



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

February 24, 2011 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2009-54

v.

Borough of Wildwood Crest (Cape May)
Custodian of Record

At the February 24, 2011 public meeting, the Government Records Council (“Council”) considered the February 15, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint should be dismissed because the Complainant withdrew his complaint from the Office of Administrative Law on January 6, 2011 via letter from his legal counsel. No further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 24th Day of February, 2011

Robin Berg Tabakin, Chair
Government Records Council



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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: February 28, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 24, 2011 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2009-54

v.

**Borough of Wildwood Crest (Cape May)²
Custodian of Records**

Records Relevant to Complaint: Audio recording of the Commissioner's meeting dated May 7, 2008.

Request Made: July 10, 2008

Response Made: July 14, 2008

Custodian: Kevin Yecco³

GRC Complaint Filed: February 24, 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 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, found that:

1. The Custodian has complied with the Council's Interim Order dated April 8, 2010 because the Custodian notified the Complainant of the actual cost to provide the requested audio cassette within three (3) business days of receipt of said Order, disclosed to the Complainant, upon receipt of the Complainant's payment of the actual cost, the requested audio cassette within ten (10) business days of receipt of said Order, and the Custodian provided a certification within five (5) business days from receipt of said Order that the Borough adopted the GRC's Model Request Form on March 5, 2010. However, the Custodian has not complied with the portion of the Council's Order that directed him to provide certified confirmation that he disclosed the audio cassette to the Complainant.

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

² Represented by Doreen Y. Corino, Esq., of Corino & Dwyer (Wildwood, NJ).

³ Kevin Yecco is the official Custodian; however, Janelle M. Hozmer, Deputy Clerk, responded to the OPRA request which is the subject of this Denial of Access Complaint.

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

2. The Custodian violated N.J.S.A. 47:1A-5.b. by failing to charge the actual cost of the requested audio cassette and incorrectly assessed a special service charge pursuant to N.J.S.A. 47:1A-5.c. Additionally, the Borough's requirement that requestors who submit OPRA requests via mail must submit photo identification prior to receiving records presents an obstacle to public access of government records pursuant to N.J.S.A. 47:1A-1. Further, the Borough's OPRA request form contained misinformation regarding the accessibility of government records. However, the Custodian mostly complied with the Council's Interim Order dated April 8, 2010 by providing the Complainant with the requested audio cassette at actual cost and adopting the GRC's Model Request Form. Moreover, there is no evidence in the record that suggests the Custodian's violations of OPRA were intentional or deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's April 8, 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. Specifically, the Custodian disclosed the requested audio cassette at actual cost and adopted the GRC's Model Request Form. 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. The Custodian provided the cassette at actual cost pursuant to the Council's Interim Order and adopted the GRC's Model Request Form after the filing of this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law. N.J.S.A. 47:1A-5.b. provides that custodians must charge the actual cost of duplication which includes only the cost of materials and supplies. 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 21, 2010

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

January 6, 2011

Letter from Complainant's Counsel. Counsel states that the parties have reached a settlement and therefore the Complainant withdraws this complaint.

January 13, 2011

OAL returns complaint to GRC due to the Complainant's withdrawal.

Analysis

No analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant withdrew his complaint from the Office of Administrative Law on January 6, 2011 via letter from his legal counsel. No further adjudication is required.

Prepared By: Dara Lownie
Communications Manager/Information Specialist

Approved By: Catherine Starghill, Esq.
Executive Director

February 15, 2011



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

CHRIS CHRISTIE
Governor

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Commissioner

INTERIM ORDER

June 29, 2010 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2009-54

v.

Borough of Wildwood Crest (Cape May)
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. The Custodian has complied with the Council's Interim Order dated April 8, 2010 because the Custodian notified the Complainant of the actual cost to provide the requested audio cassette within three (3) business days of receipt of said Order, disclosed to the Complainant, upon receipt of the Complainant's payment of the actual cost, the requested audio cassette within ten (10) business days of receipt of said Order, and the Custodian provided a certification within five (5) business days from receipt of said Order that the Borough adopted the GRC's Model Request Form on March 5, 2010. However, the Custodian has not complied with the portion of the Council's Order that directed him to provide certified confirmation that he disclosed the audio cassette to the Complainant.
2. The Custodian violated N.J.S.A. 47:1A-5.b. by failing to charge the actual cost of the requested audio cassette and incorrectly assessed a special service charge pursuant to N.J.S.A. 47:1A-5.c. Additionally, the Borough's requirement that requestors who submit OPRA requests via mail must submit photo identification prior to receiving records presents an obstacle to public access of government records pursuant to N.J.S.A. 47:1A-1. Further, the Borough's OPRA request form contained misinformation regarding the accessibility of government records. However, the Custodian mostly complied with the Council's Interim Order dated April 8, 2010 by providing the Complainant with the requested audio cassette at actual cost and adopting the GRC's Model Request Form. Moreover, there is no evidence in the record that suggests the Custodian's violations of OPRA were intentional or deliberate. Therefore, it is concluded that the Custodian's



actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's April 8, 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. Specifically, the Custodian disclosed the requested audio cassette at actual cost and adopted the GRC's Model Request Form. 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. The Custodian provided the cassette at actual cost pursuant to the Council's Interim Order and adopted the GRC's Model Request Form after the filing of this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law. N.J.S.A. 47:1A-5.b. provides that custodians must charge the actual cost of duplication which includes only the cost of materials and supplies. 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**

John Paff¹
Complainant

GRC Complaint No. 2009-54

v.

Borough of Wildwood Crest (Cape May)²
Custodian of Records

Records Relevant to Complaint: Audio recording of the Commissioner's meeting dated May 7, 2008.

Request Made: July 10, 2008

Response Made: July 14, 2008

Custodian: Kevin Yecco³

GRC Complaint Filed: February 24, 2009⁴

Background

April 8, 2010

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

1. Pursuant to N.J.S.A. 47:1A-5.b., the actual cost of the audio cassette is not \$5.44 as the Custodian alleged. The Custodian must charge the actual cost of said cassette which is determined by dividing the \$9.00 cost for the pack of cassettes by the number of cassettes in the pack.
2. The Custodian's \$25.00 charge to provide the requested audiotape does not reflect the actual cost of providing said record pursuant to N.J.S.A. 47:1A-5.b. and incorrectly includes a special service charge which is not warranted pursuant to N.J.S.A. 47:1A-5.c. As such, the Borough's Ordinance No. 1048

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

² Represented by Doreen Y. Corino, Esq., of Corino & Dwyer (Wildwood, NJ).

³ Kevin Yecco is the official Custodian; however, Janelle M. Hozmer, Deputy Clerk, responded to the OPRA request which is the subject of this Denial of Access Complaint.

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

is invalid and the Custodian must charge the actual cost of the audiotape with no charge for labor or overhead.

3. **The Custodian shall calculate the appropriate fee in accordance with Item No. 1 above and shall make the exact amount of the fee available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to the Complainant the requested audiotape upon the Complainant's payment of the actual cost within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director. In the event that the Complainant fails to pay the actual cost of the requested audiotape by the tenth (10th) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4⁶ to the Executive Director.**
4. The Borough's requirement that requestors who submit OPRA requests via mail must submit photo identification prior to receiving records is not required under OPRA and presents an obstacle to public access of government records pursuant to N.J.S.A. 47:1A-1. However, the submission of photo identification *may* be necessary when a requestor pays by check for the legitimate reason of pursuing the individual if the check bounces, but the Custodian's blanket requirement that all requestors provide same is unreasonable and unnecessary, especially before the method of payment is known. Likewise, a blanket requirement that all requestors provide photo identification to verify requestors of victims' records is unreasonable especially when the records requested in this complaint are obviously not victims' records.
5. The Borough's OPRA request form provides misinformation regarding the accessibility of personnel records and includes a burdensome requirement for requestors who submit OPRA requests by mail to provide photo identification, in essence, denying the requestor access to the records. As such, the Borough of Wildwood Crest shall either adopt the GRC's Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form in the following ways:
 - Either delete the portion of the Borough's request form regarding the personnel records exemption, or amend said statement to include the remainder of the applicable provision of OPRA at N.J.S.A. 47:1A-10;

⁵ "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."

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."

- Delete the following sentence: “Note: A photocopy of acceptable photo identification (i.e., driver’s license, passport) must be provided with all requests received via mail.
6. **The Custodian shall comply with Item No. 5 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁷, to the Executive Director.**
 7. 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.
 8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

April 13, 2010

Council’s Interim Order distributed to the parties.

April 13, 2010

E-mail from Custodian to Complainant’s Counsel. The Custodian states that pursuant to the Council’s Interim Order, he is advising the Complainant by way of this e-mail that the actual cost of the requested audio cassette is \$1.35. The Custodian states that upon receipt of the Complainant’s payment, which is to be received by the tenth (10th) business day following receipt of the Council’s Interim Order, the Custodian will immediately provide the Complainant with a copy of said tape. The Custodian also states that he is sending a copy of this e-mail to the Complainant’s post office box.

April 13, 2010

E-mail from Complainant’s Counsel to Custodian. The Complainant’s Counsel acknowledges receipt of the Custodian’s e-mail dated April 13, 2010. Counsel states that the Complainant will remit payment to the Custodian via check next week.

April 13, 2010

Custodian’s response to the Council’s Interim Order. The Custodian certifies that on April 13, 2010, in accordance with the Council’s Interim Order, he notified the Complainant in writing that the requested audio cassette tape is available upon payment of the actual cost of said tape, which is \$1.35. The Custodian states that upon receipt of the Complainant’s payment of said fee, he will immediately provide the tape to the Complainant.

Additionally, the Custodian certifies that on March 5, 2010 he replaced the Borough’s former OPRA request form with the GRC’s Model Request Form. The

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
John Paff v. Borough of Wildwood Crest (Cape May), 2009-54 – Supplemental Findings and Recommendations of the Executive Director 3

Custodian certifies that said form is located on the Borough's website at www.wildwoodcrest.org.

April 19, 2010

E-mail from Complainant to Custodian. The Complainant states that he sent a check for \$1.35 to the Custodian's attention today, April 19, 2010.

April 21, 2010

E-mail from GRC to Custodian. The GRC confirms receipt of the Custodian's certification dated April 13, 2010. However, the GRC states that the Council's Interim Order dated April 8, 2010 requires confirmation of compliance *after* the Custodian provides the Complainant with the requested audio cassette, or a certification indicating that the Complainant failed to pay the fee within the timeframe, whichever the case may be. The GRC states that the deadline for such confirmation is April 27, 2010.

April 21, 2010

E-mail from Custodian to GRC. The Custodian states that he has not yet received the Complainant's payment and thus he has not yet provided a copy of the requested audio cassette.

April 21, 2010

E-mail from Custodian to GRC. The Custodian states that he is now in receipt of the Complainant's check for \$1.35. The Custodian states that he immediately placed the copy of the requested audio cassette tape in the US postal mailbox at the corner of Cardinal Road and Pacific Avenue in the Borough of Wildwood Crest.

Analysis

Whether the Custodian complied with the Council's April 8, 2010 Interim Order?

The Council's Interim Order dated April 8, 2010 directed the Custodian to notify the Complainant of the actual cost to provide the requested audio cassette within three (3) business days of receipt of the said Order, or by April 16, 2010. The Custodian provided the Complainant's Counsel with an e-mail that included the calculation of the actual cost at \$1.35 on April 13, 2010.

The Council's Interim Order also directed the Custodian to disclose to the Complainant, upon receipt of the Complainant's payment of the actual cost, the requested audio cassette within ten (10) business days of receipt of said Order, or by April 27, 2010. Alternatively, the Council directed the Custodian to provide a legal certification by the same deadline that the Complainant failed to pay the actual cost of the audio cassette. Via e-mail to the GRC dated April 21, 2010, the Custodian stated that he received the Complainant's check for \$1.35 and that he immediately placed the copy of the requested audio cassette tape in the US postal mailbox at the corner of Cardinal Road and Pacific Avenue in the Borough of Wildwood Crest.

Further, the Council's Interim Order directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within ten (10) business

days from receipt of said Order, or by April 27, 2010. The Custodian provided a certification dated April 13, 2010; however, said certification attests that the Custodian *will* provide the requested audio cassette to the Complainant upon receipt of payment, not that the Custodian actually had completed the task. Thus, this portion of the Custodian's certification is not adequate and does not comply with the Council's Interim Order.

Additionally, the Council directed the Borough to either adopt the GRC's Model Request Form or amend its current request form, and provide certified confirmation of compliance within five (5) business days from receipt of said Order, or by April 20, 2010. The Custodian provided a certification to the GRC dated April 13, 2010 that the Borough replaced the former OPRA request form with the GRC's Model Request Form on March 5, 2010.

Therefore, the Custodian has complied with the Council's Interim Order dated April 8, 2010 because the Custodian notified the Complainant of the actual cost to provide the requested audio cassette within three (3) business days of receipt of the said Order, disclosed to the Complainant, upon receipt of the Complainant's payment of the actual cost, the requested audio cassette within ten (10) business days of receipt of said Order, and the Custodian provided a certification within five (5) business days from receipt of said Order that the Borough adopted the GRC's Model Request Form on March 5, 2010. However, the Custodian has not complied with the portion of the Council's Order that directed him to provide certified confirmation that he disclosed the audio cassette to the Complainant.

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

OPRA states that:

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

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

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

The Custodian certified that he received the Complainant's OPRA request on July 14, 2008. The Custodian stated that the Deputy Clerk responded to said request in writing on the same date in which the Deputy Clerk advised the Complainant that the

requested audiotape would be available on July 16, 2008 for \$25.00. However, the Council held that “the Custodian’s \$25.00 charge to provide the requested audiotape does not reflect the actual cost of providing said record pursuant to N.J.S.A. 47:1A-5.b. and incorrectly includes a special service charge which is not warranted pursuant to N.J.S.A. 47:1A-5.c. As such, the Borough’s Ordinance No. 1048 is invalid and the Custodian must charge the actual cost of the audiotape with no charge for labor or overhead.”

The Council also held that the Borough’s requirement that requestors who submit OPRA requests via mail must submit photo identification prior to receiving records is not required under OPRA and presents an obstacle to public access of government records pursuant to N.J.S.A. 47:1A-1. Likewise, a blanket requirement that all requestors provide photo identification to verify requestors of victims’ records is unreasonable especially when the records requested in this complaint are obviously not victims’ records.

Additionally, the Council held that the Borough’s OPRA request form contains the following statement, “[t]he term ‘public records’ generally includes those records determined to be public in accordance with N.J.S.A. 47:1A1. The term does not include employee personnel files...” 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 Borough’s form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records.

Therefore, the Council ordered the Borough of Wildwood Crest to either adopt the GRC’s Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form.

As previously stated, the Custodian has complied with the Council’s Interim Order dated April 8, 2010 because the Custodian notified the Complainant of the actual cost to provide the requested audio cassette within three (3) business days of receipt of said Order, disclosed to the Complainant, upon receipt of the Complainant’s payment of the actual cost, the requested audio cassette within ten (10) business days of receipt of said Order, and the Custodian provided a certification within five (5) business days from receipt of said Order that the Borough adopted the GRC’s Model Request Form on March 5, 2010. However, the Custodian has not complied with the portion of the Council’s Order that directed him to provide certified confirmation that he disclosed the audio cassette to the Complainant.

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

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

In this complaint, the Custodian violated N.J.S.A. 47:1A-5.b. by failing to charge the actual cost of the requested audio cassette and incorrectly assessed a special service charge pursuant to N.J.S.A. 47:1A-5.c. Additionally, the Borough's requirement that requestors who submit OPRA requests via mail must submit photo identification prior to receiving records presents an obstacle to public access of government records pursuant to N.J.S.A. 47:1A-1. Further, the Borough's OPRA request form contained misinformation regarding the accessibility of government records. However, the Custodian substantially complied with the Council's Interim Order dated April 8, 2010 by providing the Complainant with the requested audio cassette at actual cost and adopting the GRC's Model Request Form. Moreover, there is no evidence in the record that suggests the Custodian's violations of OPRA were intentional or deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under 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.⁸ 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.

⁸ The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

In this instant complaint, the Complainant sought the following relief from the Council:

1. A finding that the Custodian violated OPRA by attempting to charge a fee for an audiotape that exceeds the actual cost;
2. A finding that the Custodian violated OPRA by requiring the Complainant to transmit photo identification to have his OPRA request fulfilled;
3. A finding that the Custodian's OPRA request form contains false or misleading information;
4. An order directing the Custodian to adopt the GRC's Model Request Form; and
5. A finding that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

In its April 8, 2010 Interim Order, the Council held that the Custodian improperly charged the Complainant for a copy of an audio cassette and ordered the Custodian to disclose said cassette upon receipt of the actual cost of duplication. The Custodian complied. The Council also ordered the Borough to either amend its OPRA request form or adopt the GRC's Model Request Form. The Custodian complied.

Pursuant to Teeters, *supra*, and the Council's April 8, 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. Specifically, the Custodian disclosed the requested audio cassette at actual cost and adopted the GRC's Model Request Form. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. The Custodian provided the cassette at actual cost pursuant to the Council's Interim Order and adopted the GRC's Model Request Form after the filing of this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law. N.J.S.A. 47:1A-5.b. provides that custodians must charge the actual cost of duplication which includes only the cost of materials and supplies. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's Interim Order dated April 8, 2010 because the Custodian notified the Complainant of the actual cost to provide the requested audio cassette within three (3) business days of receipt of said Order, disclosed to the Complainant, upon receipt of the Complainant's payment of the actual cost, the requested audio cassette within ten (10) business days of receipt of said Order, and the Custodian provided a certification within five (5) business days from receipt of said Order that the Borough adopted the GRC's Model Request Form on March 5, 2010. However, the Custodian has not complied with

the portion of the Council's Order that directed him to provide certified confirmation that he disclosed the audio cassette to the Complainant.

2. The Custodian violated N.J.S.A. 47:1A-5.b. by failing to charge the actual cost of the requested audio cassette and incorrectly assessed a special service charge pursuant to N.J.S.A. 47:1A-5.c. Additionally, the Borough's requirement that requestors who submit OPRA requests via mail must submit photo identification prior to receiving records presents an obstacle to public access of government records pursuant to N.J.S.A. 47:1A-1. Further, the Borough's OPRA request form contained misinformation regarding the accessibility of government records. However, the Custodian mostly complied with the Council's Interim Order dated April 8, 2010 by providing the Complainant with the requested audio cassette at actual cost and adopting the GRC's Model Request Form. Moreover, there is no evidence in the record that suggests the Custodian's violations of OPRA were intentional or deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's April 8, 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. Specifically, the Custodian disclosed the requested audio cassette at actual cost and adopted the GRC's Model Request Form. 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. The Custodian provided the cassette at actual cost pursuant to the Council's Interim Order and adopted the GRC's Model Request Form after the filing of this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law. N.J.S.A. 47:1A-5.b. provides that custodians must charge the actual cost of duplication which includes only the cost of materials and supplies. 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: Dara Lownie
Senior Case Manager

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

April 8, 2010 Government Records Council Meeting

John Paff

Complainant

v.

Borough of Wildwood Crest (Cape May)

Custodian of Record

Complaint No. 2009-54

At the April 8, 2010 public meeting, the Government Records Council ("Council") considered the April 1, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. Pursuant to N.J.S.A. 47:1A-5.b., the actual cost of the audio cassette is not \$5.44 as the Custodian alleged. The Custodian must charge the actual cost of said cassette which is determined by dividing the \$9.00 cost for the pack of cassettes by the number of cassettes in the pack.
2. The Custodian's \$25.00 charge to provide the requested audiotape does not reflect the actual cost of providing said record pursuant to N.J.S.A. 47:1A-5.b. and incorrectly includes a special service charge which is not warranted pursuant to N.J.S.A. 47:1A-5.c. As such, the Borough's Ordinance No. 1048 is invalid and the Custodian must charge the actual cost of the audiotape with no charge for labor or overhead.
3. **The Custodian shall calculate the appropriate fee in accordance with Item No. 1 above and shall make the exact amount of the fee available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to the Complainant the requested audiotape upon the Complainant's payment of the actual cost within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4¹, to**

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."



the Executive Director. In the event that the Complainant fails to pay the actual cost of the requested audiotape by the tenth (10th) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4² to the Executive Director.

4. The Borough's requirement that requestors who submit OPRA requests via mail must submit photo identification prior to receiving records is not required under OPRA and presents an obstacle to public access of government records pursuant to N.J.S.A. 47:1A-1. However, the submission of photo identification *may* be necessary when a requestor pays by check for the legitimate reason of pursuing the individual if the check bounces, but the Custodian's blanket requirement that all requestors provide same is unreasonable and unnecessary, especially before the method of payment is known. Likewise, a blanket requirement that all requestors provide photo identification to verify requestors of victims' records is unreasonable especially when the records requested in this complaint are obviously not victims' records.
5. The Borough's OPRA request form provides misinformation regarding the accessibility of personnel records and includes a burdensome requirement for requestors who submit OPRA requests by mail to provide photo identification, in essence, denying the requestor access to the records. As such, the Borough of Wildwood Crest shall either adopt the GRC's Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form in the following ways:
 - Either delete the portion of the Borough's request form regarding the personnel records exemption, or amend said statement to include the remainder of the applicable provision of OPRA at N.J.S.A. 47:1A-10;
 - Delete the following sentence: "Note: A photocopy of acceptable photo identification (i.e., driver's license, passport) must be provided with all requests received via mail."
6. **The Custodian shall comply with Item No. 5 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4³, to the Executive Director.**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ "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."

circumstances pending the Custodian's compliance with the Council's Interim Order.

8. 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 8th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: April 13, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

John Paff¹
Complainant

GRC Complaint No. 2009-54

v.

Borough of Wildwood Crest (Cape May)²
Custodian of Records

Records Relevant to Complaint: Audio recording of the Commissioner's meeting dated May 7, 2008.

Request Made: July 10, 2008

Response Made: July 14, 2008

Custodian: Kevin Yecco³

GRC Complaint Filed: February 24, 2009⁴

Background

July 10, 2008

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

July 14, 2008

Deputy Clerk's response to the OPRA request. The Deputy Clerk responds in writing to the Complainant's OPRA request on the same business day following receipt of such request.⁵ The Deputy Clerk states that per Ordinance No. 1048 the cost to provide the requested audio recording is \$25.00 and said recording will be ready on July 16, 2008.

February 24, 2009

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

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

² Represented by Doreen Y. Corino, Esq., of Corino & Dwyer (Wildwood, NJ).

³ Kevin Yecco is the official Custodian; however, Janelle M. Hozmer, Deputy Clerk, responded to the OPRA request which is the subject of this Denial of Access Complaint.

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

⁵ The Custodian certifies in his Statement of Information that he received the Complainant's OPRA request on July 14, 2008.

- Complainant's OPRA request dated July 10, 2008.
- Deputy Clerk's response to the Complainant's OPRA request dated July 14, 2008.

The Complainant states that he submitted his OPRA request on July 10, 2008. The Complainant states that the Deputy Clerk responded to said request on July 14, 2008 indicating that the requested audio recording would be available on July 16, 2008 for \$25.00. The Complainant states that the Deputy Clerk highlighted the word "Note" in the paragraph on the request form that requires photo identification, implying that the Complainant's request would not be honored unless he presented such photo identification.

The Complainant asserts that the Deputy Clerk's \$25.00 fee for an audio tape should be reduced to actual costs. The Complainant states that in Renna v. Township of Warren (Somerset), GRC Complaint No. 2008-40 (April 2009), the Council held that a \$5.00 charge for a CD is "likely not" the actual cost pursuant to N.J.S.A. 47:1A-5.b. The Complainant states that absent extraordinary circumstances, actual cost is the material cost of providing a requestor with a copy, excluding labor and overhead. See Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26, 31 (1962); Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271, 280 (App. Div. 2005); Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 141 (App. Div. 2006); O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008); and O'Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008).

Additionally, the Complainant states that OPRA contains many requirements regarding OPRA requests, none of which include the requirement for requestors to identify themselves or provide identification. The Complainant states that OPRA actually allows requestors to submit requests anonymously. The Complainant states that the Council has previously held that if a public agency places an undue burden on a requestor, such a burden constitutes a denial of access. Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007). The Complainant contends that the Borough's requirement for a requestor to provide photo identification places an undue burden on requestors.

Further, the Complainant states that in O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008), the Council held that if a public agency's OPRA request form contains false or misleading information, it constitutes a denial of access. Similar to O'Shea, the Complainant states that the Borough's OPRA request form indicates that employee personnel files are not public records, but fails to also include the exceptions to said exemption. The Complainant states that the request form also requires photo identification for OPRA requests received via mail which is a violation of OPRA. The Complainant asserts that the Council should order the Custodian to adopt the GRC's Model Request Form.

The Complainant requests the following relief from the Council:

1. A finding that the Custodian violated OPRA by attempting to charge a fee for an audiotape that exceeds the actual cost;

2. A finding that the Custodian violated OPRA by requiring the Complainant to transmit photo identification to have his OPRA request fulfilled;
3. A finding that the Custodian's OPRA request form contains false or misleading information;
4. An order directing the Custodian to adopt the GRC's Model Request Form; and
5. A finding that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

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

March 18, 2009

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

March 24, 2009

Custodian's SOI with the following attachments:

- Borough of Wildwood Crest Ordinance No. 1048.
- Complainant's OPRA request dated July 10, 2008.
- Complainant's envelope addressed to Custodian postmarked July 10, 2008.
- Deputy Clerk's response to the Complainant's OPRA request dated July 14, 2008.
- Borough of Wildwood Crest Budget Account Status dated March 18, 2009.
- Custodian Counsel's Letter Brief dated March 24, 2009.

The Custodian certifies that he received the Complainant's OPRA request on July 14, 2008. The Custodian states that the Deputy Clerk responded to said request in writing on the same date and informed the Complainant that the requested audiotape would be available on July 16, 2008 for \$25.00 per Ordinance No. 1048. The Custodian states that the Deputy Clerk also informed the Complainant that he could access the minutes of the same meeting requested on the Borough's website free of charge. The Custodian certifies that the requested audiotape has been copied and available for the Complainant since July 15, 2008; however, the Complainant never paid the \$25.00 fee, or contacted the Custodian regarding this OPRA request until the filing of this Denial of Access Complaint.

The Custodian certifies that the \$25.00 fee is established by Ordinance No. 1048. The Custodian certifies that the fee was calculated based on the cost of an audio cassette at \$5.44, the cost of the specially purchased equipment for the sole purpose of duplicating audiotapes pursuant to OPRA requests at \$459.00, the estimated time of retrieving the tape, duplicating the tape, packaging the tape, returning the tape to its location, the median salary of the three (3) employees who would perform the duplication, and the cost for postage.

The Custodian states that pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d., in the case of a municipality, duplication rates that exceed the enumerated rates established in OPRA shall be established in advance by ordinance and the requestor shall have the opportunity to review and object to the charge prior to it being incurred. The Custodian states that the Complainant did not object to the charge at the time of his OPRA request. The Custodian also states that OPRA allows for special service charges

for any extensive use of information technology or for the labor costs to convert records to the medium requested.

Additionally, the Custodian certifies that the Borough allows requestors to pay for records received pursuant to an OPRA request by check via regular mail. The Custodian certifies that in the event that the check could not be honored, the Borough seeks to obtain information from the requestor that would enable the payment to be made. The Custodian also certifies that because the Borough is charged with the duty of ascertaining that the individual signing the certification on the OPRA request form regarding access to victim's records is the actual requestor, the Borough requires OPRA requestors who submit their requests by mail to provide adequate photo identification.

The Custodian states that the Complainant submitted his OPRA request with a post office box and no street address or phone number. The Custodian asserts that only a post office box and not a street address is not sufficient identification for most state and federal agencies. The Custodian also contends that nothing in OPRA precludes a custodian from requesting acceptable photo identification for requests submitted via mail when the custodian is required to comply with OPRA's exemptions, if applicable, based on a requestor's certification. The Custodian states that in this instance, he would have no way of knowing if the person requesting government records was the person signing the certification and would likewise have no way of contacting the requestor if payment was not honored other than via a post office box which can be cancelled at any time.

The Custodian also asserts that the Borough views this policy as falling into the broad discretion afforded to administrative agencies in selecting the appropriate method and process for fulfilling their statutory responsibilities under OPRA pursuant to Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007). The Custodian contends that production of photo identification enables the Custodian to ensure compliance of the Custodian's responsibilities under OPRA, specifically regarding the disclosure of victim's records.

Further, the Custodian states that the Complainant takes issue with the Borough's OPRA request form, specifically the portion that informs requestor that the term "public record" does not include employee personnel files. The Custodian states the Borough's OPRA request form also provides requestors with the statutory citation, as well as a statement that when a legal determination must be made as to whether records are public under OPRA, the request will be reviewed by the municipal attorney, consistent with the GRC's Model Request Form.

March 24, 2009

Custodian Counsel's Letter Brief. The Custodian's Counsel states that the Borough distinguishes its fee for audiotapes from the fee charged in Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 141 (App. Div. 2006). Counsel contends that the Borough's fee is actually less than the actual cost of duplication. Counsel re-states the fee calculation presented in the Custodian's SOI. Counsel contends that the Complainant has not provided any documentation to substantiate his claim that the \$25.00 charge is unreasonable or not based on the actual cost of providing the record in the medium requested.

Counsel states that the Complainant relies on Dittrich v. City of Hoboken, GRC Complaint No. 2006-456 (May 2007) in support of the contention that the Borough's photo identification policy places an undue burden on the requestor. Counsel distinguishes the current circumstances from those presented in Dittrich, in which the custodian required the complainant to complete an additional request form to obtain government records. Counsel states that the Borough of Wildwood Crest does not utilize any such policy.

Counsel also states that in Paff v. City of East Orange (Essex), GRC Complaint No. 2007-297 (March 2008), the Council determined that it was within the discretion of the Custodian to develop a process by which the Custodian could best meet his/her obligations under OPRA consistent with the Council's decision in Hascup, *supra*, wherein the Council held that:

“administrative agencies in general have broad discretion in selecting the appropriate method and process for fulfilling their statutory responsibilities...specifically, under OPRA a custodian has the discretion for developing processes and a custodian has the discretion to customize an OPRA request form (so long as the statutory requirements of N.J.S.A. 47:1A-5.f. 1-7 are included) to accept or not accept requests by e-mail, etc.”

Counsel contends that the photo identification requirement allows the Custodian to fulfill his statutory responsibilities by ensuring that the fees charged will be paid by the requestor, as well as to ensure that the individual submitting the OPRA request is the individual signing the certification regarding access to victim's records.

Further, Counsel contends that the Borough's OPRA request form does not amount to a denial of access because the Complainant's OPRA request did not seek employee personnel records.

Additionally, Counsel asserts that the Complainant should not be considered a prevailing party entitled to an award of prevailing party attorney's fees because the basis for the Custodian not providing the requested audiotape to the Complainant was the Complainant's failure to provide the copying fees, and thus the Custodian did not unlawfully deny access. Counsel also states that in Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court held that the plaintiff was not a prevailing party because the City of Hoboken carried its burden of proving that the plaintiff's lawsuit was not the catalyst behind the City's voluntary disclosure of the requested records. Counsel contends that pursuant to N.J.S.A. 47:1A-6 and Mason, the Complainant is not entitled to prevailing party fees because access to the requested record was properly denied.

March 25, 2009

Complainant's amended Denial of Access Complaint.⁶ The Complainant asserts that unless a special service charge is warranted, public agencies must charge the actual

⁶ The Complainant raises three (3) points in this amended complaint; however, only one (1) point is discussed here because the remaining two (2) points have already been raised by the Complainant.
John Paff v. Borough of Wildwood Crest (Cape May), 2009-54 – Findings and Recommendations of the Executive Director

cost of duplicating the requested record. The Complainant states that the Council has invalidated similar fee ordinances like the one the Custodian's Counsel is defending in this matter. *See* Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 141 (App. Div. 2006).

The Complainant contends that the Custodian in this complaint is not required to convert mediums, but rather copy an audiotape. The Complainant states that the Custodian's Counsel failed to address the 14-point test discussed in Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law. Div. 2002) regarding whether special services charges are warranted. Further, the Complainant contends that it is unlikely that the actual cost of the tape is \$5.44, despite the Custodian's claim. The Complainant states that review of the Budget Account Status does not provide a breakdown of the number of tapes per order. Additionally, the Complainant asserts that the cost to purchase duplicating equipment eight (8) years ago does not factor into the actual cost for this OPRA request. Also, the Complainant states that Counsel added in the median hourly rate of employees who might complete the copying rather than the specific hourly rate of the person actually completing the copying. Thus, the Complainant suggests that even if a special service charge was warranted, the Records Custodian's \$25.00 charge represents a flat fee, not an itemization of the actual cost.

April 6, 2009

Letter from Custodian's Counsel to GRC. The Custodian's Counsel states that the Complainant was aware of the \$25.00 fee for the requested audiotape because said fee is established by ordinance. Counsel states that pursuant to N.J.S.A. 47:1A-5.c., the Complainant had the opportunity to review and object to the charge but failed to do so. Counsel also states that pursuant to N.J.S.A. 47:1A-5.c., "in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance. The requestor shall have the opportunity to review and object to the charge prior to it being incurred." Counsel asserts that the Borough appropriately established the fees for audiotapes in advance pursuant to OPRA.

Additionally, Counsel states the hourly rate of the Deputy Clerk who performed the service is \$30.00. Counsel states that the tape had to be retrieved from storage, copied on specially purchased equipment, returned to storage and prepared for postage. Counsel states that the Deputy Clerk affirmed the time involved to provide the tape and the fee as set by ordinance of \$25.00 is a reasonable charge.⁷

Analysis

Whether the Custodian's \$25.00 charge to provide a copy of an audiotape is in violation of OPRA?

OPRA provides that:

⁷ Counsel also addresses the two (2) points in the Complainant's amended complaint that are not discussed here.

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

Additionally, OPRA defines a government record as:

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

OPRA states that:

“*[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record... The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section...*” (Emphasis added). N.J.S.A. 47:1A-5.b.

OPRA also states that:

“*[w]henver the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies; provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance. The requestor shall have the opportunity to review and object to the charge prior to it being incurred.*” (Emphasis added). N.J.S.A. 47:1A-5.c.

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 certified that he received the Complainant’s OPRA request on July 14, 2008. The Custodian stated that the Deputy Clerk responded to said request in writing on the same date in which the Deputy Clerk advised the Complainant that the requested audiotape would be available on July 16, 2008 for \$25.00. However, the Complainant asserts that the \$25.00 does not reflect the actual cost of providing the requested audiotape. The Complainant states that in Renna v. Township of Warren (Somerset), GRC Complaint No. 2008-40 (April 2009), the Council held that a \$5.00 charge for a CD is “likely not” the actual cost pursuant to N.J.S.A. 47:1A-5.b.

However, the Custodian certified that the \$25.00 charge for the requested audiotape does reflect the actual cost of providing said tape. Specifically, the Custodian certified that the \$25.00 fee is established by Ordinance No. 1048. The Custodian certified that the fee was calculated based on the cost of an audio cassette at \$5.44, the cost of the specially purchased equipment for the sole purpose of duplicating audiotapes pursuant to OPRA requests at \$459.00, the estimated time of retrieving the tape, duplicating the tape, packaging the tape, returning the tape to its location, the median salary of the three (3) employees who would perform the duplication, and the cost for postage.

Pursuant to N.J.S.A. 47:1A-5.b., government records may be purchased upon payment of the actual cost of duplicating the record. Said provision defines “actual cost” as “the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section...”

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

“[i]n adopting OPRA, the Legislature made clear that ‘government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.’ N.J.S.A. 47:1A-1. The imposition of a facially

inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication. *N.J.S.A. 47:1A-5.b.*”

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

Additionally, in *Moore v. Board of Chosen Freeholders of Mercer County*, 39 N.J. 26 (1962), the court addressed the issue of the cost of providing copies of requested records to a requestor. The plaintiffs argued that if custodians could set a per page copy fee, arguably custodians could set a rate that would deter the public from requesting records. The court stated that “[w]here the public right to know would thus be impaired the public official should calculate his charge on the basis of actual costs. Ordinarily there should be no charge for labor.” *Id.* at 31.

Further, in *Dugan v. Camden County Clerk’s Office*, 376 N.J. Super. 271 (App. Div. 2005), the court cited *Moore, supra*, by stating that “[w]hen copies of public records are purchased under the common law right of access doctrine, the public officer may charge only the actual cost of copying, which ordinarily should not include a charge for labor... Thus, the fees allowable under the common law doctrine are consistent with those allowable under OPRA.” 376 N.J. Super. at 279.

In this instant complaint, the Council first addresses the actual cost of the audio cassette itself. The Custodian certified that the actual cost of said tape is \$5.44. However, the Custodian provided a Budget Account Status with his SOI wherein a charge for audio cassettes appears for the fee of \$9.00.

Although it cannot be determined from this account status how many cassettes are included in the multi-pack purchased, such information is not required to determine that the Custodian’s quoted \$5.44 charge per tape is inaccurate. The listing on the account status specifically reads “Office Basics – Audio Cassettes...[\$]9.00.” The word “cassettes” in plural form implies that more than one cassette tape was purchased. Assuming that only two (2) cassettes were purchased in this bundle for \$9.00, the actual cost per cassette tape is then \$4.50, which is \$0.94 less than the Custodian’s cited charge, which means that the actual cost for the audio cassette is some price less than that to which the Custodian certified.

Therefore, pursuant to *N.J.S.A. 47:1A-5.b.*, the evidence of record shows that the actual cost of the audio cassette is not \$5.44 as the Custodian alleged. The Custodian must charge the actual cost of said cassette which is determined by dividing the \$9.00 cost for the pack of cassettes by the number of cassettes in the pack.

The Council next addresses the actual cost of providing a copy of said cassette to the Complainant. The Custodian's Counsel cites to N.J.S.A. 47:1A-5.c. in support of creating an ordinance that sets forth the actual cost of providing copies of audiotapes.

Specifically, N.J.S.A. 47:1A-5.c. states that:

“[w]henever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ; provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance. The requestor shall have the opportunity to review and object to the charge prior to it being incurred.” (Emphasis added).

The section of the above provision of OPRA that states “in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance,” refers to the enumerated rates for paper copies established under N.J.S.A. 47:1A-5.b. Such rates are:

“a government record embodied in the form of printed matter shall not exceed the following:

- first page to tenth page;
- eleventh page to twentieth page, \$0.50 per page;
- all pages over twenty, \$0.25 per page.”

Thus, N.J.S.A. 47:1A-5.c. actually provides that if a municipality's actual cost of providing paper copies exceeds \$0.75 per page for pages 1-10; \$0.50 per page for pages 11-20; and \$0.25 per page for all pages over 20, a municipality must establish said fees in advance by ordinance. Fees for any other type of duplication, such as audiotape, CD-ROMs or DVDs do not need to be established by ordinance because N.J.S.A. 47:1A-5.b. mandates that custodians charge the actual cost, which as indicated above is less than \$5.44 in this matter.

Further, the Custodian includes in his \$25.00 charge for an audiotape the cost of the specially purchased equipment for the sole purpose of duplicating audiotapes pursuant to OPRA requests at \$459.00, the estimated time of retrieving the tape, duplicating the tape, packaging the tape, returning the tape to its location, the median salary of the three (3) employees who would perform the duplication, and the cost for postage.

OPRA only allows charges for labor when a request requires an extraordinary amount of time and effort to fulfill pursuant to N.J.S.A. 47:1A-5.c. Moreover, special service charges cannot be set in advance. Special service charges shall be based upon the actual direct cost of providing the copy or copies pursuant to N.J.S.A. 47:1A-5.c.

The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of a variety of factors. These factors were discussed in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. *Id.* at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. *Id.*

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5.c. *Id.* at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA:

- The volume of government records involved;
- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying;
- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination;⁸ and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

The court determined that in the context of OPRA, the term “extraordinary” will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. *Id.* at 202. “[W]hat may appear to be extraordinary to one school district might be routine to another.” *Id.*

In this instant complaint, the Custodian certified that the \$25.00 charge included the median hourly rate of the three employees who *might* complete the copying. Thus, the \$25.00 charge does not reflect the actual direct cost of providing the copies, but rather a hypothetical charge based on the median hourly rate of the Borough’s employees.

⁸ With regard to this factor, the court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

The question then becomes, is a special service charge warranted in this matter? The Complainant's Counsel stated the hourly rate of the Deputy Clerk who performed the service is \$30.00. Counsel stated that the tape had to be retrieved from storage, copied on specially purchased equipment, returned to storage and prepared for postage. Counsel states that the Deputy Clerk affirmed the time involved providing the tape and the fee as set by ordinance of \$25.00 is a reasonable charge. Thus, if the Deputy Clerk's hourly rate is \$30.00 and the Deputy Clerk affirmed that the time involved providing the tape and the fee as set by ordinance of \$25.00 is a reasonable charge, the time the Deputy Clerk utilized to complete said copying is likely less than, but no more than one (1) hour. One (1) hour of time does not warrant the imposition of a special service charge in this instance. OPRA specifically provides that a special service charge is only allowed when the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request. N.J.S.A. 47:1A-5.c.

Therefore, the Custodian's \$25.00 charge to provide the requested audiotape does not reflect the actual cost of providing said record pursuant to N.J.S.A. 47:1A-5.b. and incorrectly includes a special service charge which is not warranted pursuant to N.J.S.A. 47:1A-5.c. As such, the Borough's Ordinance No. 1048 is invalid and the Custodian must charge the actual cost of the audiotape with no charge for labor or overhead.

Whether the Custodian violated OPRA by requiring the Complainant to transmit photo identification to have his OPRA request fulfilled?

OPRA states that:

“where it shall appear that a person who is convicted of any indictable offense under the laws of this State, any other state or the United States is seeking government records containing personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information, the right of access provided for in [OPRA] shall be denied...a custodian shall not comply with an anonymous request for a government record which is protected under the provisions of this section.” N.J.S.A. 47:1A-2.2.

OPRA also states that:

“[t]he custodian may require a deposit against costs for reproducing documents sought through an anonymous request whenever the custodian anticipates that the information thus requested will cost in excess of \$5 to reproduce.” N.J.S.A. 47:1A-5.f.
Additionally, OPRA states that:

“[i]n the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request, unless the requestor has elected not to provide a name, address

or telephone number, or other means of contacting the requestor. If the requestor has elected not to provide a name, address, or telephone number, or other means of contacting the requestor, the custodian shall not be required to respond until the requestor reappears before the custodian seeking a response to the original request..." N.J.S.A. 47:1A-5.i.

The Complainant states that in the Deputy Clerk's written response to the Complainant's OPRA request, the Deputy Clerk highlighted the word "Note" in the paragraph on the request form that requires photo identification, implying that the Complainant's request would not be honored unless he presented identification. The Complainant states that OPRA contains many requirements regarding OPRA requests, none of which include the requirement for requestors to identify themselves or provide identification. The Complainant states that OPRA actually allows requestors to submit requests anonymously. The Complainant states that the Council has previously held that if a public agency places an undue burden on a requestor, such a burden constitutes a denial of access. Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007). The Complainant contends that the Borough's requirement to provide photo identification places an undue burden on requestors.

The Custodian certifies that the Borough allows requestors to pay for records received pursuant to an OPRA request by check via mail. The Custodian certifies that in the event that the check could not be honored, the Borough seeks to obtain information from the requestor that would enable the payment to be made. The Custodian also certifies that because the Borough is also charged with the duty of ascertaining that the individual signing the certification on the OPRA request form regarding access to victim's records is the actual requestor, the Borough requires OPRA requestors who submit their requests by mail to provide adequate photo identification.

The Custodian also contends that nothing in OPRA precludes a custodian from requesting acceptable photo identification for requests submitted via mail when the custodian is required to comply with OPRA's exemptions, if applicable, based on a requestor's certification. The Custodian states that in this instance, he would have no way of knowing if the person requesting government records was the person signing the certification and would likewise have no way of contacting the requestor if payment was not honored other than a post office box which can be cancelled at any time.

The Custodian also asserts that the Borough views this policy as falling into the broad discretion afforded to administrative agencies in selecting the appropriate method and process for fulfilling their statutory responsibilities under OPRA pursuant to Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007). The Custodian contends that production of a photo identification enables the Custodian to ensure compliance of the Custodian's responsibilities under OPRA.

Counsel also states that in Paff v. City of East Orange, GRC Complaint No. 2007-297 (March 2008), the Council determined that it was within the discretion of the Custodian to develop a process by which the Custodian could best meet his/her obligations under OPRA consistent with the Council's decision in Hascup, *supra*, wherein the Council held that:

“administrative agencies in general have broad discretion in selecting the appropriate method and process for fulfilling their statutory responsibilities...specifically, under OPRA a custodian has the discretion for developing processes and a custodian has the discretion to customize an OPRA request form (so long as the statutory requirements of N.J.S.A. 47:1A-5.f. 1-7 are included) to accept or not accept requests by e-mail, etc.”

Counsel contends that the photo identification requirement allows the Custodian to fulfill his statutory responsibilities by ensuring that the fees charged will be paid by the requestor, as well as to ensure that the individual submitting the OPRA request is the individual signing the certification regarding access to victim’s records.

The Custodian Counsel’s first argument in support of the Borough’s requirement to seek photo identification from requestors who submit OPRA requests via mail is based on the need to contact requestors who may not make good on payment for records received pursuant to an OPRA request. However, OPRA allows requestors to submit requests anonymously. In fact, OPRA contains several provisions regarding anonymous requests. For example, OPRA allows custodians to collect deposits against costs for reproducing documents sought through an anonymous request whenever the custodian anticipates that the information requested will cost in excess of \$5.00 to reproduce. N.J.S.A. 47:1A-5.f. Presumably, the Legislature included this provision to prevent situations the Custodian in this instant complaint fears – one in which the custodian cannot contact a requestor to make good on payment for records received pursuant to an OPRA request. Requiring a deposit alleviates such a situation.

Additionally, OPRA alleviates the seven (7) day business day deadline for anonymous requests. Specifically, OPRA states that “[i]n the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request, unless the requestor has elected not to provide a name, address or telephone number, or other means of contacting the requestor.” N.J.S.A. 47:1A-5.i. Said provision continues to state that, “[i]f the requestor has elected not to provide a name, address, or telephone number, or other means of contacting the requestor, the custodian shall not be required to respond until the requestor reappears before the custodian seeking a response to the original request...” Thus, the Legislature, when enacting OPRA, envisioned situations in which a requestor would not have to provide any type of contact information when submitting an OPRA request if he/she so chose.

The Custodian’s Counsel does not state whether the Borough’s photo identification policy is lifted when anonymous requestors submit OPRA requests via mail. If not, the requirement to provide photo identification defeats the purpose of making an anonymous request, something the Legislature clearly felt strongly enough about to include multiple provisions of OPRA discussing the topic.

The Custodian’s Counsel also argues that photo identification is required to ensure that the requestor making the request is the same individual signing the certification to indicate whether he/she is requesting records pertaining to his/her victim.

Counsel contends that both the Council and the courts have determined that administrative agencies in general have broad discretion in selecting the appropriate method and process for fulfilling their statutory responsibilities. See Paff v. City of East Orange, GRC Complaint No. 2007-297 (March 2008).

However, the GRC Complaint cited by the Custodian's Counsel was appealed to the Appellate Division of the New Jersey Superior Court. The Appellate Division provided additional insight regarding the type of procedures a public agency may put into place regarding the process of submitting and fulfilling OPRA requests. First, the court noted that "OPRA is predicated upon a legislative finding that 'government records shall be readily accessible for inspection, copying or examination by the citizens of this State.' N.J.S.A. 47:1A-1."

Next, the court stated that "N.J.S.A. 47:1A-5(f)(1) expressly delegates authority to each custodian of government records to adopt a form for use in making OPRA requests that includes 'specific directions and procedures for requesting a record.'" The court went on to state that "...the procedures adopted by a custodian of government records for transmittal of OPRA requests, like any other action by a public official or agency, must be reasonable. See N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 181-84 (App. Div. 2007). Consequently, a custodian may not exercise his authority under N.J.S.A. 47:1A-7(f)(1) in a manner that would impose an unreasonable obstacle to the transmission of a request for a governmental record, such as, for example, by requiring any OPRA request to be hand-delivered."

Although the issue in Paff, supra, was whether a custodian could refuse to accept OPRA requests transmitted via facsimile, the court's reasoning regarding a custodian's adoption of OPRA request procedures still applies in this instant matter. Specifically, the court noted that said procedures must be reasonable and must not impose an unreasonable obstacle to the transmission of a request for a government record.

Here, the Borough's photo identification requirement is only in place for OPRA requests submitted by mail. Neither the Custodian nor the Custodian's Counsel have indicated why this requirement is only in place for requests sent by mail and not e-mail or fax, as well. Presumably, a custodian would have the same concerns about payment and verifying the certification for these submissions, as well. However, requiring a requestor to submit photo identification when submitting an OPRA request via mail serves no purpose beyond placing an undue burden on the requestor. Such a requirement places an obstacle in the timeframe for providing a response to a requestor. Under OPRA, a custodian must grant or deny access as soon as possible, but not later than seven (7) business days after receiving a request pursuant to N.J.S.A. 47:1A-5.i. Requiring a requestor to submit photo identification prolongs a custodian's response if he/she will not release records until the requestor presents such identification.

Therefore, the Borough's requirement that requestors who submit OPRA requests via mail must submit photo identification prior to receiving records is not required under OPRA and presents an obstacle to public access of government records pursuant to N.J.S.A. 47:1A-1. However, the submission of photo identification *may* be necessary when a requestor pays by check for the legitimate reason of pursuing the individual if the

check bounces, but the Custodian's blanket requirement that all requestors provide same is unreasonable and unnecessary, especially before the method of payment is known. Likewise, a blanket requirement that all requestors provide photo identification to verify requestors of victims' records is unreasonable especially when the records requested in this complaint are obviously not victims' records.

Whether the Township's OPRA request form violates 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 states that in O'Shea v. Township of West Milford, GRC Complaint No. 2007-237, the Council held that if a public agency's OPRA request form contains false or misleading information, it constitutes a denial of access. Similar to O'Shea, the Complainant states that the Borough's OPRA request form indicates that employee personnel files are not public records, but fails to also include the exceptions to said exemption. The Complainant states that the request form also requires photo identification for OPRA requests received via mail which is a violation of OPRA. The Complainant asserts that the Council should order the Custodian to adopt the GRC's Model Request Form.

The Custodian's Counsel contends that the Borough's OPRA request form does not amount to a denial of access because the Complainant's OPRA request did not seek employee personnel records.

In O'Shea, supra, the Complainant requested the following records:

- All documents distributed to members of the Township Council in advance of, or during the meeting on August 22, 2007, that include proposed changes to the Township's original, but now repealed, attorney accountability ordinance;
- The sheets of paper that include Council Member Joseph Smolinski's suggestions for a proposed attorney accountability ordinance that he held during the Council meeting on June 27, 2007 and mentioned during the Council meeting on August 22, 2007; and
- The list of goals submitted by each Council member to Mayor DiDonato.

None of the records at issue in the O'Shea complaint were personnel records, yet 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. Therefore, the Custodian shall either delete the portion of the Township’s OPRA request form regarding the personnel records exemption, or amend said statement to include the remainder of the applicable provision of OPRA.”

In this instant complaint, the Borough’s OPRA request form contains the following statement, “[t]he term ‘public records’ generally includes those records determined to be public in accordance with N.J.S.A. 47:1A1. The term does not include employee personnel files...” The form does not also inform requestors that there are exceptions to the personnel record exemption under OPRA. Said exceptions are:

- an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;
- personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
- data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.” N.J.S.A. 47:1A-10.

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 Borough’s form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records.

Additionally, as previously stated, the Borough’s requirement that requestors who submit OPRA request via mail must submit photo identification prior to receiving records is not required under OPRA and presents an obstacle to public access of government records pursuant to N.J.S.A. 47:1A-1.

Therefore, the Borough of Wildwood Crest shall either adopt the GRC’s Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form in the following ways:

- Either delete the portion of the Borough’s request form regarding the personnel records exemption, or amend said statement to include the remainder of the applicable provision of OPRA at N.J.S.A. 47:1A-10;
- Delete the following sentence: “Note: A photocopy of acceptable photo identification (i.e., driver’s license, passport) must be provided with all requests received via mail.

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. Pursuant to N.J.S.A. 47:1A-5.b., the actual cost of the audio cassette is not \$5.44 as the Custodian alleged. The Custodian must charge the actual cost of said cassette which is determined by dividing the \$9.00 cost for the pack of cassettes by the number of cassettes in the pack.
2. The Custodian’s \$25.00 charge to provide the requested audiotape does not reflect the actual cost of providing said record pursuant to N.J.S.A. 47:1A-5.b.

and incorrectly includes a special service charge which is not warranted pursuant to N.J.S.A. 47:1A-5.c. As such, the Borough's Ordinance No. 1048 is invalid and the Custodian must charge the actual cost of the audiotape with no charge for labor or overhead.

3. **The Custodian shall calculate the appropriate fee in accordance with Item No. 1 above and shall make the exact amount of the fee available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to the Complainant the requested audiotape upon the Complainant's payment of the actual cost within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4⁹, to the Executive Director. In the event that the Complainant fails to pay the actual cost of the requested audiotape by the tenth (10th) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4¹⁰ to the Executive Director.**
4. The Borough's requirement that requestors who submit OPRA requests via mail must submit photo identification prior to receiving records is not required under OPRA and presents an obstacle to public access of government records pursuant to N.J.S.A. 47:1A-1. However, the submission of photo identification *may* be necessary when a requestor pays by check for the legitimate reason of pursuing the individual if the check bounces, but the Custodian's blanket requirement that all requestors provide same is unreasonable and unnecessary, especially before the method of payment is known. Likewise, a blanket requirement that all requestors provide photo identification to verify requestors of victims' records is unreasonable especially when the records requested in this complaint are obviously not victims' records.
5. The Borough's OPRA request form provides misinformation regarding the accessibility of personnel records and includes a burdensome requirement for requestors who submit OPRA requests by mail to provide photo identification, in essence, denying the requestor access to the records. As such, the Borough of Wildwood Crest shall either adopt the GRC's Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form in the following ways:
 - Either delete the portion of the Borough's request form regarding the personnel records exemption, or amend said statement to include the remainder of the applicable provision of OPRA at N.J.S.A. 47:1A-10;

⁹ "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."

¹⁰ "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."

- Delete the following sentence: “Note: A photocopy of acceptable photo identification (i.e., driver’s license, passport) must be provided with all requests received via mail.
6. **The Custodian shall comply with Item No. 5 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹¹, to the Executive Director.**
 7. 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.
 8. 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: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 1, 2010

¹¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
John Paff v. Borough of Wildwood Crest (Cape May), 2009-54 – Findings and Recommendations of the Executive Director