



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

January 28, 2014 Government Records Council Meeting

Tamara White
Complainant

Complaint No. 2012-218

v.

Monmouth Regional High School
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 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:

1. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel’s fee application, conforms with the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. The Council finds that 3.2 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Luers, Counsel to the Complainant, for the full amount of \$960.00, representing 3.2 hours of service at \$300 per hour.**
2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

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 28th Day of January, 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: January 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 28, 2014 Council Meeting**

**Tamara White¹
Complainant**

GRC Complaint No. 2012-218

v.

**Monmouth Regional High School
Custodial Agency²**

Records Relevant to Complaint:³ Electronic copies via e-mail of closed session minutes of Board of Education meetings ... from November 1, 2002 through March 1, 2003.

Custodian of Record: Maria Anne Parry
Request Received by Custodian: March 22, 2012
Response Made by Custodian: March 23, 2012
GRC Complaint Received: July 20, 2012

Background⁴

October 29, 2013 Council Meeting:

At its October 29, 2013 public meeting, the Council considered the October 17, 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, found that:

1. The Custodian complied with the Council's September 24, 2013 Interim Order because she provided the Complainant with the responsive minutes without redactions of the homeowner's name and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
2. The Custodian's response was insufficient. She initially assessed a special service charge that was unreasonable and unwarranted, and she ultimately failed to bear her

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

² Represented by Martin M. Barger, Esq. (Shrewsbury)

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

⁴ The parties may have submitted additional correspondence or made additional statement/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

burden of proving a lawful denial of access to the homeowner's name contained in the December 3, 2002 and January 7, 2003 minutes. However, the Custodian bore her burden of proving a lawful denial of access to the remainder of the redactions and complied with both Interim Orders. 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, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's July 23 and September 24, 2013, Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian complied with both Orders by providing a refund to the Complainant and disclosing minutes without redactions of a homeowner's name. 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. N.J.S.A. 47:1A-6; Teeters, 387 N.J. Super. at 432; Mason, 196 N.J. at 76. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Procedural History:

On October 30, 2013, the Council distributed its October 29, 2013 Interim Order ("Interim Order") to all parties. The Council's order provided Walter M. Luers, Esq., Counsel for the Complainant ("Counsel"), twenty (20) business days to submit an application for fees.

Compliance:

On November 27, 2013, the twentieth (20th) business day from issuance of the Interim Order, Counsel filed his fee application in accordance with N.J.A.C. 5:105-2.13(b)⁵. The fee application and Certification of Services ("Certification") of counsel set forth the following:

⁵ N.J.A.C. 5:105-2.13(b) sets forth the requirements of a fee application, providing in relevant part: (b) . . . [t]he [fee] application must include a certification from the attorney(s) representing the complainant that includes: 1. The Council's complaint reference name and number; 2. Law firm affiliation; 3. A statement of client representation; 4. The hourly rates of all attorneys and support staff involved in the complaint; 5. Copies of weekly time sheets for each professional involved in the complaint, which includes detailed descriptions of all activities attributable to the project in 0.1 hour (six-minute) increments; 6. Evidence that the rates charged are in accordance with prevailing market rates in the relevant community. Such evidence shall include: (i) Years of related or similar experience; (ii) Skill level; and (iii) Reputation; and 7. A detailed listing of any expense reimbursements with supporting documentation for such costs..

- (1) The complaint name and number: Tamara White v. Monmouth Regional High School, GRC Complaint No. 2012-218.
- (2) Counsel's law firm affiliation: Law Offices of Walter M. Luers, Jr., LLC.
- (3) A statement of client representation: Counsel certified to his services, including reviewing of file; drafting complaint and letter brief; conducting legal research; reviewing of e-mail correspondence to and/or from the GRC; communicating with the client regarding the action; and preparing fee application.
- (4) The hourly rate of all attorneys and support staff involved in the complaint: Mr. Luers, the sole professional who worked on the file, certified that he charged \$300 per hour.
- (5) Copies of time sheets for each professional involved in the complaint: Counsel supplied a copy of his time sheets from June 26, 2012 through November 27, 2013 (the "Fee Period"). During the Fee Period counsel billed a total of 3.2 hours for a total fee of \$960.00.
- (6) Evidence that the rates charged are in accordance with prevailing rates in the relevant community, including years of experience, skill level and reputation: Counsel certified that he charges "\$300 per hour to clients for work in OPRA matters." Certification of Walter M. Luers, Esq., (hereinafter, "Luers Certif.") at ¶ 3(7). Counsel certified his education, years of legal experience and representation of clients in OPRA cases before the New Jersey Supreme and Superior Courts, as well as before the GRC. Finally, Mr. Luers certifies to OPRA cases where counsel for the prevailing party were awarded fees in excess of \$300 per hour. Citing, O'Boyle v. Borough of Longport, ATL-L-002294-09 (approving an hourly rate of \$325) and Pat Doe v. Rutgers, MID-L-488-11 (finding \$325 is a reasonable fee in an OPRA matter).
- (7) Detailed documentation of expenses: Counsel is not seeking reimbursements for expenses.

Accordingly, Counsel filed a timely fee application with the Government Records Council ("GRC"). The Custodian did not submit an objection to Complainant's application for fees.

Analysis

In its October 29, 2013 Interim Order, the Council found that the Complainant was a prevailing party and thus was entitled to submit an application for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). Counsel timely filed and served⁶ his Certification of Services, seeking a fee award of \$960.00, in the time period provided for pursuant to the Court's Interim Order.

Council's Interim Order further provided that the Custodian was afforded ten (10) business days, from the date of service of the application for attorney's fees, to object to Counsel's fee request. N.J.A.C. 5:105-2.13(d). The Custodian did not file or submit an objection to the Complainant's application for fees.

⁶ N.J.A.C. 5:105-2.13(c) provides in relevant part: (c) The complainant, or his or her attorney, must serve all parties with the application for attorney's fees and all attachments thereto.

Prevailing Party Attorney Fee Award

“Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney’s fee from the loser.” New Jerseyans for a Death Penalty Moratorium v. N.J. Dep’t of Corrections, (“NJMDP”) 185 N.J. 137, 152 (2005) (quoting, Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted)). However, this principle is not without exception. NJDPM, 185 N.J. at 152. Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.’” NJDPM, 185 N.J. at 153 (quoting, Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

New Jersey public policy, as codified in OPRA, is that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” NJDPM, 185 N.J. at 153 (citing, N.J.S.A. 47:1A-1). 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. See generally, NJDPM, 185 N.J. at 137. “By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” Id. at 153. (quoting, Courier News v. Hunterdon Cty. Prosecutor’s Off., 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. at 432. Further, the Council found a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 73. Accordingly, the Council ruled that the Complainant was a prevailing party entitled to an award of a reasonable attorney’s fee and was directed to file an application for attorney’s fees.

A. Standards for Fee Award

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” NJDPM, 185 N.J. at 153. (quoting, Rendine, 141 N.J. at 324 (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983))). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill and reputation in the

same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting, Rendine, 141 N.J. at 337). What the fee-shifting statutes do not contemplate is that the losing party has to pay for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing, Council Enter., Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Once the reasonable number of hours has been ascertained, the court should adjust the lodestar in light of the success of the prevailing party in relation to the relief sought. Walker, 415 N.J. Super. at 606 (citing, Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004)). The loadstar amount may be adjusted, either upward or downward, depending on the degree of success achieved. See NJDPM, 185 N.J. at 153-55. OPRA neither mandates nor prohibits enhancements. Rivera v. Office of the Cty. Prosec., 2012 N.J. Super. Unpub. LEXIS 2752 *1, * 10 (Law Div. Dec. 2012) (citing, NJDPM, 185 N.J. at 157 (applying, Rendine, 141 N.J. 292 (1995) to OPRA)). However, “[b]ecause enhancements are not preordained . . . enhancements should not be made as a matter of course.” NJDPM, 185 N.J. at 157.

“[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting, Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting, Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success. . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting, Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting, Hensley, 461 U.S. at 435). Notwithstanding that position, the NJDPM court cautioned that “unusual circumstances may occasionally justify and upward adjustment of the lodestar,” but cautioned that “[o]rdinarily[] the facts of an OPRA case will not warrant and enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157.

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at *10-11 (citing, Furst, 182 N.J. 1, 21-22 (2004) (applying RPC § 1.5(a))).

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

Rivera, at 11 (citing, R.P.C. 1.5(a)). In addition, N.J.A.C. 5:105-2.13 sets forth the information which counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by that Code section permits the reviewing tribunal to analyze the reasonableness of the requested fee.

Finally, the appellate court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate the fact that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting, Furey v. County of Ocean, 287 N.J. Super. 42, 46 (1996)).

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter Counsel is seeking a fee award of \$960.00, representing 3.2 hours at \$300 per hour. In support of this hourly rate Counsel submits legal precedent of comparable rates for attorneys that were ruled as reasonable. Citing, O’Boyle v. Borough of Longport, ATL-L-002294-09 (approving an hourly rate of \$325) and Pat Doe v. Rutgers, MID-L-488-11 (finding \$325 is a reasonable fee in an OPRA matter).

With respect to Counsel’s request for a \$300 hourly rate, he cites to his experience representing clients in OPRA matters at the Supreme and Superior Courts of New Jersey as well as before the GRC. Luers Certif. at ¶ 10. The Council also takes notice of the thirty plus published and unpublished decisions of the Supreme Court, Appellate and Law Divisions as well as the numerous GRC cases wherein Mr. Luers appeared.

The rate of \$300 is reasonable for a practitioner with experience and skill level of Mr. Luers in this geographical area.

b. Time Expended

In support of his request for fees, Counsel submitted a log of his time. For the period from “June 26, 2012 through November 27, 2013” Counsel billed a total of 3.2 hours for work on the file. This included reviewing of file; drafting complaint and letter brief; conducting legal research; reviewing of e-mail correspondence to and/or from the GRC; communicating with the client regarding the action; and preparing fee application.

Further in accordance with the mandates of N.J.A.C. 105-2.13(b), Counsel’s time-sheets provide detailed descriptions of the exact work performed and when, in the required tenths of an hour. N.J.A.C. 105-2.13(b)(5). Most entries are broken into time increments of one tenth of an hour, with an accompanying description of the work performed. Time entries of exchanges

identify the entity or individual with whom Mr. Luers communicated. Similarly, notations for reviewing of pleadings identify the specific document examined.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application, conforms with the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. The Council finds that 3.2 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Luers, Counsel to the Complainant, for the full amount of \$960.00, representing 3.2 hours of service at \$300 per hour.**

2. Enhancement Analysis

Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application, conforms with the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. The Council finds that 3.2 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Luers, Counsel to the Complainant, for the full amount of \$960.00, representing 3.2 hours of service at \$300 per hour.**
2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

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

January 21, 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

October 29, 2013 Government Records Council Meeting

Tamara White
Complainant

Complaint No. 2012-218

v.

Monmouth Regional High School
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 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:

1. The Custodian complied with the Council’s September 24, 2013 Interim Order because she provided the Complainant with the responsive minutes without redactions of the homeowner’s name and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
2. The Custodian’s response was insufficient. She initially assessed a special service charge that was unreasonable and unwarranted, and she ultimately failed to bear her burden of proving a lawful denial of access to the homeowner’s name contained in the December 3, 2002 and January 7, 2003 minutes. However, the Custodian bore her burden of proving a lawful denial of access to the remainder of the redactions and complied with both Interim Orders. 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, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s July 23 and September 24, 2013, Interim Orders, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian complied with both Orders by providing a refund to the Complainant and disclosing minutes without redactions of a homeowner’s name. 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. N.J.S.A. 47:1A-6; Teeters, 387 N.J. Super. at 432; Mason, 196 N.J. at



76. Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).

Interim Order Rendered by the
Government Records Council
On The 29th Day of October, 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: October 30, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting**

**Tamara White¹
Complainant**

GRC Complaint No. 2012-218

v.

**Monmouth Regional High School²
Custodial Agency**

Records Relevant to Complaint:³ Electronic copies via e-mail of closed session minutes of Board of Education meetings ... from November 1, 2002 through March 1, 2003.

Custodian of Record: Maria Anne Parry

Request Received by Custodian: March 22, 2012

Response Made by Custodian: March 23, 2012

GRC Complaint Received: July 20, 2012

Background

September 24, 2013 Council Meeting:

At its September 24, 2013 public meeting, the Council considered the September 17, 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, found that:

1. The Custodian complied with the Council's July 23, 2013 Interim Order because she provided the Complainant with the ordered refund, submitted unredacted copies of the responsive minutes for an *in camera* review and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
2. The Custodian bore her burden of proving that she lawfully redacted the responsive minutes in a minimal manner to protect the names and initials of parents, students and staff members. N.J.S.A. 18A:36-19, FERPA, N.J.A.C. 6A:32-7.4(a), (b)ii, N.J.A.C. 6A:32-4.9 and N.J.S.A. 47:1A-1.1.
3. The Custodian has not borne her burden of proving a lawful denial of access to the homeowner's name in the December 3, 2002 and January 7, 2003 minutes. N.J.S.A.

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

² Represented by Martin M. Barger, Esq., of Reussille Law Firm, LLC (Shrewsbury, NJ).

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

- 47:1A-6. The Custodian must disclose those minutes without redactions of the homeowner's name.
4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
 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.

Procedural History:

On September 25, 2013, the Council distributed its Interim Order to all parties. On the same day, the Custodian responded to the Council's Interim Order providing the Complainant with copies of the December 3, 2002 and January 7, 2003 minutes without redactions of the homeowner's name and simultaneously provided certified confirmation of compliance to the Executive Director.

Analysis

Compliance

On September 24, 2013, the Council ordered the Custodian to disclose the December 3, 2002 and January 7, 2003 minutes without redactions of the homeowner's name and to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On September 25, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On the same day, hours after receipt of the Order and well within the prescribed time frame to comply, the Custodian provided to the Complainant and GRC copies of the minutes without redactions of the homeowner's name and submitted certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's September 24, 2013 Interim Order because she provided the Complainant with the responsive minutes without redactions of the

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

homeowner's name and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.

Knowing & Willful

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 “... [i]f 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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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's response was insufficient. She initially assessed a special service charge that was unreasonable and unwarranted, and she ultimately failed to bear her burden of proving a lawful denial of access to the homeowner's name contained in the December 3, 2002 and January 7, 2003 minutes. However, the Custodian bore her burden of proving a lawful denial of access to the remainder of the redactions and complied with both Interim Orders. 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, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prevailing Party 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 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.

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 Supreme 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, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 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.

However, the Court noted in Mason, 196 N.J. at 72, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. *Citing* Teeters, 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 accepted the application of the catalyst theory within the context of OPRA, stating that:

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.

Mason at 73-76 (2008).

The Court in Mason, further held that:

[R]equestors 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).

Id. at 76.

Here, the Council's July 23, 2013 Interim Order required the Custodian to refund \$5.52 to the Complainant and the Council's September 24, 2013 Interim Order required the Custodian to disclose two (2) sets of minutes without redactions of a homeowner's name. The Custodian complied with both Orders in a timely manner. Thus, the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Therefore, pursuant to the Council's July 23 and September 24, 2013, Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian complied with both Orders by providing a refund to the Complainant and disclosing minutes without redactions of a homeowner's name. 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. N.J.S.A. 47:1A-6; Teeters, 387 N.J. Super. at 432; Mason, 196 N.J. at 76. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's September 24, 2013 Interim Order because she provided the Complainant with the responsive minutes without redactions of the homeowner's name and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.

2. The Custodian's response was insufficient. She initially assessed a special service charge that was unreasonable and unwarranted, and she ultimately failed to bear her burden of proving a lawful denial of access to the homeowner's name contained in the December 3, 2002 and January 7, 2003 minutes. However, the Custodian bore her burden of proving a lawful denial of access to the remainder of the redactions and complied with both Interim Orders. 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, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's July 23 and September 24, 2013, Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian complied with both Orders by providing a refund to the Complainant and disclosing minutes without redactions of a homeowner's name. 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. N.J.S.A. 47:1A-6; Teeters, 387 N.J. Super. at 432; Mason, 196 N.J. at 76. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Prepared By: Frank F. Caruso
Senior Case Manager

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

October 22, 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

September 24, 2013 Government Records Council Meeting

Tamara White
Complainant

Complaint No. 2012-218

v.

Monmouth Regional High School
Custodian of Record

At the September 24, 2013 public meeting, the Government Records Council (“Council”) considered the September 17, 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:

1. The Custodian complied with the Council’s July 23, 2013 Interim Order because she provided the Complainant with the ordered refund, submitted unredacted copies of the responsive minutes for an *in camera* review and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
2. The Custodian bore her burden of proving that she lawfully redacted the responsive minutes in a minimal manner to protect the names and initials of parents, students and staff members. N.J.S.A. 18A:36-19, FERPA, N.J.A.C. 6A:32-7.4(a), (b)ii, N.J.A.C. 6A:32-4.9 and N.J.S.A. 47:1A-1.1.
3. The Custodian has not borne her burden of proving a lawful denial of access to the homeowner’s name in the December 3, 2002 and January 7, 2003 minutes. N.J.S.A. 47:1A-6. The Custodian must disclose those minutes without redactions of the homeowner’s name.
4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

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

² Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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 24th Day of September, 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: September 25, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 24, 2013 Council Meeting**

**Tamara White¹
Complainant**

GRC Complaint No. 2012-218

v.

**Monmouth Regional High School²
Custodial Agency**

Records Relevant to Complaint:³ Electronic copies via e-mail of closed session minutes of Board of Education meetings ... from November 1, 2002 through March 1, 2003.

Custodian of Record: Maria Anne Parry

Request Received by Custodian: March 22, 2012

Response Made by Custodian: March 23, 2012

GRC Complaint Received: July 20, 2012

Background

July 23, 2013 Council Meeting:

At its July 23, 2013 public meeting, the Council considered the July 16, 2013 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 provided redacted records to the Complainant but failed to indicate the specific lawful basis for each redaction. Thus, because the Custodian failed to provide a specific lawful basis for the redactions to the requested executive session minutes, the Custodian's response to the Complainant's OPRA request is insufficient. N.J.S.A. 47:1A-5(g), Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). *See also* Schwarz v. NJ Dep't of Human Serv., GRC Complaint No. 2004-60, (February 2005); Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010).
2. The GRC must conduct an *in camera* review of the nine (9) pages of minutes to determine the validity of the Custodian's assertion that the redactions contain information exempt under N.J.S.A. 18A:36-19, FERPA, N.J.A.C. 6A:32-7.4(a), (b)ii

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

² Represented by Martin M. Barger, Esq., of Reussille Law Firm, LLC (Shrewsbury, NJ).

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

and N.J.S.A. 47:1A-1.1. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.

3. The Custodian's assessed special service charge of \$5.52 to redact nine (9) pages of minutes over six (6) minutes is unreasonable and unwarranted. N.J.S.A. 47:1A-5(c). Thus, the Custodian must refund the paid fee to the Complainant. *See McBride v. Borough of Mantoloking (Ocean)*, GRC Complaint No. 2009-138 (Interim Order dated April 8, 2010).
4. **The Custodian shall comply with item Nos. 2 and 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
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.

Procedural History:

On July 24, 2013, the Council distributed its Interim Order to all parties. On July 25, 2013, the Custodian responded to the Council's Interim Order. The Custodian certifies that on July 25, 2013, she forwarded a refund check in the amount of \$5.52 to the Complainant's colleague, who paid for the records. The Custodian further certifies that attached are unredacted copies of the minutes requested by the Council for an *in camera* review. The Custodian certifies that the legal explanation for said redactions is as follows:

- N.J.S.A. 47:1A-1.1 – attorney-client privilege of a private citizen matter and staff member.
- N.J.S.A. 18A:36-19; the Family Educational Rights and Privacy Act (“FERPA”); N.J.A.C. 6A:32-7.4(a), (b)ii; N.J.S.A. 47:1A-1.1; – Parents' and students' names and initials.
- N.J.A.C. 6A:32-4.9 – access to personnel records.

On September 4, 2013, the GRC sought additional information regarding the applicability of the attorney-client privilege exemption to the Reeds Road matters. On September 5, 2013, the

⁴ “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”

⁵ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Custodian certifies that a homeowner on Reeds Road threatened litigation over the high school gate at Reeds Road being left open. The Custodian certifies that because there was pending litigation, the name of the homeowner was redacted. N.J.S.A. 47:1A-1.1. The Custodian further certifies that a settlement between the homeowner and Monmouth Regional High School was reached regarding the Reeds Road gate issue.

Analysis

Compliance

On July 23, 2013, the Council ordered the Custodian to refund \$5.52 to the Complainant and to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. The Council further ordered the Custodian to provide copies of the unredacted meeting minutes for an *in camera* review. On July 24, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On July 25, 2013, well within the prescribed time frame to comply, the Custodian sent a refund to the Complainant via her colleague who remitted payment for the records, provided copies of the unredacted meeting minutes to the GRC and submitted certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's July 23, 2013 Interim Order because she provided the Complainant with the ordered refund, submitted unredacted copies of the responsive minutes for an *in camera* review and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.

Unlawful Denial of Access

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 "[a] government record shall not include ... any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1. OPRA further provides that its provisions "... shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute ... regulation promulgated under the authority of any statute or Executive Order of the Governor ..." N.J.S.A. 47:1A-9(a).

FERPA provides the following:

Each educational agency or institution shall maintain a record, kept with the education records of each student ... Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under

the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

20 USCA § 1232g(b)(4)(A).

N.J.S.A. 18A:36-19 provides that “[t]he State Board of Education shall provide by regulation for the creation, maintenance and retention of pupil records and for the security thereto, to provide general protection for ... the right of both pupil and parent or guardian to reasonable privacy as against other persons ...” Moreover, N.J.A.C. 6A:32-7.4 provides that “[t]he chief school administrator ... shall be responsible for ... assuring that access to [student] records is limited to authorized persons.” Finally, N.J.A.C. 6A:32-4.9 provides that “[a] district board of education shall make ... employee records and information available for public access, pursuant to N.J.S.A. 47:1A-10 ...”

The GRC conducted an *in camera* examination of the submitted executive session minutes for November 5, 2002, November 19, 2002, December 3, 2002, December 17, 2002, January 7, 2003, January 21, 2003, February 4, 2003, and February 18, 2003, to determine the validity of the Custodian’s assertion that the minutes were properly redacted pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 18A:36-19, FERPA, N.J.A.C. 6A:32-7.4(a), (b)ii and N.J.A.C. 6A:32-4.9. Seven (7) of the eight (8) records submitted contained minimal redactions. The Custodian redacted names and initials of parents and students pertaining to several student issues, initials of a staff member involved in possible pending charges, and the name of a homeowner regarding “Reed Road.” This is the only content redacted from the minutes.

The *in camera* examination of the seven (7) sets of executive session minutes reveals that the student initials, names and parent names were properly redacted. Specifically, FERPA is a privacy law where the presumption is that records are exempt unless sought by persons or organizations as authorized therein. Here, there is no evidence in the record to indicate that the Complainant is one of those persons or organizations authorized to receive education records otherwise exempt from disclosure under FERPA. Thus, the Custodian properly redacted student initials, names and parent names.

The redaction of the staff member’s initials was also proper because the matter pertained to personnel issues. Specifically, the staff member was not at work because said member had pending charges that were subsequently dismissed. This type of personnel information does not fall within one of the excepted categories of disclosable information under N.J.S.A. 47:1A-10. *See also* N.J.A.C. 6A:32-4.9.

Accordingly, the Custodian bore her burden of proving that she lawfully redacted the responsive minutes in a minimal manner to protect the names and initials of parents, students and staff members. N.J.S.A. 18A:36-19, FERPA, N.J.A.C. 6A:32-7.4(a), (b)ii, N.J.A.C. 6A:32-4.9 and N.J.S.A. 47:1A-1.1.

However, the redaction of the homeowner regarding an issue on Reeds Road was outside the proper scope of the attorney-client privilege. Attorney-client communications involving discussion of litigation strategy, evaluation of liability, potential monetary exposure and

settlement recommendations are considered privileged. The Press of Atlantic City v. Ocean Cnty. Joint Ins. Fund, 337 N.J. Super. 480, 487 (Law Div. 2000). Also confidential are mental impressions, legal conclusions, and opinions or theories of attorneys. In Re Env'tl. Ins. Actions, 259 N.J. Super. 308, 317 (App. Div. 1992). Also, whether the matter contained in the requested documents pertains to pending or closed cases is important because the need for confidentiality is greater in pending matters. Keddie v. Rutgers, State Univ., 148 N.J. 36, 54 (1997).

Here, the identity of the homeowner's name itself is not attorney-client privileged. The homeowner's name in light of threatened litigation does not implicate the type of information the Court considers privileged. The disclosure of the name would not reveal litigation strategy, evaluation, liability, or opinions. Furthermore, that the matter has been settled also obviates the need for confidentiality.

Thus, the Custodian has not borne her burden of proving a lawful denial of access to the homeowner's name in the December 3, 2002 and January 7, 2003 minutes. N.J.S.A. 47:1A-6. The Custodian must disclose those minutes without redactions of the homeowner's name.

Knowing & Willful

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.

Prevailing Party 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 complied with the Council's July 23, 2013 Interim Order because she provided the Complainant with the ordered refund, submitted unredacted copies of the responsive minutes for an *in camera* review and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
2. The Custodian bore her burden of proving that she lawfully redacted the responsive minutes in a minimal manner to protect the names and initials of parents, students and staff members. N.J.S.A. 18A:36-19, FERPA, N.J.A.C. 6A:32-7.4(a), (b)ii, N.J.A.C. 6A:32-4.9 and N.J.S.A. 47:1A-1.1.
3. The Custodian has not borne her burden of proving a lawful denial of access to the homeowner's name in the December 3, 2002 and January 7, 2003 minutes. N.J.S.A. 47:1A-6. The Custodian must disclose those minutes without redactions of the homeowner's name.

4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
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: Brandon D. Minde, Esq.
Executive Director

September 17, 2013

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INTERIM ORDER

July 23, 2013 Government Records Council Meeting

Tamara White
Complainant

Complaint No. 2012-218

v.

Monmouth Regional High School
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 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 provided redacted records to the Complainant but failed to indicate the specific lawful basis for each redaction. Thus, because the Custodian failed to provide a specific lawful basis for the redactions to the requested executive session minutes, the Custodian’s response to the Complainant’s OPRA request is insufficient. N.J.S.A. 47:1A-5(g), Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). *See also* Schwarz v. NJ Department of Human Services, GRC Complaint No. 2004-60, (February, 2005); Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (May 2010).
2. The GRC must conduct an *in camera* review of the nine (9) pages of minutes to determine the validity of the Custodian’s assertion that the redactions contain information exempt under N.J.S.A. 18A:36-19, FERPA, N.J.A.C. 6A:32-7.4(a), (b)ii and N.J.S.A. 47:1A-1.1. *See* Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
3. The Custodian’s assessed special service charge of \$5.52 to redact nine (9) pages of minutes over six (6) minutes is unreasonable and unwarranted. N.J.S.A. 47:1A-5(c). Thus, the Custodian must refund the paid fee to the Complainant. *See* McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (Interim Order dated April 8, 2010).
4. **The Custodian shall comply with item Nos. 2 and 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**



redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to 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.

Interim Order Rendered by the
Government Records Council
On The 23rd Day of July, 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: July 24, 2013

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

² Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting**

**Tamara White¹
Complainant**

GRC Complaint No. 2012-218

v.

**Monmouth Regional High School²
Custodial Agency**

Records Relevant to Complaint:³ Electronic copies via e-mail of closed session minutes of Board of Education meetings ... from November 1, 2002 through March 1, 2003.

Custodian of Record: Maria Anne Parry

Request Received by Custodian: March 22, 2012

Response Made by Custodian: March 23, 2012

GRC Complaint Received: July 20, 2012

Background⁴

Request and Response:

On March 20, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request. On March 22, 2012, the same business day following receipt of said request, the Custodian responded in writing that closed session minutes must be redacted and that a charge will apply. The Custodian requested that the Complainant advise if she still wanted the responsive records. On March 27, 2012, the Complainant stated that because the minutes are nine (9) years old, it is unlikely that redaction is necessary. The Complainant requested that the Custodian forward the fee and noted that a special service charge is only warranted if an extraordinary amount of time and effort is spent.

On March 27, 2012, the Custodian responded that the cost for redacting the records is \$5.58. The Complainant requested a cost breakdown. On March 28, 2012, the Custodian advised that the revised cost is \$5.52 for six (6) minutes of redaction time. The Custodian stated that she would send the records to the Complainant electronically upon receipt of payment. The

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

² Represented by Martin M. Barger, Esq. (Shrewsbury, NJ).

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

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Complainant disputed the redactions made to the minutes and the assessed special service charge.

On April 5, 2012, the Complainant stated that she will pay the fee but will also be filing a complaint because the charge is unreasonable and unwarranted. On April 10, 2012, a colleague of the Complainant paid the fee and retrieved the responsive records.

Denial of Access Complaint:

On July 20, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputes the assessment of a special service charge of \$5.52 for six (6) minutes of time to redact responsive minutes. The Complainant contends that the Council has previously concluded that a special service charge for seven (7) minutes of time was unreasonable and unwarranted. McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (Interim Order dated April 8, 2010). The Complainant contends that the facts in McBride, are similar to the facts here and the Council should reject the Custodian’s assessed fee and order the Board to refund her money.

The Complainant further contends that the Custodian violated OPRA by failing to provide a lawful basis for redacting the minutes. N.J.S.A. 47:1A-5(g); Schwarz v. NJ Dep’t of Human Services, GRC Complaint No. 2004-60 (February 2005); Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (Interim Order dated July 14, 2005); Paff v. Borough of Lavallette (Ocean), GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008); Rivera v. City of Camden (Camden), GRC Complaint No. 2010-182 (Interim Order dated January 31, 2012). The Complainant requests that the Council order the Custodian to provide the lawful basis for redacting portions of the responsive minutes.

The Complainant finally requests that the Council determine that she is a prevailing party entitled to an award of reasonable attorney’s fees. N.J.S.A. 47:1A-6.

Statement of Information:

On September 17, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on March 22, 2012. She located the responsive records (9 pages) and identified student and employee names present in the minutes. The Custodian sought advice from Counsel as well as relied on an inquiry response from the GRC to redact the minutes. She returned copies of the unredacted and redacted minutes to Counsel and sought approval to disclose the minutes. The Custodian certifies that upon approval, she contacted the Complainant providing access to the minutes upon payment of \$5.52. After several e-mails, the Complainant decided to send a colleague to pay the fee and retrieve the redacted records in electronic form.

The Custodian asserts she determined the special service charge by comparing the request at issue here to the request in Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010). The Custodian asserts that she also recently responded to a similar OPRA request in which she charged for redactions uncontested. The Custodian contends

that since she charged for the previous OPRA request, she felt as though she had to remain consistent by charging the Complainant especially because the Complainant was familiar with said request. The Custodian knew she had to review each set of minutes for possible redactions because she was not the Board secretary when the minutes were created. The Custodian started at 12:47 pm and finished her review and redaction at 12:53 pm, and then calculated the charge based on her salary.

The Custodian certifies that the minutes were redacted because they contained names of students and staff involved in legal matters at the time of their employment or enrollment at Monmouth Regional High School. The Custodian contends that although the students and employees are no longer at the school, the records reflect matters that occurred at the time the students were minors or involved in litigation and were properly redacted. N.J.S.A. 18:36-19; Family Educational Rights and Privacy Act (“FERPA”); *N.J.A.C.* 6A:32-7.4(a), (b)ii; N.J.S.A. 47:1A-1.1. The Custodian certifies that the minutes also included the name of a private citizen in matter that could have become litigation. N.J.S.A. 47:1A-1.1.

Analysis⁵

Insufficient Response

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

OPRA requires that, when providing access to redacted records, a custodian shall provide a specific lawful basis for redactions. In Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), the Custodian responded in a timely manner providing redacted records to the Complainant; however, the Custodian failed to provide a specific legal basis for said redactions. The Council held that “[t]he Custodian’s response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction ...” *Id.* at 4. The Council further held that “... the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and has not borne his burden of proving the denial of access to the redacted portions was authorized by law pursuant to N.J.S.A. 47:1A-6.” *Id.* at 5. See Schwarz v. NJ Department of Human Services, GRC Complaint No. 2004-60, (February, 2005)(setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial); Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (May 2010)(noting that N.J.S.A. 47:1A-5(g) requires a custodian of record to indicate the specific basis for noncompliance).

Here, the Custodian provided redacted records to the Complainant but failed to indicate the specific lawful basis for each redaction. Thus, because the Custodian failed to provide a specific lawful basis for the redactions to the requested executive session minutes, the

⁵ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

Custodian's response to the Complainant's OPRA request is insufficient. N.J.S.A. 47:1A-5(g), Paff, supra. See also Schwarz, supra; Renna, supra.

Unlawful Denial of Access

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 Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁶ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The Court stated that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." *Id.* The Court also stated that:

The statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court stated that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Complainant filed this complaint without the benefit of being able to refute the asserted exemptions for redactions that the Custodian failed to raise until submission of the SOI.

⁶ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).

These exemptions include N.J.S.A. 18A:36-19, FERPA, *N.J.A.C.* 6A:32-7.4(a), (b)ii and N.J.S.A. 47:1A-1.1. A review of the minutes indicates that most of the redactions appear to be names of students and families involved in disciplinary hearings. However, the Custodian also redacted names that appear not to be related to any matters exempting them from access.

Therefore, the GRC must conduct an *in camera* review of the nine (9) pages of minutes to determine the validity of the Custodian's assertion that the redactions contain information exempt under N.J.S.A. 18A:36-19, FERPA, *N.J.A.C.* 6A:32-7.4(a), (b)ii and N.J.S.A. 47:1A-1.1. See Paff, *supra*, and N.J.S.A. 47:1A-1.1.

Special Service Charge

OPRA provides that:

A copy or copies of a government record may be purchased ... upon payment of the fee prescribed by law or regulation. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be \$ 0.05 per letter size page or smaller, and \$ 0.07 per legal size page or larger ... The 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 except as provided for in subsection c. of this section. *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 further provides that:

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ... 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).

Whenever a 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). The determination of what constitutes an “extraordinary

expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of a variety of factors. The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002).

Additionally, in complaints where the complainant paid an assessed fee and the Council subsequently determined that the fee was unwarranted or unreasonable, the Council has ordered public agencies to refund monies to a complainant. See Coulter v. Township of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009)(citing Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (January 2008))(holding that the assessed special service charge was unreasonable and ordering the Custodian to refund the difference between the \$5.00 fee and the actual cost of \$0.96 (or \$4.04)).

Here, the Complainant disputed the \$5.52 special service charge the Custodian assessed for six (6) minutes of time spent redacting the nine (9) pages of minutes. The Custodian contended in the SOI that she determined the special service charge by comparing the request at issue here to the request in Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010). The Custodian did not assert that the charge was based on having to print out and redact the records. Additionally, the Custodian did not argue that the fee represented the actual cost of providing the responsive records to the Complainant electronically. N.J.S.A. 47:1A-5(b).

The Custodian erroneously relied on Paff, *supra*, which involved the Council invalidating the custodian’s charge of \$7.50 to scan and e-mail records to the complainant. The facts here are similar to those in McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (Interim Order dated April 8, 2010). The Council determined there that seven (7) minutes of time for redaction was “... not an extraordinary amount of time to fulfill an OPRA request, a special service charge is not warranted pursuant to N.J.S.A. 47:1A-5(c).” *Id.* at 13. That holding applies here because six (6) minutes of time to redact nine (9) pages of minutes does not meet the definition of “... an extraordinary expenditure of time and effort to accommodate the request ...” N.J.S.A. 47:1A-5(c).

Therefore, the Custodian’s assessed special service charge of \$5.52 to redact nine (9) pages of minutes over six (6) minutes is unreasonable and unwarranted. N.J.S.A. 47:1A-5(c) Thus, the Custodian must refund the paid fee to the Complainant. See McBride, *supra*.

Knowing & Willful

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.

Prevailing Party 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 provided redacted records to the Complainant but failed to indicate the specific lawful basis for each redaction. Thus, because the Custodian failed to provide a specific lawful basis for the redactions to the requested executive session minutes, the Custodian's response to the Complainant's OPRA request is insufficient. N.J.S.A. 47:1A-5(g), Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). *See also* Schwarz v. NJ Department of Human Services, GRC Complaint No. 2004-60, (February, 2005); Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (May 2010).
2. The GRC must conduct an *in camera* review of the nine (9) pages of minutes to determine the validity of the Custodian's assertion that the redactions contain information exempt under N.J.S.A. 18A:36-19, FERPA, N.J.A.C. 6A:32-7.4(a), (b)ii and N.J.S.A. 47:1A-1.1. *See* Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
3. The Custodian's assessed special service charge of \$5.52 to redact nine (9) pages of minutes over six (6) minutes is unreasonable and unwarranted. N.J.S.A. 47:1A-5(c). Thus, the Custodian must refund the paid fee to the Complainant. *See* McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (Interim Order dated April 8, 2010).
4. **The Custodian shall comply with item Nos. 2 and 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁷ to the Executive Director.⁸**
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

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."

⁸ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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

July 16, 2013