



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

December 18, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-164

v.

Borough of Lincoln Park (Morris)
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 23, 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 September 20, 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 18th Day of December, 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: December 19, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-164

v.

**Borough of Lincoln Park (Morris)²
Custodian of Records**

Records Relevant to Complaint: Copies of the following:

1. Audio recording of the most recent regular public meeting of the governing body that was recorded, preferably in WAV format.
2. Check registry data by check date from January 1, 2008 to the present of the Current/Main or General fund exported in Word, Excel, ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer (CFO) or business administrator, in electronic format.
3. Current OPRA request form, in electronic format.

Request Made: June 29, 2010

Response Made: June 30, 2010

Custodian: Annette Maida-Smith

GRC Complaint Filed: July 21, 2010

Background

February 28, 2012

Government Records Council's ("Council") Interim Order. At its February 28, 2012 public meeting, the Council considered the February 21, 2012 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 provided certified confirmation of compliance to the GRC that the Borough adopted the GRC's model request form within five (5) days of receipt of the Council's Interim Order and Ms. Sloan certified that the Complainant did not respond to Council's November 29, 2011 Interim Order within seven (7) business days of the issuance of said Interim Order, the Custodian has complied with the Council's November 29, 2011 Interim Order. Thus, the Complainant's failure to take any action within five (5) business days of

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

² Represented by Tiena M. Cofoni, Esq., of The Buzak Law Group, LLC (Montville, NJ).

receipt of the Council's Interim Order is therefore construed as a declination to purchase the requested records and the Custodian is no longer required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

2. The Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide an anticipated date certain upon which the records responsive to request Item No. 2 would be provided to the Complainant. The Custodian also violated N.J.S.A. 47:1A-5.b. by initially charging the Complainant \$10.00 for the records responsive to request Item No. 1 in DVD format and by charging the Complainant \$3.00 to e-mail the records responsive to request Item No. 3. Lastly, the Custodian violated N.J.S.A. 47:1A-5.f. by having a misleading OPRA request form. However, the Custodian certified in the Statement of Information that she calculated the actual cost of the record responsive to request Item No. 1 as \$2.98 and offered to provide that record to the Complainant on July 26, 2010. In addition, the Custodian provided the records responsive to request Item No. 3 at no cost to the Complainant on July 26, 2010. Lastly, the Custodian complied with the Council's November 29, 2011 Interim Order by provided certified confirmation of compliance that the Borough adopted the GRC's model request form in July 2011 and Ms. Sloan certified that the Complainant did not respond to the Order within the prescribed five (5) business days. 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. Thus, 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. Specifically, the Custodian certified that the Borough adopted the GRC's model request form in July 2011. Additionally, the Custodian certified in the Statement of Information the actual cost to convert the audio recording responsive to request Item No. 1 was \$2.98 and offered that charge to the Complainant on July 26, 2010. Lastly, the Custodian provided the records responsive to request Item No. 3 at no cost to the Complainant on July 26, 2010. Further, the relief achieved ultimately had a basis in law. Therefore, the Complainant is a prevailing party with regards to the records responsive for request Item No. 1 and No. 3 and is 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 (November 2011), 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.

February 29, 2012

Council’s Interim Order distributed to the parties.

March 19, 2012

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

September 20, 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.

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 September 20, 2012. Therefore, no further adjudication is required.

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

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 23, 2012³

³ This complaint was prepared and scheduled for adjudication at the Council’s October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council’s November 27, 2012 was cancelled due to lack of quorum.
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

February 28, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-164

v.

Borough of Lincoln Park (Morris)
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 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:

1. Because the Custodian provided certified confirmation of compliance to the GRC that the Borough adopted the GRC’s model request form within five (5) days of receipt of the Council’s Interim Order and Ms. Sloan certified that the Complainant did not respond to Council’s November 29, 2011 Interim Order within seven (7) business days of the issuance of said Interim Order, the Custodian has complied with the Council’s November 29, 2011 Interim Order. Thus, the Complainant’s failure to take any action within five (5) business days of receipt of the Council’s Interim Order is therefore construed as a declination to purchase the requested records and the Custodian is no longer required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. The Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide an anticipated date certain upon which the records responsive to request Item No. 2 would be provided to the Complainant. The Custodian also violated N.J.S.A. 47:1A-5.b. by initially charging the Complainant \$10.00 for the records responsive to request Item No. 1 in DVD format and by charging the Complainant \$3.00 to e-mail the records responsive to request Item No. 3. Lastly, the Custodian violated N.J.S.A. 47:1A-5.f. by having a misleading OPRA request form. However, the Custodian certified in the Statement of Information that she calculated the actual cost of the record responsive to request Item No. 1 as \$2.98 and offered to provide that record to the Complainant on July 26, 2010. In addition, the Custodian provided the records responsive to request Item No. 3 at no cost to the Complainant on July 26, 2010. Lastly, the Custodian complied with the Council’s November 29, 2011 Interim Order by provided certified confirmation of compliance that the Borough adopted the GRC’s model request form in July 2011 and Ms. Sloan certified that the Complainant did not respond to the Order within the prescribed five (5) business days. 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. Thus, 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. Specifically, the Custodian certified that the Borough adopted the GRC's model request form in July 2011. Additionally, the Custodian certified in the Statement of Information the actual cost to convert the audio recording responsive to request Item No. 1 was \$2.98 and offered that charge to the Complainant on July 26, 2010. Lastly, the Custodian provided the records responsive to request Item No. 3 at no cost to the Complainant on July 26, 2010. Further, the relief achieved ultimately had a basis in law. Therefore, the Complainant is a prevailing party with regards to the records responsive for request Item No. 1 and No. 3 and is 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 (November 2011), 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 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: February 29, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 28, 2012 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-164

v.

**Borough of Lincoln Park (Morris)²
Custodian of Records**

Records Relevant to Complaint:³ Copies of the following:

1. Audio recording of the most recent regular public meeting of the governing body that was recorded, preferably in WAV format.
2. Check registry data by check date from January 1, 2008 to the present of the Current/Main or General fund exported in Word, Excel, ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer (CFO) or business administrator, in electronic format.
3. Current OPRA request form, in electronic format.

Request Made: June 29, 2010

Response Made: June 30, 2010

Custodian: Annette Maida-Smith

GRC Complaint Filed: July 21, 2010

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. Although the Custodian provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to provide an anticipated date upon which the records responsive to request Item No. 2 would be provided to the Complainant, thus violating OPRA pursuant to N.J.S.A. 47:1A-5.i. and Russomano v. Township

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

² Represented by Tiena M. Cofoni, Esq., of The Buzak Law Group, LLC (Montville, NJ).

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

of Edison (Middlesex), GRC Complaint No. 2002-86 (July 2003) because the Custodian's response was not proper.

2. Pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the "actual cost" of duplicating the requested record. As such, the Custodian's initial proposed charge of \$10.00 for an audio recording in DVD format was unreasonable and in violation of N.J.S.A. 47:1A-5.b. However, because the Custodian certified that the actual cost of the requested recording was \$1.76, and because the Custodian certified that she offered to provide the requested record to the Complainant at the actual cost plus postage of \$1.22 for a total cost of \$2.98, the Council declines to order the Custodian to provide the requested record at the actual cost.
3. The Custodian's proposed charge of \$3.00 to e-mail the records responsive to request Item No. 3 is unlawful because the evidence of record indicates that the Borough maintained the requested OPRA request form electronically and the Complainant requested that such records be sent to him electronically. *See* McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (April 2010 Interim Order)(holding that there is no actual cost incurred by a public agency to electronically transmit records which are maintained electronically). However, the Council declines to order the Complainant to provide the records responsive to request Item No. 3 at no cost because these records were provided to the Complainant at no cost on July 26, 2010.
4. The Custodian shall adopt the GRC's model request form, delete the portion of the Township's OPRA request form regarding the personnel records and police investigation records, or amend said statement to include the remainder of the applicable provisions of OPRA. Specifically,

"the following information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

- where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;
- if an arrest has been made, information as to the name, address and age of any victims unless there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or Court Rule. In deciding on the release of information as to the identity of a victim, the safety of

the victim and the victim's family, and the integrity of any ongoing investigation, shall be considered;

- if an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;
- information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;
- information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;
- information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police; and
- information as to circumstances surrounding bail, whether it was posted and the amount thereof.” N.J.S.A. 47:1A-3.b.

“the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

- 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.

5. The Custodian shall comply with item No. 4 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 1:4-4⁴, to the Executive Director.⁵ With

⁴ "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."

regard to Item No. 2 above, the Complainant shall deliver to the Custodian (a) payment of the actual cost in the amount of two dollars and ninety-eight cents (\$2.98), or (b) a statement declining to purchase these records. The Complainant's failure to take any action within five (5) business days of receipt of the Council's Interim Order shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within seven (7) business days from receipt of the Council's Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.⁶

6. 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

November 30, 2011

Council's Interim Order distributed to the parties.

December 6, 2011

Custodian's response to the Council's Interim Order. The Custodian responds to Item No. 4 of the Council's Interim Order on the second (2nd) business day following receipt of said Order.⁷ The Custodian certifies that Item No. 4 of the Council's Interim Order required the Custodian to adopt the GRC model request form, delete the portion of the Borough's OPRA request form regarding the personnel records and police investigation records, or amend said statement to include the remainder of the applicable provisions of OPRA. The Custodian also certifies that the Borough has adopted the GRC's model request form. The Custodian further certifies that the Borough has been using the OPRA request form since approximately July 2011.

December 9, 2011

Ms. Cindi Sloan's ("Ms. Sloan"), Deputy Clerk, response to the Council's Interim Order. Ms. Sloan certifies that she assists the Custodian with various duties of the

⁵ 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.

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

⁷ The evidence of record indicates that the Custodian received the Council's Interim Order on December 2, 2011.

Clerk's Office, including preparing responses to OPRA requests.⁸ Ms. Sloan also certifies that in the Custodian's absence she performs all duties of the Custodian. Ms. Sloan further certifies that she submits in this certification because the Custodian is out of the office at this time.

Ms. Sloan certifies that the last section of Item No. 5 requires the submission of a legal certification to the Executive Director containing a statement with respect to the Complainant's willingness or refusal to purchase the records responsive to request Item No. 2. Ms. Sloan also certifies that the Borough Clerk's Office has not received any communication from the Complainant in response to the Interim Order regarding whether he would like to purchase the records responsive to request Item No. 2.

Analysis

Whether the Custodian complied with the Council's November 29, 2011 Interim Order?

The Council's November 29, 2011 Interim Order required the Custodian to adopt the GRC model request form, delete the portion of the Borough's OPRA request form regarding the personnel records and police investigation records, or amend said statement to include the remainder of the applicable provisions of OPRA.

The Council's Interim Order also required the Complainant to deliver to the Custodian (a) payment of the actual cost in the amount of two dollars and ninety-eight cents (\$2.98), or (b) a statement declining to purchase these records. The Complainant's failure to take any action within five (5) business days of receipt of the Council's Interim Order shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within seven (7) business days from receipt of the Council's Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records.

The Custodian legally certified on December 6, 2011 that the Borough adopted the GRC's model request form in July 2011. Furthermore, on December 9, 2011, Ms. Sloan certified that the Complainant did not deliver to the Custodian (a) payment of the actual cost in the amount of two dollars and ninety-eight cents (\$2.98), or (b) a statement declining to purchase these records.⁹

Therefore, because the Custodian provided certified confirmation of compliance to the GRC that the Borough adopted the GRC's model request form within five (5) days of receipt of the Council's Interim Order and Ms. Sloan certified that the Complainant did not respond to Council's November 29, 2011 Interim Order within seven (7) business days of the issuance of said Interim Order, the Custodian has complied with the Council's November 29, 2011 Interim Order. Thus, the Complainant's failure to take any action

⁸ The Borough Clerk is the Records Custodian in the instant complaint.

⁹ Ms. Sloan certified that in the Custodian's absence she performs all the duties of the Custodian.

within five (5) business days of receipt of the Council's Interim Order is therefore construed as a declination to purchase the requested records and the Custodian is no longer required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

Whether the Custodian's actions 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 (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)).

The Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide an anticipated date certain upon which the records responsive to request Item No. 2 would be provided to the Complainant. The Custodian also violated N.J.S.A. 47:1A-5.b. by initially charging the Complainant \$10.00 for the records responsive to request Item No. 1 in DVD format and by charging the Complainant \$3.00 to e-mail the records responsive to request Item No. 3. Lastly, the Custodian violated N.J.S.A. 47:1A-5.f. by having a misleading OPRA request form. However, the Custodian certified in the Statement of Information that she calculated the actual cost of the record responsive to request Item No. 1 as \$2.98 and offered to provide that record to the Complainant on July 26, 2010. In

addition, the Custodian provided the records responsive to request Item No. 3 at no cost to the Complainant on July 26, 2010. Lastly, the Custodian complied with the Council's November 29, 2011 Interim Order by providing certified confirmation of compliance that the Borough adopted the GRC's model request form in July 2011 and Ms. Sloan certified that the Complainant did not respond to the Order within the prescribed five (5) business days. 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. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) 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)."

After the filing of this Denial of Access Complaint and the issuance of the Council's November 29, 2011 Interim Order, the Council ordered the Custodian to adopt the GRC's model request form within five (5) business days from receipt of the Interim Order. In response to the Council's Interim Order, the Custodian provided certified confirmation of compliance to the Executive Director that that the Borough adopted the GRC's model request form in July 2011. Furthermore, the Custodian certified in the Statement of Information that the actual cost to convert the audio recording responsive to request Item No. 1 was \$2.98 and that she offered that charge to the Complainant on July 26, 2010. Lastly, the Custodian provided the records responsive to request Item No.3 to the Complainant at no cost on July 26, 2010.

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. Thus, 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. Specifically, the Custodian certified that the Borough adopted the GRC's model request form in July 2011. Additionally, the Custodian certified in the Statement of Information that the actual cost to convert the audio recording responsive to request Item No. 1 was \$2.98 and offered that charge to the Complainant on July 26, 2010. Lastly, the Custodian provided the records responsive to request Item No. 3 at no cost to the Complainant on July 26, 2010. Further, the relief achieved ultimately had a basis in law. Therefore, the Complainant is a prevailing party with regards to the records responsive for request Item No. 1 and No. 3 and is 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 (November 2011), 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided certified confirmation of compliance to the GRC that the Borough adopted the GRC's model request form within five (5) days of receipt of the Council's Interim Order and Ms. Sloan certified that the Complainant did not respond to Council's November 29, 2011 Interim Order within seven (7) business days of the issuance of said Interim Order, the Custodian has complied with the Council's November 29, 2011 Interim Order. Thus, the Complainant's failure to take any action within five (5) business days of receipt of the Council's Interim Order is therefore construed as a declination to purchase the requested records and the Custodian is no longer required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. The Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide an anticipated date certain upon which the records responsive to request Item No. 2 would be provided to the Complainant. The Custodian also violated N.J.S.A. 47:1A-5.b. by initially charging the Complainant \$10.00 for the records responsive to request Item No. 1 in DVD format and by charging the Complainant \$3.00 to e-mail the records responsive to request Item No. 3. Lastly, the Custodian violated N.J.S.A. 47:1A-5.f. by having a misleading OPRA request form. However, the Custodian certified in the Statement of Information that she calculated the actual cost of the record responsive to request Item No. 1 as \$2.98 and offered to provide that record to the Complainant on July 26, 2010. In addition, the Custodian provided the records responsive to request Item No. 3 at no cost to the Complainant on July 26, 2010. Lastly, the Custodian complied with the Council's November 29, 2011 Interim Order by provided certified confirmation of compliance that the Borough adopted the GRC's model request form in July 2011 and Ms. Sloan certified that the Complainant did not respond to the Order within the prescribed five (5) business days. 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. Thus, 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. Specifically, the Custodian certified that the Borough adopted the GRC's model request form in July 2011. Additionally, the Custodian certified in the Statement of Information the actual cost to convert the audio recording responsive to request Item No. 1 was \$2.98 and offered that charge to the Complainant on July 26, 2010. Lastly, the Custodian provided the records responsive to request Item No. 3 at no cost to the Complainant on July 26, 2010. Further, the relief achieved ultimately had a basis in law. Therefore, the Complainant is a prevailing party with regards to the records responsive for request Item No. 1 and No. 3 and is 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 (November 2011), 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

February 21, 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. 2010-164

v.

Borough of Lincoln Park (Morris)
Custodian of Record

At the November 29, 2011 public meeting, the Government Records Council (“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, finds that:

1. Although the Custodian provided a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to provide an anticipated date upon which the records responsive to request Item No. 2 would be provided to the Complainant, thus violating OPRA pursuant to N.J.S.A. 47:1A-5.i. and Russomano v. Township of Edison (Middlesex), GRC Complaint No. 2002-86 (July 2003) because the Custodian’s response was not proper.
2. Pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the “actual cost” of duplicating the requested record. As such, the Custodian’s initial proposed charge of \$10.00 for an audio recording in DVD format was unreasonable and in violation of N.J.S.A. 47:1A-5.b. However, because the Custodian certified that the actual cost of the requested recording was \$1.76, and because the Custodian certified that she offered to provide the requested record to the Complainant at the actual cost plus postage of \$1.22 for a total cost of \$2.98, the Council declines to order the Custodian to provide the requested record at the actual cost.
3. The Custodian’s proposed charge of \$3.00 to e-mail the records responsive to request Item No. 3 is unlawful because the evidence of record indicates that the Borough maintained the requested OPRA request form electronically and the Complainant requested that such records be sent to him electronically. See McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (April 2010 Interim Order)(holding that there is no actual cost incurred by a public agency to electronically transmit records which are maintained electronically). However, the



Council declines to order the Complainant to provide the records responsive to request Item No. 3 at no cost because these records were provided to the Complainant at no cost on July 26, 2010.

4. The Custodian shall adopt the GRC's model request form, delete the portion of the Township's OPRA request form regarding the personnel records and police investigation records, or amend said statement to include the remainder of the applicable provisions of OPRA. Specifically,

“the following information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

- where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;
- if an arrest has been made, information as to the name, address and age of any victims unless there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or Court Rule. In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim's family, and the integrity of any ongoing investigation, shall be considered;
- if an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;
- information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;
- information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;
- information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police; and
- information as to circumstances surrounding bail, whether it was posted and the amount thereof.” N.J.S.A. 47:1A-3.b.

“the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

- 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.

5. **The Custodian shall comply with item No. 4 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 1:4-4¹, to the Executive Director.² With regard to Item No. 2 above, the Complainant shall deliver to the Custodian (a) payment of the actual cost in the amount of two dollars and ninety-eight cents (\$2.98), or (b) a statement declining to purchase these records. The Complainant’s failure to take any action within five (5) business days of receipt of the Council’s Interim Order shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within seven (7) business days from receipt of the Council’s Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant’s willingness or refusal to purchase the requested records. The Custodian’s statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.³**
6. 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.
7. 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 29th Day of November, 2011

Robin Berg Tabakin, Chair
Government Records Council

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 "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."

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: November 30, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-164

v.

**Borough of Lincoln Park (Morris)²
Custodian of Records**

Records Relevant to Complaint:³ Copies of the following:

1. Audio recording of the most recent regular public meeting of the governing body that was recorded, preferably in WAV format.
2. Check registry data by check date from January 1, 2008 to the present of the Current/Main or General fund exported in Word, Excel, ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer (CFO) or business administrator, in electronic format.
3. Current OPRA request form, in electronic format.

Request Made: June 29, 2010

Response Made: June 30, 2010

Custodian: Annette Maida-Smith

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. The Complainant also requests that the Custodian inform him of the cost for copying the records responsive to Item No. 1 and in what medium the recording will be copied.

June 30, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that the Borough is currently in the process of reducing its OPRA fees via ordinance, which will not be effective until August 8, 2010. The Custodian states that the Borough's current fees are \$0.75 cents per page for

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

² Represented by Tiena M. Cofoni, Esq., of The Buzak Law Group, LLC (Montville, NJ).

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

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

pages one (1) through ten (10), \$0.50 cents per pages for pages eleven (11) through twenty (20) and \$0.25 cents per page thereafter. The Custodian also states that copies for records responsive to Item No. 1 will be \$10.00 in DVD format. The Custodian states that the Chief Financial Officer (“CFO”) has contacted Edmunds for the records responsive to request Item No. 2 and is waiting for Edmunds’ response. The Custodian states she does not know how many records responsive exist for request Item No. 2. The Custodian further states that she has a copy of the records responsive to request Item No. 3, which consist of a total of four (4) pages.

June 30, 2010

E-mail from the Custodian to the Complainant. The Custodian states that the total charge for the Complainant’s OPRA request is \$17.22.⁵ The Custodian states that the cost for the records responsive to request Item No. 1 is \$10.00 for the DVD and \$1.22 for postage. The Custodian also states that Edmunds has provided the Custodian copies of the records responsive to request Item No. 2 at no charge. The Custodian further states that the Custodian will e-mail the Complainant this portion of the Complainant’s OPRA request for free. The Custodian further states that the cost for request Item No. 3 is \$3.00.

July 2, 2010

E-mail from the Complainant to the Custodian. The Complainant states that it is his understanding that the cost of the DVD responsive to request Item No. 1 is \$10.00. The Complainant informs the Custodian not to make a copy of the DVD until he decides to purchase it. The Complainant thanks the Custodian for the records responsive to request Item No. 2, which were provided at no charge. The Complainant also states that he is confirming with the Custodian that there is a \$3.00 charge to e-mail the records responsive to request Item No. 3.

July 6, 2010

E-mail from the Custodian to the Complainant. The Custodian states that the cost for the records responsive to request Item No. 1 is \$11.22. Specifically, the Custodian states that the cost for the DVD is \$10.00 and the cost for the postage is \$1.22.

July 7, 2010

E-mail from the Complainant to the Custodian. The Complainant states that it is his understating that the cost for the records responsive to request Item No. 1 will be \$10.00. The Complainant informs the Custodian not to make a copy of the records responsive to request Item No. 1 until he decides to purchase it.

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 June 30, 2010
- E-mail from the Custodian to the Complainant dated June 30, 2010

⁵ The Custodian’s total proposed charge for the records responsive includes additional items which were requested but which are not relevant to the adjudication of this complaint.

- E-mail from the Complainant to the Custodian dated July 2, 2010
- E-mail from the Custodian to the Complainant dated July 6, 2010
- E-mail from the Complainant to the Custodian dated July 7, 2010

The Complainant's Counsel states that the Complainant submitted an OPRA request on June 29, 2010 on the Borough's official OPRA request form. Counsel states that the Complainant made an OPRA request for the following records: Item No. 1 (an audio recording of the most recent regular public meeting of the governing body that was recorded); Item No. 2 (the check registry data for the Borough from January 1, 2008 to the present); and Item No. 3 (a copy of the Borough's current OPRA request form). The Complainant requested the records responsive to request Item No. 2 and No. 3 in electronic format.

Counsel states that the Custodian responded to the Complainant's OPRA request on June 30, 2010. Counsel further states that the Custodian requested a \$10.00 copying fee for the records responsive to request Item No. 1. Counsel also states that the Custodian stated that the CFO has contacted Edmunds for the records responsive to request Item No. 2 and is awaiting Edmunds' response.

Counsel states that on June 30, 2010 the Custodian requested payment of \$17.22, which consisted of \$10.00 for a DVD and \$1.22 postage for the records responsive to request Item No. 1 and \$3.00 for four (4) pages of records to be e-mailed to the Complainant.⁶ Counsel states that the Custodian continued to request \$11.22 for the DVD and the postage. Counsel further states that the Complainant e-mailed the Custodian confirming the proposed charges on July 2, 2010. Counsel states that the Custodian e-mailed the records responsive to request Item No. 3 to the Complainant at no charge on July 6, 2010.

Counsel argues that OPRA mandates 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 public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in the favor of the public's right of access." Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006). Counsel also argues that "[t]he purpose of OPRA is to maximize the public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Lafayette Yard Community Development Corp., 183 N.J. 519, 535(2005). Counsel further argues that the burden of proof is on the Custodian to show a proper denial of access, N.J.S.A. 47:1A-6 and Paff v. Borough of Lawnside, GRC Complaint No. 2009-155 (April 2010). Lastly, Counsel argues that the Complainant requested records responsive which are considered public under OPRA, N.J.S.A. 47:1A-1.1.

Records Responsive to Request Item No. 1:

Counsel argues that it is extremely unlikely that the Custodian's proposed charge of \$10.00 is the Borough's actual cost for the recording responsive to request Item No. 1.

⁶ The \$6.00 charge was for other records not relevant to the adjudication of this complaint and which were ultimately provided to the Complainant at no cost.

Counsel points to Renna v. Township of Warren, GRC Complaint No. 2008-40 (November 2008), where 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. Counsel states that when a public agency copies records in a specific medium, the public agency must charge the “actual cost” pursuant to N.J.S.A. 47:1A-5.b. Counsel argues that the actual cost is the material cost of providing the Complainant 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, GRC Complaint No. 2007-185 (April 2008), and O’Shea v. Township of Vernon, GRC Complaint No. 2007-207 (April 2008).

Counsel states that the Custodian may assert that the \$10.00 charge for the record responsive to Item No. 1 reflects a special service charge. Counsel also states that for non-paper records, a public agency shall not charge a special service charge unless the conditions of N.J.S.A. 47:1A-5.d are met. Counsel further states that the provisions of N.J.S.A. 47:1A-5.d authorize the Custodian to charge a special service charge if the “request for a record is 1) in a medium not routinely used by the agency; 2) not routinely developed or maintained by an agency; or 3) would require a substantial amount of manipulation or programming of information technology. Therefore, the agency may charge, in addition to the actual cost of duplication, a special service charge...based...on the cost for any extensive use of information technology...” Counsel argues that because the Custodian is merely downloading an FTR recording onto a DVD, a special service charge is inappropriate.

Records Responsive to Request Item No. 2:

Counsel states that the Custodian responded to the Complainant’s OPRA request on June 30, 2010 stating that the Custodian would e-mail the Complainant records responsive to request Item No. 2. However, Counsel states that the Complainant has not yet received these records as of the filing of this Denial of Access Complaint.

Records Responsive to Request Item No. 3:

Counsel states that in O’Shea v. Township of West Milford, GRC Complaint No. 2007-327 (May 2008), the GRC held that a denial of access occurs if a public agency’s OPRA request form contains false or misleading information about OPRA. Counsel argues that the Borough’s request form states that “employee personnel files” are not public records, but does not state OPRA’s exceptions to the general rule that personnel files are not public records. Counsel also argues that the Borough’s request form states that “police investigation records” are not public records and ignores the exceptions under N.J.S.A. 47:1A-3.b. Counsel argues that the GRC should order the Borough to revise its OPRA request form pursuant to O’Shea v. Stillwater Township, GRC Complaint No. 2007-253 (November 2008).

Therefore, Counsel requests the GRC: 1) order the Custodian to determine the actual cost of the DVD responsive to request Item No. 1 and make that record available to the Complainant at actual cost; 2) order the Custodian to adopt the GRC’s model

request form or amend their OPRA form to eliminate misleading information; 3) order the Custodian to disclose the records responsive to request Item No. 2 via e-mail; and 4) find that the Complainant is the prevailing party pursuant to N.J.S.A. 47:1A-11 and award him reasonable attorney's fees.

The Complainant does not agree to mediate this complaint.

July 23, 2010

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

July 26, 2010

E-mail from Kerry L. Geisler, ("Ms. Geisler"), Chief Financial Officer, to the Custodian. Ms. Geisler attaches copies of the records responsive to request Item No. 2. Ms. Geisler states that Edmunds provided the records responsive to the Borough at no charge.

July 26, 2010

E-mail from the Custodian to the Complainant. The Custodian apologizes for inadvertently forgetting to send the records responsive to request Item No. 2. The Custodian states that she has attached the records responsive to this e-mail. The Custodian also states that the cost of the records responsive to request Item No. 1 has been reduced to the actual cost of \$1.76 from the \$10.00 originally quoted. The Custodian further states that the cost for the postage for the records responsive to Item No. 1 is \$1.22, for a total cost of \$2.98.

July 29, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 29, 2010;
- E-mail from the Custodian to the Complainant dated June 30, 2010;
- E-mail from the Custodian to the Complainant dated June 30, 2010;
- E-mail from the Complainant to the Custodian dated July 2, 2010;
- E-mail from the Custodian to the Complainant dated July 6, 2010;
- E-mail from the Complainant to the Custodian dated July 7, 2010;
- E-mail from the Custodian to the Complainant dated July 26, 2010.

The Custodian certifies that the records responsive to request Item No. 1 and No. 3 are kept and maintained by the Borough Clerk's office. The Custodian also certifies that she contacted Ms. Geisler for the records responsive to request Item No. 2 and Ms. Geisler obtained the records directly from Edmunds. The Custodian further certifies that none of the records responsive to the Complainant's OPRA request have been destroyed in accordance with the New Jersey Department of State, Division of Archives and Records Management ("DARM").

Record Responsive to Request Item No. 1:

The Custodian certifies that she consulted with the Borough Attorney after being made aware of the Complainant's objection to the proposed copying cost. The Custodian

also certifies that she calculated the actual cost of the record responsive as \$1.76 and offered to provide that record to the Complainant at the actual cost plus shipping of \$1.22 for a total cost of \$2.98 on July 26, 2010. The Custodian further certifies that she was unaware of the Complainant's objection to the cost of the record prior to receipt of the Complainant's Denial of Access Complaint. The Custodian also certifies that in the Complainant's e-mail dated July 7, 2010, he acknowledged the \$10.00 fee and asked that the Custodian not make a copy of the requested record until he decided to purchase such record. The Custodian argues that this issue could have easily been resolved if the Complainant had brought this issue to the Custodian's attention prior to the filing of this complaint.

Records Responsive to Request Item No. 2:

The Custodian certifies that the records responsive to request Item No. 2 were inadvertently not provided to the Complainant. The Custodian certifies that Ms. Geisler provided the Custodian with a copy of the records responsive on June 30, 2010. The Custodian also certifies that she e-mailed the Complainant the records responsive to request Item No. 2 on July 26, 2010. The Custodian further certifies that she believed that she had provided the Complainant with copies of the records because the Complainant had e-mailed the Custodian on July 7, 2010 stating "thank you for this free portion of my OPRA request." The Custodian argues that if the Complainant had informed the Custodian that he did not receive such records prior to the filing of this complaint, she would have immediately provided the records responsive to the Complainant. The Custodian also certifies that she did not purposely neglect to send the records responsive but corrected the error once the Custodian was made aware of her failure to send the records.

Record Responsive to Request Item No. 3:

The Custodian argues she believes that the Borough's OPRA request form does not contain false or misleading information about OPRA. The Custodian also argues that it is unreasonable to expect that the form will contain all the information regarding what is a public record and list all of OPRA's exceptions. The Custodian further argues that the OPRA form contains a summary of relevant portions of OPRA and then refers the requestor to the legal citation. Lastly, the Custodian argues that she has no objection to a modification of the Borough's OPRA form in accordance with direction by the GRC.

The Custodian certifies that she made every effort to completely and promptly respond to each and every OPRA request received, as demonstrated by her providing the Complainant with copies of the records one day after receipt of his request. The Custodian argues that the fact she inadvertently forgot to provide the Complainant with the records responsive to request Item No. 2 demonstrates that she is a clerk in a busy municipality. The Custodian also argues that she did not intentionally violate OPRA in this case or in any other situation. Lastly, the Custodian requests that the Complainant's request for a penalty and attorney's fees be denied.

August 9, 2010

E-mail from Complainant’s Counsel to the GRC. Counsel responds to the Custodian’s SOI and states that in response to the Complainant’s filing of this Denial of Access Complaint on July 20, 2010, the Custodian sent the Complainant copies of the records responsive to request Item No. 2 on July 26, 2010. Counsel also states that the Custodian stated that the cost of the records responsive to Item No. 1 has been reduced from \$10.00 to \$1.76. Counsel further states that none of this information was submitted in the form of a certification and the Custodian did not proffer an invoice or other documentation that might indicate the actual cost for the record responsive for request Item No. 1. Counsel requests that the GRC continue with its investigation of this matter and because the Complainant has achieved the relief sought by him, find that the Complainant is a “prevailing party” entitled to an award of reasonable attorney’s fees pursuant to N.J.S.A. 47:1A-6.

August 13, 2010

E-mail from Custodian’s Counsel to the GRC. Counsel states that she is in receipt of Complainant Counsel’s e-mail dated August 9, 2010. Counsel states she would like to clarify the Custodian’s certification, which was attached to the Statement of Information, regarding the actual cost of the record responsive to request Item No. 1. Counsel states that the Complainant was not denied access to any of the requested records and therefore is not a “prevailing party” and the award of attorney’s fees in this matter is inappropriate.

August 23, 2010

E-mail from Complainant’s Counsel to the GRC. Counsel states that he is responding to the Custodian’s certification dated July 28, 2010.⁷

Records Responsive to Request Item No. 2:

Counsel states that the Custodian would have the GRC excuse the Custodian’s negligent failure to provide the records responsive because it was inadvertent. Counsel also states that the Custodian provided no evidence that she has created or maintained a system of administering the OPRA requests she received. Further, Counsel states that the Custodian has provided no evidence that she tracks the number of days that have elapsed since receiving OPRA requests. Counsel states that the Custodian has not provided any evidence to show that she knows at any given time which OPRA requests have been fulfilled and which remain open. Counsel also states that the Custodian has provided no evidence to show that if the Complainant had not filed his Denial of Access Complaint, she would have fulfilled the Complainant’s OPRA request.

Counsel states that the Custodian appears to take an *ad hoc* approach to records requests and has no system in place to guard against the Custodian’s inadvertence and negligence. Counsel further states that the Custodian tries to place the burden of fulfilling the OPRA requests on the Complainant when she certified that “if the Complainant had contacted me about not receiving [the records responsive to request

⁷ Complainant’s Counsel is referring to Custodian’s certification enclosed with her SOI received by the GRC on July 29, 2010.

[Item No. 2] prior to the filing of his complaint, I would have immediately provided him with the same.” Counsel argues that the burden to track and fulfill OPRA requests lies with the Custodian.

Counsel states that he wonders how many other OPRA requests go unfulfilled because members of the public become so frustrated with the Borough’s lack of response that they give up altogether in following up on their OPRA requests. Counsel also states that the Custodian’s behavior is evidence of an epidemic among clerks who apparently believe that strict compliance with the law is optional and only take OPRA seriously when they are confronted with the consequences of their conduct. Lastly, Custodian states that until the Borough imposes a system that tracks OPRA requests and responses, the Custodian will continue to thwart public access through the Custodian’s alleged “inadvertence.”

Records Responsive to Request Item No. 3:

Counsel states that the Custodian is entitled to her opinion “that the Borough’s form does not contain false or misleading information regarding what is a public record and it is unreasonable to expect that the form will contain all the information regarding what is a public record and list all the exceptions.” Counsel also states that the GRC has maintained and continues to maintain a model request form that the Borough could have used which correctly lists all of the applicable exceptions to OPRA. Lastly, Counsel states that while the Custodian stated that she has no objection to adopting the GRC’s model request form, she has not actually done so.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA also provides:

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. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.” N.J.S.A. 47:1A-5.b.

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 Complainant argued that the Custodian’s charge of \$10.00 for a DVD in response to request Item No. 1 violates OPRA because it is not the actual cost pursuant to N.J.S.A. 47:1A-5.b. The Complainant also argued that the Custodian indicated that the records responsive to request Item No. 2 would be e-mailed to the Complainant, but the Complainant did not receive these records responsive before the filing of the Denial of Access Complaint. Furthermore, the Complainant argued that the Borough’s OPRA request form is false and misleading because the Borough’s request form states that “employee personnel files” are not public records, but does not state OPRA’s exceptions to the general rule that personnel files are not public records. The Complainant also argues that the Borough’s request form states that “police investigation records” are not public records and ignores the exceptions under N.J.S.A. 47:1A-3.b.

Conversely, the Custodian argued that although she originally charged the Complainant \$10.00 for the requested DVD, the Custodian consulted with the Borough Attorney and calculated the actual cost of the DVD at \$1.76. The Custodian argued that she offered to provide the DVD to the Complainant at actual cost, plus shipping costs (\$1.22) for a total cost of \$2.98. The Custodian argued that she provided the Complainant with the records responsive to request Item No. 2 on July 26, 2010. The Custodian argued that she believed that she had provided the Complainant with copies of the records because the Complainant e-mailed the Custodian on July 7, 2010 stating “thank you for this free portion of my OPRA request.” The Custodian further argued that if the Complainant had informed the Custodian that he did not receive such records prior to the filing of this complaint, she would have immediately provided the records responsive to the Complainant. The Custodian finally argued that she did not purposely neglect to send the records responsive but corrected the error once she was made aware of her failure to send the records. The Custodian further argued that the Borough’s request form is not false or misleading. The Custodian argued that it is unreasonable to expect that the form will contain all the information regarding what is a public record and list all of OPRA’s exceptions. In addition, the Custodian argued that the OPRA form contains a summary of relevant portions of OPRA and then refers the requestor to the legal citation.

The Council first addresses the issue of whether the Custodian properly responded to the Complainant's OPRA request Item No. 2.

The evidence of record indicates that the Custodian responded to the Complainant's OPRA request on the first (1st) business day following receipt of such request stating that the CFO had contacted Edmunds for the records responsive to request Item No. 2 and was waiting for Edmunds' response. The evidence of record also indicates that in such response the Custodian stated she did not know how many records responsive exist for request Item No. 2. The evidence of record further indicates that the Custodian provided the Complainant with the records responsive for request Item No. 2 on July 26, 2010.

In Russomano v. Township of Edison (Middlesex), GRC Complaint No. 2002-86 (July 2003), the Custodian informed the Complainant that the Township Administrator would provide a response to the Complainant's request. However, the Custodian did not provide a date certain as to when the Township Administrator would do so. The Council held that the Custodian erred in not providing a date certain as to when the Township Administrator would respond to the Complainant's OPRA request.

The facts in the instant complaint are similar to those in Russomano, supra. In the instant complaint, the Custodian responded within the statutorily mandated seven (7) business day response period stating that the CFO contacted Edmunds for the records responsive to request Item No. 2 and was waiting for Edmunds' response. The Custodian failed to specify a date certain upon which the Complainant could expect disclosure of the requested records and failed to request an extension of time. However, the Custodian disclosed the records responsive on July 26, 2010, after the statutorily-mandated seven (7) business day time period for a response elapsed.

Therefore, although the Custodian provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to provide an anticipated date upon which the records responsive to request Item No. 2 would be provided to the Complainant, thus violating OPRA pursuant to N.J.S.A. 47:1A-5.i. and Russomano, supra, because the Custodian's response was not proper.

The Council next turns to the issue of whether the Custodian violated OPRA by quoting the Complainant a \$10.00 charge for reproduction of the record responsive to request Item No. 1 in DVD format.

OPRA sets forth the amount to be charged for a government record in printed form. Specifically, OPRA states:⁸

“[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

⁸ N.J.S.A. 47:1A-5.b. was amended effective November 9, 2010 to set the permissible copying fees to \$0.05 per letter size or smaller and \$0.07 per legal size page or larger. However, the request at issue herein was made on June 29, 2010, prior to the change in law.

is not prescribed by law or regulation, upon payment of the *actual cost* of duplicating the record.

Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following:

- First page to tenth page, \$0.75 per page;
- Eleventh page to twentieth page, \$0.50 per page;
- All pages over twenty, \$0.25 per page.

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. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.” (Emphasis added). N.J.S.A. 47:1A-5.b.

Whenever a records custodian asserts that fulfilling an OPRA records request requires an “extraordinary” expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5.c. In this regard, OPRA provides:

“Whenever 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 ...*” (Emphasis added.) N.J.S.A. 47:1A-5.c.

OPRA also states that:

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

The Complainant asserted that the Custodian’s charge of \$10.00 per DVD of the Township’s most recent public meeting violates OPRA because said charge exceeds the actual cost of duplicating the records. The Custodian certified in the SOI that she calculated the actual cost of the record responsive as \$1.76 and offered to provide that

record to the Complainant at the actual cost plus shipping of \$1.22 for a total cost of \$2.98 on July 26, 2010.

While OPRA provides that paper copies of government records may be obtained upon payment of the actual cost of duplication not to exceed the enumerated rates of \$0.75/0.50/0.25 per page (N.J.S.A. 47:1A-5.b.), the Act does not provide explicit copy rates for any other medium. N.J.S.A. 47:1A-5.b. goes on to state that 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. However, OPRA does provide that whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter cannot be reproduced by ordinary document copying equipment in ordinary business size, 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 copies. N.J.S.A. 47:1A-5.c. Additionally, OPRA provides that when a request for a record in a medium not routinely used by an agency, not routinely developed or maintained by an agency, or requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the *actual cost of duplication*, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both. N.J.S.A. 47:1A-5.d.

Thus, it appears that the Legislature included the central theme throughout OPRA that duplication cost should equal actual cost and when actual cost cannot be applied, the duplication cost should be reasonable. See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006).

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-5b.”

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.”

Further, in Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the court cited to Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), in 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.

Moreover, the GRC previously decided on this issue in O’Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008). In that case, the custodian responded to the complainant’s OPRA request for an audio recording of the Council’s May 14, 2007 public and executive session in a timely manner stating that the cost for a meeting disc would be \$35.00. The custodian also requested that the complainant indicate whether he would like the custodian to prepare the record. Subsequently, the complainant filed a Denial of Access Complaint arguing that the proposed fee did not represent the “actual cost,” and that copying fees prescribed in a Township ordinance, Chapter 250, Article II § 250.9(E), appear to violate OPRA.

In the instant complaint, the evidence of record indicates that the Complainant requested an audio recording of the most recently recorded regular public meeting of the governing body. The evidence of record also indicates that the Custodian responded to the OPRA request in writing in a timely manner stating that duplication of the audio recording in DVD format would cost \$10.00. The Complainant subsequently filed a Denial of Access Complaint disputing the proposed charge and arguing that it is unlikely that the Township’s proposed fee represents the actual cost of producing the requested CD. The Custodian certified in the SOI that she calculated the actual cost of the record responsive as \$1.76 and offered to provide that record to the Complainant at the actual cost plus postage of \$1.22 for a total cost of \$2.98 on July 26, 2010.⁹

Pursuant to N.J.S.A. 47:1A-5.b., Spaulding, *supra*, Libertarian Party of Central New Jersey, *supra*, Moore, *supra*, and Dugan, *supra*, the Custodian must charge the “actual cost” of duplicating the requested record. As such, the Custodian’s initial proposed charge of \$10.00 for an audio recording in DVD format was unreasonable and in violation of N.J.S.A. 47:1A-5.b. However, because the Custodian certified that the actual cost of the requested recording was \$1.76, and because the Custodian certified that she offered to provide the requested record to the Complainant at the actual cost plus

⁹ The Custodian’s e-mail was dated July 26, 2010, approximately three (3) business days after the filing of the Complainant’s Denial of Access Complaint.

postage of \$1.22 for a total cost of \$2.98, the Council declines to order the Custodian to provide the requested record at the actual cost.

Furthermore, the Custodian's proposed charge of \$3.00 to e-mail the records responsive to request Item No. 3 is unlawful because the evidence of record indicates that the Borough maintained the requested OPRA request form electronically and the Complainant requested that such records be sent to him electronically. *See McBride v. Borough of Mantoloking (Ocean)*, GRC Complaint No. 2009-138 (April 2010 Interim Order)(holding that there is no actual cost incurred by a public agency to electronically transmit records which are maintained electronically). However, the Council declines to order the Complainant to provide the records responsive to request Item No. 3 at no cost because these records were provided to the Complainant at no cost on July 26, 2010.

The Council next addresses the issue of whether the Township's OPRA request form is valid under OPRA.

The Complainant argued that the Township's OPRA request form is invalid under OPRA because it states that "employee personnel files" are not public records but does not state the exceptions to that rule. The Complainant also argued that the Township's OPRA request form is invalid because it states that "police investigation records" are not public records ignoring the exceptions contained in N.J.S.A. 47:1A-3.b. However, the Custodian asserted that the Borough's request form does not contain false or misleading information regarding what is a public record and lists all exceptions. The Custodian asserted that the information contained in the form is a summary of relevant portions of OPRA and then refers the requestor to the legal citation. The Custodian certified that she has no objection to modifying the Borough's OPRA request form in accordance with directions by the GRC.

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.

N.J.S.A. 47:1A-5.f. mandates that public agencies adopt an official OPRA request form. While OPRA does not mandate that agencies adopt the GRC’s model OPRA request form, the GRC has mandated that agencies alter those forms which are inconsistent with the requirements of N.J.S.A. 47:1A-5.f. or are potentially misleading to requestors.

In O’Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Township’s official OPRA request form stated that employee personnel files are not considered public records under OPRA but failed to list the exceptions to this provision as outlined in N.J.S.A. 47:1A-10. The Council held that this omission could result in a requestor being deterred from submitting an OPRA request for certain personnel records because the Township’s form provided misinformation regarding the accessibility of said records. The Council held that such deterrence due to the ambiguity of the Township’s official OPRA request form constitutes a denial of access to the requested records. Holding the exclusion of the necessary information unlawful, the Council ordered the Custodian to either delete the portion of the Township’s OPRA request form referencing personnel records (as it was not required by N.J.S.A. 47:1A-5.f.) or include the exception to the personnel records provision in its entirety.

In O’Shea, supra, the Council held that “while 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.” Similarly to O’Shea, in the instant complaint, the Township’s OPRA request form advises requestors that police investigation reports are exempt from public access but fails to inform requestors that portions of arrest reports are subject to public access pursuant to N.J.S.A. 47:1A-3.b., and fails to inform requestors of the accessibility of certain information contained in personnel records pursuant to N.J.S.A. 47:1A-10.

Therefore, the Custodian shall adopt the GRC’s model request form, delete the portion of the Township’s OPRA request form regarding the personnel records and police investigation records, or amend said statement to include the remainder of the applicable provisions of OPRA. Specifically,

“the following information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

- where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;
- if an arrest has been made, information as to the name, address and age of any victims unless there has not been sufficient opportunity

for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or Court Rule. In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim's family, and the integrity of any ongoing investigation, shall be considered;

- if an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;
- information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;
- information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;
- information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police; and
- information as to circumstances surrounding bail, whether it was posted and the amount thereof.” N.J.S.A. 47:1A-3.b.

“the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

- 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.

Whether the Custodian’s actions rise 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. Although the Custodian provided a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to provide an anticipated date upon which the records responsive to request Item No. 2 would be provided to the Complainant, thus violating OPRA pursuant to N.J.S.A. 47:1A-5.i. and Russomano v. Township of Edison (Middlesex), GRC Complaint No. 2002-86 (July 2003) because the Custodian’s response was not proper.
2. Pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must charge the “actual cost” of duplicating the requested record. As such, the Custodian’s initial proposed charge of \$10.00 for an audio recording in DVD format was unreasonable and in violation of N.J.S.A. 47:1A-5.b. However, because the Custodian certified that the actual cost of the requested recording was \$1.76, and because the Custodian certified that she offered to provide the requested record to the Complainant at the actual cost plus postage of \$1.22 for a total cost of \$2.98, the Council declines to order the Custodian to provide the requested record at the actual cost.
3. The Custodian’s proposed charge of \$3.00 to e-mail the records responsive to request Item No. 3 is unlawful because the evidence of record indicates that the Borough maintained the requested OPRA request form electronically and the Complainant requested that such records be sent to him electronically. *See* McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (April 2010 Interim Order)(holding that there is no actual cost incurred by a public agency to electronically transmit records which are

maintained electronically). However, the Council declines to order the Complainant to provide the records responsive to request Item No. 3 at no cost because these records were provided to the Complainant at no cost on July 26, 2010.

4. The Custodian shall adopt the GRC's model request form, delete the portion of the Township's OPRA request form regarding the personnel records and police investigation records, or amend said statement to include the remainder of the applicable provisions of OPRA. Specifically,

“the following information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

- where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;
- if an arrest has been made, information as to the name, address and age of any victims unless there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or Court Rule. In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim's family, and the integrity of any ongoing investigation, shall be considered;
- if an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;
- information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;
- information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;
- information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police; and
- information as to circumstances surrounding bail, whether it was posted and the amount thereof.” N.J.S.A. 47:1A-3.b.

“the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

- 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.
5. **The Custodian shall comply with item No. 4 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 1:4-4¹⁰, to the Executive Director.¹¹ With regard to Item No. 2 above, the Complainant shall deliver to the Custodian (a) payment of the actual cost in the amount of two dollars and ninety-eight cents (\$2.98), or (b) a statement declining to purchase these records. The Complainant’s failure to take any action within five (5) business days of receipt of the Council’s Interim Order shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within seven (7) business days from receipt of the Council’s Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant’s willingness or refusal to purchase the requested records. The Custodian’s statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.¹²**
6. 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.

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."

¹¹ 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.

¹² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

7. The 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

November 22, 2011