



## State of New Jersey

### GOVERNMENT RECORDS COUNCIL

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VINCENT P. MALTESE, Chairman  
ACTING COMMISSIONER CHALRES RICHMAN  
COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

### FINAL DECISION

#### September 26, 2007 Government Records Council Meeting

Joe B. Truland, Esq.  
Complainant

Complaint No. 2006-88

v.

Borough of Madison  
Custodian of Record

At the September 26, 2007 public meeting, the Government Records Council ("Council") considered the September 19, 2007 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. While public agencies may routinely accept non-OPRA requests for motor vehicle accident reports, because the Complainant submitted his request for said reports on the agency's official OPRA request form and because the Custodian attempted to fulfill the Complainant's request, the Complainant's March 31, 2006 request is considered a valid OPRA request.
2. Although the Custodian provided a written response within the statutorily mandated seven (7) business days, said response is not adequate pursuant to OPRA because it does not grant access, deny access, seek clarification, or request an extension of time. Thus, the request is "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., John Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006) and John Bart, Esq. v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007).
3. Pursuant to N.J.S.A. 47:1A-9.a., the provisions of OPRA do not abrogate the provisions of N.J.S.A. 39:4-131. Consequently, the Custodian has lawfully charged the Complainant \$40.25 for the requested accident reports pursuant to N.J.S.A. 39:4-131.
4. No redactions to the requested auto accident reports are warranted pursuant to N.J.S.A. 39:4-131.



5. Because the Custodian provided a written response within the statutorily mandated seven (7) business days indicating that he was seeking legal advice, and because the Custodian provided the requested records to the Complainant within one (1) month of receiving the request, 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. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 26<sup>th</sup> Day of September, 2007

Vincent P. Maltese, Chairman  
Government Records Council

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

David Fleisher, Secretary  
Government Records Council

**Decision Distribution Date: October 2, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 26, 2007 Council Meeting**

**Joe B. Truland, Esq.<sup>1</sup>**  
**(on behalf of American Legal Marketing, LLC)**  
**Complainant**

**GRC Complaint No. 2006-88**

**v.**

**Borough of Madison<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Accident reports for all automotive accidents occurring between March 25, 2006 and March 31, 2006.

**Request Made:** March 31, 2006

**Response Made:** March 31, 2006 and April 20, 2007

**Custodian:** Marilyn Schaefer

**GRC Complaint Filed:** May 3, 2006

**Background**

**March 31, 2006**

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.

**March 31, 2006**

Custodian's response to the Complainant's OPRA request dated March 31, 2006. The Custodian responds to the Complainant's OPRA request on the same business day following receipt of such request. The Custodian states that the Complainant's request was referred to the Borough Attorney and copied to the Police Department.

**April 3, 2006**

Letter from Complainant to Custodian's Counsel. The Complainant requests that Counsel advise him of when he should start receiving the auto accident reports that the Complainant has requested over the last several months. The Complainant requests that the Borough only provide the records requested in the Complainant's most recent OPRA request (March 31, 2006) as the necessity for the previously requested records has passed.

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<sup>1</sup> The Complainant is representing himself as an employee of American Legal Marketing, LLC.

<sup>2</sup> Represented by Joseph Mezzacca, Jr., Esq. (Madison, NJ).

**April 20, 2006**

Custodian's subsequent response to the Complainant's OPRA request. The Custodian states that seven (7) police accident reports will be provided at the cost of \$5.00 for each report plus \$0.75 per page. The Custodian states that because the seven (7) reports total seven (7) pages, the total cost for copying is \$40.25.

**April 21, 2006**

Facsimile from Complainant to Custodian. The Complainant states that he is in receipt of the Custodian's invoice. The Complainant states that because his request is a bulk request, he has been billed by all other towns at \$5.00 for the first page and \$0.75 for each page thereafter. The Complainant requests that the Custodian confirm that the Borough's invoice shall be adjusted.

**April 21, 2006<sup>3</sup>**

Letter from Complainant to Custodian's Counsel. The Complainant states that he is in receipt of an invoice from the Custodian and that he has discussed this matter with her. The Complainant states that he has received accident reports from other municipalities at the cost of \$5.00 for the first page and \$0.75 for each additional page of the package of requested records. The Complainant states that the Custodian is interpreting the statute to allow the charge of \$5.00 per report. The Complainant asserts that he is not ordering one (1) report, but that he is ordering a package of information.

Additionally, the Complainant states that if the Borough is not able to provide the requested records for the same cost as every other town, then the Complainant will file a complaint with the Government Records Council to obtain the reports for the proper price.

**April 25, 2006**

Letter from Complainant to Custodian's Counsel. The Complainant states that he has enclosed a copy of the most recent invoice from Paramus, NJ so that Counsel can see that the Complainant was billed as a bulk request and not at \$5.00 per report. The Complainant suggests that Counsel call Morristown, NJ to inquire as to its pricing policy.

**May 2, 2006**

Letter from Custodian's Counsel to Complainant. Counsel states that this letter acknowledges his various telephone conversations with the Complainant regarding the Complainant's request for accident reports from the Madison Police Department. Counsel states that he does not view the Complainant's request solely as an OPRA request, but also a request covered under N.J.S.A. 39:4-131, the Motor Vehicle and Traffic Regulations of the New Jersey Statutes. Counsel states that the Paramus invoice, which was provided by the Complainant, appears to not take into account the fee allowed by N.J.S.A. 39:4-131 specifically regarding accident reports. Counsel quotes N.J.S.A. 39:4-131 in part as:

Every citizen of this State shall have the right, during regular business hours and under supervision, to inspect and copy such reports and also shall have the right in person to purchase copies of the reports at the same

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<sup>3</sup> Dated April 3, 2006 but received by the Custodian on April 21, 2006.

fee established by section 2 of P.L. 1963 c.73 (C.47:1A-2). If copies of reports are requested other than in person, an additional fee of up to \$5.00 for the first three pages and \$1.00 per page thereafter may be added to cover the administrative costs of the report.

Counsel asserts that the statute provides that any reports obtained in person will be charged the fee prescribed under OPRA of \$0.75 per page for pages 1-10. Counsel states that the statute provides that if the reports are requested other than in person, an additional fee of up to \$5.00 for the first three (3) pages and \$1.00 per page thereafter may be added. Counsel states that the statute specifically uses the word "report." Counsel asserts that although the beginning of the sentence refers to multiple reports, the terminology regarding the fee refers to each report, which Counsel asserts is in addition to the fees prescribed under OPRA.

### **May 3, 2006**

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

- Complainant's OPRA request dated March 31, 2006
- Custodian's response to the OPRA request dated March 31, 2006
- Letter from Complainant to Custodian's Counsel dated April 3, 2006
- Custodian's subsequent response to the OPRA request dated April 20, 2006
- Facsimile from Complainant to Custodian dated April 21, 2006
- Letter from Complainant to Custodian's Counsel dated April 25, 2006
- Letter from Custodian's Counsel to Complainant dated May 2, 2006<sup>4</sup>

The Complainant states that this complaint is based on the fee requested by the Borough for providing copies of auto accident reports, which the Complainant asserts is excessive. The Complainant states that he has been requesting copies of auto accident reports since January 2006 and had been advised that Borough Attorney was reviewing said requests. The Complainant states that in late April, he was advised that the requested records would be provided. The Complainant states that the Borough's position was that each report requested should be billed at \$5.00 for the first page and a smaller fee thereafter, which the Complainant states is unlike the policy of other municipalities. The Complainant asserts that the fee requested by the Borough is excessive because his request is for one (1) set of records, which are reports consisting of one (1) to three (3) pages. The Complainant states that the Borough is charging \$5.00 for the first page of each report, treating each report as a separate request. Additionally, the Complainant states that he would expect such a response if he sent separate requests for specific reports. The Complainant contends that the fees requested by the Borough make it cost prohibitive to gain access to government records.

### **May 12, 2006**

Offer of Mediation sent to both parties.

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<sup>4</sup> Additional OPRA requests and responses were submitted with the Complainant's Denial of Access Complaint; however, said requests are not the subject of this complaint.

**May 19, 2006**

The Custodian declines mediation of this complaint.<sup>5</sup>

**May 19, 2006**

Request for the Statement of Information sent to the Custodian.

**May 26, 2006**

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated March 31, 2006
- Custodian's response to the OPRA request dated March 31, 2006
- Letter from Complainant to Custodian's Counsel dated April 3, 2006
- GRC Advisory Opinion 2006-01

The Custodian asserts that the subject matter of this complaint is not within the jurisdiction of the GRC. The Custodian contends that the Complainant's request for auto accident reports is a non-OPRA request as described in the GRC's Advisory Opinion 2006-01. The Custodian states that said opinion states that "[m]any agencies grant non-OPRA requests for such documents as building inspection reports, motor vehicle accident reports, birth certificates and municipal resolutions." The Custodian asserts that because the request is a non-OPRA request, the Council should dismiss this complaint.

The Custodian certifies that the Complainant submitted his OPRA request on March 31, 2006 for motor vehicle accident reports dated March 25, 2006 through March 31, 2006. The Custodian certifies that the Borough Attorney had several conversations and exchanged correspondence with the Complainant regarding access to the requested accident reports. The Custodian certifies that in a response dated April 20, 2006, the Custodian advised the Complainant that the requested reports would cost \$40.25. The Custodian certifies that via letter dated April 3, 2006 (received by the Borough on April 21, 2006), the Complainant objected to the fees. The Custodian also certifies that via letter dated May 2, 2006, the Borough Attorney provided the Complainant with the legal basis for the charge of \$5.00 for the first three pages and \$1.00 for each page thereafter of each requested accident report in addition to the \$0.75 per page copy fee.

The Custodian certifies that this matter is governed by N.J.S.A. 39:4-131 which provides that accident reports shall be provided and sets the fee for same. Additionally, the Custodian certifies that OPRA states that the Act shall not abrogate an exemption of a public record from public access or any other statute. N.J.S.A. 47:1A-9.<sup>6</sup> The Custodian contends that the GRC has identified that motor vehicle accident reports are non-OPRA records. The Custodian states that the only issue in this matter is the amount of the fee and asserts that such matter is of statutory construction under N.J.S.A. 39:4-131. The Custodian contends that said statute sets forth a fee structure for obtaining accident reports which is to encompass not only the copying fee, but the administrative cost of the report. The Custodian asserts that it would make no sense under that statute to ignore the administrative cost of all subsequent reports supplied in the same request.

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<sup>5</sup> The Complainant submitted his Agreement to Mediate on May 12, 2006.

<sup>6</sup> N.J.S.A. 47:1A-9.a.

Additionally, the Custodian contends that the Complainant's reliance on other municipalities' invoices is not persuasive. The Custodian states that OPRA provides that a copy of a government record may be purchased upon payment of the fee prescribed by law or regulation. N.J.S.A. 47:1A-5.b. The Custodian also states that said section provides for limits except as otherwise provided by law or regulation. Thus, the Custodian asserts that if the requested records are considered to be within the jurisdiction of the GRC and are considered to be OPRA records, the fee set forth by N.J.S.A. 39:4-131 still applies. The Custodian contends that the fee of \$5.00 for the first three pages is in addition to the copying cost allowed under N.J.S.A. 47:1A-2.<sup>7</sup> Thus, the Custodian asserts that the invoice provided to the Complainant is proper for the records being sought.

Further, the Custodian states that in Laufgas v. New Jersey Turnpike Authority, 156 N.J. 436 (1998), one of the issues was whether a State statute authorizing the State Police to collect a \$10.00 fee for each certified copy of a motor vehicle accident report was consistent with the Right to Know Law which provided a limit of \$0.75 per page for the first ten (10) pages. The Custodian states that the court held that the statutory fee of \$10.00 was not preempted by the \$0.75 per page limitation for copying of records under the Right to Know Law.

Additionally, the Custodian contends that names, addresses, vehicle identification numbers and birthdates should be redacted from the requested auto accident reports. The Custodian states that the GRC has previously ruled that names and addresses of citizens who obtain dog or cat licenses shall not be released to the public due to confidentiality concerns. *See* Richard Bernstein v. Borough of Wallington, GRC Complaint No. 2005-01 (July 2005); Richard Bernstein v. Woodcliff Lake, GRC Complaint No. 2005-02 (July 2005); Richard Bernstein v. Borough of Ho Ho Kus, GRC Complaint No. 2005-13 (July 2005); Richard Bernstein v. Borough of Harrington Park, GRC Complaint No. 2005-06 (July 2005); Richard Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005); Richard Bernstein v. Borough of Allendale, GRC Complaint No. 2004-195 (July 2005). Based on the above, the Custodian asserts that the requested accident reports have similar confidential information that should not be made available to the public. The Custodian contends that this argument is made only in the event that the GRC determine that the requested accident reports are OPRA records.

### **August 9, 2006**

Letter from Complainant to Custodian's Counsel. The Complainant requests that Counsel review N.J.S.A. 39:4-131 again because the Complainant asserts that the statute anticipates that the requestor will be able to wait for the request to be fulfilled on the spot. The Complainant contends that his request cannot be satisfied on the spot and thus the Complainant requested the accident reports by fax so that the person putting together the copies can perform this task at a convenient time in his/her schedule. The Complainant asserts that only the OPRA rates should be charged.

### **August 10, 2006**

Letter from Complainant to GRC. The Complainant contends that the only issue in this complaint is the copy fees charged by the Borough for the requested reports. The

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<sup>7</sup> N.J.S.A. 47:1A-5.b.

Complainant states that the Borough's position is that the appropriate costs are established under N.J.S.A. 39:4-131. The Complainant states that the aforementioned statute provides that the fees prescribed under OPRA must be charged if copies of auto accident reports are requested. The Complainant also states that the statute provides that if the reports are requested other than in person, a fee of up to \$5.00 for the first three pages and \$1.00 for each page thereafter may be charged to cover the cost of the administrative cost of the report.

The Complainant asserts that the statute anticipates that a person would walk into the police station and be provided with the requested accident report. However, the Complainant contends that in this situation, where he is requesting multiple accident reports, it is unlikely that the request could be fulfilled while he is waiting. Thus, the Complainant states that to allow the Custodian ample time to fulfill the request, the Complainant faxed said request rather than request the reports in person. The Complainant asserts that it is unreasonable for the Borough to charge a drastically increased copy fee since the Borough is being accommodated by being allowed to prepare the reports at the Borough's convenience.

Additionally, the Complainant states that other municipalities have provided copies of accident reports charging only the fees established in OPRA. The Complainant contends that the Borough has not provided any basis other than N.J.S.A. 39:4-131 for charging more than the OPRA fees. The Complainant asserts that all municipalities should charge the same amount for copies of accident reports because the same amount of work is necessary to prepare said reports, with the exception of towns that have more accidents than others.

### Analysis

#### **What constitutes a valid OPRA records request?**

The Custodian contends that the Complainant's request for auto accident reports is a non-OPRA request as described in the GRC's Advisory Opinion 2006-01. The Custodian states that said opinion states that "[m]any agencies grant non-OPRA requests for such documents as building inspection reports, motor vehicle accident reports, birth certificates and municipal resolutions." The Custodian asserts that because the request is a non-OPRA request, the Council should dismiss this complaint.

Review of the OPRA statute and its legislative intent lead the Council to conclude that use of the request form is required for all requestors. The statute provides that the custodian "shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency." N.J.S.A. 47:1A-5.f. The statute specifically prescribes what must be on the form:

- (1) space for the name, address and phone number of the requestor and a brief description of the government record sought;
- (2) space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged;
- (3) specific directions and procedures for requesting a record;



- (4) a statement as to whether prepayment of fees for a deposit is required;
- (5) the time period in which the public agency is required by OPRA to make the record available;
- (6) 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;
- (7) space for the custodian to list reasons if a request is denied in whole or in part;
- (8) space for the requestor to sign and date the form;
- (9) space for the custodian to sign and date the form if the request is fulfilled or denied.

*Id.*

Although the statute does not expressly state that OPRA requests must be on the form adopted by the agency pursuant to N.J.S.A. 47:1A-5.f., principles of statutory construction show that the Legislature intended use of this form by all requestors to be mandatory. In interpreting a statute, it is axiomatic that "each part or section [of the statute] should be construed in connection with every other part or section so as to produce a harmonious whole." Matturi v. Bd. of Trustees of JRS, 173 N.J. 368, 383 (2002), quoting In re Passaic Cty. Utilities Auth., 164 N.J. 270, 300 (2000). In addition, a construction which renders statutory language meaningless must be avoided. Bergen Comm. Bank v. Sisler, 157 N.J. 188, 204 (1999). *See also* G.S. v. Dept. of Human Serv., 157 N.J. 161, 172 (1999). (a statute should be interpreted so as to give effect to all of its provisions, without rendering any language inoperative, superfluous, void, or insignificant).

As noted, N.J.S.A. 47:1A-5.f. requires that custodians adopt a request form, and sets forth a detailed list of what the form must contain. The next subsection of the statute provides:

If 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.* (Emphasis added.)  
N.J.S.A. 47:1A-5.g.

The form to which N.J.S.A. 47:1A-5.g. refers is the form required by N.J.S.A. 47:1A-5.f. In providing, in 5.g., that the custodian "shall" sign and date the form, indicate the basis for denial on the form, and return the form to the requestor, the Legislature evidenced its clear intent that it is mandatory for the form to be used by requestors. *See* Harvey v. Essex Cty. Bd. Of Freeholders, 30 N.J. 381, 391-92 (1959) (the word "shall" in a statute is generally mandatory). The express requirement that the custodian use the request form in denying an OPRA request, construed together with the preceding statutory requirement that the custodian adopt a request form, demonstrates that the Legislature intended that this form would be used for all OPRA requests. If all requestors are not required to submit requests on the form prescribed by the statute, then the statutory provisions requiring the custodian to sign and date the form, and return it to the requestor, would be meaningless. Indeed, a custodian would be unable to fulfill these

express requirements of N.J.S.A. 47:1A-5.g. if the requestor does not use the form in submitting his request.

Accordingly, nothing in OPRA suggests that some requestors may forgo using the official request form. In enacting the form requirement, the Legislature has expressed its policy that use of the form promotes clarity and efficiency in responding to OPRA requests, consistent with OPRA's central purpose of making government records "readily accessible" to requestors. N.J.S.A. 47:1A-1.

The Appellate Division has indicated that the statute's form requirement serves the additional purpose of prompting the legislative policy that a requestor must specifically describe identifiable records sought. *See* Mag Entertainment LLC v. Div. of ABC, 375 N.J. Super 534, 546 (App. Div. 2005) (an open-ended request that fails to identify records with particularity is invalid). In Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30, 33 (App. Div. 2005), the Court held that the requestor's general request for information violated this policy and was therefore invalid. In reaching this conclusion, the Court noted that OPRA mandates that the request form provide space for a "brief description" of the record request. *Id.* Similarly, in Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005), the Court specifically pointed to the same statutory request form requirement in determining that OPRA does not authorize requestors to make blanket requests for agency records.

Additionally, in NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), the court held that the requestor's "...five (5) page, thirty nine (39) paragraph request bears no resemblance to the record request envisioned by the Legislature, which is one submitted on a form..."

Accordingly, based on the language of the statute, as well as judicial recognition of the importance of the statutory request form, it is determined that the statute requires all requestors to submit OPRA requests on an agency's official OPRA records request form. OPRA's provisions come into play only where a request for records is submitted on an agency's official OPRA records request form. Therefore, while public agencies may routinely accept non-OPRA requests for motor vehicle accident reports, because the Complainant submitted his request for said reports on the agency's official OPRA request form and because the Custodian attempted to fulfill the Complainant's request, the Complainant's March 31, 2006 request is considered a valid OPRA request.

### **Whether the Custodian unlawfully denied access to the requested auto accident reports?**

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 states that:

“...[e]xcept 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 not exceed the following:

- first page to tenth page, \$0.75 per page;
- eleventh page to twentieth page, \$0.50 per page;
- all pages over twenty, \$0.25 per page.

(Emphasis added). N.J.S.A. 47:1A-5.b.

OPRA also provides that:

“...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore 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.

Additionally, OPRA states that:

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

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 also states that:

“[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA] any other *statute*; resolution of either or both Houses *of the Legislature*; regulation promulgated under the authority of any statute or

Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” (Emphasis added). N.J.S.A. 47:1A-9.a.

The Motor Vehicles and Traffic Regulation states that:

“...[s]uch written reports required to be forwarded by law enforcement officers and the information contained therein *shall not be privileged or held confidential*. Every citizen of this State shall have the right... in person to purchase copies of the [accident] reports at the same fee established by [OPRA]. *If copies of reports are requested other than in person, an additional fee of up to \$5.00 for the first three pages and \$1.00 per page thereafter may be added to cover the administrative costs of the report...*” (Emphasis added). N.J.S.A. 39:4-131.

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. 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 also mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial.

In John Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), the Custodian failed to grant access, deny access, seek clarification, or request an extension of time within the statutorily mandated seven (7) business days because the Custodian was seeking legal advice from his attorney regarding the OPRA request subject of the complaint. The Council held that:

[w]hile seeking legal advice on how to appropriately respond to a records request is reasonable, it is not a lawful reason for delaying a response to an OPRA records request because the Custodian should have obtained a written agreement from the Complainant extending the time period to respond. Therefore, the Custodian violated N.J.S.A. 47:1A-6 by not providing a lawful basis for the denial of access to the request...[Additionally] the Custodian violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with a written response within the statutorily mandated seven (7) business days therefore creating a “deemed” denial.

In the complaint at issue here, the Custodian certifies receiving the Complainant’s OPRA request on March 31, 2006 and providing a written response on the same business day indicating that the Complainant’s request had been forwarded to the Borough Attorney and the Police Department. The Custodian’s March 31, 2006 response did not grant access, deny access, seek clarification or request an extension of time. The

Custodian did not grant access to the requested records until April 20, 2006, almost one (1) month following the date of the Complainant's request.

In John Bart, Esq. v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007), the Custodian provided a written response to the Complainant's request; however, said response did not explicitly grant or deny access to the requested record. The Council held that:

[a]lthough the Custodian responded in writing within the statutory time period under OPRA the Custodian's response to the request for the sign that references the PHA's desire for Spanish-speaking tenants to bring their own interpreter was so vague that it could not be determined if the requested sign did not exist or if the request was being denied. Therefore, even though the sign was eventually released to the Complainant, the request is deemed denied and the Custodian has violated N.J.S.A. 47:1A-5.i.

Therefore, although the Custodian provided a written response within the statutorily mandated seven (7) business days, said response is not adequate pursuant to OPRA because it does not grant access, deny access, seek clarification, or request an extension of time. Thus, the request is "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., Paff and Bart, supra.

Additionally, the Complainant asserts that the Custodian's copy fee of \$40.25 is excessive because the Complainant contends that his request is a bulk request and as such, other municipalities have charged \$5.00 for the first page and \$0.75 per page thereafter for the packet of requested reports, not \$5.00 for each report as is the case here. The Custodian certifies that the fees he is charging the Complainant are established under N.J.S.A. 39:4-131.

The aforementioned statute provides that "if copies of reports are requested other than in person, an additional fee of up to \$5.00 for the first three pages and \$1.00 per page thereafter may be added to cover the administrative costs of the *report*." (Emphasis added). Because the language of the statute specifically refers to the "report" (singular), it appears as though the legislative intent of the statute was to impose a fee of "up to \$5.00 for the first three pages and \$1.00 per page thereafter," in addition to the OPRA copying rates to cover the administrative costs of each individual report requested in any manner other than in person.

In James Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007), the Council held that "[t]he Custodian may only charge the enumerated copying rates listed in OPRA when responding to an OPRA records request made in person for copies of auto accident reports consistent with N.J.S.A. 47:1A-5.b. If the records request is not made in person, the Custodian may charge the additional fee of up to \$5.00 for the first three pages and \$1.00 per page thereafter to cover the administrative costs of mailing the reports pursuant to N.J.S.A. 39:4-131."

In the complaint at issue here, the Custodian certifies that there are seven (7) accident reports responsive to the Complainant's request, all of which are one (1) page each. Pursuant to N.J.S.A. 39:4-131, the Custodian is to charge the OPRA copying fees which are up to \$0.75 per page for the first ten (10) pages. Thus, the OPRA copying charge for seven (7) pages is \$5.25. Also pursuant to N.J.S.A. 39:4-131, the Custodian is permitted to charge *up to* \$5.00 for the first three (3) pages of each accident report requested other than in person.<sup>8</sup> Therefore, the statute permits the Custodian to charge a fee in addition to the OPRA copying rates ranging from \$0 to \$5.00 per report. The Custodian in this complaint chose to charge the maximum fee permitted by statute. The Custodian's total for the additional fee of \$5.00 for each of the seven (7) reports equals \$35.00. The grand total for the Complainant's request, as charged by the Custodian pursuant to N.J.S.A. 39:4-131 equals \$40.25. The Complainant's contention that other municipalities treat similar requests as a bulk request and thus do not charge the fees established under N.J.S.A. 39:4-131 for each report is unpersuasive because the actions of employees of other municipalities are not at issue in this complaint before the GRC.

Therefore, pursuant to N.J.S.A. 47:1A-9.a., the provisions of OPRA do not abrogate the provisions of N.J.S.A. 39:4-131. Consequently, the Custodian has lawfully charged the Complainant \$40.25 for the requested accident reports pursuant to N.J.S.A. 39:4-131.

Further, the Custodian contends that names, addresses, vehicle identification numbers and birthdates should be redacted from the requested auto accident reports pursuant to several prior GRC decisions regarding the confidentiality concerns of releasing the names and addresses of dog and cat license owners.

OPRA allows the Custodian to deny access to records under those circumstances in which the records requested are exempt from access under OPRA or any other law. While the Custodian cites several GRC decisions regarding confidentiality issues of releasing names and addresses, N.J.S.A. 39:4-131 provides that "written reports required to be forwarded by law enforcement officers and the information contained therein *shall not be privileged or held confidential*." (Emphasis added). Therefore, no redactions to the requested auto accident reports are warranted pursuant to N.J.S.A. 39:4-131.

**Whether the Custodian's delay in access to the requested accident reports rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

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

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<sup>8</sup> This provision of N.J.S.A. 39:4-131 is permissive, not mandatory.

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 at 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

While the Custodian’s failure to provide an adequate response either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days resulted in a “deemed” denial, the Custodian certifies that the delay was caused by the Custodian’s attempt to seek legal advice from the Borough Attorney. While seeking legal advice is reasonable, such a reason for delaying the response to an OPRA records request is not lawful under the Act.

Because the Custodian provided a written response within the statutorily mandated seven (7) business days indicating that he was seeking legal advice, and because the Custodian provided the requested records to the Complainant within one (1) month of receiving the request, 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. However, the Custodian’s unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. While public agencies may routinely accept non-OPRA requests for motor vehicle accident reports, because the Complainant submitted his request for said reports on the agency’s official OPRA request form and because the Custodian attempted to fulfill the Complainant’s request, the Complainant’s March 31, 2006 request is considered a valid OPRA request.

2. Although the Custodian provided a written response within the statutorily mandated seven (7) business days, said response is not adequate pursuant to OPRA because it does not grant access, deny access, seek clarification, or request an extension of time. Thus, the request is “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., John Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006) and John Bart, Esq. v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007).
3. Pursuant to N.J.S.A. 47:1A-9.a., the provisions of OPRA do not abrogate the provisions of N.J.S.A. 39:4-131. Consequently, the Custodian has lawfully charged the Complainant \$40.25 for the requested accident reports pursuant to N.J.S.A. 39:4-131.
4. No redactions to the requested auto accident reports are warranted pursuant to N.J.S.A. 39:4-131.
5. Because the Custodian provided a written response within the statutorily mandated seven (7) business days indicating that he was seeking legal advice, and because the Custodian provided the requested records to the Complainant within one (1) month of receiving the request, 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. However, the Custodian’s unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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September 19, 2007