



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

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 31, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-162

v.

Borough of Wharton (Morris)
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 2012 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 be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law via letter from his legal counsel dated July 6, 2012. Therefore, 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 31st Day of July, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: August 7, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-162

v.

**Borough of Wharton (Morris)²
Custodian of Records**

Records Relevant to Complaint: Approved closed or executive session minutes held by the governing body during January, February, March and April 2010 in electronic format.³

Request Made: June 29, 2010

Response Made: July 2, 2010

Custodian: Gabrielle Evangelista

GRC Complaint Filed: July 21, 2010⁴

Background

November 29, 2011

Government Records Council's ("Council") Interim Order. At its November 29, 2011 public meeting, the Council considered the November 22, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian disclosed the approved executive session minutes to the Complainant without redactions and provided certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of said Interim Order, the Custodian has complied with the Council's July 26, 2011 Interim Order.
2. The Custodian unlawfully denied access to the approved executive session minutes for the February 8, 2010 and April 26, 2010 meetings because said minutes were approved at the time of the Complainant's OPRA request and thus no longer considered advisory, consultative and deliberative material. However, the Custodian certified that she provided copies of unredacted

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

² Represented by George Johnson, Esq. (Dover, NJ).

³ The Complainant requested additional records which are not relevant to the adjudication of this complaint.

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

executive session minutes in accordance with the Council's July 26, 2011 Interim Order in a timely manner. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and 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), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian provided the Complainant copies of the requested February 8, 2010 and April 26, 2010 executive session minutes without redactions pursuant to the Council's July 26, 2011 Interim Order. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because the Custodian unlawfully denied access to the requested approved executive session minutes from January through April 2010. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, adjudicated concurrently herewith, an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

December 1, 2011

Council's Interim Order distributed to the parties.

March 8, 2012

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

July 6, 2012

Letter from Complainant's Counsel to the Administrative Law Judge and the GRC. Counsel states that this matter has been resolved and the Complainant withdraws this complaint with prejudice.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law via letter from his legal counsel dated July 6, 2012. Therefore, no further adjudication is required.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

November 29, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-162

v.

Borough of Wharton (Morris)
Custodian of Record

At the November 29, 2011 public meeting, the Government Records Council (“Council”) considered the November 22, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian disclosed the approved executive session minutes to the Complainant without redactions and provided certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of said Interim Order, the Custodian has complied with the Council’s July 26, 2011 Interim Order.
2. The Custodian unlawfully denied access to the approved executive session minutes for the February 8, 2010 and April 26, 2010 meetings because said minutes were approved at the time of the Complainant’s OPRA request and thus no longer considered advisory, consultative and deliberative material. However, the Custodian certified that she provided copies of unredacted executive session minutes in accordance with the Council’s July 26, 2011 Interim Order in a timely manner. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and 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), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Specifically, the Custodian provided the Complainant copies of the requested February 8, 2010 and April 26, 2010 executive session minutes without redactions pursuant to the Council’s July 26, 2011 Interim Order. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved



had a basis in law because the Custodian unlawfully denied access to the requested approved executive session minutes from January through April 2010. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, adjudicated concurrently herewith, an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 29th Day of November, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-162

v.

**Borough of Wharton (Morris)²
Custodian of Records**

Records Relevant to Complaint: Approved closed or executive session minutes held by the governing body during January, February, March and April 2010 in electronic format.³

Request Made: June 29, 2010

Response Made: July 2, 2010

Custodian: Gabrielle Evangelista

GRC Complaint Filed: July 21, 2010⁴

Background

July 26, 2011

Government Records Council's ("Council") Interim Order. At its July 26, 2011 public meeting, the Council considered the July 19, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Township Council approved the requested February 8, 2010 and April 26, 2010 executive session minutes on March 8, 2010 and May 10, 2010, respectively, such requested executive session minutes no longer constituted advisory, consultative and deliberative material at the time of the Complainant's request and were therefore disclosable with appropriate redactions for discussions exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and Wolosky v. Township of Roxbury (Morris), GRC Complaint No. 2010-183 (June 2011). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the records responsive to the Complainant's OPRA request pursuant

¹ Represented by Jonathan E. McMeen, Esq., of the Law Office of Jonathan E. McMeen, Esq. (Sparta, NJ).

² Represented by George Johnson, Esq. (Dover, NJ).

³ The Complainant requested additional records which are not relevant to the adjudication of this complaint.

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

to N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant.

2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.⁶**
3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

July 27, 2011

Council's Interim Order distributed to the parties.

August 2, 2011

Custodian's response to the Council's Interim Order. The Custodian certifies that that the unredacted executive session minutes of the February 8, 2010 and April 26, 2010 meetings were provided to the Complainant on August 2, 2011 via e-mail in compliance with the GRC's July 26, 2011 Interim Order.

Analysis

Whether the Custodian complied with the Council's July 26, 2011 Interim Order?

The Council's July 26, 2011 Interim Order required the Custodian to disclose the approved executive session minutes from the February 8, 2010 and April 26, 2010 meetings and to provide certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of the Council's Interim Order. The Council issued its Interim Order on July 27, 2011. The Custodian provided certified confirmation of compliance with the Council's Interim Order on August 2, 2011, four (4) business days after the issuance of the Council's Interim Order.

Because the Custodian disclosed the approved executive session minutes to the Complainant without redactions and provided certified confirmation of compliance to the

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 Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Executive Director within five (5) business days of the issuance of said Interim Order, the Custodian has complied with the Council's July 26, 2011 Interim Order.

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

OPRA states that:

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

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

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

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

The Custodian unlawfully denied access to the approved executive session minutes for the February 8, 2010 and April 26, 2010 meetings because said minutes were approved at the time of the Complainant's OPRA request and thus no longer considered advisory, consultative and deliberative ("ACD") material. However, the Custodian certified that she provided copies of unredacted executive session minutes in accordance with the Council's July 26, 2011 Interim Order in a timely manner. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and 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 the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought

about a voluntary change in the defendant's conduct." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" Singer v. State, 95 N.J. 487, 495, *cert denied* (1984)."

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

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

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

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); *see also Szczepanski v. Newcomb Med.*

Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

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

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a

reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.⁷ 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 the instant complaint, the Complainant filed a Denial of Access Complaint on June 29, 2010 alleging that the Custodian unlawfully denied the Complainant's OPRA request for approved executive session minutes because such minutes were approved by the governing body for content but not for release at the time of the request. After the filing of the Denial of Access Complaint and pursuant to its July 26, 2011 Interim Order, the Council ordered the Custodian to release the approved executive session minutes with appropriate redactions within five (5) business days from receipt of the Interim Order. As previously stated, the Custodian complied with the Council's Interim Order by providing certified confirmation to the GRC on August 2, 2011 that the Custodian provided the February 8, 2010 and April 26, 2010 executive session minutes to the Complainant without redactions.

Therefore, pursuant to Teeters, *supra*, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian provided the Complainant copies of the requested February 8, 2010 and April 26, 2010 executive session minutes without redactions pursuant to the Council's July 26, 2011 Interim Order. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because the Custodian unlawfully denied access to the requested approved executive session minutes from January through April 2010. 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. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, adjudicated concurrently herewith, an enhancement of the lodestar fee is not appropriate

⁷ 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 matter because the facts of this case do not rise to a level of “unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]” this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian disclosed the approved executive session minutes to the Complainant without redactions and provided certified confirmation of compliance to the Executive Director within five (5) business days of the issuance of said Interim Order, the Custodian has complied with the Council’s July 26, 2011 Interim Order.
2. The Custodian unlawfully denied access to the approved executive session minutes for the February 8, 2010 and April 26, 2010 meetings because said minutes were approved at the time of the Complainant’s OPRA request and thus no longer considered advisory, consultative and deliberative material. However, the Custodian certified that she provided copies of unredacted executive session minutes in accordance with the Council’s July 26, 2011 Interim Order in a timely manner. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and 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), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Specifically, the Custodian provided the Complainant copies of the requested February 8, 2010 and April 26, 2010 executive session minutes without redactions pursuant to the Council’s July 26, 2011 Interim Order. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law because the Custodian unlawfully denied access to the requested approved executive session minutes from January through April 2010. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees. Based on the New Jersey Supreme Court’s decision in New Jerseyans for a Death Penalty

Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, adjudicated concurrently herewith, an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 22, 2011



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

July 26, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-162

v.

Borough of Wharton (Morris)
Custodian of Record

At the July 26, 2011 public meeting, the Government Records Council ("Council") considered the July 19, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Township Council approved the requested February 8, 2010 and April 26, 2010 executive session minutes on March 8, 2010 and May 10, 2010, respectively, such requested executive session minutes no longer constituted advisory, consultative and deliberative material at the time of the Complainant's request and were therefore disclosable with appropriate redactions for discussions exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and Wolosky v. Township of Roxbury (Morris), GRC Complaint No. 2010-183 (June 2011). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the records responsive to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²**

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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

3. 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.
4. 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 26th Day of July, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: July 27, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 26, 2011 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-162

v.

**Borough of Wharton (Morris)²
Custodian of Records**

Records Relevant to Complaint: Approved closed or executive session minutes held by the governing body during January, February, March and April 2010 in electronic format.³

Request Made: June 29, 2010

Response Made: July 2, 2010

Custodian: Gabrielle Evangelista

GRC Complaint Filed: July 21, 2010⁴

Background

June 29, 2010

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 2, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that the governing body has had two (2) executive sessions and the minutes for those sessions have not yet been released because the matters discussed therein are still pending.

July 7, 2010

E-mail from the Complainant to the Custodian. The Complainant inquires if the records responsive to his OPRA request have been approved but have not been approved for release.

¹ Represented by Jonathan E. McMeen, Esq. of the Law Office of Jonathan E. McMeen, Esq. (Sparta, NJ).

² Represented by George Johnson, Esq. (Dover, NJ)

³ The Complainant requested additional records which are not relevant to the adjudication of this complaint.

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

July 7, 2010

E-mail from the Custodian to the Complainant. The Custodian states that the minutes responsive to the OPRA request have been approved but have not yet been released. The Custodian states she can let the Complainant know when the minutes will be released.

July 21, 2010

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

- Complainant’s OPRA request dated June 29, 2010
- E-mail from the Custodian to the Complainant dated July 2, 2010
- E-mail from the Complainant to the Custodian dated July 7, 2010
- E-mail from the Custodian to the Complainant dated July 7, 2010

Complainant’s Counsel states that the Complainant filed an OPRA request using the Borough’s official form on June 29, 2010. Complainant’s Counsel states that the records relevant to this complaint are approved executive session minutes held by the governing body during January, February, March and April 2010 in electronic format.

Counsel also states that the Custodian responded to the Complainant’s OPRA request on July 2, 2010 stating that from January through April, 2010, the governing body had two (2) executive sessions and that none of these minutes have been released because the matters discussed therein are still pending. Counsel further states that the Complainant responded on July 7, 2010 to the Custodian’s e-mail dated July 2, 2010 inquiring into the status of the executive session minutes and inquiring if these minutes have been approved, but have not yet been released. In addition, Counsel states that the Custodian responded to the Complainant’s e-mail dated July 7, 2010 stating that these minutes have not yet been released but that the Custodian can inform the Complainant when they will be released.

Counsel states that executive session minutes are public records within the meaning of OPRA. Counsel also states that executive session minutes that have not been approved are exempt from OPRA as advisory, consultative and deliberative (“ACD”) pursuant to Parave-Fogg v. Lower Alloways Creek Township GRC Complaint No. 2006-51 (August 2006). Furthermore, Counsel states that once these executive session minutes have been approved, these minutes are no longer considered ACD and are therefore disclosable pursuant to N.J.S.A. 47:1A-1.1 and Wolosky v. Vernon Township Board of Education, GRC Complaint 2009-57 (December 2009).

Counsel argues that the executive session minutes responsive were approved as stated in the Custodian’s e-mail of July 7, 2010. Counsel further argues that once these minutes are approved they become public record and are therefore disclosable. Counsel asserts that the Custodian is creating an additional barrier to access which the Township is not permitted to create. See Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007). Counsel argues that the additional barrier the Custodian created is that the matters in the executive session minutes are “still pending” by the governing body

after they have been approved. Counsel states that the Borough has turned itself into a mini-court that has jurisdiction to review and grant or deny OPRA requests. Counsel argues that no public agency has the power to do this.

Lastly, Counsel requests the GRC find that: 1) the Custodian violated OPRA and denied access by not releasing the records responsive that had previously been approved; and 2) the Complainant is a prevailing party and order an award of reasonable party attorney fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

July 23, 2010

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

July 23, 2010

E-mail from the Custodian to the GRC. The Custodian states she will be out of the office next week on vacation so she will not be able to submit anything until she returns on August 2, 2010. The Custodian also states that she forwarded the request for the SOI to the municipal attorney.

July 23, 2010

E-mail from the GRC to the Custodian. The GRC states that the SOI will be due no later than August 9, 2010.

August 6, 2010

Custodian’s SOI with the following attachments:

- Executive session minutes from the February 8, 2010 meeting.
- Executive session minutes from the April 26, 2010 meeting.
- E-mail from the Custodian to the Complainant dated July 2, 2010
- E-mail from the Complainant to the Custodian dated July 7, 2010
- E-mail from the Custodian to the Complainant dated July 7, 2010
- Municipal Clerk’s Manual, Chapter three (3), page twenty-seven (27)⁵

The Custodian certifies that her search for the requested records included searching for closed session minutes. The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”). The Custodian further certifies that the

⁵ The Municipal Clerk’s Manual on page twenty-seven (27) states in relevant part:
“B. Minutes of every meeting must be prepared in writing as soon as possible after the conclusion of the meeting.

C. All minutes must be listed on the next agenda by the governing body.

D. Closed session minutes should be confidentially circulated, listed separately for approval and maintained in a separate binder from the open session minutes, and approved in the same manner as open session minutes. They should be reviewed periodically with the Municipal Attorney for release to the public....

I. Minutes except for closed session minutes which have not been authorized for release to the public by the governing body, must be accessible to the public.”

records responsive must be permanently retained by the agency and can only be archived and destruction is not allowed.

The Custodian certifies that all the minutes must be listed on the next agenda for approval by the governing body. The Custodian also certifies that executive session minutes should be approved in the same manner as open session minutes. The Custodian further certifies that executive session minutes should be reviewed periodically with the municipal attorney for release to the public. Lastly, the Custodian certifies that these minutes had not been reviewed by the municipal attorney for release to the public at the time of the request.

May 26, 2011

E-mail from the GRC to the Custodian. The GRC requests a legal certification from the Custodian as to if the executive session minutes for February 8, 2010 and April 26, 2010 were approved for content and not for release. The GRC also requests the Custodian to certify when these executive session minutes were approved for content and release.

June 3, 2011

E-mail from the Custodian to the GRC. The Custodian attaches the requested certification. The Custodian certifies that the executive session minutes for February 8, 2010 and April 26, 2010 were released to the public at the August 16, 2010 Council meeting.⁶

June 3, 2011

Telephone call from the GRC to the Custodian. The GRC asks the Custodian if the executive session minutes from February 8, 2010 and April 26, 2010 were approved for content before they were approved for release. The GRC requests a legal certification as to when these meetings were approved for content.

June 3, 2011

E-mail from the Custodian to the GRC. The Custodian attaches the requested certification. The Custodian certifies that the executive session minutes for February 8, 2010 and April 26, 2010 were approved for content on March 8, 2010 and May 10, 2010 respectively.⁷

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

⁶ The Custodian attaches a copy of the August 16, 2010 meeting minutes.

⁷ The Custodian attaches a copy of the May 10, 2010 and March 8, 2010 meeting minutes.

Additionally, OPRA defines a government record as:

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

OPRA also provides:

The provisions of this act, P.L.2001, c.404 (C.47:1A-5 et al.), shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.); any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order. N.J.S.A. 47:1A-9.a.

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

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

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

In the instant complaint, the Custodian certified in the SOI that all the minutes must be listed on the next agenda for approval by the governing body. The Custodian certified that the responsive minutes had not been reviewed by the municipal attorney for release to the public at the time of the request. In a separate certification to the GRC, the Custodian certified that the executive session minutes from February 8, 2010 and April 26, 2010 were approved for content on March 8, 2010 and May 10, 2010 respectively. The Custodian further certifies that the governing body approved these executive session minutes for release at the August 16, 2010 council meeting.

As a general matter, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a “government record” as records either “made, maintained or kept on file in the course of [an agency’s] official business,” or “received” by an agency in the course of its official business, N.J.S.A. 47:1A-1.1, the statute also excludes from this definition a variety of documents and information. *Ibid.* See Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that “inter-agency or intra-agency

advisory, consultative, or deliberative material” is not included within the definition of a government record. N.J.S.A. 47: 1A-1 .1.

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass’n, v. Dinkins, 807 F.Supp., 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn.App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it “reflect[s] that aspect of the agency’s function that precedes formal and informed decision making.” *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

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

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

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

Thus, in accordance with the foregoing case law and the prior GRC decision in Parave-Fogg, *supra*, all draft minutes of a meeting held by a public body, are entitled to the protection of the deliberative process privilege. Draft minutes are pre-decisional. In addition, they reflect the deliberative process in that they are prepared as part of the public body’s decision making concerning the specific language and information that should be contained in the minutes to be adopted by that public body, pursuant to its obligation, under the Open Public Meetings Act, to “keep reasonably comprehensible minutes.” N.J.S.A. 10:4-14.

In the instant complaint, the Custodian certified in the SOI that the requested executive session minutes had not been approved by the Township Committee for disclosure to the public, although they had been approved by the governing body for content. Furthermore, the Custodian certified that the Custodian has made a practice of asking the Township Committee to review the executive session minutes for release in response to OPRA requests and informally when requested. The Custodian further certified that the executive session minutes for February 8, 2010 and April 26, 2010 were approved for content on March 8, 2010 and May 10, 2010 respectively. Lastly, the Custodian certified that these executive session minutes were approved for release on August 16, 2010.

In Merckx v. Township of Franklin Board of Education (Gloucester), 2009-47 (April 2010), the Council addressed the issue of a two-tier approval process for closed session minutes as follows:

“Because all of the requested closed session minutes, with the exception of the minutes dated January 21, 2009, were approved by the Board of Education at the time of the Complainant’s OPRA request and no longer constituted advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., the Custodian failed to bear her burden of proving a lawful denial of access to the requested closed session meeting minutes pursuant to N.J.S.A. 47:1A-6. *A second approval by the governing body for public release of the requested minutes is not required because N.J.S.A. 47:1A-5.g. allows for the redaction of information that is exempt from disclosure under OPRA. **In fact, OPRA requires the disclosure of a record with redactions of only the information which is asserted to be exempt from disclosure.** A denial of access to the entire record is therefore unlawful under OPRA.” [Emphasis added].*

In Wolosky v. Township of Roxbury (Morris), 2010-183 (June 2011), the Custodian denied the Complainant access to executive session minutes on the grounds that said minutes had not yet been approved for release by the Township. Moreover, the Custodian argued that although the minutes were approved as to accuracy and content, they were not approved for release to the general public. The Council noted that it has previously found that once the governing body of an agency has approved meeting minutes as to accuracy and content (per the requirement of the Open Public Meetings Act), said minutes are disclosable pursuant to the provision of OPRA. Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009); *see also* Wolosky v. County of Sussex, Board of Chosen Freeholders, GRC Complaint No. 2009-26 (February 2010), stating that “[a]lthough properly approved executive session minutes are disclosable, pursuant to N.J.S.A. 47:1A-5.g., custodians may redact from the minutes those discussions that require confidentiality because the matters discussed therein are unresolved or still pending.”

The Council therefore held that because the evidence of record indicated that the Township approved the requested executive session minutes prior to the Complainant’s OPRA request, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant’s request and were therefore disclosable

pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Moreover, the Council suggested that the Custodian consult the township attorney or some other designated person to determine the resolution of issues discussed in executive session minutes to identify those issues still requiring confidentiality and for which redactions are allowed.

Like the custodian in Wolosky, the Custodian in the instant complaint argued that although the requested executive session minutes were approved for content by the Township Council, the Township Council also votes to approve the executive session minutes for release.

However, the Council has previously found that once the governing body of an agency has approved meeting minutes as to accuracy and content (per the requirement of OPMA), said minutes are subject to disclosure under OPRA. Wolosky v. Township of Roxbury (Morris), 2010-183 (June 2011). Although properly approved executive session minutes are disclosable, custodians may redact from the minutes those discussions that require confidentiality because the matters discussed therein are unresolved or still pending pursuant to N.J.S.A. 47:1A-5.g.

Therefore, because the Township Council approved the requested February 8, 2010 and April 26, 2010 executive session minutes on March 8, 2010 and May 10, 2010, respectively, such requested executive session minutes no longer constituted ACD material at the time of the Complainant's request and were therefore disclosable with appropriate redactions for discussions exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and Wolosky v. Township of Roxbury (Morris), 2010-183 (June 2011).). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the records responsive to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records 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?

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

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Township Council approved the requested February 8, 2010 and April 26, 2010 executive session minutes on March 8, 2010 and May 10, 2010, respectively, such requested executive session minutes no longer constituted advisory, consultative and deliberative material at the time of the Complainant's request and were therefore disclosable with appropriate redactions for discussions exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and Wolosky v. Township of Roxbury (Morris), GRC Complaint No. 2010-183 (June 2011). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the records responsive to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁸, to the Executive Director.⁹**
3. 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.
4. 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

July 19, 2011

⁸ "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."

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.