



**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**

**February 25, 2014 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2011-134

v.

City of Paterson (Passaic)  
Custodian of Record

At the February 25, 2014 public meeting, the Government Records Council ("Council") considered the February 18, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed because the Complainant (via Counsel) withdrew his complaint in a letter to the Honorable Leslie Z. Celentano, Administrative Law Judge, dated January 10, 2014, because the parties have agreed to settle the matter. Therefore, no further adjudication is required.

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



Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of February, 2014

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 26, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
February 25, 2014 Council Meeting**

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

**GRC Complaint No. 2011-134**

v.

**City of Paterson (Passaic)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. An audio recording of the most recent regular public meeting of the governing body that was recorded.
2. The minutes of each and every closed/executive session held by the governing body from January 1, 2010 to December 31, 2010 that have been approved.
3. A blank copy of the current OPRA request form.<sup>3</sup>

**Custodian of Record:** Jane E. Williams-Warren

**Request Received by Custodian:** February 22, 2011

**Response Made by Custodian:** March 10, 2011

**GRC Complaint Received:** April 20, 2011

**Background**

**September 25, 2012 Council Meeting:**

At its September 25, 2012 public meeting, the Council considered the September 18, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian failed to timely provide the GRC's Executive Director with a certification of compliance within the required five (5) business days and failed to submit competent evidence that she informed the Complainant of the applicable charges or otherwise made the records available to the Complainant, the Custodian did not comply with the Council's August 28, 2012 Interim Order.
2. In the instant matter, the Custodian initially unlawfully denied the Complainant access by (1) untimely responding to the Complainant's OPRA request, (2) unlawfully denied

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

<sup>2</sup> Represented by Paul Forsman, Esq.

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

access to the requested executive session minutes, (3) charging inaccurate cost of duplication in violation of N.J.S.A. 47:1A-5(b), and (4) adopted a defective OPRA request form that deviated from the requirements of N.J.S.A. 47:1A-5(f). Additionally, the Custodian did not fully comply with the Council's Interim Order dated August 28, 2012 because she failed to provide certified confirmation of compliance within the prescribed five (5) business days. However, in the Custodian's September 10, 2012 certification of compliance, the Custodian certified that the City's official OPRA request form has been amended to comply with the requirements of N.J.S.A. 47:1A-5(f), and the Custodian certified that she will provide the Complainant with the requested audio records and minutes upon receipt of the applicable charges. Accordingly, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Id. at 432. 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. 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 and Mason. 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 Dep't of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Twp. of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, adjudicated concurrently herewith, an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances . . . justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

#### Procedural History:

On September 27, 2012, the Council distributed its Interim Order to all parties. On April 29, 2013, the complaint was transmitted to the Office of Administrative Law ("OAL").

On January 10, 2014, the Complainant's Counsel sent a letter to the Honorable Leslie Z. Celentano, Administrative Law Judge, withdrawing this complaint because the parties have agreed to settle this matter.

### **Analysis**

No analysis required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant (via Counsel) withdrew his complaint in a letter to the Honorable Leslie Z. Celentano, Administrative Law Judge, dated January 10, 2014, because the parties have agreed to settle the matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

February 18, 2014



**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*

**INTERIM ORDER**

**September 25, 2012 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2011-134

v.

City of Paterson (Passaic)  
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to timely provide the GRC’s Executive Director with a certification of compliance within the required five (5) business days and failed to submit competent evidence that she informed the Complainant of the applicable charges or otherwise made the records available to the Complainant, the Custodian did not comply with the Council’s August 28, 2012 Interim Order.
2. In the instant matter, the Custodian initially unlawfully denied the Complainant access by (1) untimely responding to the Complainant’s OPRA request, (2) unlawfully denied access to the requested executive session minutes, (3) charging inaccurate cost of duplication in violation of N.J.S.A. 47:1A-5.b., and (4) adopted a defective OPRA request form that deviated from the requirements of N.J.S.A. 47:1A-5.f. Additionally, the Custodian did not fully comply with the Council’s Interim Order dated August 28, 2012 because she failed to provide certified confirmation of compliance within the prescribed five (5) business days. However, in the Custodian’s September 10, 2012 certification of compliance, the Custodian certified that the City’s official OPRA request form has been amended to comply with the requirements of N.J.S.A. 47:1A-5.f., and the Custodian certified that she will provide the Complainant with the requested audio records and minutes upon receipt of the applicable charges. Accordingly, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. 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. 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 and Mason. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees. Based on the New Jersey Supreme Court’s decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council’s decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, adjudicated concurrently herewith, an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of “unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]” this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of September, 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: September 27, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 25, 2012 Council Meeting**

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

**GRC Complaint No. 2011-134**

v.

**City of Paterson (Passaic)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. An audio recording of the most recent regular public meeting of the governing body that was recorded.
2. The minutes of each and every closed/executive session held by the governing body from January 1, 2010 to December 31, 2010 that have been approved.
3. A blank copy of the current OPRA request form.<sup>3</sup>

**Request Made:** February 22, 2011

**Response Made:** March 10, 2011

**Custodian:** Jane E. Williams-Warren

**GRC Complaint Filed:** April 20, 2011<sup>4</sup>

**Background**

**August 28, 2012**

At its August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 Executive Director’s Findings and Recommendations and all related documents 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 did not timely respond to the Complainant’s OPRA request. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A.

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

<sup>2</sup> Represented by Paul Forsman, Esq.

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

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



47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), and Jesse Wolosky v. Sparta Board of Education (Sussex), 2009-56 (October 2009), the Custodian's proposed charge of \$5.00 for reproduction of the requested audio recording onto DVD is not the actual cost and is in violation of N.J.S.A. 47:1A-5.b. See also O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). Furthermore, the Custodian failed to bear his burden of proving that the proposed charge was reasonable pursuant to N.J.S.A. 47:1A-6.
3. The Custodian must compute the actual cost for the duplication of the requested audio recording of the most recent regular public meeting of the governing body and provide the Complainant with said record upon the Complainant's payment of the applicable charge pursuant to N.J.S.A. 47:1A-5.b.
4. The Custodian has failed to meet her burden of proving a lawful denial of access to the requested approved minutes of each and every closed/executive session held by the governing body from January 1, 2010 to December 31, 2010 as required by N.J.S.A. 47:1A-6. Therefore, the Custodian must provide the Complainant with said records upon the Complainant's payment of any applicable charges pursuant to N.J.S.A. 47:1A-5.b.
5. The City of Paterson's official OPRA request form is deficient because (a) the form states that "employee personnel files" were not public records, but does not state OPRA's exceptions to the general rule that personnel files are not public records; (b) the form states that "police investigation records" were not public records, ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b; and (c) contains the repealed copy rates of \$0.75, \$0.50, and \$0.25 per page and not the updated statutory rates of \$0.05 (letter size) and \$0.07 (legal size) per page. Accordingly, consistent with Martin O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the City's official OPRA request form is deficient and potentially misleading to requestors. In essence, such a form constitutes a denial of access. *Id.* As such, the City of Paterson shall either adopt the GRC's Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form by:

- Providing a section that details the exemptions in regards to personnel file requests listed in N.J.S.A. 47:1A-10.
  - Providing the details of the circumstances in which police investigation records can be requested under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
  - Amending the outdated copy rates to reflect the current copy rates of \$0.05 and \$0.07 as contained in N.J.S.A. 47:1A-5.b.
6. **The Custodian shall comply with Items No. 3, 4 and 5 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>5</sup>, to the Executive Director. If the Complainant fails to accept the proposed charge for duplication of the requested audio recording within five (5) days of notification of same, the Custodian shall so certify to the Council.**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

**August 29, 2012**

Council's Interim Order distributed to the parties.

**September 10, 2012**

Letter from the Custodian to the GRC. The Custodian certifies that she has computed the actual cost for the duplication of the requested audio recording of the most recent regular public meeting of the governing body. The Custodian certifies that she will provide the recording to the Complainant upon receiving a payment of \$0.75 per DVD/CD in accordance with N.J.S.A. 47:1A-5.b.

The Custodian further certifies that she will provide the Complainant with copies of the requested minutes upon receipt of payment of any applicable charges for the requested minutes. The Custodian also certifies that the City's official OPRA request form has been amended as required by the GRC's August 28, 2012 Interim Order.

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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."

## Analysis

### **Whether the Custodian complied with the Council's August 28, 2012 Interim Order?**

The Council's August 28, 2012 Interim Order specifically directed the Township Police Department to disclose the requested accident reports and provide certification of compliance to the GRC's Executive Director within five (5) business days. The Order was distributed by the Council on August 29, 2012. However, the Custodian did not provide the Council with certified confirmation of compliance until September 10, 2012, the seventh (7<sup>th</sup>) business day following the receipt of the Council's Interim Order. Accordingly, the Custodian's submission of the certification of compliance is untimely.

In the Custodian's September 10, 2012 certification of compliance, the Custodian certified that the City's official OPRA request form has been amended to comply with the requirements of N.J.S.A. 47:1A-5.f. In addition, the Custodian certified that she will provide the Complainant with the requested audio records and minutes upon receipt of the applicable charges.

Accordingly, because the Custodian failed to timely provide the GRC's Executive Director with a certification of compliance within the required five (5) business days, the Custodian did not fully comply with the Council's August 28, 2012 Interim Order.

### **Whether the Custodian's delay in access to the requested records and deficient OPRA request form 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).

Here, the Custodian initially unlawfully denied the Complainant access by (1) untimely responding to the Complainant’s OPRA request, (2) unlawfully denied access to the requested executive session minutes, (3) charging inaccurate cost of duplication in violation of N.J.S.A. 47:1A-5.b., and (4) adopted a defective OPRA request form that deviated from the requirements of N.J.S.A. 47:1A-5.f. Additionally, the Custodian did not fully comply with the Council’s Interim Order dated August 28, 2012 because she failed to provide certified confirmation of compliance within the prescribed five (5) business days. However, in the Custodian’s September 10, 2012 certification of compliance, the Custodian certified that the City’s official OPRA request form has been amended to comply with the requirements of N.J.S.A. 47:1A-5.f., and the Custodian certified that she will provide the Complainant with the requested audio records and minutes upon receipt of the applicable charges. Accordingly, 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 when the Complainant is an attorney?**

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.

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. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). "But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes." 196 N.J. at 73 (citations omitted).

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

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

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

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, supra, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005) (NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale

underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

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

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

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

The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can

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<sup>6</sup> The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

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 matter, the GRC issued an Interim Order on August 28, 2012 that found that the Custodian had unlawfully denied access to the requested audio recording and executive session minutes. Pursuant to this Interim Order, the Custodian was ordered to make the responsive records available to the Complainant. Accordingly, the evidence of record indicates that the Complainant’s Denial of Access Complaint is the catalyst for the relief ultimately achieved.

Therefore, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. 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. 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 and Mason. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees. Based on the New Jersey Supreme Court’s decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council’s decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, adjudicated concurrently herewith, an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of “unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]” this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to timely provide the GRC’s Executive Director with a certification of compliance within the required five (5) business days and failed to submit competent evidence that she informed the Complainant of the applicable charges or otherwise made the records available to the Complainant, the Custodian did not comply with the Council’s August 28, 2012 Interim Order.
2. In the instant matter, the Custodian initially unlawfully denied the Complainant access by (1) untimely responding to the Complainant’s OPRA request, (2) unlawfully denied access to the requested executive session minutes, (3) charging inaccurate cost of duplication in violation of N.J.S.A. 47:1A-5.b., and (4) adopted a defective OPRA request form that



deviated from the requirements of N.J.S.A. 47:1A-5.f. Additionally, the Custodian did not fully comply with the Council's Interim Order dated August 28, 2012 because she failed to provide certified confirmation of compliance within the prescribed five (5) business days. However, in the Custodian's September 10, 2012 certification of compliance, the Custodian certified that the City's official OPRA request form has been amended to comply with the requirements of N.J.S.A. 47:1A-5.f., and the Custodian certified that she will provide the Complainant with the requested audio records and minutes upon receipt of the applicable charges. Accordingly, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. 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. 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 and Mason. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277, adjudicated concurrently herewith, an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: Darryl C. Rhone  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

September 18, 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

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

August 28, 2012 Government Records Council Meeting

Jesse Wolosky  
Complainant

Complaint No. 2011-134

v.

City of Paterson (Passaic)  
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not timely respond to the Complainant’s OPRA request. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), and Jesse Wolosky v. Sparta Board of Education (Sussex), 2009-56 (October 2009), the Custodian’s proposed charge of \$5.00 for reproduction of the requested audio recording onto DVD is not the actual cost and is in violation of N.J.S.A. 47:1A-5.b. See also O’Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). Furthermore, the Custodian failed to bear his burden of proving that the proposed charge was reasonable pursuant to N.J.S.A. 47:1A-6.
3. The Custodian must compute the actual cost for the duplication of the requested audio recording of the most recent regular public meeting of the governing body and provide the Complainant with said record upon the Complainant’s payment of the applicable charge pursuant to N.J.S.A. 47:1A-5.b.



4. The Custodian has failed to meet her burden of proving a lawful denial of access to the requested approved minutes of each and every closed/executive session held by the governing body from January 1, 2010 to December 31, 2010 as required by N.J.S.A. 47:1A-6. Therefore, the Custodian must provide the Complainant with said records upon the Complainant's payment of any applicable charges pursuant to N.J.S.A. 47:1A-5.b.
  
5. The City of Paterson's official OPRA request form is deficient because (a) the form states that "employee personnel files" were not public records, but does not state OPRA's exceptions to the general rule that personnel files are not public records; (b) the form states that "police investigation records" were not public records, ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b; and (c) contains the repealed copy rates of \$0.75, \$0.50, and \$0.25 per page and not the updated statutory rates of \$0.05 (letter size) and \$0.07 (legal size) per page. Accordingly, consistent with Martin O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the City's official OPRA request form is deficient and potentially misleading to requestors. In essence, such a form constitutes a denial of access. *Id.* As such, the City of Paterson shall either adopt the GRC's Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form by:
  - Providing a section that details the exemptions in regards to personnel file requests listed in N.J.S.A. 47:1A-10.
  - Providing the details of the circumstances in which police investigation records can be requested under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
  - Amending the outdated copy rates to reflect the current copy rates of \$0.05 and \$0.07 as contained in N.J.S.A. 47:1A-5.b.
  
6. **The Custodian shall comply with Items No. 3, 4 and 5 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>1</sup>, to the Executive Director. If the Complainant fails to accept the proposed charge for duplication of the requested audio recording within five (5) days of notification of same, the Custodian shall so certify to the Council.**
  
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
  
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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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."

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of August, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: August 29, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2011-134**

v.

**City of Paterson (Passaic)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. An audio recording of the most recent regular public meeting of the governing body that was recorded.
2. The minutes of each and every closed/executive session held by the governing body from January 1, 2010 to December 31, 2010 that have been approved.
3. A blank copy of the current OPRA request form.<sup>3</sup>

**Request Made:** February 22, 2011

**Response Made:** March 10, 2011

**Custodian:** Jane E. Williams-Warren

**GRC Complaint Filed:** April 20, 2011<sup>4</sup>

**Background**

**February 22, 2011**

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 if Item No. 1 of his request is digitally stored, he would prefer that the audio recording be provided to him in MP3 or WAV format. The Complainant asks that he be notified whether the recording must be copied onto a CD, DVD, or cassette tape and whether there will be any applicable charges.

**March 10, 2011**

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the twelfth (12<sup>th</sup>) business day following receipt of such request. The Custodian states that she has forwarded the request to the necessary City of Paterson ("City") departments, but due to staff shortages and furlough days, she will need an additional two (2) weeks (until March 24, 2011) to complete the

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

<sup>2</sup> Represented by Paul Forsman, Esq.

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

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

request. The Custodian asserts that if she receives the requested information sooner, she will forward the information to the Complainant.

**March 10, 2011**

E-mail from the Complainant to the Custodian. The Complainant acknowledges the Custodian's request for an extension.

**March 10, 2011**

E-mail from the Custodian to the Complainant attaching a copy of the City's official OPRA request form. The Custodian states that the record responsive to Item No. 3 of the Complainant's request is attached to this e-mail.

**March 21, 2011**

E-mail from the Custodian to the Complainant. The Custodian states that she has retrieved Item No. 1 of the Complainant's request. The Custodian maintains that the audio recording is on two (2) DVDs that cost \$5.00 each. The Custodian further asserts that she will forward the DVDs via mail once she receives payment. The Custodian states that the Complainant can also choose to pick up the DVDs.

The Custodian states that she is still working out retrieving the records responsive to Item No. 2 of the Complainant's request.

**April 20, 2011**

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

- Complainant's OPRA request dated February 22, 2011
- E-mail from the Custodian to the Complainant dated March 10, 2011
- E-mail from the Complainant to the Custodian dated March 10, 2011<sup>5</sup>

The Complainant's Counsel contends that the \$5.00 per DVD cost charged by the City is not the actual cost of reproducing the requested audio recording. Counsel argues that this is in violation of OPRA as N.J.S.A. 47:1A-5.b. dictates that the copying fee for a public record that is other than printed matter shall be the actual cost, which includes the costs of materials and supplies used to make the record but not the cost of labor or other overhead expenses associated with making the copy except as provided for in OPRA's "special service charge".

Counsel maintains that the GRC has ordered public agencies to reduce charges for audio copies that ranged from \$5.00 to \$35.00 to their actual cost and cites O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (April 2008) and Coulter v. Township of Bridgewater (Somerset), GRC Complaint No. 2008-220 (November 2009). Counsel asserts that the GRC has determined that absent evidence that would warrant a special service charge, "actual cost" consists of the cost of acquiring a copy of the audio tape, CD or DVD to make a recording.

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<sup>5</sup> The Complainant attached additional documentation that is not relevant to the adjudication of this complaint.

Counsel further argues that although the Custodian may argue that \$5.00 reflects a special service charge, the Custodian may not charge a special service charge unless the conditions of N.J.S.A. 47:1A-5.d. are met. Counsel states that this requires that the request seeks a record (1) in a medium not routinely used by the agency, (2) not routinely developed or maintained by an agency, or (3) require a substantial amount of manipulation or programming of information technology. *Id.* Counsel contends that the Complainant's request for the audio recording does not meet any of these conditions. Counsel requests that the GRC order the Custodian to reduce her charge for Item No. 1 (audio recording) to the actual cost.

In addition, Counsel states that in O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (July 2008 Interim Order), the GRC held that if a public agency's OPRA request form contained false or misleading information about OPRA, it constituted a denial of access. Counsel contends that the City's official OPRA request form states that employee personal files are not public records but fails to state OPRA's exceptions to this general rule. In addition, Counsel asserts that while the City's OPRA request form states that police investigatory records are not public records, it fails to note any of the several exceptions to this general rule contained in N.J.S.A. 47:1A-3.b. Counsel also asserts that the City's official OPRA request form contains the repealed copy rates of \$0.75, \$0.50, and \$0.25 per page and not the updated statutory rates of \$0.05 (letter size) and \$0.07 (legal size) per page. Counsel requests that the GRC order the City to adopt the GRC's model OPRA request form.

Counsel alleges that the Custodian has failed to provide Item No. 2 of the Complainant's request and has therefore never provided the requested executive session minutes. Counsel maintains that the Custodian's failure to provide the records, despite the granted extension, constitutes a deemed denial under OPRA. Counsel requests that the GRC order the Custodian to provide the Complainant the requested minutes.

In summation, Counsel requests that the GRC find that the Complainant a prevailing party and awards him a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

The Complainant does not agree to mediate this complaint.

#### **April 28, 2011**

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

#### **May 4, 2011**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 22, 2011
- E-mail from the Custodian to the Complainant dated March 10, 2011
- E-mail from the Complainant to the Custodian dated March 10, 2011
- E-mail from the Custodian to the Complainant dated March 21, 2011<sup>6</sup>

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<sup>6</sup> The Custodian attached additional documentation that is not relevant to the adjudication of this complaint. *Jesse Wolosky v. City of Paterson (Passaic)*, 2011-134 – Findings and Recommendations of the Executive Director

The Custodian certifies that a search for the requested records yielded an audio recording of the most recent regular public meeting of the governing body, a copy of the City's official OPRA request form, check registry data from the years of 2008-2011, and minutes of the 2010 executive sessions of the governing body. The Custodian certifies that the requested audio recording have a records retention schedule of eighty (80) days. The Custodian further certifies that the requested official OPRA request form of the City does not have a retention schedule. In addition, the Custodian certifies that the requested executive session minutes of the governing body have a permanent record retention schedule.

The Custodian certifies that the requested OPRA request form was provided to the Complainant on March 10, 2011. The Custodian argues that the Complainant's refusal to pay the fee for the DVD is the reason that he did not receive the audio recording. The Custodian maintains that the Complainant's failure to respond to the Custodian's March 21, 2011 e-mail is the reason the Complainant did not receive the requested audio recording and executive session minutes.

The Custodian certifies that the City's official OPRA request form is in the process of being revised to conform to the GRC's model OPRA request form. The Custodian certifies that despite the outdated copying fees on the City's current OPRA request form, the City has been charging requestors the updated \$0.05 (letter size) and \$0.07 (legal size) per page fees since November 9, 2010.

The Custodian contends that the complaint should be dismissed as premature and that the alleged denial of access resulted from the Complainant's abandoning of his OPRA request. The Custodian states that she is ready to accept a new request by the Complainant if he still wishes to receive the records.

### **July 3, 2012**

Letter from the GRC to the Custodian. To aid with the adjudication of this complaint, the GRC sends a letter requesting the following information:

1. What is the actual cost of reproducing the requested audio recording?
2. Were the requested executive session minutes approved at the time of the Complainant's request? If they were, please certify as to when. Please provide a specific, detailed breakdown for each month requested.

### **July 11, 2012**

Letter from the Custodian to the GRC. The Custodian replies to the GRC's July 3, 2012 letter requesting additional information. The Custodian certifies that the City charges \$5.00 per DVD and that this cost reflects overhead costs and materials. The Custodian certifies that the City will adjust this charge to \$0.75 to reflect the actual cost of only the materials.

The Custodian further certifies that it is the practice of the City that minutes are certified by the City Clerk approximately one (1) week after the date of each meeting. The Custodian certifies that is common practice to have a court reporter take stenographic notes during executive session.



## Analysis

### **Whether the Custodian timely and sufficiently responded to the Complainant's OPRA request?**

OPRA provides that:

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

In addition:

"[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.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i, a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>7</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i, and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant matter, the Custodian received the Complainant's request on February 22, 2011. However, the Custodian did not provide a response until March 10, 2011, the twelfth (12<sup>th</sup>) business day following receipt of the Complainant's request. In said response, the Custodian requested an extension until March 24, 2011 to fulfill the request.

Therefore, the Custodian did not timely respond to the Complainant's OPRA request. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g,

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

N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

**Whether the \$5.00 cost proposed by the Custodian for the duplication of the requested audio recording violates OPRA?**

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.

Additionally, OPRA provides that

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. ... *The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section.* If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.” N.J.S.A. 47:1A-5.b.

Furthermore, OPRA states that:

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

Moreover, OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to

public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the instant matter, the Complainant has challenged the \$5.00 charge proposed by the Custodian for the reproduction of the requested audio recording of the most recent regular public meeting of the governing onto a DVD. In response, the Custodian certified in her Statement of Information that the City charges \$5.00 per DVD and that this cost reflects overhead costs and materials. The Custodian further certified that the City will adjust this charge to \$0.75 to reflect the actual cost of only the materials.

While OPRA provides that paper copies of government records may be obtained upon payment of the actual cost of duplication not to exceed the enumerated rates of \$0.05 and \$0.07 per page (N.J.S.A. 47:1A-5.b.), the Act does not provide explicit copy rates for any other medium. N.J.S.A. 47:1A-5.b. goes on to state that the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy.

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

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

“[i]n adopting OPRA, the Legislature made clear that ‘government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.’ N.J.S.A. 47:1A-1. The imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication. N.J.S.A. 47:1A-5.b.”

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

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

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

In Jesse Wolosky v. Sparta Board of Education (Sussex), 2009-56 (October 2009), the complainant requested an audiotape recording of the Board of Education's most recent public session meeting. The custodian responded, stating that two (2) audiotapes exist at a proposed fee of \$5.00 per audiotape. The Council determined that the custodian failed to provide any evidence showing that the initial proposed fee of \$5.00 per audiotape represents the actual cost of one (1) audiotape. The custodian later certified in the SOI that after receiving the Denial of Access Complaint, the BOE discovered the "actual cost" of each audiotape to be \$0.68. The Council therefore concluded that pursuant to Spaulding, *supra*, Libertarian Party of Central New Jersey, *supra*, Moore, *supra*, and Dugan, *supra*, the custodian's proposed charge of \$5.00 per audiotape recording of the requested meeting was not the actual cost and in violation of N.J.S.A. 47:1A-5.b. See also O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). Further, the Council determined that the custodian failed to bear his burden of proving that the proposed charge was reasonable pursuant to N.J.S.A. 47:1A-6.

Because the Custodian certified in her SOI that the cost for reproducing the requested audio recording on a DVD is \$0.75 per DVD and not \$5.00, the proposed charge of \$5.00 is not the *actual cost* of reproduction. Accordingly, the Complainant's estimate of a \$5.00 charge for the duplication of the requested audio recording constitutes a violation of OPRA pursuant to N.J.S.A. 47:1A-5.b.

Therefore, pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271

(App. Div. 2005), and Jesse Wolosky v. Sparta Board of Education (Sussex), 2009-56 (October 2009), the Custodian's proposed charge of \$5.00 for reproduction of the requested audio recording onto DVD is not the actual cost and is in violation of N.J.S.A. 47:1A-5.b. See also O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). Furthermore, the Custodian failed to bear his burden of proving that the proposed charge was reasonable pursuant to N.J.S.A. 47:1A-6.

Moreover, the Custodian must compute the actual cost for the duplication of the requested audio recording of the most recent regular public meeting of the governing body and provide the Complainant with said record upon the Complainant's acceptance of the applicable charge pursuant to N.J.S.A. 47:1A-5.b.

**Whether the Custodian lawfully denied access to the requested executive session minutes?**

As previously stated, 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.

In the instant matter the Complainant sought access to the “[approved] minutes of each and every closed/executive session held by the governing body from January 1, 2010 to December 31, 2010.” The Custodian failed to provide evidence that the requested minutes were ever provided to the Complainant. Accordingly, on July 3, 2012, the GRC inquired into the disclosability of the requested minutes. While the Custodian provided a response to the GRC in the form of a legal certification on July 11, 2012, the Custodian failed to sufficiently respond to the GRC's inquiry into whether the denial of access to the requested executive session minutes had a basis in law.

Accordingly, the Custodian has failed to meet her burden of proving a lawful denial of access to the requested approved minutes of each and every closed/executive session held by the governing body from January 1, 2010 to December 31, 2010 as required by N.J.S.A. 47:1A-6. Therefore, the Custodian must provide the Complainant with said records upon the Complainant's payment of any applicable copying charges pursuant to N.J.S.A. 47:1A-5.b.

**Whether the Custodian violated OPRA and unlawfully denied access by failing to follow the requirements for a lawful OPRA request form pursuant to N.J.S.A. 47:1A-5.f?**

OPRA provides that:

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

which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

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

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

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

In the instant matter, as in Martin O’Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the Township of East Hanover’s official OPRA request form is deficient and potentially misleading to requestors. The evidence of record in the instant complaint shows that the City’s official OPRA request form lacks some of the elements required to be contained within an agency’s official OPRA request form; specifically:

- The form states that "employee personnel files" are not public records, but does not state OPRA's exceptions to the general rule that personnel files are not public records.

- The form stated that "police investigation records" are not public records, ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b.
- The form contains the repealed copy rates of \$0.75, \$0.50, and \$0.25 per page and not the updated statutory rates of \$0.05 (letter size) and \$0.07 (legal size) per page.

Therefore, pursuant to O'Shea, the Council orders that the City of Paterson amend its official OPRA request form to bring it into compliance with N.J.S.A. 47:1A-5.f., as the form's current ambiguities constitute a prospective denial of access. As such, the City of Paterson shall either adopt the GRC's model request form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form by:

- Providing a section that details the exemptions in regards to personnel file requests listed in N.J.S.A. 47:1A-10.
- Providing the details of the circumstances in which police investigation records can be requested under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
- Amending the outdated copy rates to reflect the current copy rates of \$0.05 and \$0.07 as contained in N.J.S.A. 47:1A-5.b.

**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 did not timely respond to the Complainant's OPRA request. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), and Jesse Wolosky v. Sparta Board of Education (Sussex), 2009-56 (October 2009), the Custodian's proposed charge of \$5.00 for reproduction of the requested audio recording onto DVD is not the actual cost and is in violation of N.J.S.A. 47:1A-5.b. See also O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). Furthermore, the Custodian failed to bear his burden of proving that the proposed charge was reasonable pursuant to N.J.S.A. 47:1A-6.
3. The Custodian must compute the actual cost for the duplication of the requested audio recording of the most recent regular public meeting of the governing body and provide the Complainant with said record upon the Complainant's payment of the applicable charge pursuant to N.J.S.A. 47:1A-5.b.
4. The Custodian has failed to meet her burden of proving a lawful denial of access to the requested approved minutes of each and every closed/executive session held by the governing body from January 1, 2010 to December 31, 2010 as required by N.J.S.A. 47:1A-6. Therefore, the Custodian must provide the Complainant with said records upon the Complainant's payment of any applicable charges pursuant to N.J.S.A. 47:1A-5.b.
5. The City of Paterson's official OPRA request form is deficient because (a) the form states that "employee personnel files" were not public records, but does not state OPRA's exceptions to the general rule that personnel files are not public records; (b) the form states that "police investigation records" were not public records, ignoring the several exceptions contained in N.J.S.A. 47:1A-3.b; and (c) contains the repealed copy rates of \$0.75, \$0.50, and \$0.25 per page and not the updated statutory rates of \$0.05 (letter size) and \$0.07 (legal size) per page. Accordingly, consistent with Martin O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008 Interim Order), the City's official OPRA request form is deficient and potentially misleading to requestors. In essence, such a form constitutes a denial of access. *Id.* As such, the City of Paterson shall either adopt the GRC's Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its OPRA request form by:
  - Providing a section that details the exemptions in regards to personnel file requests listed in N.J.S.A. 47:1A-10.



- Providing the details of the circumstances in which police investigation records can be requested under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
  - Amending the outdated copy rates to reflect the current copy rates of \$0.05 and \$0.07 as contained in N.J.S.A. 47:1A-5.b.
6. **The Custodian shall comply with Items No. 3, 4 and 5 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>8</sup>, to the Executive Director. If the Complainant fails to accept the proposed charge for duplication of the requested audio recording within five (5) days of notification of same, the Custodian shall so certify to the Council.**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Darryl C. Rhone  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

August 21, 2012

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<sup>8</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. City of Paterson (Passaic), 2011-134 – Findings and Recommendations of the Executive Director