response Made: January 8, 2009

Custodian: Elaine Morgan

GRC Complaint Filed: January 13, 2009⁴

Background

January 5, 2009

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 via facsimile. The Complainant requests that responsive records be sent to him via e-mail or facsimile.

January 8, 2009

Custodian's response to the OPRA request. The Custodian responds via e-mail on the third (3rd) business day following receipt of the OPRA request. The Custodian states that the minutes of the November 25, 2008 executive session were approved by the Board of Chosen Freeholders ("Board") on December 17, 2008 but have not yet been released. The Custodian states that these minutes will be released subject to approval by the Board at its meeting of January 14, 2009. The Custodian states that a copy of the executive session meeting minutes for the November 25, 2008 executive session meeting will be sent to the Complainant via e-mail on January 15, 2009, subject to approval for release by the Board.

January 16, 2009

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

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

² Represented by Dennis R. McConnell, Esq, of McConnell, Lenard & Campbell (Stanhope, NJ).

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

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

- Complainant's OPRA request dated January 5, 2009;
- E-mail from the Custodian to the Complainant dated January 8, 2009.

The Complainant alleges that on January 5, 2009, he faxed an OPRA request on the County's official OPRA request form to the Custodian. The Complainant asserts that he requested copies of the November governing body executive session minutes that have been approved and the resolutions that authorized those executive session meetings. The Complainant also asserts that on January 8, 2009, Deputy Clerk Diane Eakman, at the direction of the Custodian, responded to the OPRA request via e-mail, providing the Complainant with the documents he requested except for the November 25, 2008 executive session minutes. The Complainant asserts that access to these minutes was improperly denied.

The Complainant asserts that executive session minutes are public records within the meaning of OPRA. (N.J.S.A. 47:1A-1.1 defining public records broadly as "any paper" "made, maintained or kept on file" in the course of a public agency's business. McClain v. College Hosp., 99 N.J. 346, 354 (1985)(defining, in the context of the common law right of access, a public record as a written memorial made by a public officer that he or she is required by law to make)).

The Complainant also asserts that although executive session minutes that have not been "approved" are exempt from OPRA pursuant to the advisory, consultative or deliberative privilege (Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), once those minutes are "approved" they are public records just like any other. Paff v. Borough of Roselle, GRC Complaint No. 2007-255 (April 2008 Interim Order).

The Complainant states that here, the November 25, 2008 executive session minutes were approved on December 17, 2008. The Complainant states that once said minutes were approved, they became public records. The Complainant states that while the Custodian appears to claim that the minutes have not been released and will only be released subject to approval for release by the Board's Custodian, public agencies cannot create additional barriers to access. *See* Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007)(holding that custodians could not create undue burdens on access such as forcing requestors to fill out multiple forms). The Complainant asserts that here, the additional barrier to access is that a public record must be "released" by the public agency after it has been approved. The Complainant asserts that essentially, the Board has turned itself into a mini-court that has the jurisdiction to review and grant or deny OPRA requests. The Complainant asserts that no public agency has the power to do that.

The Complainant also asserts that Sussex County's OPRA request form is not modeled on the GRC's model request form and contains the statement that public records "[do] not include personnel files" or "public investigation files." The Complainant contends that in O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008), the GRC held that if a public agency's OPRA request form contained false or misleading information about OPRA, that constituted a denial of access. The Complainant states that in the instant matter, as in the O'Shea case, the Sussex County

OPRA request form stated that “employee personnel files” were not public records, but did not set forth OPRA’s exceptions to the general rule that personnel files are not public records. In addition, Sussex County’s OPRA request form states that “police investigation records” are not public records, ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b. Based on the O’Shea decision, the GRC should order Sussex County to revise its OPRA form. *See also* O’Shea v. Stillwater, GRC Complaint No. 2007-253 (holding that several portions of Stillwater’s OPRA request form were incomplete or misleading and ordering Stillwater to correct the deficiencies).

The Complainant requests that the GRC:

- (1) find that the Custodian violated OPRA and denied access by not releasing November 25, 2008 executive session minutes;
- (2) find that the Board of Chosen Freeholders’ OPRA form violates OPRA because it contains false and misleading information;
- (3) order the Board of Chosen Freeholders to correct the deficiencies in its OPRA request form; and
- (4) find that the Complainant is the prevailing party entitled to an award of reasonable attorneys’ fees pursuant to N.J.S.A. 47:1A-6.

January 21, 2009

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

January 26, 2009⁵

Custodian’s SOI with the following attachments:

- Proposed GRC model request form dated 2002;
- Complainant’s OPRA request dated January 5, 2009;
- E-mail from the Custodian to the Complainant dated January 8, 2009;
- E-mail from the Custodian to the Complainant dated January 15, 2009 attaching a copy of the November 25, 2008 executive session minutes.

The Custodian certifies that the executive session minutes from November 25, 2008 had been approved for completeness and accuracy prior to the submission of the Complainant’s OPRA request; however, the minutes were not approved for release at that time. The Custodian further certifies that the Custodian was immediately advised of that fact and was advised when the minutes were expected to be released. The Custodian certifies that the release of the November 25, 2008 executive session minutes was on the agenda for the Board’s January 14, 2009 meeting.

The Custodian also certifies that approval of executive session minutes is a two part process. The Custodian certifies that the first part of the approval process occurs as soon as practicable after the meeting and involves the same process that applies to all minutes; specifically, they are reviewed for completeness and accuracy and, if acceptable, are approved by the Board. The Custodian certifies that executive session minutes are not

⁵ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
Jesse Wolosky v. County of Sussex, Board of Chosen Freeholders, 2009-26 – Findings and Recommendations of the Executive Director 3

approved for release to the public until the Board, with input from counsel, determines that the need for confidentiality that prompted the matter to be considered in closed session no longer applies. The Custodian further certifies that once the confidentiality that justified the closed session is no longer applicable, the minutes are approved by the Board for release to the public. The Custodian certifies that the November 25, 2008 executive session minutes were in fact approved for release by the Board on January 14, 2009. The Custodian further certifies that these minutes were e-mailed to the Complainant on January 15, 2009.

The Custodian contends that the Appellate Division addressed this issue and confirmed that OPRA must be reconciled with the Open Public Meetings Act to the extent that the Board of Chosen Freeholders must formally determine that the circumstances that justified conducting a closed executive session are no longer a concern prior to releasing the closed session minutes under an OPRA request. Payton v. N.J. Tpk. Auth., 148 N.J. 524, 557 (1997) (quoting N.J.S.A. 10:4-14). O’Shea v. West Milford Township Bd. of Educ., 391 N.J. Super. 534, (App. Div. 2007). The Custodian contends that although the requested executive meeting minutes were approved as to their accuracy and content at the time of the Complainant’s request, pursuant to O’Shea, *supra*, said minutes were not disclosable until after the minutes were approved for release by the Board of Chosen Freeholders. The Custodian also contends that in Paff v. Borough of Rochelle, GRC Complaint No. 2007-255 (June 2008), the Council found that unapproved minutes were not disclosable. The Custodian argues that the analysis in Paff applies to the facts in the current case. The Custodian further argues that the requested executive session meeting minutes were not approved because the Board of Chosen Freeholders had yet to determine if the need for confidentiality of the issues discussed at the November 25, 2008 executive session still existed.

The Custodian admits that the County’s OPRA request form states:

“The term ‘public records’ generally includes those records determined to be public in accordance with P.L. 2001, c. 404. The term does not include personnel files, police investigation records, public assistance files or other matters in which there is a right of privacy or confidentiality or which is specifically exempted by law.”

The Custodian certifies that the County did not draft this paragraph. The Custodian further certifies that this language was included on a model request form developed by or in cooperation with the Department of Community Affairs at the time OPRA was enacted. The Custodian argues that is clear that the model request form was used by other government entities because this same exact language was criticized in O’Shea v. West Milford Township Bd. of Educ., GRC Complainant 2007-237 (December 2008). The Custodian also argues that her use of the alleged defective language does not rise to a knowing or willful violation of OPRA because the Custodian relied upon this previously circulated GRC model request form in drafting the County of Sussex’s (“County”) current request form. The Custodian further argues that her use of the form could not be considered negligent or heedless.

The Custodian argues that the Complainant's allegations regarding the Board of Chosen Freeholders' form do not meet the definition of a "complaint" as set forth in *N.J.A.C. 5:105-1.3*. The Custodian argues that because the Complainant failed to request access to records affected by the form's questionable language or to allege that he was denied access or inhibited in his effort to obtain records by said language, the Complainant's involvement with the form falls within the category of an inquiry whether the Board of Chosen Freeholders' request form is misleading or otherwise reduces the efficiency with which the public might obtain access to public records. The Custodian argues that the Complainant misconstrues the plain language of the records request form, which was based on a model records request form that was circulated at the time that OPRA was adopted in 2002. The Custodian also contends that the Complainant failed to allege that the form violated any statutory requirement set forth in OPRA. The Custodian argues that if the Council believes that the various agencies that may still be utilizing this form should be advised that they should either delete the subject paragraph or supplement it with additional clarifying definition, then the Council should do so under its mandate to be facilitator of the OPRA process.

The Custodian argues that the Complainant in effect seeks an advisory opinion for the sole purpose of collecting legal fees. The Custodian also argues that the Council's purpose is not to issue opinions for the sole purpose of collecting legal fees, nor is it within the Council's delegated statutory authority to so. The Custodian further argues that because there is no fee to file a Denial of Access Complaint with the GRC and OPRA contains an incentive in the form of prevailing party attorneys' fees, custodians and the public will be drawn into unnecessary and unauthorized litigation, contrary to the legislative intent expressed in *Mason v. City of Hoboken*, 196 N.J. 51 (2008). The Custodian states that the *Mason* Court confirmed that OPRA's purpose is to enable the public to obtain access to public records and expressed the general rule that cooperation, and not litigation should be promoted. The Custodian argues that to accept complaints for matters which do not result in access to records or fit within the definition of a complaint would result in an unending string of claims brought simply to obtain an award of counsel fees. *Mason, supra*. The Custodian requests that the Council dismiss this complaint.

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 ... [t]he terms shall not include *inter-agency or intra agency advisory, consultative, or deliberative* material.” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

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

The Custodian responded to the Complainant’s OPRA request on the third (3rd) business day following receipt of said request denying the Complainant access to the November 25, 2008 executive session minutes because the minutes had not yet been approved for release by the Freeholders. The Custodian certified in the SOI that executive session minutes undergo a two-part approval process whereby the minutes are first reviewed by the Freeholders for factual accuracy and completeness. The Custodian further certified that the minutes are then reviewed by legal counsel to determine if any need for confidentiality still exists. The Custodian certified that executive session minutes are approved for release to the public only after undergoing this two-part process.

As a general matter, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a “government record” as records either “made, maintained or kept on file in the course of [an agency’s] official business,” or “received” by an agency in the course of its official business, N.J.S.A. 47:1A-1.1, the statute also excludes from this definition a variety of documents and information. *Ibid.* See Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that “inter-agency or intra-agency advisory, consultative, or deliberative material” is not included within the definition of a government record. N.J.S.A. 47: 1A-1 .1.

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass’n. v. Dinkins, 807 F.Supp., 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn.App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in *Coalition*, the entire draft document is deliberative because in draft form, it “reflect[s] that aspect of the agency’s

function that precedes formal and informed decision making.” *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004), the court reviewed an OPRA request to the Department of Corrections (“DOC”) for draft regulations and draft statutory revisions. The court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” *Id.* at 18. It further held:

“[t]he trial judge ruled that while appellant had not overcome the presumption of non-disclosure as to the entire draft, it was nevertheless entitled to those portions which were eventually adopted. Appellant appeals from the portions withheld and DOC appeals from the portions required to be disclosed. We think it plain that all these drafts, in their entirety, are reflective of the deliberative process. On the other hand, appellant certainly has full access to all regulations and statutory revisions ultimately adopted. We see, therefore, no basis justifying a conclusion that the presumption of nondisclosure has been overcome. *Ibid.* (Emphasis added.)”

Additionally, the GRC has previously ruled on the issue of whether draft meeting minutes are exempt from disclosure pursuant to OPRA. In Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council held that “...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.”

In Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009), the custodian denied the complainant access to executive session minutes on the basis that the requested minutes were not approved for release to the public. The custodian argued that the sole issue was the complainant’s misconception that the BOE’s approval as to accuracy and content signified that the minutes were for release to the general public. The Council ultimately found that because the BOE had already approved the requested executive session minutes as to accuracy and content, said minutes no longer constituted ACD material pursuant to N.J.S.A. 47:1A-1.1., and were therefore disclosable pursuant to the provisions of OPRA.

Like the complainant in Wolosky, the Custodian in the instant complaint denied the Complainant access to executive session minutes on the grounds that said minutes had not yet been approved for release by the Board of Chosen Freeholders. Moreover, the Custodian in this complaint argued that although the minutes were approved as to accuracy and content, they were not approved for release to the general public and therefore the minutes were exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1. However, the Council has previously found that once the governing body of an agency has approved meeting minutes as to accuracy and content (per the requirement

of the Open Public Meetings Act), said minutes are disclosable pursuant to the provision of OPRA. Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Although properly approved executive session minutes are disclosable, pursuant to N.J.S.A. 47:1A-5.g., custodians may redact from the minutes those discussions that require confidentiality because the matters discussed therein are unresolved or still pending.

Therefore, because the Board of Chosen Freeholders approved the November 25, 2008 executive session minutes on December 17, 2008, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.

Because the Custodian has certified that a copy of the November 25, 2008 executive session minutes were e-mailed to the Complainant on January 15, 2009, the Council need not order disclosure.

Whether the County of Sussex's OPRA request form complies with the requirements set forth in OPRA?

OPRA provides that:

“[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

- (1) specific directions and procedures for requesting a record;
- (2) a statement as to whether prepayment of fees or a deposit is required;
- (3) the time period within which the public agency is required by [OPRA], to make the record available;
- (4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (5) space for the custodian to list reasons if a request is denied in whole or in part
- (6) space for the requestor to sign and date the form;
- (7) space for the custodian to sign and date the form if the request is fulfilled or denied. N.J.S.A. 47:1A-5.f.

The Complainant alleged that the County's OPRA request form lists personnel records and police investigation files as exempt from disclosure. The Custodian certified that the alleged defective language was set forth on a form widely distributed by the GRC to provide guidance to custodians and government entities at the time OPRA went into effect in 2002.

The purpose of OPRA is to provide public access to government records. However, under OPRA, not all government records are subject to public access. OPRA contains 24 specific exemptions to disclosure. Additionally, under OPRA a custodian is legally obligated to grant or deny access in accordance with the law.

In O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008), the Council held that:

“[w]hile the Township's form advises requestors that personnel records are exempt from disclosure (pursuant to N.J.S.A. 47:1A-10), the form does not also inform requestors that there are exceptions to the personnel record exemption under OPRA. N.J.S.A. 47:1A-1 provides that ‘government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions...’ Additionally, custodians must grant or deny access to records in accordance with the law. Thus, a requestor may be deterred from submitting an OPRA request for certain personnel records because the Township's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records.” *Id.*

The crux of the argument in O'Shea was based on language included on the Township of West Milford's official OPRA request form. This language, which asserted that personnel records would not be provided as part of an OPRA request, failed to include the exceptions to the personnel record exemption contained in N.J.S.A. 47:1A-10. The form in O'Shea clearly stated that various classes of records were exempt from disclosure but failed to include the exception to the rule against disclosure. The Complainant argued that the language created a barrier to public records. The Council held that “the Township's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records” and ordered the Township of West Milford to either delete the language or include the exceptions to personnel records afforded in N.J.S.A. 47:1A-10.

The GRC has reviewed the records request form in question and finds that the County's form advises requestors that personnel files, police investigation records and public assistance files are exempt from disclosure, but does not inform requestors of the exceptions to these exemptions. N.J.S.A. 47:1A-1 provides that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions...” Furthermore, Custodians must grant or deny access to records in accordance with the law. Thus, a requestor may be deterred from submitting an OPRA request for certain records because the Township's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records.

Therefore, pursuant to O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian shall amend the Board of Freeholder’s official OPRA request form to include the remainder of the applicable provisions of OPRA. Alternatively, the Custodian may adopt the GRC’s newly revised model request form in its entirety.

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Board of Chosen Freeholders approved the November 25, 2008 executive session minutes on December 17, 2008, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant’s request and were therefore disclosable pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.
2. Pursuant to O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian shall amend the Board of Freeholder’s official OPRA request form to include the remainder of the applicable provisions of OPRA.
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Paragraph 2 of these Findings and Recommendations set forth above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005)⁶ to the Executive Director.**

⁶ “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010