



**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. 2010-194

v.

Borough of Mount Arlington (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, accepts the Administrative Law Judge’s Initial Decision dated October 10, 2012 in which the Administrative Law Judge approved the Stipulation of Dismissal signed by the parties or their representatives.

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 18<sup>th</sup> 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 Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-194**

v.

**Borough of Mount Arlington (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of:

1. The Borough of Mount Arlington's ("Borough") current OPRA request form.
2. Check registry data by check from January 1, 2008 to present of the current/main or general fund exported into Microsoft Word®, Excel, Access, comma delimited or fixed-field ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer ("CFO"), accountant or business administrator that is readable as a .txt file.<sup>3</sup>

**Request Made:** June 29, 2010

**Response Made:** July 9, 2010

**Custodian:** Linda DeSantis

**GRC Complaint Filed:** August 3, 2010<sup>4</sup>

**Background**

**January 31, 2012**

Government Records Council's ("Council") Interim Order. At its January 31, 2012 public meeting, the Council considered the January 24, 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 a legible copy of the Borough's check registry data in an electronic format consistent with the Complainant's OPRA request as required by the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the five (5) business days required by

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ). Previously represented by Jonathan E. McMeen, Esq., of the Law Office of Jonathan E. McMeen, Esq. (Sparta, NJ).

<sup>2</sup> Represented by Levi J. Kool, Esq. (Morristown, NJ). Previously represented by Thomas A. Segreto, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

the Council's Interim Order, the Custodian has complied with the Council's November 29, 2011 Interim Order.

2. The Custodian violated OPRA by initially failing to address the Complainant's preferred method of delivery. The Custodian further violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.d. and unlawfully denied access to the requested check registry by failing to convert same into an appropriate, legible medium. Additionally, the Borough's OPRA request form at the time of the Complainant's OPRA request was misleading to requestors because it failed to contain the exceptions set forth at N.J.S.A. 47:1A-10 and failed to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. *See O'Shea v. Township of West Milford*, GRC Complaint No. 2007-237 (December 2008). Moreover, the Borough's OPRA request form violated N.J.S.A. 47:1A-5.f. because it did not include "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" or a "space for the custodian to list reasons if a request is denied in whole or in part." However, the Custodian complied with Council's November 29, 2011 Interim Order and the Borough officially began using a request form mirroring the GRC's model request form on or about July 22, 2010 (before this complaint was filed). 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), and the Council's November 29, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided a legible copy of the Borough's check registry data in a format consistent with the Complainant's OPRA request pursuant to the Council's Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. 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 3, 2012**

Council's Interim Order distributed to the parties.

**April 24, 2012**

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

**September 12, 2012**

Letter from the Custodian's Counsel to the GRC attaching an executed Stipulation of Dismissal.<sup>5</sup> The Custodian's Counsel states that pursuant to the attached Stipulation of Dismissal, this complaint has been settled by the parties and is hereby withdrawn.

**September 13, 2012**

E-mail from the GRC to Ms. Randye Bloom, OAL, attaching the Stipulation of Dismissal. The GRC states that attached is a Stipulation of Dismissal regarding this complaint.

**October 10, 2012**

Administrative Law Judge's ("ALJ") Initial Decision. The ALJ **FINDS** that:

1. "[t]he parties have voluntarily agreed to the Stipulation of Dismissal as evidenced by the signatures of the parties or their representatives.
2. The Stipulation of Dismissal fully disposes of all issues in controversy and is consistent with the law."

As such, the ALJ **CONCLUDES** that "the agreement meets the safeguard requirements of *N.J.A.C. 1:1-19.1* and, accordingly...approves the settlement." The ALJ **ORDERS** "the parties [to] comply with the settlement terms and that these proceedings be concluded."

**Analysis**

No analysis required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends that the Council accept the Administrative Law Judge's Initial Decision dated October 10, 2012 in which the Administrative Law Judge approved the Stipulation of Dismissal signed by the parties or their representatives.

Prepared By: Frank F. Caruso  
Senior Case Manager

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<sup>5</sup> The Custodian's Counsel did not copy the OAL on this letter.

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

October 23, 2012<sup>6</sup>

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<sup>6</sup> 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 meeting was cancelled due to lack of quorum.  
Jesse Wolosky v. Borough of Mount Arlington (Morris), 2010-194 – Supplemental Findings and Recommendations of the Executive Director



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RICHARD E. CONSTABLE, III  
Acting Commissioner

**INTERIM ORDER**

**January 31, 2012 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2010-194

v.

Borough of Mount Arlington (Morris)  
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian provided a legible copy of the Borough’s check registry data in an electronic format consistent with the Complainant’s OPRA request as required by the Council’s Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the five (5) business days required by the Council’s Interim Order, the Custodian has complied with the Council’s November 29, 2011 Interim Order.
2. The Custodian violated OPRA by initially failing to address the Complainant’s preferred method of delivery. The Custodian further violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.d. and unlawfully denied access to the requested check registry by failing to convert same into an appropriate, legible medium. Additionally, the Borough’s OPRA request form at the time of the Complainant’s OPRA request was misleading to requestors because it failed to contain the exceptions set forth at N.J.S.A. 47:1A-10 and failed to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. See O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008). Moreover, the Borough’s OPRA request form violated N.J.S.A. 47:1A-5.f. because it did not include “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” or a “space for the custodian to list reasons if a request is denied in whole or in part.” However, the Custodian complied with Council’s November 29, 2011 Interim Order and the Borough officially began using a request form mirroring the GRC’s model request form on or about July 22, 2010 (before this complaint was filed). 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), and the Council's November 29, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided a legible copy of the Borough's check registry data in a format consistent with the Complainant's OPRA request pursuant to the Council's Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. 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 31<sup>st</sup> Day of January, 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: February 3, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-194**

v.

**Borough of Mount Arlington (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of:

1. The Borough of Mount Arlington's ("Borough") current OPRA request form.
2. Check registry data by check from January 1, 2008 to present of the current/main or general fund exported into Microsoft Word®, Excel, Access, comma delimited or fixed-field ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer ("CFO"), accountant or business administrator that is readable as a .txt file.<sup>3</sup>

**Request Made:** June 29, 2010

**Response Made:** July 9, 2010

**Custodian:** Linda DeSantis

**GRC Complaint Filed:** August 3, 2010<sup>4</sup>

**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. The Custodian's initial response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A- 5.g., O'Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008), because she failed to address the Complainant's preferred method of delivery (e-mail), instead stating that the records could be provided on CD or as paper copies.

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

<sup>2</sup> Represented by Matt O'Donnell, Esq. (Morristown, NJ). Previously represented by Thomas A. Segreto, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.



2. The statement contained on the Borough's OPRA request form that employee personnel files and police investigation records are exempt from public access under OPRA is misleading because said statement fails to address the exceptions set forth at N.J.S.A. 47:1A-10 and fails to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. As such, pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008), a requestor may be deterred from submitting an OPRA request for certain personnel records and police investigation reports because the Borough's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records. Moreover, the Borough's previous request form violated N.J.S.A. 47:1A-5.f because it did not include "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" or a "space for the custodian to list reasons if a request is denied in whole or in part." *Id.* However, pursuant to Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010), because the Custodian certified that the Borough officially began using a form mirroring the GRC's model request form on or about July 22, 2010 (before this complaint was filed), the GRC declines to order the Custodian to amend the Borough's form.
  
3. The Custodian violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.d because the check registry provided to the Complainant was merely an unusable stream of data from which the Complainant would not be able to glean any usable information, and thus was not responsive to the Complainant's request. *See* NJ Libertarian Party v. NJ Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-144 (April 2006). The Custodian has thus unlawfully denied access to the requested check registry by failing to convert same into an appropriate, legible medium. N.J.S.A. 47:1A-6. The Custodian must provide the requested check registry in a readable electronic format consistent with the Complainant's OPRA request.
  
4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>5</sup>, to the Executive Director.<sup>6</sup>**
  
5. Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the

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<sup>5</sup> "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."

<sup>6</sup> 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.

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

6. 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 5, 2011**

E-mail from the Custodian to the Complainant (with attachment). The Custodian states that pursuant to the Council's November 29, 2011 Interim Order, attached is the Borough's check registry data from January 1, 2008 to June 29, 2010 (the date of the Complainant's OPRA request). The Custodian states that this data is being provided from the Borough's software program used by the Chief Financial Officer ("CFO") and is readable as a .txt file.

### **December 5, 2011**

Custodian's response to the Council's Interim Order attaching an e-mail from the Custodian to the Complainant dated December 5, 2011 (with attachment). The Custodian certifies that pursuant to the Council's Order, she provided the Complainant with the Borough's check registry data from January 1, 2008 through June 29, 2010. The Custodian certifies that the check registry data was produced from the current software used by the CFO and is readable as a .txt file. The Custodian certifies that a copy of the e-mail transmitting the record is attached.

## **Analysis**

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

The Council's November 29, 2011 Interim Order specifically directed the Custodian to do the following:

**"...Custodian must provide the requested check registry in a readable electronic format consistent with the Complainant's OPRA request ... **The Custodian shall comply ... within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>7</sup>, to the Executive Director.**"**

The Custodian's response to the Council's Interim Order was due by close of business on December 7, 2011. The Custodian e-mailed the Complainant a legible copy

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<sup>7</sup> "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."  
Jesse Wolosky v. Borough of Mount Arlington (Morris), 2010-194 – Supplemental Findings and Recommendations of the Executive Director 3

of the Borough's check registry data in a format consistent with the Complainant's OPRA request on December 5, 2011. The Custodian subsequently provided certified confirmation of compliance with the Council's Order to the GRC on the same day.

Therefore, because the Custodian provided a legible copy of the Borough's check registry data in an electronic format consistent with the Complainant's OPRA request as required by the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the five (5) business days required by the Council's Interim Order, the Custodian has complied with the Council's November 29, 2011 Interim Order.

**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 OPRA by initially failing to address the Complainant's preferred method of delivery. The Custodian further violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.d. and unlawfully denied access to the requested check registry by

failing to convert same into an appropriate, legible medium. Additionally, the Borough's OPRA request form at the time of the Complainant's OPRA request was misleading to requestors because it failed to contain the exceptions set forth at N.J.S.A. 47:1A-10 and failed to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. See O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008). Moreover, the Borough's OPRA request form violated N.J.S.A. 47:1A-5.f because it did not include "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" or a "space for the custodian to list reasons if a request is denied in whole or in part." However, the Custodian complied with the Council's November 29, 2011 Interim Order and the Borough officially began using a request form mirroring the GRC's model request form on or about July 22, 2010 (before this complaint was filed). 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)). 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 (7<sup>th</sup> 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. Klagholtz, 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)."

In the instant complaint, the Custodian provided over 400 pages of check registry data to the Complainant. The Complainant subsequently filed this complaint contending that the Borough's OPRA request form contained false or misleading information and was missing elements required to be included on the form pursuant to N.J.S.A. 47:1A-5.f. The Complainant requested that the GRC order the Borough to revise its form. Moreover, the Complainant argued that the check registry data was provided as an unintelligible stream of data that was unreadable. The Complainant requested that the GRC order the Borough to provide the check registry in a readable format.

Regarding the OPRA request form, the Custodian certified that the Borough adopted officially began using a request form mirroring the GRC's model request form on or about July 22, 2010 (before this complaint was filed). Thus, the Council held that although the Borough's form was not compliant with OPRA at the time of the Complainant's OPRA request, no order to amend the form was necessary because the Borough did so prior to the filing of this complaint.

Regarding the check registry data, the Council held that the Custodian violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.d. because the check registry provided to the

Complainant was merely an unusable stream of data from which the Complainant would not be able to glean any usable information, and thus was not responsive to the Complainant's request. The Council reasoned that although the Custodian technically complied with N.J.S.A. 47:1A-5.d. by providing the record in one of the formats identified in the Complainant's OPRA request, providing access to a record composed of an unreadable stream of data does not constitute a lawful conversion of the record when viewed in the light of N.J.S.A. 47:1A-1. The Council thus ordered the Custodian to provide the requested check registry in a readable electronic format consistent with the Complainant's OPRA request.

The Custodian e-mailed the Complainant a legible copy of the Borough's check registry data in a format consistent with the Complainant's OPRA request on December 5, 2011. The Custodian subsequently provided certified confirmation of compliance with the Council's Order to the GRC on the same day. Thus, the Complainant is a prevailing party entitled to reasonable attorney's fees because the complaint brought about a change (voluntary or otherwise) in the Custodian's conduct.

Pursuant to Teeters, supra, and the Council's November 29, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, 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 provided a legible copy of the Borough's check registry data in a format consistent with the Complainant's OPRA request pursuant to the Council's Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. 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 a legible copy of the Borough's check registry data in an electronic format consistent with the Complainant's OPRA request as required by the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the five (5) business days required by



the Council's Interim Order, the Custodian has complied with the Council's November 29, 2011 Interim Order.

2. The Custodian violated OPRA by initially failing to address the Complainant's preferred method of delivery. The Custodian further violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.d. and unlawfully denied access to the requested check registry by failing to convert same into an appropriate, legible medium. Additionally, the Borough's OPRA request form at the time of the Complainant's OPRA request was misleading to requestors because it failed to contain the exceptions set forth at N.J.S.A. 47:1A-10 and failed to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. See O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008). Moreover, the Borough's OPRA request form violated N.J.S.A. 47:1A-5.f. because it did not include "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" or a "space for the custodian to list reasons if a request is denied in whole or in part." However, the Custodian complied with Council's November 29, 2011 Interim Order and the Borough officially began using a request form mirroring the GRC's model request form on or about July 22, 2010 (before this complaint was filed). 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), and the Council's November 29, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided a legible copy of the Borough's check registry data in a format consistent with the Complainant's OPRA request pursuant to the Council's Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. 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: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

January 24, 2012



## State of New Jersey

GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET

PO BOX 819

TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

### INTERIM ORDER

#### November 29, 2011 Government Records Council Meeting

Jesse Wolosky  
Complainant

Complaint No. 2010-194

v.

Borough of Mount Arlington (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. The Custodian’s initial response to the Complainant’s OPRA request is insufficient pursuant to N.J.S.A. 47:1A- 5.g., O’Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008), because she failed to address the Complainant’s preferred method of delivery (e-mail), instead stating that the records could be provided on CD or as paper copies.
2. The statement contained on the Borough’s OPRA request form that employee personnel files and police investigation records are exempt from public access under OPRA is misleading because said statement fails to address the exceptions set forth at N.J.S.A. 47:1A-10 and fails to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. As such, pursuant to O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008), a requestor may be deterred from submitting an OPRA request for certain personnel records and police investigation reports because the Borough’s form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records. Moreover, the Borough’s previous request form violated N.J.S.A. 47:1A-5.f. because it did not include “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” or a “space for the custodian to list reasons if a request is denied in whole or in part.” *Id.* However, pursuant Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010), because the Custodian certified that the Borough officially began using a form mirroring the GRC’s model request form on or about July 22, 2010 (before this complaint was filed), the GRC declines to order the Custodian to amend the Borough’s form.



3. The Custodian violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.d. because the check registry provided to the Complainant was merely an unusable stream of data from which the Complainant would not be able to glean any usable information, and thus was not responsive to the Complainant's request. *See NJ Libertarian Party v. NJ Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-144 (April 2006).* The Custodian has thus unlawfully denied access to the requested check registry by failing to convert same into an appropriate, legible medium. N.J.S.A. 47:1A-6. The Custodian must provide the requested check registry in a readable electronic format consistent with the Complainant's OPRA request.
4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>1</sup>, to the Executive Director.<sup>2</sup>**
5. 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.
6. 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 29<sup>th</sup> Day of November, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: November 30, 2011**

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<sup>1</sup> "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."

<sup>2</sup> 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.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-194**

v.

**Borough of Mount Arlington (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of:

1. The Borough of Mount Arlington's ("Borough") current OPRA request form.
2. Check registry data by check from January 1, 2008 to present of the current/main or general fund exported into Microsoft Word®, Excel, Access, comma delimited or fixed-field ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer ("CFO"), accountant or business administrator that is readable as a .txt file.<sup>3</sup>

**Request Made:** June 29, 2010

**Response Made:** July 9, 2010

**Custodian:** Linda DeSantis

**GRC Complaint Filed:** August 3, 2010<sup>4</sup>

**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 indicates that the preferred method of delivery is via e-mail.

**July 9, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request. The Custodian states that access to request Item No. 1 for the Borough's OPRA request form is granted. The Custodian states that she can provide the form as a .pdf file on a compact disc ("CD") or the Complainant can purchase a copy of the form, which is two (2) pages, for \$0.05 per page.

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

<sup>2</sup> Represented by Matt O'Donnell, Esq. (Morristown, NJ). Previously represented by Thomas A. Segreto, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

The Custodian further states that access to request Item No. 2 for the Borough's check registry from January 1, 2008 to present exported to Microsoft Word® is granted. The Custodian states that the check registry can be placed on a CD.

**July 12, 2010**

E-mail from the Complainant to the Custodian. The Complainant states that in regard to the Custodian's response to request Item No. 1 and No. 2, he requested that the records be sent to him via e-mail. The Complainant asks if there is a charge to e-mail the records.

**July 16, 2010**

E-mail from the Custodian to the Complainant with the following attachments:

- Borough's official OPRA request form.
- Check registry data from January 1, 2008 to present converted to Microsoft Word®.

The Custodian states that attached are the records responsive to the Complainant's OPRA request.

**July 16, 2010**

E-mail from the Complainant to the Custodian. The Complainant acknowledges receipt of the responsive records.

**August 3, 2010**

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

- Complainant's OPRA request dated June 29, 2010.
- Letter from the Custodian to the Complainant dated July 9, 2010.
- E-mail from the Complainant to the Custodian dated July 12, 2010.
- E-mail from the Custodian to the Complainant dated July 16, 2010.
- E-mail from the Complainant to the Custodian dated July 16, 2010.
- Records responsive to the Complainant's OPRA request:
  - Check registry data from 2008 to the date of the Complainant's OPRA request in Microsoft Word®.
  - The Borough's official OPRA request form.

Complainant's Counsel states that this complaint has been filed because the Borough's OPRA request form violates OPRA and the check registry provided by the Borough is unintelligible.

Counsel states that the Complainant submitted an OPRA request to the Borough on June 29, 2010. Counsel states that the Custodian responded on July 9, 2010 offering to put the OPRA request form on CD or provide paper copies and to put the check registry in Microsoft Word® on CD. Counsel states that the Complainant e-mailed the Custodian on July 12, 2010 reiterating that his preferred method of delivery was via e-mail and asking if there was a charge for transmission of the records electronically.

Counsel states that on July 16, 2010, the Custodian forwarded the responsive records to the Complainant via e-mail.

Counsel states 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 the public interest, and any limitations on the right of access accorded [under OPRA] ... shall be construed in favor of the public's right of access.” Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006)(citing N.J.S.A. 47:1A-1). Further, Counsel states that “[t]he purpose of OPRA is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.” Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004). Counsel states that in any action under OPRA, the burden of proof rests with the public agency. N.J.S.A. 47:1A-6.

#### Complainant's OPRA request Item No. 1

Counsel states that in O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (Interim Order dated May 28, 2008), the Council held that if a public agency's OPRA request form contained false or misleading information about OPRA, the result is a denial of access. Counsel contends that similar to the facts in O'Shea, *supra*, the Borough's OPRA request form provided to the Complainant states that “employee personnel files” are not public records, but did not also note the exceptions provided in N.J.S.A. 47:1A-10. Counsel further contends that the OPRA request form states that “police investigation records” are not public records and ignores several exceptions provided in N.J.S.A. 47:1A-3.b. Finally, Counsel contends that the Borough's OPRA request form does not contain the appeal process required pursuant to N.J.S.A. 47:1A-5.f. Counsel asserts that based on the Council's decision in O'Shea, *supra*, the GRC should order the Borough to revise its OPRA request form. *See also* O'Shea v. Township of Stillwater (Sussex), GRC Complaint No. 2007-253 (Interim Order dated November 19, 2008)(holding that several portions of the Township's OPRA request form were incomplete or misleading and ordering the Township to correct the deficiencies).

#### Complainant's OPRA request Item No. 2

Counsel states that the requested financial data was provided by the Custodian in an unreadable form. Counsel states that the data was not in columns, rather it consisted of lines upon lines of data that were not separated in any way. Counsel asserts that any attempt to put the registry in some type of readable searchable database, which is the Complainant's intent, is impossible.

Counsel asserts that the check registry was not provided in the format requested by the Complainant. Counsel argues that the Complainant requested the check registry in

a “comma delimited or fixed field”<sup>5</sup> format. Counsel argues that the Borough’s software is more than capable of producing readable text files, as is the case with most other public agencies the Complainant has dealt with and especially in Morris County. Counsel argues that instead of providing the check registry in a readable form, the Borough provided access to a stream of data that cannot be reformatted into a database except by repairing 818 pages of data line by line. Counsel contends that the Custodian’s failure to provide a readable version of the check registry constitutes a “deemed” denial. N.J.S.A. 47:1A-5.i.

Counsel requests the following relief:

1. A determination ordering the Custodian to either adopt the GRC’s model request form or amend the OPRA request form to eliminate misleading information and include information required by law;
2. A determination ordering the Custodian to disclose the check registry via e-mail in a readable format; and,
3. A determination that the Complainant is a prevailing party entitled to reasonable attorney’s fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

**August 6, 2010**

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

**August 9, 2010**

E-mail from the Custodian’s Counsel to the GRC. The Custodian’s Counsel requests an extension of five (5) business days to submit the requested SOI.

**August 9, 2010**

E-mail from the GRC to the Custodian’s Counsel. The GRC grants Counsel an extension of time until August 20, 2010 to submit the requested SOI.

**August 20, 2010**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated June 29, 2010 with the Custodian’s notes thereon.
- Letter from the Custodian to the Complainant dated July 9, 2010.

The Custodian certifies that whether any records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable in this complaint.<sup>6</sup>

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<sup>5</sup> The Complainant’s OPRA request sought the check registry in “electronic format, such as Word, Excel, Access, comma delimited or fixed-field, ASCII from Edmonds, MSI or the current form used by the CFO that is readable as ‘.txt’ file.”

<sup>6</sup> The Custodian does not certify to the search undertaken to locate responsive records as was required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).



The Custodian certifies that she received the Complainant's OPRA request on June 29, 2010. The Custodian certifies that she responded in writing to the Complainant on July 9, 2010 granting access to the requested records.

The Custodian certifies that the OPRA request form provided to the Complainant was the form that existed as of June 29, 2010; however, the request form has since changed and not as a result of the Complainant's OPRA request. The Custodian further certifies that the format of the check registry was a result of converting the check registry from a .pdf file into Microsoft Word®.

Custodian's Counsel submits a letter brief in support of the Borough's position. Counsel asserts that the Complainant has submitted a number of highly technical and vaguely worded OPRA requests to many municipalities in Morris County, including the Borough. Counsel argues that the Complainant filed this complaint notwithstanding the Custodian's timely compliance with the Complainant's OPRA request.

Counsel states that the Complainant submitted an OPRA request to the Borough on June 29, 2010. Counsel states that the Custodian responded in writing on July 9, 2010 granting access to the Borough's OPRA request form to be placed on a CD or provided in paper copy and the Borough's check registry from January 1, 2008 to present to be placed on a CD. Counsel states that on July 12, 2010, the Complainant sent an e-mail to the Custodian reiterating that his preferred method of delivery was via e-mail. Counsel states that the Custodian provided access to the responsive records via e-mail on July 16, 2010. Counsel states that the Complainant e-mailed the Custodian on July 16, 2010 acknowledging receipt of the records. Counsel states that no objections or further dialogue occurred between the parties until the Complainant's Counsel filed this complaint.

Counsel contends that the GRC should dismiss this complaint because the Custodian timely complied with the Complainant's OPRA request. Counsel asserts that Complainant's Counsel misinterpreted the language used in the Complainant's OPRA request. Counsel states that Complainant's Counsel asserted that the Borough's OPRA request form is misleading because it contains incomplete information. Counsel states that Complainant's Counsel further argued that the check registry provided was completely illegible and not separated into columns, rather consisted of lines and lines of data for which organization by the Complainant would be impossible.

#### Complainant's OPRA request Item No. 1

Counsel asserts that the most basic and common sense principle of OPRA is that OPRA requests must be analyzed as of the date of said request. Counsel states that OPRA provides for access to government records and provides a time frame within which a custodian must respond to an OPRA request. N.J.S.A. 47:1A-5. Counsel asserts that the only way a time frame makes sense is if an OPRA request is temporally fixed as of the date of said request.

Counsel states that the Superior Court has held that:

“The initial step in statutory construction is to look at the language of the statute. ‘If the statute is clear and unambiguous on its face and admits of the only one interpretation, we need delve no deeper than the act’s literal terms to divine the Legislature’s intent.’ ... If the statute is not clear and unambiguous on its face, we consider ‘extrinsic factors, such as the statute’s purpose, legislative history and statutory context to ascertain the legislature’s intent.’ ... We should also consider the policy underlying the statute.” (Citations omitted.) Simpkins v. Saiani, 356 N.J. Super. 26, 30-31 (App. Div. 2002).

Counsel states that a construction which renders statutory language meaningless must be avoided. Bergen Comm. Bank v. Sisler, 157 N.J. 188, 204 (1999). *See also* G.S. v. Dept. of Human Serv., 157 N.J. 161, 172 (1999)(a statute should be interpreted so as to give effect to all of its provisions, without rendering any language inoperative, superfluous, void or insignificant.)

Counsel asserts that the statutorily mandated time frame to respond in writing to an OPRA request would be rendered meaningless unless the statute is read to establish that a response to an OPRA request must be reviewed as of the date of said request. Counsel asserts that to read OPRA otherwise would impose on custodians an undue burden of providing records based on any given day following receipt of said request. Counsel asserts that this was clearly not the Legislature’s intent.

Counsel states that the Custodian provided the Complainant with the OPRA request form that existed as of the date of the Complainant’s OPRA request; however, the Borough was using a form based on the GRC’s model request form as of June 29, 2010.<sup>7</sup> Counsel asserts that the Borough was updating its OPRA request form consistent with the Court’s holding in Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010)<sup>8</sup> and chose to use the GRC’s model request form, omitting the pages containing the check box exemptions.

Counsel further argues that pursuant to Renna v. County of Union, 40 N.J. Super. 230, 232 (App. Div. 2009), the form is not even necessary for an OPRA request to be valid; thus, the Complainant’s argument regarding the form itself is entirely moot. Counsel states that in Renna, supra, the court held that, “all requests for OPRA records must be in writing; that such requests shall utilize the forms provided by the custodian of the records; however, no custodian shall withhold such records if the written request ... not presented on the official form, contains the requisite information prescribed in N.J.S.A. 47:1A-5.f.” Counsel further argues that Complainant Counsel’s reliance on O’Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (Interim Order dated May 28, 2008) is misplaced and no longer valid in light of Renna. Counsel asserts that the Council’s holding in O’Shea, was predicated on the existing assumption

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<sup>7</sup> Counsel later states in the SOI and in a subsequent e-mail to the GRC dated August 27, 2010 that the Borough began using an OPRA request form similar to the GRC’s model request form on July 1, 2010. However, the Custodian certified on September 13, 2010 that she believed the new OPRA request form was implemented on or about July 22, 2010 according to an e-mail from Ms. Mayers to the Custodian’s Counsel dated July 22, 2010.

<sup>8</sup> In Smith, supra, the court held that public agencies could charge no more than the reasonably approximated “actual cost” to produce copies of records to requestors.

that the form was required and also relies on GRC Advisory Opinion No. 2006-01 which was overruled by the Court in Renna.

Counsel again notes that the Borough was in the process of updating the OPRA request form to comply with the Court's decision in Smith, and implemented the amended form on July 1, 2010. Counsel states that this change took place prior to the filing of the instant complaint.

Counsel argues that nothing in the OPRA request form provided to the Complainant imposed an unreasonable obstacle to access to government records. Counsel contends that the Complainant never alleged that he was confused or misled by any information contained within the OPRA request form; thus, the Complainant lacks standing to bring this portion of the complaint. Counsel further asserts that the Complainant did not allege that the Custodian's response was false or misleading.

#### Complainant's OPRA request Item No. 2

Counsel states that OPRA provides 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. If a request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) *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.*” (Emphasis added.) N.J.S.A. 47:1A-5.d.*

Counsel argues that the Custodian complied with the Complainant's OPRA request by converting the check registry from .pdf into one of the formats identified in the Complainant's OPRA request (Microsoft Word®). Counsel contends that the Complainant did not object to nor express dissatisfaction with the check registry. Counsel asserts that the Complainant made no representation as to how he intended to use the check registry data, but all requested data was included in the responsive file. Counsel asserts that the only formats the Complainant specified to be “comma delimited or fixed field” were “ASCII from Edmonds, MSI or the current form used by the CFO that is readable as .txt.” Counsel argues that the Complainant did not request the Microsoft Word® conversion to be “comma delimited or fixed field;” however, if the Complainant did, the Borough would have surely advised the Complainant of a proposed special service charge for the additional work involved in inputting the data as requested into over 400 pages.

Counsel states that in Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (Interim Order dated November 4, 2009), the complainant requested delivery of certain records via fax or e-mail and the custodian stated that she did not maintain the records in a medium conducive to electronic delivery. Counsel states that the Council held that "...if the Custodian does not maintain any of the records responsive in an electronic medium, she is required to convert the records in order to provide them electronically via e-mail." *Id.* Counsel states that the Custodian herein complied with the Complainant's request to convert the existing data into a medium of his choice.

Counsel argues that OPRA imposes no obligation on a Custodian to ensure that the format of the data contained within a record must remain the same during the conversion process. Counsel argues that data is not always replicated exactly as the original file when converting an electronic file into another format. Counsel contends that the Complainant is merely dissatisfied with the manner in which he requested the check registry.

Counsel contends that the Custodian was only obligated to provide the check registry in one of the formats listed in the Complainant's OPRA request and cannot know how the Complainant intends to use the check registry. Counsel states that OPRA does not allow custodians to inquire about a requestor's intended use of the records sought.

Counsel asserts that here, the Complainant could have advised the Custodian that the check registry was difficult to read and revise his request to be more specific as to the type of format he sought. Counsel asserts that the Custodian would have advised the Complainant that a special service charge would be imposed to convert and format the record or that the Borough would have to contact a third party and pass the costs on to the Complainant. Counsel argues that instead, the Complainant filed this complaint alleging a denial of access.

#### **August 27, 2010**

Letter from Complainant's Counsel to the GRC. Counsel states that Custodian's Counsel contends that the Borough adopted a new OPRA request form and that said action was not the result of this complaint. Counsel argues that the Borough's alleged new OPRA request form is not attached to the SOI nor has the Custodian stated when the new form was put in use. Counsel argues that without this information, the Custodian has not borne her burden of proving that the Borough's OPRA request form complies with OPRA.

Moreover, Counsel contends that the Custodian was not compelled to provide the requested financial data in an unreadable Microsoft Word® file. Counsel states that the Complainant's OPRA request sought checks and disbursements in "... electronic format, such as Word, Excel, Access, comma delimited or fixed-field, ASCII ...". Counsel asserts that the purpose behind the request was so that the data could be analyzed.

Counsel states that when a requestor requests a record in a particular medium that is not maintained by a custodian, OPRA requires that the custodian "either convert the

record to the medium requested or provide a copy in some other meaningful medium.” N.J.S.A. 47:1A-5.d. Counsel argues that the Custodian converted the requested data, but not into a “meaningful medium,” because the file is unreadable. Counsel argues that the thousands of lines of code not separated by commas, tables or other delineations does not constitute a “meaningful medium.” Counsel argues that the Custodian further failed to explain why the requested financial data could not be converted into Microsoft Excel® or some other program.

Counsel disputes Custodian Counsel’s argument that the Complainant failed to object to the format of the records provided to the Complainant prior to the filing of this complaint. Counsel asserts that the Complainant does not bear the burden of objecting to the Custodian’s response when same fails to follow the law. Counsel states that OPRA places the burden on the Custodian to lawfully respond to the Complainant’s OPRA request.

Counsel further asserts that the contention that the Borough is incapable of producing a check registry in a text-searchable electronic format is not credible. Counsel asserts that proof is on the Borough’s own website. Counsel states that the Borough maintains a list of OPRA requests by name of people who make OPRA requests and the responses. Counsel states that on August 6, 2010, the Custodian provided the “June 1 Bill List” to a requestor.<sup>9</sup> Counsel states that the bill list was entitled “Check Register by Check Date.” Counsel states that the bill list, which is attached to this letter,<sup>10</sup> is neatly delineated into readable columns and asserts that the same type of output should have been provided to the Complainant.

Moreover, Counsel disputes Custodian Counsel’s argument that Renna, *supra*, implicitly overruled O’Shea and the long line of GRC case law holding that a public agency must utilize a form that does not contain any information that is misleading or false. Counsel argues that the quotes used by Custodian’s Counsel actually show that Renna did not overrule the Council’s holding in O’Shea. Counsel argues that Renna holds that “requestors shall utilize the forms provided by the custodian...” and that a request could not be denied solely because it was not presented on the agency’s form. Counsel argues that OPRA still requires that public agencies maintain official forms. N.J.S.A. 47:1A-5.f.

Counsel argues that in any event, Renna was decided on May 21, 2009. Counsel states that the GRC has continued to enforce O’Shea and its progeny without regard to Renna. *See Wolosky v. Township of Fredon (Sussex)*, GRC Complaint No. 2009-12 (April 2010)(holding that Fredon’s OPRA request form violated OPRA.)

### **August 27, 2010**

E-mail from Custodian’s Counsel to the GRC. Counsel requests that the GRC advise whether he is permitted to respond to Complainant Counsel’s August 27, 2010 submission. Counsel further requests that the GRC advise if it wishes to obtain a copy of the Borough’s OPRA request form which has been in use since July 1, 2010 as stated in

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<sup>9</sup> This Borough appears to only keep the current year’s OPRA requests on its website at <http://www.ci.mount-arlington.nj.us/OPRA%20Requests.html>.

<sup>10</sup> The bill list referenced to by the Complainant’s Counsel in his August 27, 2010 letter was not attached.

the SOI. Counsel states that for the GRC's reference, the Borough's OPRA request form can be located at <http://www.ci.mount-arlington.nj.us/pix/NewOPRAForm.pdf>.

### **August 31, 2010**

E-mail from the GRC to Custodian's Counsel. The GRC states that its regulations at *N.J.A.C. 5:105-2* set forth the complaint process, including which submissions a party must provide. The GRC states that although *N.J.A.C. 5:105-2* does not expressly permit additional submissions beyond the Denial of Access Complaint and SOI, and is silent as to whether any additional submissions are prohibited, as a matter of practice the GRC will, in its sole discretion, consider additional submissions which provide new information or evidence that was not available at the time of the party's first submission.

The GRC states if Counsel wishes to submit a rebuttal that provides new information or proof such as evidence or certifications regarding this matter, Counsel may do so at this time.

Additionally, the GRC states that it will print a copy of the Borough's OPRA request form from the link provided by Counsel.<sup>11</sup>

### **August 5, 2011**

E-mail from the GRC to Complainant's Counsel. The GRC states that in reviewing Counsel's letter to the GRC dated August 27, 2010, the letter appears to be missing an attachment Counsel described as a bill list entitled "Check Register by Check Date." The GRC states that the omission of this attachment may have been an oversight or technical error that can be corrected by resubmitting the letter with the referenced document attached. The GRC requests that Counsel provide the August 20, 2010 correspondence by August 9, 2011.<sup>12</sup>

### **August 30, 2011**

E-mail from the GRC to the Custodian. The GRC states that it is in need of clarification regarding when the Borough adopted its current OPRA request form. The GRC states that in the SOI, Custodian's Counsel states that the form provided to the Complainant in response to his OPRA request was replaced by a form similar to the GRC's model request form on July 1, 2010. The GRC states that Counsel later provided the website link to the Borough's current OPRA request form in an e-mail to the GRC dated August 27, 2010. The GRC requests that the Custodian certify to the following:

1. On what date did the Borough adopt and begin using its current OPRA request form? Please provide any evidence to corroborate the certification, if any exists.

The GRC requests that the Custodian provide the requested certification by September 2, 2011.

### **September 12, 2011**

E-mail from the GRC to the Custodian attaching an e-mail from the GRC to the Custodian dated August 31, 2011.

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<sup>11</sup> The Custodian's Counsel did not provide any additional correspondence in response to this e-mail.

<sup>12</sup> The GRC did not receive a response from the Complainant's Counsel.

The GRC states that on August 31, 2011, it sent an e-mail to the Custodian seeking additional information regarding the Borough's adoption of its current OPRA request form. The GRC states that it appears that the contact information on file was out of date; therefore, the GRC is resending its request for additional information and requesting that the Custodian provide the requested legal certification by September 13, 2011.

### **September 13, 2011**

Custodian's legal certification attaching an e-mail from Ms. Mayer to the Custodian's Counsel dated July 22, 2010. The Custodian certifies that she believes the Borough began using its current OPRA request form on or about July 22, 2010. The Custodian certifies that this is based on the attached e-mail in which Ms. Mayer sends Counsel a copy of the Borough's new OPRA request form based on the GRC's model request form.

### **Analysis**

#### **Whether the Custodian's initial response to the Complainant's OPRA request was insufficient?**

OPRA also provides that:

"[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ..." N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ..." (Emphasis added.) N.J.S.A. 47:1A-5.i.

Although the Complainant did not raise the issue of whether the Custodian sufficiently responded to the Complainant's OPRA request, the GRC must address this issue.

In the Complainant's OPRA request, he identified his preferred method of delivery as e-mail. The Custodian initially responded in writing on the seventh (7<sup>th</sup>) business day after receipt of the Complainant's OPRA request granting access to both request items. The Custodian stated that the Borough's request form could be provided as a .pdf file on CD or as paper copies. The Custodian further stated that the check

registry could be provided on a CD. The Complainant subsequently e-mailed the Custodian on July 12, 2010 advising that he requested the records electronically. The Custodian provided the responsive records to the Complainant on July 16, 2010 via the preferred method of delivery.

In O’Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), the complainant contended that the custodian’s response to his OPRA request was insufficient because it did not address his preference for e-mailed records over paper copies via regular mail. The Council held that “[a]ccording to [the] language of N.J.S.A. 47:1A-5.g., the custodian was given two ways to comply and should have, therefore, responded acknowledging the complainant’s preferences with a sufficient response for each.”<sup>13</sup> The Council further held that “the Custodian’s response is insufficient because she failed to specifically address the Complainant’s preference for receipt of records.”

Moreover, in Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008), the complainant requested that the records be provided via e-mail or facsimile, and the custodian failed to address the method of delivery in his response to the OPRA request. Despite the fact the custodian responded in writing granting access to the requested record in a timely manner, the Council determined that the “Custodian’s response [was] insufficient because she failed to specifically address the Complainant’s preference for receipt of the records...[t]herefore, the Custodian...violated OPRA...” *Id.*

Here, the Custodian initially granted access to the responsive records but not in the preferred method of delivery. Further, the Custodian provided the records via e-mail only after the Complainant contacted the Custodian reiterating his preferred method of delivery. Thus the Custodian’s initial response to the Complainant’s OPRA request was insufficient.

Therefore, the Custodian’s initial response to the Complainant’s OPRA request is insufficient pursuant to N.J.S.A. 47:1A- 5.g., O’Shea, supra, and Paff, supra, because she failed to address the Complainant’s preferred method of delivery (e-mail), instead stating that the records could be provided on CD or as paper copies.

### **Whether the Borough’s OPRA request form violates OPRA?**

OPRA provides that:

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

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<sup>13</sup> The Council noted that N.J.S.A. 47:1A-5.g. states that if a Custodian is “unable to comply with a request for access, then the Custodian shall indicate the specific basis” for noncompliance. In O’Shea, supra, the Complainant stated in his request that receipt of the requested records by e-mail was preferred over having to pay copying costs.



available, and the fees to be charged. The form shall also include the following:

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

The Complainant herein argued in the Denial of Access Complaint that the Borough’s OPRA request form noted that employee personnel files and police investigation records are not “public records” contrary to the exceptions contained in N.J.S.A. 47:1A-3.b. (listing criminal investigatory information that must be disclosed) and N.J.S.A. 47:1A-10 (listing personnel information that must be disclosed). The Complainant stated that the Council previously held that OPRA request forms containing false or misleading information constitute a denial of access. O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008). The Complainant further argued that the Borough’s form did not contain the appeals process, which is required pursuant to N.J.S.A. 47:1A-5.f.

The crux of the argument in O’Shea, supra, was based on language included on the Township’s official OPRA request form. This language, which asserted that personnel records would not be provided as part of an OPRA request, failed to include the exceptions to the personnel record exemption contained in N.J.S.A. 47:1A-10. The complainant argued that the language created a barrier to public records. The Council in turn held that “the Township’s form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records” and ordered the Township to either delete the language or include the exceptions to personnel records afforded in N.J.S.A. 47:1A-10:

- 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.

Although O’Shea, *supra*, addresses a form noting that personnel records are exempt from disclosure under OPRA, the Council’s holding in Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010) addresses forms noting that police investigatory information is exempt from disclosure (in addition to the personnel records issue):

“... the Complainant asserts that the [City’s] OPRA request form makes another blanket statement that police investigation records are not public records. The Complainant states that N.J.S.A. 47:1A-3.b. expressly lists several exceptions to this rule.

OPRA does exempt from public access criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. However, OPRA also provides that:

‘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. (Emphasis added).” *Id.* at pg. 13.

The Council ultimately held that because the City’s form did not note that arrest reports, which pertain to criminal investigations, were deemed to be accessible records (pursuant to Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2009)), the City’s form contained misleading information that may deter requestors from submitting OPRA requests for same.

The GRC reviewed the OPRA request form submitted by the Complainant as part of this complaint and confirmed that said form is similar to the forms at issue in both O’Shea, supra, and Paff, supra. Specifically, the Borough’s form states that “[t]he term [of government record] does not include employee personnel files [and] police investigation records ...” N.J.S.A. 47:1A-1 provides that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions...” Additionally, custodians must grant or deny access to records in accordance with the law. As such, pursuant to O’Shea, supra, and Paff, supra, a requestor may be deterred from submitting an OPRA request for certain personnel records and police investigation reports because the Borough’s form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records.

Moreover, the form does not include “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” or a “space for the custodian to list reasons if a request is denied in whole or in part.” N.J.S.A. 47:1A-5.f. Thus, the form used by the Borough at the time of the Complainant’s OPRA request violated OPRA pursuant to N.J.S.A. 47:1A-5.f.

However, this complaint differs from O’Shea, supra, in that the Borough subsequently changed its OPRA request form to mirror the GRC’s model request form following receipt of the Complainant’s OPRA request and prior to the filing of this complaint. In the SOI, Custodian’s Counsel stated that the Borough began using a form consistent with the GRC’s model request form on July 1, 2010 (omitting the check box exemption pages). Counsel further asserted that this action was not prompted by the filing of this complaint.

Complainant’s Counsel e-mailed the GRC on August 27, 2010 disputing that the Borough did not provide the alleged new OPRA request form as part of the SOI nor did the Custodian certify to the date the form was adopted. Counsel further argued that without this information, the Custodian did not bear her burden of proving that the Borough’s OPRA request form complies with OPRA.

Custodian’s Counsel subsequently sent an e-mail to the GRC on August 27, 2010 attaching a website link to the Borough’s new form.<sup>14</sup> On August 30, 2011, the GRC

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<sup>14</sup> <http://www.ci.mount-arlington.nj.us/pix/NewOPRAForm.pdf>.

requested that the Custodian certify to the date the Borough began using the new OPRA request form. The Custodian responded on September 13, 2011 certifying that the Borough began using the new OPRA request form on or about July 22, 2010. The Custodian supplemented her certification with an e-mail from Ms. Mayer to the Custodian's Counsel dated July 22, 2010 in which Ms. Mayer attached a copy of the Borough's new form based off the GRC's model request form.

The facts of this complaint are more similar to Paff, *supra*, in which the Council determined that the request form provided to the complainant in response to his OPRA request was in fact deficient. However, in Paff, the Council recognized that the custodian later adopted the GRC's model request form. The GRC found same on the City's website and confirmed that the form mirrored the GRC's model request form. Based on the foregoing, the Council declined to order the City to amend its OPRA request form. In the matter currently before the Council, the Custodian proved that the Borough was using a form similar to the GRC's model request form (with the exception of the exemption check box pages); thus, the GRC declines to order the Borough to amend its current form.

Therefore, the Borough's previous OPRA request form violated OPRA pursuant to N.J.S.A. 47:1A-5.f. Specifically, the previous OPRA request form contained a statement that employee personnel files and police investigation records are exempt from public access under OPRA, which was misleading because said statement failed to address the exceptions set forth at N.J.S.A. 47:1A-10 and failed to address the disclosure of arrest reports pursuant to N.J.S.A. 47:1A-3.b. As such, pursuant to O'Shea, *supra*, a requestor could be deterred from submitting an OPRA request for certain personnel records and police investigation reports because the Borough's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records. Moreover, the Borough's previous OPRA request form violated N.J.S.A. 47:1A-5.f. because it did not include "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" or a "space for the custodian to list reasons if a request is denied in whole or in part." *Id.* However, pursuant to Paff, *supra*, because the Custodian certified that the Borough officially began using a form mirroring the GRC's model request form on or about July 22, 2010 (before this complaint was filed), the GRC declines to order the Custodian to amend the Borough's form.

Moreover, the Custodian's Counsel argued in the SOI that the Court's holding in Renna v. County of Union, 40 N.J. Super. 230, 232 (App. Div. 2009) deemed that an OPRA request need not be submitted on an OPRA request form, thus mooting the Complainant's argument. Although the Court's holding in Renna, *supra*, did address whether the submission of a request on a request form is required, the Court did not render N.J.S.A. 47:1A-5.f. moot. OPRA still requires that every public agency adopt a form consistent with N.J.S.A. 47:1A-5.f. To the contrary, the Court's holding in Renna, *supra*, no longer allows custodians to deny access to requests for the sole basis that same is not on a form but does provide that a requestor submit his/her request in an equivalent writing.

**Whether the Custodian unlawfully denied access to the requested record by failing to convert same in an appropriate legible medium?**

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...* and *any limitations on the right of access ... shall be construed in favor of the public's right of access...*” (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 provides 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.* If a request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) 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.” (Emphasis added.) N.J.S.A. 47:1A-5.d.

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 this instant complaint, the Complainant submitted his OPRA request Item No. 2 for check registry data and noted that he wished to obtain the data via e-mail in one of several types of formats to include "... Microsoft Word®, Excel, Access, comma delimited or fixed-field ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer ("CFO"), accountant or business administrator that is readable as a .txt file." On July 16, 2010, the Custodian responded to the Complainant's OPRA request Item No. 2 providing over 400 pages of data. The Complainant filed this complaint arguing that the records were provided in an unreadable form. The Complainant supplemented this assertion by attaching a copy of the check registry provided by the Custodian. Complainant's Counsel argued that the record was not provided in the "comma delimited or fixed field" format; rather, the Custodian provided access to a stream of data that could not be reformatted into a database except by repairing 818 pages of data line by line.

In the SOI, Custodian's Counsel argued that the Custodian complied with the Complainant's OPRA request item by converting the .pdf version of the check registry into Microsoft Word®. Counsel further argued that the Complainant did not associate "comma delimited or fixed field" with Microsoft Word®; if he had done so, the Borough would have charged a special service charge to input the data into a document over 400 pages. Counsel further argued that pursuant to Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (Interim Order dated November 4, 2009), the Custodian followed N.J.S.A. 47:1A-5.d. by converting the check registry from a .pdf file into a medium of the Complainant's choice. Counsel contended that the Custodian was only required to provide the check registry in one of the formats listed in the Complainant's OPRA request.

Complainant's Counsel disputed Custodian Counsel's argument that the Custodian complied with OPRA. Complainant's Counsel argued that although the Custodian may have converted the check registry it was not in a "meaningful medium" because the file was unreadable. *See* N.J.S.A. 47:1A-5.d.

The Legislature did not define what the term "medium" in N.J.S.A. 47:1A-5.d. would encompass; thus, the GRC has previously contemplated the definition of "medium" from three separate sources:

"The American Heritage Dictionary of the English Language, Fourth Edition (Copyright 2000 by Houghton Mifflin Company) defines medium as 'an intervening substance through which something else is transmitted or carried on.' And, its plural abstraction 'media' is defined in the same dictionary as 'an object or device, such as a disk, on which data is stored.' Further, the Wikipedia (free encyclopedia) (Copyright 2001-2005) describes a 'recording medium' as 'a physical material that holds information expressed in any of the existing recording formats.'" *See* NJ Libertarian Party v. NJ Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-114 (April 2006) *and*

Fosque v. New Jersey Department of Corrections, GRC Complaint No. 2008-185 (June 2009).

The medium sought in this matter is “Microsoft Word®, Excel, Access, comma delimited or fixed-field ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer (“CFO”), accountant or business administrator that is readable as a .txt file.” As noted above, the Custodian chose to convert the check registry from .pdf into Microsoft Word® and provided same to the Complainant. Although the Microsoft Word® format in which the Custodian provided the requested records was one of the mediums which the Complainant specified, the Complainant argued that such format was unreadable and did not represent a “meaningful medium” as required in N.J.S.A. 47:1A-5.d.

As part of the Custodian’s SOI, Custodian’s Counsel argued that OPRA imposes no obligation on a Custodian to ensure that the format of the data contained within a record must remain the same during the conversion process. Counsel further argued that data is not always replicated exactly as the original file when converting an electronic file into another format and contended that the Complainant is merely dissatisfied with the manner in which he requested the check registry.

The Custodian herein technically complied with N.J.S.A. 47:1A-5.d. by converting the requested data “to the medium requested.” *Id.* The Custodian’s Counsel noted this fact in the SOI; however, such argument places form over substance and ignores the requirement in OPRA that “any limitations on the right of access ... shall be construed in favor of the public’s right of access.” N.J.S.A. 47:1A-1. Providing access to a record composed of an unreadable stream of data does not constitute a lawful conversion of the record when viewed in the light of N.J.S.A. 47:1A-1.

Moreover, the issue in the instant complaint is not whether the Custodian failed to comply with N.J.S.A. 47:1A-5.d. by not providing the check registry “in some other meaningful medium,” as suggested by the Complainant’s Counsel. Specifically, the requested check registry was already in electronic format (a .pdf file) and the Complainant’s OPRA request identified several different electronic formats in which the Custodian could provide the check registry. The plain language of OPRA provides that a custodian must provide a record “in the medium requested,” in this case an electronic format compatible with “Microsoft Word®, Excel, Access, comma delimited or fixed-field ASCII from Edmunds, MSI or the current software used by the Chief Financial Officer (“CFO”), accountant or business administrator that is readable as a .txt file.”

The Council previously made a similar distinction in NJ Libertarian Party v. NJ Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-144 (April 2006). In that complaint, the custodian offered the requested records to the complainant in the medium requested (CD). The complainant subsequently raised, among other issues, the issue of whether the record has been unlawfully denied based on the fact that the Custodian failed to address whether the requested record could be converted to Microsoft Word®, WordPerfect or other generally available format. The complainant further argued that the CD was not readable without the purchasing proprietary software for which the custodian proposed a cost of \$139.00.

The Council noted that based on the encyclopedic definition of “medium,” it may be determined that the custodian lawfully provided access to the responsive records because same were provided on the “physical material ... requested by the Complainant.” *Id.* However, the Council held that “the fact that the Complainant cannot read the records in the medium he requested does not invoke the Custodian’s obligation to provide the records in ‘some other meaningful medium’ pursuant to OPRA.” *Id.* The Council reasoned that:

“... a custodian is obligated to provide a copy of a requested record in some other meaningful medium *only* ‘if the public agency *does not maintain the record in the medium requested.*’ In that situation, the custodian must either convert the record to the medium requested or provide a copy in some other meaningful medium ... The Custodian in this case has certified that the [CD](which is the medium requested by the Complainant) is the medium on which the requested record is maintained by the agency. Therefore, given the plain language of OPRA, the Custodian is under no obligation to convert the ‘CD’ to ‘some other meaningful medium’ since the agency *does* maintain the record in the medium requested.” (Emphasis added.) *Id.*

The facts herein are similar to those in NJ Libertarian in that the Custodian maintained the check registry electronically (“pdf”) and converted same into another electronic format (“Microsoft Word®”). Thus, the GRC must determine whether the Custodian’s conversion of the check registry into Microsoft Word®, which created an unreadable record from which the Complainant could not glean useful information, constitutes a violation of OPRA and an unlawful denial of access to the requested registry.

A review of the check registry attached to the Complainant’s Denial of Access Complaint reveals that the record is, in fact, a stream of data from which the Complainant would not be able to glean any usable information. The Custodian chose to provide the requested check registry as a stream of data; thus, the record was not converted properly because the illegible record does not “... maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.” Times of Trenton Publ’g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean County Prosecutor’s Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). Thus, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.d. by failing to provide the check registry in the format most likely to produce a legible record.<sup>15</sup>

Further, the Borough’s argument that the Custodian was only required to provide the check registry in one of the formats listed in the Complainant’s OPRA request is disingenuous. Although the Borough correctly notes that OPRA imposes no obligation on a Custodian to ensure that the format of the data contained within a record must remain the same during the conversion process, the Custodian should have known upon completion of the conversion that the resulting file was merely an unusable stream of data

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<sup>15</sup> The GRC will not address the parties’ dispute over whether the placement of “comma delimited or fixed-field” referred to all file types identified by the Complainant or only those following the term. Jesse Wolosky v. Borough of Mount Arlington (Morris), 2010-194 – Findings and Recommendations of the Executive Director 20



from which the Complainant would not be able to glean any usable information, and thus was not responsive to the Complainant's request.

Therefore, the Custodian violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.d. because the check registry provided to the Complainant was merely an unusable stream of data from which the Complainant would not be able to glean any usable information, and thus was not responsive to the Complainant's request. See N.J. Libertarian, *supra*. The Custodian has thus unlawfully denied access to the requested check registry by failing to convert same into an appropriate, legible medium. N.J.S.A. 47:1A-6. The Custodian must provide the requested check registry in a readable electronic format consistent with the Complainant's OPRA request.

**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. The Custodian's initial response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A- 5.g., O'Shea v. Township of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008), because she failed to address the Complainant's preferred method of delivery (e-mail), instead stating that the records could be provided on CD or as paper copies.
2. The statement contained on the Borough's OPRA request form that employee personnel files and police investigation records are exempt from public access under OPRA is misleading because said statement fails to address the exceptions set forth at N.J.S.A. 47:1A-10 and fails to address the disclosure of arrest reports provided for under N.J.S.A. 47:1A-3.b. As such, pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008), a requestor may be deterred from submitting an OPRA request for certain personnel records and police investigation reports because the Borough's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records. Moreover, the Borough's previous request form violated N.J.S.A. 47:1A-5.f. because it did not include "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” or a “space for the custodian to list reasons if a request is denied in whole or in part.” *Id.* However, pursuant Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010), because the Custodian certified that the Borough officially began using a form mirroring the GRC’s model request form on or about July 22, 2010 (before this complaint was filed), the GRC declines to order the Custodian to amend the Borough’s form.

3. The Custodian violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.d. because the check registry provided to the Complainant was merely an unusable stream of data from which the Complainant would not be able to glean any usable information, and thus was not responsive to the Complainant’s request. *See* NJ Libertarian Party v. NJ Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-144 (April 2006). The Custodian has thus unlawfully denied access to the requested check registry by failing to convert same into an appropriate, legible medium. N.J.S.A. 47:1A-6. The Custodian must provide the requested check registry in a readable electronic format consistent with the Complainant’s OPRA request.
4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>16</sup>, to the Executive Director.<sup>17</sup>**
5. 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.
6. 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: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

November 22, 2011

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<sup>16</sup> "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."

<sup>17</sup> 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.