



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

November 19, 2013 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2011-99

v.

Borough of Woodland Park (Passaic)
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council (“Council”) considered the November 12, 2013 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 it adopts the Administrative Law Judge’s October 24, 2013 Initial Decision in which the Judge approved the Settlement Agreement signed by the parties or their representatives ordering the parties to comply with the settlement terms and further determining that these proceedings be concluded.

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 19th Day of November, 2013

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: November 21, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 19, 2013 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2011-99

v.

**Borough of Woodland Park (Passaic)²
Custodian of Records**

Records Relevant to Complaint: Copy of an audio recording of the Borough of Woodland Park's ("Borough") most recent public session.³

Custodian of Record: Kevin Galland

Request Received by Custodian: February 23, 2011

Response Made by Custodian: February 25, 2011

GRC Complaint Received: March 31, 2011

Background

July 31, 2012 Council Meeting:

At its July 31, 2012 public meeting, the Council considered the July 24, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian timely complied with the Council's June 26, 2012 Interim Order by adopting the GRC's model request form and providing certified confirmation to the GRC within the prescribed time frame to comply.
2. Although the Borough's OPRA request form was in violation of N.J.S.A. 47:1A-5(f) pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008) and Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010), the Council determined that the Custodian's proposed charge of \$10.00 is the actual cost of reproduction of the requested audio recording and is reasonable and warranted under OPRA pursuant to N.J.S.A. 47:1A-5(d) and O'Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009) and the Custodian timely complied with the Council's

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

² Represented by Albert C. Buglione, Esq., of Law Office of Albert C. Buglione (Wayne, NJ).

³ The Complainant requested additional records that are not at issue in the instant complaint.

June 26, 2012 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Id. at 432. 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 adopted the GRC's model request form in accordance with the Council's June 26, 2012 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 complaint 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 August 3, 2012, the Council distributed its Interim Order to all parties. On January 16, 2013, the complaint was transmitted to the Office of Administrative Law ("OAL"). On October 24, 2013, the Honorable Tiffany M. Williams, Administrative Law Judge ("ALJ") issued an Initial Decision as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, the ALJ "... **CONCLUDE[D]** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms of the settlement, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded."

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council adopt the Administrative Law Judge's October 24, 2013 Initial Decision in which the Judge approved the Settlement Agreement signed by the parties or their representatives ordering the parties to comply with the settlement terms and further determining that these proceedings be concluded.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

November 12, 2013



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

July 31, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2011-99

v.

Borough of Woodland Park (Passaic)
Custodian of Record

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

1. The Custodian timely complied with the Council’s June 26, 2012 Interim Order by adopting the GRC’s model request form and providing certified confirmation to the GRC within the prescribed time frame to comply.
2. Although the Borough’s OPRA request form was in violation of N.J.S.A. 47:1A-5.f. pursuant to O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008) and Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010), the Council determined that the Custodian’s proposed charge of \$10.00 is the actual cost of reproduction of the requested audio recording and is reasonable and warranted under OPRA pursuant to N.J.S.A. 47:1A-5.d. and O’Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009) and the Custodian timely complied with the Council’s June 26, 2012 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. 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 adopted the GRC’s model request form in accordance with the Council’s June 26, 2012 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 complaint 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 31st Day of July, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: August 3, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2011-99

v.

**Borough of Woodland Park (Passaic)²
Custodian of Records**

Records Relevant to Complaint: Copy of an audio recording of the Borough of Woodland Park's ("Borough") most recent public session.³

Request Made: February 22, 2011

Response Made: February 25, 2011

Custodian: Kevin Galland

GRC Complaint Filed: March 31, 2011⁴

Background

June 26, 2012

Government Records Council's ("Council") Interim Order. At its June 26, 2012 public meeting, the Council considered the June 19, 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. The Custodian certified in the Statement of Information and again on April 23, 2012 that the actual cost to reproduce the requested meeting DVD is \$10.00 and the vendor invoice provided by the Custodian proves that this charge is reasonable and based on the Borough's incurred cost. Additionally, the Complainant did not submit any competent, credible evidence to refute the Custodian's certification. Thus, the proposed charge of \$10.00 charge is the actual cost of reproduction of the requested audio recording and is reasonable and warranted under OPRA pursuant to N.J.S.A. 47:1A-5.d. See also O'Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009). The GRC notes that the Custodian is not required to again offer access to the responsive DVD because the Complainant already declined to purchase same in an e-mail to the Custodian dated February 28, 2011.

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

² Represented by James M. LaBianca, Esq., of DeYoe, Heissenbuttel & Bulione, LLC (Wayne, NJ).

³ The Complainant requested additional records that are not at issue in the instant complaint.

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

2. The Borough of Woodland Park's OPRA request form is in violation of OPRA pursuant to N.J.S.A. 47:1A-5.f. Specifically, the OPRA request form contains a statement that employee personnel files and police investigation records are exempt from public access under OPRA, which 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 pursuant to 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) and Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010), 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 OPRA request form is in violation of N.J.S.A. 47:1A-5.f. because it 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." *Id.*
3. The Borough shall either adopt the GRC's Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its official OPRA request form by:
 - Providing a section that details the exceptions in regards to personnel file requests listed in N.J.S.A. 47:1A-10 or altogether omitting references to personnel file records.
 - Providing the details of the circumstances in which police investigation records are disclosable under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
 - Instructing a requestor that an agency's denial of access to government records may be challenged by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council.
 - Providing a section on the request form where a custodian can provide a legal reason for denying the request in whole or in part.
4. **The Custodian shall comply with Item No. 3 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 1:4-4,⁵ to the Executive Director.**

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
Jesse Wolosky v. Borough of Woodland Park (Passaic), 2011-99 – Supplemental Findings and Recommendations of the Executive Director 2

5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

June 27, 2012

Council's Interim Order ("Order") distributed to the parties.

July 3, 2012

Custodian's response to the Council's Interim Order attaching the Borough's updated OPRA request form. The Custodian certifies that he is in receipt of the Council's Order advising that the Borough's OPRA request form is in violation of OPRA. The Custodian certifies that he has adopted the GRC's model request form for the Borough in lieu of amending the Borough's previous form.

Analysis

Whether the Custodian complied with the Council's June 26, 2012 Interim Order?

At its June 26, 2012 meeting, the Council ordered the Custodian to:

"...The [Borough's] OPRA request form is in violation of OPRA pursuant to N.J.S.A. 47:1A-5.f. ... The Borough shall either adopt the GRC's Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its official OPRA request form ... **The Custodian shall comply with Item No. 3 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, to the Executive Director.**" (Footnote omitted.)

The Council disseminated its Interim Order to the parties on June 27, 2012. Thus, the Custodian's response was due by close of business on July 5, 2012.

On July 3, 2012, the Custodian provided certified confirmation of compliance to the Executive Director that the Borough adopted the GRC's model request form in accordance with the Council's Order.

Therefore, the Custodian timely complied with the Council's June 26, 2012 Interim Order by adopting the GRC's model request form and providing certified confirmation to the GRC within the prescribed time frame to comply.

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 (Felder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

Although the Borough’s OPRA request form was in violation of N.J.S.A. 47:1A-5.f. pursuant to O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008) and Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010), the Council determined that the Custodian’s proposed charge of \$10.00 is the actual cost of reproduction of the requested audio recording and is reasonable and warranted under OPRA pursuant to N.J.S.A. 47:1A-5.d. and O’Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009) and the Custodian timely complied with the Council’s June 26, 2012 Interim Order. 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 OPRA, N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The Court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term

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

As the New Jersey Supreme Court noted in Mason, Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing Teeters*, *supra*, 387 N.J. Super. at 429; *see, e.g., Baer v. Klagholz*, 346 N.J. Super. 79 (App. Div. 2001)(applying Buckhannon to the federal Individuals with Disabilities Education Act), *cert. 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).”

The Complainant’s Counsel filed this complaint on March 31, 2011 requesting the following:

1. A determination that the Custodian violated OPRA by charging more than the actual cost for a DVD copy of the requested recording.
2. A determination ordering the Custodian to certify to the actual cost of its recording.
3. A determination ordering the Custodian to make available a copy of the recording to the Complainant at the actual cost thereof.
4. A determination that the Borough’s official OPRA request form is misleading and that the Borough must either correct the deficiencies or adopt the GRC’s model request form.
5. 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 Council subsequently determined that the proposed charge of \$10.00 was reasonable and warranted pursuant to N.J.S.A. 47:1A-5.d. and thus the Custodian was not required to reoffer the responsive DVD. However, the Council also determined that the Borough’s OPRA request form was in violation of OPRA pursuant to N.J.S.A. 47:1A-5.f. Specifically, the form contained misleading information and failed to include all elements of N.J.S.A. 47:1A-5.f. Thus in its June 26, 2012 Interim Order, the Council ordered the Custodian to either adopt the GRC’s model request form or make several changes to the Borough’s current form. The Custodian submitted certified confirmation of compliance on July 3, 2012 certifying that he adopted the GRC’s model request form. Therefore, the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

Pursuant to Teeters, *supra*, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. 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 adopted the GRC’s model request form in accordance with the Council’s June 26, 2012 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 complaint 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. The Custodian timely complied with the Council's June 26, 2012 Interim Order by adopting the GRC's model request form and providing certified confirmation to the GRC within the prescribed time frame to comply.
2. Although the Borough's OPRA request form was in violation of N.J.S.A. 47:1A-5.f. pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (December 2008) and Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010), the Council determined that the Custodian's proposed charge of \$10.00 is the actual cost of reproduction of the requested audio recording and is reasonable and warranted under OPRA pursuant to N.J.S.A. 47:1A-5.d. and O'Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009) and the Custodian timely complied with the Council's June 26, 2012 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. 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 adopted the GRC's model request form in accordance with the Council's June 26, 2012 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 complaint 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: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

June 26, 2012 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2011-99

v.

Borough of Woodland Park (Passaic)
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council (“Council”) considered the June 19, 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, finds that:

1. The Custodian certified in the Statement of Information and again on April 23, 2012 that the actual cost to reproduce the requested meeting DVD is \$10.00 and the vendor invoice provided by the Custodian proves that this charge is reasonable and based on the Borough’s incurred cost. Additionally, the Complainant did not submit any competent, credible evidence to refute the Custodian’s certification. Thus, the proposed charge of \$10.00 charge is the actual cost of reproduction of the requested audio recording and is reasonable and warranted under OPRA pursuant to N.J.S.A. 47:1A-5.d. See also O’Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009). The GRC notes that the Custodian is not required to again offer access to the responsive DVD because the Complainant already declined to purchase same in an e-mail to the Custodian dated February 28, 2011.
2. The Borough of Woodland Park’s OPRA request form is in violation of OPRA pursuant to N.J.S.A. 47:1A-5.f. Specifically, the OPRA request form contains a statement that employee personnel files and police investigation records are exempt from public access under OPRA, which 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 pursuant to 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) and Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010), 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 OPRA request form is in violation of N.J.S.A. 47:1A-5.f. because it 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.” *Id.*

3. The Borough shall either adopt the GRC’s Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its official OPRA request form by:
 - Providing a section that details the exceptions in regards to personnel file requests listed in N.J.S.A. 47:1A-10 or altogether omitting references to personnel file records.
 - Providing the details of the circumstances in which police investigation records are disclosable under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
 - Instructing a requestor that an agency’s denial of access to government records may be challenged by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council.
 - Providing a section on the request form where a custodian can provide a legal reason for denying the request in whole or in part.
4. **The Custodian shall comply with Item No. 3 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 1:4-4,¹ to the Executive Director.**
5. 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.
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 26th Day of June, 2012

Steven F. Ritardi, Esq., Acting Chair
Government Records Council

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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: June 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 26, 2012 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2011-99

v.

**Borough of Woodland Park (Passaic)²
Custodian of Records**

Records Relevant to Complaint: Copy of an audio recording of the Borough of Woodland Park's ("Borough") most recent public session.³

Request Made: February 22, 2011

Response Made: February 25, 2011

Custodian: Kevin Galland

GRC Complaint Filed: March 31, 2011⁴

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 requests that before making copies, the Custodian advise via e-mail the cost of the audio recording and in what medium the recording will be provided. The Complainant states that if the recording is stored electronically, he would prefer same in .mp3 or .wav format. The Custodian further asks whether there is a special service charge associated with production of an electronic recording placed on a CD.

February 25, 2011

Custodian's response to the OPRA request. On behalf of the Custodian, Ms. Nancy Ferrigno ("Ms. Ferrigno"), Deputy Municipal Clerk, responds in writing via e-mail to the Complainant's OPRA request on the second (2nd) business day following receipt of such request.⁵ Ms. Ferrigno states that a DVD of the most recent public meeting will cost \$10.00. Ms. Ferrigno requests that the Complainant advise if she should order a copy.

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

² Represented by James M. LaBianca, Esq., of DeYoe, Heissenbuttel & Bulione, LLC (Wayne, NJ).

³ The Complainant requested additional records that are not at issue in the instant complaint.

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

⁵ The Custodian certifies in the Statement of Information that he received the Complainant's OPRA request on February 23, 2011.

February 28, 2011

E-mail from the Complainant to Ms. Ferrigno. The Complainant states that he does not wish to purchase a copy of the DVD as it is too expensive.

February 28, 2011

E-mail from the Ms. Ferrigno to the Complainant. Ms. Ferrigno states that she offered a copy of the recording of the most recent public meeting on February 25, 2011 and has not received a response. Ms. Ferrigno states that the DVD will take at least one (1) week to duplicate.

February 28, 2011

E-mail from the Complainant to Ms. Ferrigno. The Complainant states that he does not wish to purchase a copy of the DVD as it is too expensive. The Complainant asks whether the recording can be placed on a less expensive compact disc (“CD”).

February 28, 2011

E-mail from Ms. Ferrigno to the Complainant. Ms. Ferrigno states that the official recording of the meeting is on a DVD and not an audio cassette.

March 31, 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 Ms. Ferrigno to the Complainant dated February 25, 2011.
- E-mail from the Complainant to Ms. Ferrigno dated February 28, 2011.
- E-mail from Ms. Ferrigno to the Complainant dated February 28, 2011.
- E-mail from the Complainant to Ms. Ferrigno dated February 28, 2011.
- E-mail from Ms. Ferrigno to the Complainant dated February 28, 2011.

The Complainant’s Counsel states that the Borough unlawfully denied access to a recording of the most recent public meeting by charging \$10.00 for a DVD copy and the Borough’s official OPRA request form is misleading.

Counsel states that the Complainant submitted an OPRA request to the Borough on February 22, 2011. Counsel states that Ms. Ferrigno responded in writing on February 25, 2011 advising that a DVD copy of the recording would cost \$10.00. Counsel states that the Complainant e-mailed Ms. Ferrigno on February 28, 2011 and declined to purchase the DVD. Counsel states that subsequent e-mails between the Complainant and Ms. Ferrigno confirmed that the Borough was charging \$10.00 for the responsive DVD.

Counsel asserts that regarding the proposed \$10.00 fee, it is extremely unlikely that the fee reflects the Borough’s actual cost. Counsel states that in Renna v. Township of Warren (Somerset), GRC Complaint No. 2008-40 (Interim Order dated November 19, 2008), the Council held that even a \$5.00 charge for a CD is “likely not” the “actual cost” pursuant to N.J.S.A. 47:1A-5.b. Counsel contends that the GRC should follow well-established Court and GRC case law holding that public agencies must charge the actual cost to provide records in the medium in which they existed. *Id.* Counsel contends that

absent extraordinary circumstances, actual cost is the material cost of providing a record, excluding labor and overhead. Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26, 31 (1962), Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271, 280 (App. Div. 2005) and Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 141 (App. Div. 2006).

Counsel states that the GRC has routinely invalidated audio recording charges that exceed actual cost. O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (Interim Order dated February 27, 2008), O'Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (Interim Order dated March 26, 2008), Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-278 (Interim Order dated September 30, 2009), Coulter v. Township of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009) and Renna. Counsel further states that the GRC's interpretation of N.J.S.A. 47:1A-5.b. was recently ratified by the New Jersey Legislature when it amended OPRA to provide that "[t]he actual cost of duplicating the record, upon which all copy fees are based, 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 ..." (Emphasis added.) *Id.*⁶

Counsel contends that the Custodian may argue that the \$10.00 charge reflects a special service charge; however, OPRA does not provide for a special service charge for non-paper records unless the conditions of N.J.S.A. 47:1A-5.d. are met:

"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"

Counsel contends that the Custodian has failed to prove that the Complainant's OPRA request met any of the aforementioned requirements.

Counsel states that regarding the OPRA request form, the GRC previously held that if an agency's official OPRA request form contained false or misleading information about OPRA, same constituted a denial of access. O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (Interim Order dated May 28, 2008). Counsel contends that here, the Borough's form states that employee personnel files and police records are exempt from access and ignores OPRA's exceptions in N.J.S.A. 47:1A-10 and N.J.S.A. 47:1A-3.b. respectively. Counsel asserts that the GRC should order the Borough to revise its form pursuant to O'Shea. See also O'Shea v. Stillwater Township (Sussex), GRC Complaint No. 2007-253 (Interim Order dated November 19, 2008).

Counsel thus requests the following:

⁶ This amendment took effect on November 9, 2010.

1. A determination that the Custodian violated OPRA by charging more than the actual cost for a DVD copy of the requested recording.
2. A determination ordering the Custodian to certify to the actual cost of its recording.
3. A determination ordering the Custodian to make available a copy of the recording to the Complainant at the actual cost thereof.
4. A determination that the Borough's official OPRA request form is misleading and that the Borough must either correct the deficiencies or adopt the GRC's model request form.
5. 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.

April 15, 2011

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

April 19, 2011

Letter from the Custodian's Counsel to the GRC with the following attachments:

- M&A Video Productions Invoice No. 202 dated April 21, 2010.
- Complainant's OPRA request dated February 22, 2011.
- E-mail from Ms. Ferrigno to the Complainant dated February 25, 2011.
- E-mail from Ms. Ferrigno to the Complainant dated February 28, 2011.
- E-mail from the Complainant to Ms. Ferrigno dated February 28, 2011.
- E-mail from Ms. Ferrigno to the Complainant dated February 28, 2011.

Counsel states that the Borough received the Complainant's OPRA request on February 23, 2011. Counsel states that Ms. Ferrigno responded on February 25, 2011 stating that the cost to obtain an audio recording of the meeting would be \$10.00. Counsel states that the Complainant declined to accept the record because it was too expensive.

Counsel states that in the Denial of Access Complaint, the Complainant's Counsel argues that the proposed \$10.00 charge did not represent the "actual cost" to produce the responsive record. Counsel notes that the Complainant's Counsel further requested that the GRC order the Custodian to certify to the "actual cost." Counsel states that the Complainant's Counsel cited to N.J.S.A. 47:1A-5.b., O'Shea, Wolosky, Coulter, and Renna. Counsel contends that none of these complaints addressed a situation in which a municipality, due to insufficient resources based on its size, is forced to pay an outside vendor to obtain the requested record. Counsel contends that this is exactly the issue facing the Borough and the reason why the Borough appropriately charged \$10.00 for a DVD copy of the responsive record.

Counsel states that the Borough is a small municipality that cannot afford the costs associated with the purchase of equipment necessary to duplicate audio recordings. Counsel notes that there is no statutory requirement or other regulatory authority that requires a municipality to purchase such equipment. Counsel states that in the few

instances that a requestor seeks an audio recording, the Borough must pay an outside vendor, M&A Video Productions, \$10.00 to make a copy. Counsel asserts that the attached M&A Video Productions Invoice No. 202 dated April 21, 2010 establishes that the Borough's actual cost for audio copies is \$10.00 per copy.

Counsel thus asserts that the Borough quoted the Complainant the "actual cost" it pays to reproduce the record. Counsel asserts that because the Borough is not charging for internal labor or overhead costs associated with acquiring a copy of the responsive record from an outside vendor, the Borough is in full compliance with N.J.S.A. 47:1A-5.b. Counsel further argues that N.J.S.A. 47:1A-5.d permits the Borough to charge \$10.00 as a special service charge because the Borough does not have the resources to make a copy of the recording and must obtain same from an outside vendor.

Counsel states that in Burnett v. County of Bergen, 198 N.J. 408 (April 2009), the Supreme Court reasoned that:

"OPRA provides that costs may be passed on to requestors. The statute allows for recovery of actual duplication costs. *N.J.S.A. 47:1A-5(b)*. In addition, requestors may be assessed costs for preparation work involved in responding to a request. *See N.J.S.A. 47:1A-5(c)*(allowing reasonable special service charge when records cannot be reproduced using ordinary equipment ...)" *Id.* at 438.

Counsel thus contends that the Borough maintains that it properly complied with OPRA and relevant Court and GRC case law by charging \$10.00 for the responsive recording.

Counsel states that the Complainant's Counsel alleged in the Denial of Access Complaint that the Borough's official OPRA request form was misleading because it failed to include exceptions to the general rule that personnel files are exempt from access under OPRA. N.J.S.A. 47:1A-10. Counsel states that the Complainant's Counsel further alleged that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees. N.J.S.A. 47:1-6.

Counsel contends that relief under N.J.S.A. 47:1A-6 is improper in this case because the GRC has not issued an Interim Order and henceforth there is no mechanism for bringing a change in the Custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) *and* Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Counsel further argues that there is no reason for the Custodian to change her conduct as the Borough already utilizes an OPRA request form that complies with OPRA. Counsel states that if the GRC releases an updated form, the Borough will act to implement such form. Counsel asserts that the Borough believes it is using the most current OPRA request form available and is therefore compliant with OPRA and the GRC's regulations pertaining to the disclosure of public records.

Counsel requests that the GRC dismiss this complaint with prejudice and order the Complainant to pay attorney's fees to the Borough for having to expend taxpayer money on what appears to be a frivolous complaint. Counsel further states that the Borough will disclose the responsive record upon payment of the \$10.00 copying cost.

April 22, 2011

E-mail from the Complainant's Counsel to the GRC. Counsel states that he is in receipt of Custodian Counsel's April 19, 2011 submission that purports to be the Borough's response in this matter. Counsel notes that the letter is not accompanied by the necessary SOI form or legal certification of the Custodian. Counsel thus requests that the GRC return the submission to the Borough and request them to submit an SOI in compliance with the GRC's April 15, 2011 request and promulgated regulations.

April 25, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that this e-mail will confirm that the Borough has received a one (1) week extension of time until May 2, 2011 to submit the SOI.

April 25, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC confirms that Counsel is granted an extension of time until May 2, 2011 to submit the SOI.

April 26, 2011

Custodian's SOI with the following attachments:

- M&A Video Productions Invoice No. 202 dated April 21, 2010.
- Complainant's OPRA request dated February 22, 2011.
- E-mail from Ms. Ferrigno to the Complainant dated February 25, 2011.
- E-mail from Ms. Ferrigno to the Complainant dated February 28, 2011.
- E-mail from the Complainant to Ms. Ferrigno dated February 28, 2011.
- E-mail from Ms. Ferrigno to the Complainant dated February 28, 2011.
- Letter from the Custodian's Counsel to the GRC dated April 19, 2011.

The Custodian certifies that his search for the requested records involved going to the Borough's safe and confirming that the responsive DVD was on file.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that he received the Complainant's OPRA request on February 23, 2011. The Custodian certifies that Ms. Ferrigno offered the responsive DVD to the Complainant on February 25, 2011 and February 28, 2011 at the cost of reproduction; however, the Complainant declined to incur the \$10.00 cost.

The Custodian's Counsel resubmits his April 19, 2011 letter arguing that the Borough appropriately charged the Complainant \$10.00 for the requested DVD because this is the cost charged to the Borough by M&A Video Productions to copy same. Counsel reiterates that the Borough is currently using the most current official OPRA request form but will act quickly to update the form if the GRC has since released a more current form. Counsel finally reiterates that the Complainant is not entitled to prevailing party attorney's fees under N.J.S.A. 47:1A-6 because there has been no mechanism for bringing a change in the Custodian's conduct. Teeters, *supra*, and Mason, *supra*.

April 20, 2012

Letter from the GRC to the Custodian. The GRC states that its regulations provide that “[t]he Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint.” *N.J.A.C. 5:105-2.4(1)*. The GRC states that it has reviewed the parties’ submissions and has determined that additional information is required.

The GRC states that the Borough has asserted that the “actual cost” to provide a copy of the requested DVD to the Complainant is \$10.00. The GRC states that in support of this argument, the Borough submitted to the GRC a copy of an invoice dated April 21, 2010; however, this invoice predates the Complainant’s February 22, 2011 OPRA request by nine (9) months.

The GRC thus requests that the Custodian provide either an invoice relevant to the Complainant’s February 22, 2011 OPRA request or a contemporaneous invoice for reproduction of a DVD. The GRC further requests that the Custodian provide a legal certification, pursuant to N.J. Court Rule 1:4-4, that the invoice provided is the invoice requested by the GRC.

The GRC requests that the Custodian provide the requested invoice and legal certification by close of business on April 25, 2012. The GRC notes that submissions received after this deadline date may not be considered by the Council for adjudication.

April 23, 2012

Custodian’s legal certification attaching M&A Video Productions Invoice No. 227 dated April 5, 2011. The Custodian certifies that the attached invoice shows that M&A Video Productions charges the Borough \$10.00 to reproduce a DVD recording of a Council meeting. The Custodian further certifies that the attached invoice was produced in response to another OPRA request that was the same as the Complainant’s OPRA request.

Analysis

Whether the \$10.00 charge assessed by the Custodian for duplicating the record requested is warranted and reasonable pursuant to OPRA?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or*

kept on file ... or that has been received in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA 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 ... *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 ... Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the *actual costs of any needed supplies such as computer discs.*” (Emphasis added.) N.J.S.A. 47:1A-5.b.

OPRA also provides 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 ...*” (Emphasis added.) N.J.S.A. 47:1A-5.c.

OPRA further 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 a request is for a record ... (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.

OPRA provides that 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. N.J.S.A. 47:1A-5.b.

OPRA further authorizes a custodian to charge the actual cost for duplication of a record where the cost of duplication is not enumerated or exceeds the cost set forth in OPRA. N.J.S.A. 47:1A-5.b. OPRA further allows a custodian to for the “*actual cost* of any supplies such as computer discs.” (Emphasis added.) *Id.*

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

Additionally, OPRA provides that when a request for a record requires a substantial amount of manipulation or programming of information technology, the agency may charge, “... in *addition to the actual cost of duplication*, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.” N.J.S.A. 47:1A-5.d.

Thus, it appears that the Legislature included the central theme throughout OPRA that duplication cost should equal “actual cost” and when additional effort is required to reproduce the requested record, the cost of such effort should be reasonable. *See Spaulding v. County of Passaic*, GRC Complaint No. 2004-199 (September 2006).

At issue here is whether the Custodian properly charged the Complainant \$10.00 to reproduce a copy of a DVD recording. The Complainant declined to pay the proposed charge and instead filed this complaint arguing that the fee was unreasonable pursuant to O’Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (Interim Order dated February 27, 2008), O’Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (Interim Order dated March 26, 2008), Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-278 (Interim Order dated September 30, 2009), Coulter v. Township of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009) and Renna v. Township of Warren (Somerset), GRC Complaint No. 2008-40 (Interim Order dated November 19, 2008). However, those complaints are not factually similar to this complaint: none of the public agencies in those complaints argued that an outside vendor was required to duplicate an audio recording.

Instead, the facts of this complaint are similar to those in O’Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009). In O’Shea, the complainant requested a copy of an audio recording and the custodian charged the complainant \$10.00 for the duplication. The complainant objected to the fee asserting that it was excessive. The custodian subsequently certified that the Board of Education did not possess the capability to complete the duplication in-house and provided the GRC with a cost estimate from an outside vendor that charged \$2.49 for the audiotape and \$7.99 for the duplication. The Council held that:

“[b]ecause the Custodian has certified that the Pine Hill Board of Education lacks the equipment necessary to fulfill the OPRA request, and because the vendor invoice submitted by the Custodian is reasonable and based on the cost to be incurred by the agency, and because the Complainant has failed to submit any credible evidence that the vendor invoice submitted by the agency is unreasonable, the proposed estimate of \$10.48 for duplication is reasonable and consistent with N.J.S.A. 47:1A-5.c.” *Id.* at pg.

Although the GRC has previously recognized that a cost passed on by a public agency from a vendor is a special service charge pursuant N.J.S.A. 47:1A-5.c., OPRA also provides that an agency may assess a reasonable special service charge “... 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 ...” N.J.S.A. 47:1A-5.d. Thus, this provision is more applicable to the instant complaint in that it allows an agency to charge a reasonable cost that is actually incurred by the agency.

In this matter, the Custodian’s proposed charge of \$10.00 is the actual cost the Borough incurs to reproduce the requested DVD for disclosure. In support of this position, the Custodian provided a copy of an invoice dated April 5, 2011 that was contemporaneous to the Complainant’s OPRA request and certified that the Borough must pay M&A Video Productions \$10.00 to duplicate DVD recordings of meetings. Thus, the Borough charged the Complainant a reasonable cost “actually ... attributable” to their cost for obtaining a copy of the responsive record from M&A Video Productions.

Therefore, the Custodian certified in the SOI and again on April 23, 2012 that the actual cost to reproduce the requested meeting DVD is \$10.00 and the vendor invoice provided by the Custodian proves that this charge is reasonable and based on the Borough’s incurred cost. Additionally, the Complainant did not submit any competent, credible evidence to refute the Custodian’s certification. Thus, the proposed charge of \$10.00 charge is the actual cost of reproduction of the requested audio recording and is reasonable and warranted under OPRA pursuant to N.J.S.A. 47:1A-5.d. *See also O’Shea, supra.* The GRC notes that the Custodian is not required to again offer access to the responsive DVD because the Complainant already declined to purchase same in an e-mail to the Custodian dated February 28, 2011.

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 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's Counsel 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-10 (listing certain personnel information that must be disclosed) and N.J.S.A. 47:1A-3.b. (listing criminal investigatory 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). Counsel further requested that the GRC order the Borough to revise its form pursuant to O'Shea. *See also* O'Shea v. Stillwater Township (Sussex), GRC Complaint No. 2007-253 (Interim Order dated November 19, 2008).

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 ‘public records’ ... 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, in the matter before the Council, the GRC notes that the Borough’s official OPRA request 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.

Therefore, the Borough’s OPRA request form is in violation of OPRA pursuant to N.J.S.A. 47:1A-5.f. Specifically, the OPRA request form contains a statement that employee personnel files and police investigation records are exempt from public access under OPRA, which 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 pursuant to N.J.S.A. 47:1A-3.b. As such, pursuant to O’Shea, supra, and Paff, 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 OPRA request form is in violation of N.J.S.A. 47:1A-5.f. because it 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." *Id.*

As such, the Borough shall either adopt the GRC's Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its official OPRA request form by:

- Providing a section that details the exceptions in regards to personnel file requests listed in N.J.S.A. 47:1A-10 or altogether omitting references to personnel file records.
- Providing the details of the circumstances in which police investigation records are disclosable under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
- Instructing a requestor that an agency's denial of access to government records may be challenged by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council.
- Providing a section on the request form where a custodian can provide a legal reason for denying the request in whole or in part.

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 certified in the Statement of Information and again on April 23, 2012 that the actual cost to reproduce the requested meeting DVD is \$10.00 and the vendor invoice provided by the Custodian proves that this charge is reasonable and based on the Borough's incurred cost. Additionally, the Complainant did not submit any competent, credible evidence to refute the Custodian's certification. Thus, the proposed charge of \$10.00 charge is the

actual cost of reproduction of the requested audio recording and is reasonable and warranted under OPRA pursuant to N.J.S.A. 47:1A-5.d. See also O’Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009). The GRC notes that the Custodian is not required to again offer access to the responsive DVD because the Complainant already declined to purchase same in an e-mail to the Custodian dated February 28, 2011.

2. The Borough of Woodland Park’s OPRA request form is in violation of OPRA pursuant to N.J.S.A. 47:1A-5.f. Specifically, the OPRA request form contains a statement that employee personnel files and police investigation records are exempt from public access under OPRA, which 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 pursuant to 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) and Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010), 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 OPRA request form is in violation of N.J.S.A. 47:1A-5.f. because it 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.” *Id.*
3. The Borough shall either adopt the GRC’s Model Request Form located at <http://www.nj.gov/grc/custodians/request/>, or amend its official OPRA request form by:
 - Providing a section that details the exceptions in regards to personnel file requests listed in N.J.S.A. 47:1A-10 or altogether omitting references to personnel file records.
 - Providing the details of the circumstances in which police investigation records are disclosable under N.J.S.A. 47:1A-3.b. or altogether omitting reference to police records.
 - Instructing a requestor that an agency’s denial of access to government records may be challenged by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council.
 - Providing a section on the request form where a custodian can provide a legal reason for denying the request in whole or in part.
4. **The Custodian shall comply with Item No. 3 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 1:4-4,⁷ to the Executive Director.

5. 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.
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: Karyn Gordon, Esq.
Acting Executive Director

June 19, 2012

⁷ "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 Woodland Park (Passaic), 2011-99 – Findings and Recommendations of the Executive Director