



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

November 29, 2011 Government Records Council Meeting

Vincent LaFata
Complainant

Complaint No. 2010-166

v.

Monroe Township Fire District No. 1 (Middlesex)
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 amended findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).
2. Because the Custodian certified that the executive session minutes from January 1, 2009 through February 28, 2010 were not approved for accuracy of content by the Board of Fire Commissioners at the time of the Complainant’s OPRA request, said minutes are exempt from disclosure under OPRA as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. See Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009) and Wolosky v. County of Sussex, Board of Chosen Freeholders, GRC Complaint No. 2009-26 (February 2010). Because the requested records are exempt from disclosure as advisory, consultative and deliberative material, the Council declines to address whether attorney client privilege would apply to these records.
3. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not timely responding to the Complainant’s OPRA request within the statutorily mandated seven (7) business days. However, the requested executive session minutes were not approved for accuracy of content at the time of the Complainant’s OPRA request, thus said minutes are draft documents which constitute advisory consultative and deliberative material and are exempt from disclosure under OPRA. 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 an unreasonable denial of access under the totality of the circumstances.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Specifically, the Custodian's denial of access to the requested records was lawful because said executive session minutes were not approved for content at the time of the Complainant's OPRA request and are therefore draft documents exempt from disclosure as advisory consultative and deliberative pursuant to N.J.S.A. 47:1A-1.1. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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 29th Day of November 29, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 5, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Vincent LaFata¹
Complainant**

GRC Complaint No. 2010-166

v.

**Monroe Township Fire District No. 1 (Middlesex)²
Custodian of Records**

Records Relevant to Complaint: Copies of all executive session minutes from January 1, 2009 through February 28, 2010.

Request Made: March 17, 2010

Response Made: April 7, 2010

Custodian: Joanne Hayes

GRC Complaint Filed: July 21, 2010³

Background

March 17, 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.

April 7, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourteenth (14th) business day following receipt of such request. The Custodian states that access to the records responsive to the OPRA request cannot be granted because each record contains attorney-client privileged material concerning active/ongoing or threatened litigation. The Custodian states that the records responsive to the request will not be made public until the litigation discussed in these sessions has been fully resolved. The Custodian also states that the Open Public Meetings Act ("OPMA") specifically provides that the attorney-client privilege applies to public bodies pursuant to N.J.S.A. 10:4-12(b)(7).

¹ Represented by Walter M. Luers, Esq., (Clinton, NJ).

² Represented by Joseph Yousouf, Esq. (Manalapan, NJ)

³ The GRC received the Denial of Access Complaint on said date.

April 9, 2010⁴

Letter from Complainant's Counsel to the Custodian. Counsel states that he is submitting a public records request on behalf of the Complainant pursuant to OPRA, OPMA and the common law right of access. Counsel also states that he requests the minutes of all executive or closed sessions of the Board of Fire Commissioners held between January 1, 2009 and March 31, 2010.⁵ Counsel further states that the Complainant made a similar OPRA request on March 17, 2010 but never received a response. Counsel additionally states that if the Board of Fire Commissioners ignores the Complainant's OPRA request, then Counsel may initiate legal action without further notice to the Board. Lastly, Counsel states that if he has to initiate legal action, he will seek an award of reasonable attorney's fees.

April 14, 2010

Letter from the Custodian to Complainant's Counsel. The Custodian encloses a copy of the Custodian's response sent to the Complainant on April 7, 2010. The Custodian states that the Commissioners did not ignore the Complainant's request, rather, it took time to review the records requested.

May 3, 2010

Letter from Complainant's Counsel to the Custodian. Counsel thanks the Custodian for copying him on the Custodian's response to the Complainant's OPRA request. Counsel states that the Custodian has not responded to his OPRA request on behalf of the Complainant dated April 9, 2010. Counsel also states that because he requested identical records to the Complainant's March 17, 2010 OPRA request, the Custodian's response should be the same. Counsel further states that he reviewed the Custodian's letter dated April 7, 2010 and notes that the Custodian's denial of access to the records responsive violates OPRA. Counsel additionally states that minutes which have been approved by the Board cannot be withheld in their entirety. Counsel states that copies of approved minutes must be provided to requestors with appropriate redactions. Counsel refers the Custodian to Wolosky v. Andover Regional School District, GRC Complaint No. 2009-94 (August 2010), which held that approved executive session minutes must be disclosed with appropriate redactions and not withheld in their entirety.

May 14, 2010

Letter from Custodian to Complainant's Counsel. The Custodian states that she did not respond to Counsel's letter dated April 9, 2010 under a separate cover because the Custodian assumed that Counsel was representing the Complainant and the Custodian had already responded to the Complainant's March 17, 2010 OPRA request. Custodian also states that the Board's attorney has attempted to contact Counsel by telephone. The Custodian further states that the Board's attorney will try to reach Counsel by telephone in order to discuss the disclosure of the executive session minutes.

May 21, 2010

Letter from Custodian's Counsel to Complainant's Counsel. Counsel responds to Complainant's Counsel's letter dated May 3, 2010. Counsel states that the executive

⁴ Counsel attaches a copy of the Complainant's original OPRA request dated March 17, 2010.

⁵ Counsel requested additional records which are not relevant to the adjudication of this complaint.

session minutes are subject to attorney-client privilege and furthermore, Counsel has asserted that privilege in litigation which is currently pending in Superior Court of New Jersey, Law Division, Middlesex County.⁶ Counsel also states that this issue was discussed at a recent case management conference before Judge Hyland and the Court indicated that it would examine the minutes claimed as privileged and issue a ruling regarding the same, including appropriate redaction of those minutes.

May 27, 2010

Letter from Complainant's Counsel to Custodian's Counsel. Counsel responds to Custodian Counsel's letter dated May 21, 2010. Counsel states that the appropriate course for the Board of Fire Commissioners under OPRA would be to provide the Complainant with copies of the executive session minutes with appropriate redactions. Counsel also states that specific reasons for the redactions should be given, including the name of the pending cases, if appropriate.

July 21, 2010

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

- Complainant's OPRA request dated March 17, 2010
- Letter from the Custodian to the Complainant dated April 7, 2010
- Letter from the Complainant's Counsel to the Custodian dated April 9, 2010⁷
- Letter from the Custodian to Complainant's Counsel dated April 14, 2010
- Letter from Complainant's Counsel to the Custodian dated May 3, 2010
- Letter from the Custodian to Complainant's Counsel dated May 14, 2010
- Letter from Custodian's Counsel to Complainant's Counsel dated May 21, 2010
- Letter from Complainant's Counsel to Custodian's Counsel dated May 27, 2010

Complainant's Counsel states that the Complainant filed an OPRA request on March 17, 2010 seeking copies of closed or executive session minutes of the Fire District from January 1, 2009 through February 28, 2010. Counsel also states that seven (7) business days elapsed without any response from the Custodian. Counsel further states that he sent a letter to the Custodian on April 9, 2010, reiterating the Complainant's OPRA request. Counsel additionally states that the Custodian responded to the Complainant's OPRA request on April 7, 2010, denying the requested executive session minutes in their entirety because they contain privileged information.

Counsel states that in a letter to the Custodian dated May 3, 2010 he requested that the records responsive be disclosed with appropriate redactions. Counsel also states that the Custodian referred the release of the requested records to the Custodian's Counsel on May 14, 2010. Counsel states that on May 21, 2010 the Custodian's Counsel reiterated the Custodian's denial of access because the records responsive contained attorney-client privileged material. Counsel also states that on May 27, 2010 he again

⁶ In a separate legal certification dated September 14, 2011, the Custodian certified that the Board of Fire Commissioners is involved in several civil actions before the New Jersey Public Employment Relations Commission and the Superior Court of New Jersey, Law Division.

⁷ Complainant's Counsel also encloses a copy of the Complainant's OPRA request.

requested the redacted version of the minutes. Counsel states that as of the filing of this Denial of Access Complaint, the Custodian has not responded to Counsel's request for redacted records.

Counsel argues that public agencies must grant access, deny access, seek clarification or request an extension of time to respond to an OPRA request within seven (7) business days after receipt of that request pursuant to N.J.S.A. 47:1A-5.i. Counsel also argues that failure to do so results in a deemed denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., Kelly v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007), Kossup v. City of Newark, GRC Complaint No. 2009-314 (January 2010). Counsel states that the Custodian responded on the fifteenth (15th) business day following receipt of the Complainant's request.⁸

Counsel argues that the records responsive to the Complainant's request should have been provided to the Complainant subject to appropriate redactions. See O'Shea v. Borough of Stillwater, GRC Complaint No. 2007-253 (November 2008). Counsel also argues that executive session minutes, even when they are redacted, contain important information such as what resolutions or decisions were reached in the executive sessions, who attended, what votes were taken, what issues were considered, and the length of the meeting.

Counsel requests that the GRC order that the Custodian provide copies of the records responsive with appropriate redactions and an award of reasonable attorney's fees.

The Complainant does not agree to mediate this complaint.

July 26, 2010

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

August 3, 2010

E-mail from the GRC to the Custodian. The GRC confirms a telephone conversation with the Custodian granting a five (5) business day extension to complete the SOI. The GRC informs the Custodian that the SOI will be due on August 10, 2010.

August 9, 2010

E-mail from the GRC to the Custodian. The GRC states that the Executive Director has agreed to grant the Custodian another five (5) business days to complete the SOI. The GRC informs the Custodian that the SOI will be due on August 17, 2010.

August 17, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated March 17, 2010
- Letter from the Custodian to the Complainant dated April 7, 2010

⁸ The GRC notes that April 2, 2010 was a State holiday, thus not counting as a business day.
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The Custodian certifies that her search for the requested records included reviewing the records responsive with Custodian's Counsel and determining that the executive session minutes contain attorney-client privileged material involving litigation. The Custodian also certifies that no records responsive to the Complainant's request have been destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

The Custodian certifies that the records responsive to the Complainant's OPRA request were denied because the records contain attorney-client privileged information. The Custodian also certifies that the Board of Fire Commissioners is a named party defendant in three (3) separate litigation proceedings instituted by former employees of the Board. The Custodian further certifies that these pending cases include Joseph Calella v. Monroe Township Board of Fire Commissioners of Fire District No. 1, Docket No. L-6820-08; Monroe Township Fire District No. 1 and Monroe Township Professional Firefighters Association International Association of Firefighters Local 3170 Docket No. CO-2009-332; Monroe Township Uniformed Firefighters Association, International Association of Firefighters Local 3170, District No. 1, Michael J. Mangeri and David Shapter v. Monroe Township Board of Fire Commissioners, District No. 1, Docket No. L-1677-10.

The Custodian certifies that all executive sessions held during January 1, 2009 through February 28, 2010 were held for the specific purpose of discussing with the Board Attorney the legal position, defense strategies, discovery and procedural issues relating to the above-referenced pending litigations. The Custodian argues that disclosure of the confidential legal advice contained in those minutes could adversely impact the Board's defense to the claims asserted by the Plaintiffs in the pending litigation.

The Custodian certifies that when the Board of Fire Commissioner's meeting went into executive session, it did so for the specific purpose of consulting with its attorney. The Custodian also certifies that upon moving into each executive session, the Board adopted a resolution specifying that it was doing so for the express purpose of discussing litigation and asserted the attorney-client privilege permitted by N.J.S.A. 10:4-12(b)(7). The Custodian argues that N.J.S.A. 2A:84A-20 defines the attorney-client privilege as "communications between a lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such communication and (b) to prevent his lawyer from disclosing it..."

The Custodian argues that in Burnett v. Gloucester County Board of Chosen Freeholders, 409 N.J. Super. 219, 238 (App. Div. 2009), the Court stated that "[t]he intent of N.J.S.A. 10:4-12(b)(7) is to allow officials to meet privately with counselors and advisors in order to discuss policy, formulate plans of action and generally to have an exchange of ideas." The Custodian also argues that in Payton v. NJ Turnpike Transit Authority, 148 N.J. 524, 558 (1997), the court held that if disclosure of executive session minutes subverts the purpose of an exemption, the minutes should not be made public. The Custodian argues that in The Press of Atlantic City, et. al. v. Ocean County Joint Insurance Fund, et. al., 337 N.J. Super. 480, 484 (Law Division 2001), the Judge

observed that “this cases focuses on the tension which exists between the right to obtain governmental documents and the attorney-client privilege as it relates to communications between an attorney and a client which is a public entity.” The Custodian argues that the Court noted that:

“the importance of protecting confidentiality within the attorney-client relationship are not limited to private representation. The privilege has been fully applicable to communications between a public body and an attorney retained to represent it...Although New Jersey has a notable strong public policy in favor of open government as evidence by the OPMA and the Right to Know Law, the public’s right of inspection is not unlimited.”

The Custodian argues that the Court noted that “the attorney-client privilege recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system.”

The Custodian argues that New Jersey courts have long recognized the importance of the attorney-client privilege and the need to protect the confidentiality between an attorney and his client. The Custodian also argues that based upon this well-established law, the Custodian properly denied the Complainant access to the records responsive to his OPRA request.

August 23, 2010

E-mail from the Complainant’s Counsel to the GRC. Counsel responds to the Custodian’s SOI. Counsel states that the Custodian has not distinguished this case from O’Shea v. Borough of Stillwater, GRC Complaint, 2007-253 (November 2008) or the similar cases of Wolosky v. Vernon Township Board of Education, GRC Complaint 2009-57 (December 2009) and Taylor v. Township of Downe, GRC Complaint 2009-174 (July 2010). Counsel argues that in these complaints, the GRC held that approved meeting minutes cannot be completely withheld; rather, they must be produced to the public with appropriate redactions.

Counsel states that he sought to avoid litigation in this complaint when he referred the Custodian’s Counsel to Wolosky v. Vernon Township Board of Education, GRC Complaint 2009-57 (December 2009) and urged that the minutes be released with appropriate redactions on May 3, 2010. Counsel argues that this complaint was filed because the Custodian and Custodian’s Counsel refuse to abide by the GRC’s rulings. Counsel requests that the GRC order the Custodian to produce the records responsive with appropriate redactions and award the Complainant a reasonable attorney’s fee.

June 22, 2011

E-mail from the GRC to the Custodian. The GRC requests a legal certification from the Custodian certifying whether the requested executive session minutes from January 1, 2009 through February 28, 2010 have been approved. The GRC also requests the Custodian certify when these executive session meetings occurred and when these minutes were approved.

June 30, 2011

Facsimile from the Custodian to the GRC attaching the requested legal certification. The Custodian certifies that executive session meetings were held on January 21, 2009, February 18, 2009, March 18, 2009, April 15, 2009, May 20, 2009, June 17, 2009, July 15, 2009, September 16, 2009, November 18, 2009, December 16, 2009, January 20, 2010 and February 17, 2010. The Custodian also certifies that the Board of Fire Commissioners has not formally approved the executive session minutes to date.

August 31, 2011

E-mail from the GRC to the Custodian. The GRC requests an additional legal certification from the Custodian certifying whether the requested executive session minutes from January 1, 2009 through February 28, 2010 have been approved for accuracy of content and whether the executive session minutes have been approved for release to the public. The GRC requests the Custodian complete the legal certification within five (5) business days.

September 7, 2011

E-mail from the GRC to Custodian’s Counsel. The GRC confirms a five (5) business day extension to complete the requested legal certification. The GRC requests that the legal certification be completed no later than September 15, 2011.

September 14, 2011

Facsimile from the Custodian to the GRC. The Custodian encloses the requested legal certification. The Custodian certifies that executive sessions were held on January 21, 2009, February 18, 2009, March 18, 2009, April 15, 2009, May 20, 2009, June 17, 2009, July 15, 2009, September 16, 2009, November 18, 2009, December 16, 2009, January 20, 2010 and February 17, 2010. The Custodian also certifies that the Board of Fire Commissioners has not formally approved the executive session minutes for accuracy of content nor have the minutes been approved for release to the public due to the pending active litigation before the New Jersey Public Employment Relations Commission. The Custodian further certifies that the attorney-client privilege has been invoked for all the executive session minutes because of the on-going active litigation discussed in each of the executive sessions.

Analysis

Whether the Custodian timely replied to the Complainant’s OPRA request dated March 17, 2010 pursuant to N.J.S.A. 47:1A-5.i.?

OPRA provides that:

“[A] custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived.

[If] a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request...”
N.J.S.A. 47:1A-5.i.

The evidence of record indicates that the Custodian received the Complainant’s OPRA request on March 17, 2010. The evidence of record also indicates that the Custodian responded in writing to the Complainant’s OPRA request on the fourteenth (14th) business day from receipt of such request. The evidence of record further indicates that the Custodian denied the Complainant access to the records responsive because all of the requested executive session minutes contain attorney-client privileged material concerning active/ongoing or threatened litigation.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁹ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).

Whether the Custodian unlawfully denied access to the requested executive session minutes from January 1, 2009 through February 28, 2010?

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:

⁹ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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

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

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

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

The Custodian in this matter denied access to the requested records in their entirety based on the attorney-client privilege. In the Denial of Access Complaint, the Complainant argued that the executive session minutes should be disclosed with redactions because even when redacted, such minutes contain important information.

The Custodian certified in the SOI that all of the executive sessions from January 1, 2009 to February 28, 2010 were held for the specific purpose of discussing with the Board’s attorney legal positions, defense strategies, discovery and procedural issues relating to the pending litigation. In a separate certification dated June 30, 2011, the Custodian certified that the Board of Fire Commissioners has not yet formally approved the executive session minutes that are the subject of this complaint.¹⁰ Furthermore, in an additional certification, the Custodian certified that the requested executive session minutes have not been approved for accuracy of content nor have the minutes been approved for release to the public due to the pending active litigation before the New Jersey Public Employment Relations Commission.

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

¹⁰ The Custodian also certified that executive session meeting minutes were held on January 21, 2009, February 18, 2009, March 18, 2009, April 15, 2009, May 20, 2009, June 17, 2009, July 15, 2009, September 16, 2009, November 18, 2009, December 16, 2009, January 20, 2010 and February 17, 2010. Vincent LaFata v. Monroe Township Fire District No. 1 (Middlesex), 2010-166 – Findings and Recommendations of the Executive Director 9

(App. Div. 2004). The statute expressly provides that “inter-agency or intra-agency advisory, consultative, or deliberative material” is not included within the definition of a government record. N.J.S.A. 47: 1A-1.

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

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

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

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

The Council notes that it has previously found that once the governing body of an agency has approved meeting minutes as to accuracy and content (per the requirement of the Open Public Meetings Act), said minutes are disclosable pursuant to OPRA. Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009); *see also* Wolosky v. County of Sussex, Board of Chosen Freeholders, GRC Complaint No. 2009-26 (February 2010), stating that “[a]lthough properly approved

executive session minutes are disclosable, pursuant to N.J.S.A. 47:1A-5.g., custodians may redact from the minutes those discussions that require confidentiality because the matters discussed therein are unresolved or still pending.”

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

Therefore, because the Custodian certified that the executive session minutes from January 1, 2009 through February 28, 2010 were not approved for accuracy of content by the Board of Fire Commissioners at the time of the Complainant’s OPRA request, said minutes are exempt from disclosure under OPRA as ACD material pursuant to N.J.S.A. 47:1A-1.1. See Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009) and Wolosky v. County of Sussex, Board of Chosen Freeholders, GRC Complaint No. 2009-26 (February 2010). Because the requested records are exempt from disclosure as ACD material, the Council declines to address whether attorney client privilege would apply to these records.

Whether the Custodian’s delayed response to the Complainant’s OPRA request rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

The evidence of record indicates that the Complainant filed his OPRA request on March 17, 2010. The evidence of record further indicates that the Custodian responded to the Complainant’s OPRA request in writing on April 7, 2010, fourteen (14) business days after receipt of said request, denying access to the requested records because each

record contains attorney-client privileged material concerning active/ongoing or threatened litigation. Furthermore, the Custodian certified that the requested executive sessions minutes have not yet been approved for accuracy of content by the Board of Fire Commissioners.

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.g. and N.J.S.A. 47:1A-5.i. by not timely responding to the Complainant's OPRA request within the statutorily mandated seven (7) business days. However, the requested executive session minutes were not approved for accuracy of content at the time of the Complainant's OPRA request, thus said minutes constitute ACD material and are exempt from disclosure under OPRA. 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 an 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 Vincent LaFata v. Monroe Township Fire District No. 1 (Middlesex), 2010-166 – Findings and Recommendations of the Executive Director

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)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

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

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

redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.¹¹ Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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

¹¹ The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight business days later, or one day beyond the statutory limit. *Id.* at 79. As a result, the Court shifted the burden to Hoboken to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind the City's voluntary disclosure. *Id.* Because Hoboken's February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

In the matter before the Council, the Custodian's denial of access to the requested records was lawful because said executive session minutes were not approved for content at the time of the Complainant's OPRA request and are therefore draft documents exempt from disclosure as ACD pursuant to N.J.S.A. 47:1A-1.1.

Therefore, pursuant to Teeters, *supra*, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Specifically, the Custodian's denial of access to the requested records was lawful because said executive session minutes were not approved for content at the time of the Complainant's OPRA request and are therefore draft documents exempt from disclosure as ACD pursuant to N.J.S.A. 47:1A-1.1. Additionally, pursuant to Mason, *supra*, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).
2. Because the Custodian certified that the executive session minutes from January 1, 2009 through February 28, 2010 were not approved for accuracy of content by the Board of Fire Commissioners at the time of the Complainant's OPRA request, said minutes are exempt from disclosure under OPRA as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. See Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009) and Wolosky v. County of Sussex, Board of Chosen Freeholders, GRC Complaint No. 2009-26 (February 2010). Because the requested records are exempt from disclosure as advisory, consultative and deliberative material, the Council declines to address whether attorney client privilege would apply to these records.

3. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not timely responding to the Complainant's OPRA request within the statutorily mandated seven (7) business days. However, the requested executive session minutes were not approved for accuracy of content at the time of the Complainant's OPRA request, thus said minutes are draft documents which constitute advisory consultative and deliberative material and are exempt from disclosure under OPRA. 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 an unreasonable denial of access under the totality of the circumstances.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Specifically, the Custodian's denial of access to the requested records was lawful because said executive session minutes were not approved for content at the time of the Complainant's OPRA request and are therefore draft documents exempt from disclosure as advisory consultative and deliberative pursuant to N.J.S.A. 47:1A-1.1. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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