



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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ROBIN BERG TABAKIN, Chair
COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

June 25, 2008 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2006-154

v.

Town of Guttenberg (Hudson)
Custodian of Record

At the June 25, 2008 public meeting, the Government Records Council (“Council”) considered the June 18, 2008 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, accepts the Complainant’s request to withdraw this complaint from the Office of Administrative Law. No further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 25th Day of June, 2008

Robin Berg Tabakin, 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: July 2, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 25, 2008 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2006-154

v.

**Town of Guttenberg (Hudson)²
Custodian of Records**

Records Relevant to Complaint: The Complainant seeks to listen to Guttenberg Police Department telephone recordings for the following dates and times:

1. February 19, 2006 1:00 PM to 6:00 PM (5 hours)
2. February 20, 2006 8:00 AM to 5:00 PM (9 hours)
3. February 22, 2006 11:00AM to 10:00 PM (11 hours)
4. May 1, 2006 1:00 PM to 5:00 PM (4 hours)
5. May 2, 2006 9:00 AM to 12:30 PM (3 hours, 30 minutes)
6. May 4, 2006 11:45 AM to 12:36 PM (51 minutes)

Request Made: May 15, 2006

Response Made: May 22, 2006

Custodian: Linda Martin

GRC Complaint Filed: August 31, 2006

Background

February 27, 2008

Government Records Council's ("Council") Interim Order. At its February 27, 2008 public meeting, the Council considered the February 20, 2008 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 the complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances because:

1. Although the Custodian submitted a response to the Council's October 31, 2007 Interim Order on December 17, 2007, within the thirty-day extension of time, the Custodian's response was insufficient to comply with the Council's Interim Order. The Custodian failed to provide the

¹ No representation listed on record.

² Represented by Charles P. Daglian, Esq. (Jersey City, NJ).

Council with a redaction index specifically identifying each redacted telephone call and the legal basis therefor as required in the October 31, 2007 Interim Order.

2. Because the Custodian failed to provide the Council with a redaction index specifically identifying each redacted telephone call and the legal basis therefor, the Custodian has failed to establish that redaction of the recordings requested by Complainant was necessary.
3. Because the Custodian did not provide the Complainant with an opportunity to review the proposed special service charge and object to the charge prior to it being incurred, the Custodian may not assess a special service charge for these functions. N.J.S.A. 47:1A-5.c.
4. The Custodian may not charge the proposed special service charge of \$2,099.41 because it is not reasonable pursuant to N.J.S.A. 47:1A-5.d. Of the special service charge assessed, only \$973.92, for the eight (8) hours to listen to the 911 calls and the six (6) hours to export the audio files from the selected dates and convert them into a .wav format, is reasonable. However, because the Custodian did not provide the Complainant with an opportunity to review and object to the special service charge prior to it being incurred as is required by N.J.S.A. 47:1A-5.c., the Custodian may only charge the Complainant for the actual cost of the CD-Rom on which the requested telephone calls was recorded. *See Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006).*
5. This complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

March 3, 2008

Council's Interim Order distributed to the parties.

May 20, 2008

Letter from the Custodian's Counsel to the GRC attaching a release signed by the Complainant. The Custodian's Counsel states that the Complainant has been provided with the requested records free of charge and has agreed to withdraw this complaint from the Office of Administrative Law ("OAL").

June 13, 2008

This complaint is referred back from OAL.

Analysis

Because the Complainant withdrew this complaint from OAL, no legal analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Complainant's request to withdraw this complaint from the Office of Administrative Law. No further adjudication is required.

Prepared By:

Frank F. Caruso
In House Counsel

Approved By:

Catherine Starghill, Esq.
Executive Director

June 18, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

February 27, 2008 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2006-154

v.

Town of Guttenberg
Custodian of Record

At the February 27, 2008 public meeting, the Government Records Council ("Council") considered the February 20, 2008 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. Although the Custodian submitted a response to the Council's October 31, 2007 Interim Order on December 17, 2007, within the thirty-day extension of time, the Custodian's response was insufficient to comply with the Council's Interim Order. The Custodian failed to provide the Council with a redaction index specifically identifying each redacted telephone call and the legal basis therefor as required in the October 31, 2007 Interim Order.
2. Because the Custodian failed to provide the Council with a redaction index specifically identifying each redacted telephone call and the legal basis therefor, the Custodian has failed to establish that redaction of the recordings requested by Complainant was necessary.
3. Because the Custodian did not provide the Complainant with an opportunity to review the proposed special service charge and object to the charge prior to it being incurred, the Custodian may not assess a special service charge for these functions. N.J.S.A. 47:1A-5.c.
4. The Custodian also may not charge the proposed special service charge of \$2,099.41 because it is not reasonable pursuant to N.J.S.A. 47:1A-5.d. Of the special service charge assessed, only \$973.92, for the eight (8) hours to listen to the 911 calls and the six (6) hours to export the audio files from the selected dates and convert them into a .wav format, is reasonable.



However, because the Custodian did not provide the Complainant with an opportunity to review and object to the special service charge prior to it being incurred as is required by N.J.S.A. 47:1A-5.c., the Custodian may only charge the Complainant for the actual cost of the CD-Rom on which the requested telephone calls was recorded. *See Libertarian Party of Cent. New Jersey v. Murphy*, 384 N.J. Super. 136, 139 (App. Div. 2006).

5. This complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 27th Day of February, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

Government Records Council

Decision Distribution Date: March 3, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 27, 2008 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2006-154

v.

**Town of Guttenberg, Police Department²
Custodian of Records**

Records Relevant to Complaint:

The Complainant seeks to listen to Guttenberg Police Department telephone recordings for the following dates and times:

1. February 19, 2006 1:00 PM to 6:00 PM (5 hours)
2. February 20, 2006 8:00 AM to 5:00 PM (9 hours)
3. February 22, 2006 11:00AM to 10:00 PM (11 hours)
4. May 1, 2006 1:00 PM to 5:00 PM (4 hours)
5. May 2, 2006 9:00 AM to 12:30 PM (3 hours, 30 minutes)
6. May 4, 2006 11:45 AM to 12:36 PM (51 minutes)

Request Made: May 15, 2006

Response Made: May 22, 2006

Custodian: Linda Martin

GRC Complaint Filed: August 31, 2006

Background

October 31, 2007

Government Records Council's ("Council") Interim Order. At its October 31, 2007 public meeting, the Council considered the October 24, 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, found that:

1. Because the Custodian failed to review the recordings requested by the Complainant to identify any necessary redactions, the Custodian has violated N.J.S.A. 47:1A-5.g.

2. **The Custodian shall review the recordings requested by the Complainant, identify any necessary redactions and provide a redaction index to the**

¹ No legal representation listed on record.

² Represented by Charles P. Daglian, Esq. (Guttenberg, NJ).

Council within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

3. Because the Custodian has failed to establish that the special service charges are reasonable and reflect the actual cost to the Township of the materials and costs necessary to fulfill the Complainant's OPRA request, the special service charges of \$13,825.00 and approximately \$797.00 proposed by the Custodian are unreasonable and unwarranted under N.J.S.A. 47:1A-5.d.
4. **The Custodian shall prepare a detailed estimate of actual costs to be incurred by the Township for the materials and effort (including a computation of the necessary number of hours required for an employee to fulfill the Complainant's request and that employee's hourly rate), to fulfill the Complainant's OPRA request, including review and any necessary redactions of the recordings requested, and provide this estimate to the Complainant and to the Council within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. Because the Custodian failed to provide a written response to the Complainant's May 15, 2006 OPRA request within the statutorily mandated seven (7) business days either granting access, denying access, requesting an extension or seeking clarification of the request, the Complainant's OPRA request was "deemed" denied. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
6. Based on the evidence of record, it is possible that the actions of the Custodian were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

November 15, 2007

Council's Interim Order distributed to the parties.

November 19, 2007

Letter from Custodian's Counsel to the GRC sent via facsimile. Counsel requests a thirty (30) day extension of time within which to provide the information required by the GRC in its October 31, 2007 Interim Order.

December 17, 2007

Custodian's response to the Council's Interim Order. The Custodian submits a certification to the GRC via facsimile in which she certifies that in response to the Council's Interim Order, the Police Director for the Town of Guttenberg instructed Police Sergeant Victor Conversano to listen to the 911 calls requested by the Complainant and

redact as necessary. The Custodian also certifies that she directed the police to copy the computer tapes to a CD-Rom and that the completed CD-Rom is in her possession.

The Custodian attached three (3) invoices to her certification. The Custodian certifies that the first invoice was produced by the manufacturer of the computer system. The Custodian further certifies that the second invoice was produced by the Information Technology representative who is the consultant for the Town of Guttenberg. The Custodian certifies that the third invoice represents the cost of Sgt. Conversano's time to listen to and redact the requested tapes. The Custodian certifies that the total cost for these activities is "\$2,099.49 which has been incurred by the Town of Guttenberg and must be paid."

The Custodian asserts that she has not willfully failed to respond to the Complainant in this matter and that she has responded in a timely manner to the Complainant. The Custodian further asserts that at no time did she prevent the Complainant from listening to the requested 911 calls, but that she was attempting to protect the privacy of individuals who called 911 and to "protect the Town from incurring costs that would not be reimbursed."

The Custodian further asserts that the computer system used by the Town of Guttenberg is extremely sophisticated and that the Town did not have any police officers in its 21-man force who were technically capable of listening to the 911 calls. The Custodian also contends that the Complainant's request represents the "first time that any [one] had to review a 911 call since the new system was installed approximately three years ago."

The Custodian requests that the GRC determine the appropriate amount that can be charged to the Complainant to fulfill his OPRA request. The Custodian further requests that the GRC withdraw its conclusion that this matter should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

January 14, 2008

The Complainant submitted to the GRC a response to the Custodian's December 14, 2007, certification via e-mail and facsimile. The Complainant states that the Custodian has demonstrated a pattern or practice of not releasing public information and contends that the Complainant had ample time to correct the record relating to this matter but failed to do so until after the GRC issued the Interim Order on November 15, 2007. The Complainant objects to the Custodian's submission of invoices in excess of \$2,000, which sum represents training for police officers to learn to use the 911 computer system, "the officer's hourly rate for his learning curve, ... [and] redactions for times of the day which [the Complainant] never requested."

Analysis

Whether the Custodian complied with the Council's October 31, 2007 Interim Order?

The Council's October 31, 2007 Interim Order required the Custodian to:

“[R]eview the recordings requested by the Complainant, identify any necessary redactions and provide a redaction index to the Council within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

[and]

[P]repare a detailed estimate of actual costs to be incurred by the Township for the materials and effort (including a computation of the necessary number of hours required for an employee to fulfill the Complainant's request and that employee's hourly rate), to fulfill the Complainant's OPRA request, including review and any necessary redactions of the recordings requested, and provide this estimate to the Complainant and to the Council within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.” (Emphasis added)

The Council's October 31, 2007 Interim Order required compliance within five (5) business days of receipt of the Order. The Council's Order was distributed on November 15, 2007. On November 19, 2007, the Custodian requested an extension of time to December 20, 2007 in order to comply with the Council's Interim Order.

Although the Custodian submitted a response to the Council's October 31, 2007 Interim Order on December 17, 2007, within the thirty-day extension of time requested, the Custodian's response was insufficient to comply with the Council's Interim Order. The Custodian failed to provide the Council with a redaction index as required in the October 31, 2007 Interim Order. The supporting documentation submitted by the Custodian to the Council includes a list apparently compiled by Sgt. Victor Conversano, which sets forth the calls Sgt. Conversano redacted from the 911 call files and the nature of the calls. The cover memorandum to this list, which is dated December 14, 2007 and is from Sgt. Conversano to Public Safety Director Michael Caliguero, states that the redactions were made because certain of the recordings “are not public record.” The list does not state the legal grounds on which such calls were redacted. Moreover, the calls are apparently designated by some type of number, and no key or other method of identifying these calls is provided; no time or length of call is set forth.

Therefore, the Custodian failed to comply with the Council's October 31, 2007 Interim Order because the Custodian failed to provide the Council with a redaction index specifically identifying each redacted telephone call and the legal basis therefor.

The Custodian submitted three (3) invoices in support of her contention that the Town of Guttenberg expended \$2,099.49 in the fulfillment of the Complainant's request.

The first of these invoices is a memorandum dated December 13, 2007 from Michael Caliguero, Director of Public Safety to Charles Daglian, Esq. The memorandum notes that Sgt. V. Conversano spent eight (8) hours listening to the recorded 911 calls at an hourly rate of \$27.99. The total amount for Sgt. Conversano's time was therefore \$223.92. The second invoice is dated December 11, 2007 from NICE Systems, Inc. to the Town of Guttenberg. This invoice indicates that on November 28, 2007, a representative provided telephone support to instruct Rick Ramos of GoLogic how to play calls outside of the software. The charge for this service is listed as \$351.00 plus \$24.57 tax, for a total charge of \$375.57. The third invoice is dated December 7, 2007 from GoLogic to the Guttenberg Police Department. This invoice indicates that a representative spent four (4) hours to train a Sergeant how to find and listen to audio files from the NICE system and save the files to a hard disk by specific dates. The invoice also indicates that the representative spent six (6) hours to export the audio files from the selected dates and convert them into a .wav format. Finally, the invoice indicates that the representative spent one (1) hour using proprietary codes so the encrypted files could play on external computers, burning the files onto a disk with the player, and testing the files on three (3) separate PC's in the office to make sure that the files could be opened and that the copy onto the CD was completed properly. The hourly rate for this service is noted as \$125.00. The total cost for all services rendered is shown as \$1,500.00. The total of these three (3) invoices is \$2,099.49. However, the GRC notes that the Custodian has previously submitted estimates of \$13,825.00 and \$797.00 for special service charges necessary to fulfill the Complainant's request.

N.J.S.A. 47:1A-5.c. and d. state that:

c. *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; provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance. **The requestor shall have the opportunity to review and object to the charge prior to it being incurred.***

d. *A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not*

maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. *If a request is for a record:*

1. in a medium not routinely used by the agency;
2. not routinely developed or maintained by an agency; or
3. *requiring a substantial amount of manipulation or programming of information technology,*

the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both. (Emphasis added).

In the matter before the Council, the Complainant requested to listen to Guttenberg Police Department telephone recordings for certain dates and times. On June 28, 2006, the Custodian advised the Complainant that the estimated cost to transcribe the telephone calls and burn the recordings onto a CD was \$13,825.00. The Custodian requested a check in advance for the expenses. On July 5, 2006, the Complainant stated that he did not want transcriptions but merely wanted to listen to the recordings and possibly purchase copies. On September 7, 2006, the Custodian stated that she was advised by the Town Attorney, Charles P. Daglian, that because of the sensitive nature of calls to the Police Department, that such calls had to be transcribed and reviewed by the Police Department before they could be released. On September 28, 2006, the Custodian attested that the estimated cost to produce a CD of the telephone recordings was \$797.00, because some of the requested telephone recordings had been automatically purged from the Town's computers. In a certification dated December 14, 2007, the Custodian now asserts that Town of Guttenberg has incurred charges of \$2,099.49 to redact the remaining calls and to record the result on a CD.

N.J.S.A. 47:1A-5.c requires that a requestor be provided with an opportunity to review a proposed special service charge and object to the charge prior to it being incurred. The Custodian did not provide the Complainant with an opportunity to review the proposed charges of \$2,099.49, which she claims are associated with exporting the audio files and converting them into a .wav format, and burning those files onto a disk and ascertaining whether the copying process was completed properly, before those charges were incurred.

Because the Custodian did not provide the Complainant with an opportunity to review the proposed special service charge and object to the charge prior to it being incurred, the Custodian may not assess a special service charge for these functions. N.J.S.A. 47:1A-5.c.

N.J.S.A. 47:1A-5.d requires that a Custodian provide access to a record and a copy of that record in the medium requested by a Complainant if the public agency maintains the record in that medium. N.J.S.A. 47:1A-5.d further requires that if the request is for a record that requires a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of

duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.

Based on the evidence of record, the GRC has determined that the \$2,099.41 charge proposed by the Custodian is not reasonable. The proposed charge includes a \$375.57 fee for instructing the computer consultant how to play calls outside of the software. The cost to obtain the ability to play back calls to the Police Department is one which the Town of Guttenberg Police Department should absorb, and the Complainant should not be charged for an administrative function inherent in the Police Department's duties. Janney v. Estell Manor City, GRC Complaint No. 2006-105 (December 2007). Moreover, the \$2,099.41 charge proposed by the Custodian includes \$500 to train Sgt. Conversano how to locate and listen to audio files from the computerized system. Again, this is a cost which the Police Department should absorb; the Complainant should not be charged for this administrative training of Police Department personnel. *Id.*

The Custodian may not charge the proposed special service charge of \$2,099.41 because it is not reasonable pursuant to N.J.S.A. 47:1A-5.d. Of the special service charge assessed, only \$973.92, for the eight (8) hours to listen to the 911 calls and the six (6) hours to export the audio files from the selected dates and convert them into a .wav format, is reasonable. However, because the Custodian did not provide the Complainant with an opportunity to review and object to the special service charge prior to it being incurred as is required by N.J.S.A. 47:1A-5.c., the Custodian may only charge the Complainant for the actual cost of the CD-Rom on which the requested telephone calls was recorded. *See* Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006).

For the foregoing reasons, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that the complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances because:

1. Although the Custodian submitted a response to the Council's October 31, 2007 Interim Order on December 17, 2007, within the thirty-day extension of time, the Custodian's response was insufficient to comply with the Council's Interim Order. The Custodian failed to provide the Council with a redaction index specifically identifying each redacted telephone call and the legal basis therefor as required in the October 31, 2007 Interim Order.

2. Because the Custodian failed to provide the Council with a redaction index specifically identifying each redacted telephone call and the legal basis therefor, the Custodian has failed to establish that redaction of the recordings requested by Complainant was necessary.
3. Because the Custodian did not provide the Complainant with an opportunity to review the proposed special service charge and object to the charge prior to it being incurred, the Custodian may not assess a special service charge for these functions. N.J.S.A. 47:1A-5.c.
4. The Custodian also may not charge the proposed special service charge of \$2,099.41 because it is not reasonable pursuant to N.J.S.A. 47:1A-5.d. Of the special service charge assessed, only \$973.92, for the eight (8) hours to listen to the 911 calls and the six (6) hours to export the audio files from the selected dates and convert them into a .wav format, is reasonable. However, because the Custodian did not provide the Complainant with an opportunity to review and object to the special service charge prior to it being incurred as is required by N.J.S.A. 47:1A-5.c., the Custodian may only charge the Complainant for the actual cost of the CD-Rom on which the requested telephone calls was recorded. *See Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006).*
5. This complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By:

Karyn Gordon, Esq.
In House Counsel

Approved By:

Catherine Starghill, Esq.
Executive Director

February 20, 2008



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

October 31, 2007 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2006-154

v.

Town of Guttenberg Police Department
Custodian of Record

At the October 31, 2007 public meeting, the Government Records Council ("Council") considered the October 24, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council adopted the entirety of said findings and recommendations by a majority vote. The Council, therefore, finds that:

1. Because the Custodian failed to review the recordings requested by the Complainant to identify any necessary redactions, the Custodian has violated N.J.S.A. 47:1A-5.g.
2. **The Custodian shall review the recordings requested by the Complainant, identify any necessary redactions and provide a redaction index to the Council within five (5) days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
3. Because the Custodian has failed to establish that the special service charges are reasonable and reflect the actual cost to the Township of the materials and costs necessary to fulfill the Complainant's OPRA request, the special service charges of \$13,825.00 and approximately \$797.00 proposed by the Custodian are unreasonable and unwarranted under N.J.S.A. 47:1A-5.d.
4. **The Custodian shall prepare a detailed estimate of actual costs to be incurred by the Township for the materials and effort (including a computation of the necessary number of hours required for an employee to fulfill the Complainant's request and that employee's hourly rate), to fulfill the Complainant's OPRA request, including**



review and any necessary redactions of the recordings requested, and provide this estimate to the Complainant and to the Council within five (5) days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

5. Because the Custodian failed to provide a written response to the Complainant's May 15, 2006 OPRA request within the statutorily mandated seven (7) business days either granting access, denying access, requesting an extension or seeking clarification of the request, the Complainant's OPRA request was "deemed" denied. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

6. Based on the evidence of record, it is possible that the actions of the Custodian were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 31st Day of October, 2007

Vincent Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman
Government Records Council

Decision Distribution Date: November 15, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 31, 2007 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2006-154

v.

**Town of Guttenberg Police Department²
Custodian of Records**

Records Relevant to Complaint:

The Complainant seeks to listen to Guttenberg Police Department telephone recordings for the following dates and times:

1. February 19, 2006 1:00 PM to 6:00 PM (5 hours)
2. February 20, 2006 8:00 AM to 5:00 PM (9 hours)
3. February 22, 2006 11:00AM to 10:00 PM (11 hours)
4. May 1, 2006 1:00 PM to 5:00 PM (4 hours)
5. May 2, 2006 9:00 AM to 12:30 PM (3 hours, 30 minutes)
6. May 4, 2006 11:45 AM to 12:36 PM (51 minutes)

Request Made: May 15, 2006

Response Made: May 22, 2006

Custodian: Linda Martin

GRC Complaint Filed: August 31, 2006

Background

May 15, 2006

Complainant's Open Public Records Act ("OPRA") request attached to an official OPRA request form. The Complainant requests to listen to any recordings of telephone conversations received by the Town of Guttenberg Police Department for the dates and times listed above.

May 22, 2006

Custodian's response to the Complainant. The Custodian responds to the OPRA request five (5) business days following receipt of such request. The Custodian advises the Complainant that the requested records have been located, but that she is waiting on the third party vendor's quote on the cost to transcribe the telephone recordings. The Custodian states that she will contact the Complainant when the cost information is received.

¹ No legal representation listed on record.

² Represented by Charles P. Daglian, Esq. (Guttenberg, NJ).

June 23, 2006

Letter from the Secretary of Guttenberg’s Police Department to the Custodian’s Counsel with an attached detailed cost memo. The Secretary provides that in order to burn the recordings onto CD-ROM, the vendor is charging \$125.00 an hour for five (5) hours, and \$200.00 for the equipment needed. The Secretary further provides that the total fee for burning the recordings onto a CD-ROM is \$825.00.

The attached memo included the following transcription cost details:

Date	Time	Hours	Total pages	Cost per page	Total Cost
2/19/06	1:00pm to 6:00pm	5	300	\$6.50	\$2,000.00
2/20/06	8:00am to 5:00 pm	9	540	\$6.50	\$3,500.00
2/22/06	11:00am to 10:00pm	11	660	\$6.50	\$4,300.00
5/1/06	1:00pm to 5:00pm	4	240	\$6.50	\$1,560.00
5/2/06	9:00am to 12:30pm	3.5	210	\$6.50	\$1,365.00
5/4/06	11:45am to 12:36pm	45 minutes ³	45	\$6.50	\$292.50

June 28, 2006

Letter from Custodian to the Complainant. The Custodian advises the Complainant that the estimated cost to transcribe the calls and burn the recordings onto a CD-ROM is \$13,825.00. The Custodian requests a check in advance for the expenses. The Custodian also states that the Complainant is responsible for any cost over the estimated cost, and that a refund of any amount the Complainant paid above the actual cost will be refunded.

July 5, 2006

Letter from the Complainant to the Custodian. The Complainant requests a detailed cost breakdown because the Custodian’s estimated cost for transcriptions does not include a breakdown. The Complainant specifically requests that the Custodian forward an itemized detail of the estimated work per each date including labor and length of calls. The Complainant asserts that, as he indicated to the Custodian and the Town Attorney, he is not interested in transcriptions of the recordings requested; he would merely like to listen to the recordings and possibly purchase copies. The Complainant also asserts that based on prior experiences with similar requests of other New Jersey police agencies, the typical cost for ninety (90) minute audio cassettes or CD-ROMs has been \$5.00 to \$10.00. The Complainant asserts that considering the size of the Guttenberg Police Department and the telephone call volume, a similar fee would be more reasonable than the proposed \$13,825.00.

³ This should total 51 minutes instead of the 45 minutes stated by the vendor.

The Complainant also asserts that in addition to the likely low call volume, based on the same rationale, the need to redact callers' personal information should be minimal.

July 19, 2006

Letter from the Custodian's Counsel to the Complainant. The Custodian's Counsel states that he has investigated whether the requirement of a deposit for the preparation and transcription of the recordings requested on May 16, 2006 is reasonable.

The Custodian's Counsel attests that it is his legal position that requesting a deposit is lawful pursuant to N.J.S.A. 47:1A-5.c. Therefore, the Custodian's Counsel states that if the Complainant would like to continue with the original request, he will be required to submit the deposit and any money not spent will be refunded to the Complainant.

July 25, 2006

Letter from the Complainant to the Custodian. The Complainant states that he requests a written response to his letter of July 5, 2006. The Complainant also states that since July 5, 2006, he has spoken to the Town Attorney but has not received a revised estimate of cost. The Complainant further states that if he does not hear from the Custodian by July 28, 2006, he will proceed to the GRC or file suit in the Superior Court of New Jersey.

August 31, 2006

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

- Complainant's OPRA request dated May 15, 2006⁴
- Letter from Custodian to Complainant dated May 22, 2006
- Letter from Custodian to Complainant date June 28, 2006
- Letter from the Complainant to the Custodian dated July 5, 2006
- Letter from the Custodian's Counsel to the Complainant dated July 19, 2006
- Letter from the Complainant to the Custodian dated July 25, 2006

The Complainant asserts that he filed the OPRA request on May 15, 2006 and received a response from the Custodian on May 22, 2006. The Complainant asserts that the Custodian advised him that the estimated cost to transcribe the requested telephone calls and burn the recordings onto a CD-ROM was \$13,825.00. The Complainant requested that the Custodian send an itemized detail of the estimated work for each date including length of each call and labor involved.

The Complainant also asserts that he is not interested in transcriptions of the requested recordings. The Complainant states that he would merely like to listen to the recordings with the possibility of purchasing copies after he considers the cost for each date. The Complainant also states that based on prior experience with similar requests of

⁴ The Complainant did not include the OPRA request form; he included a letter that was attached with his form dated May 15, 2006. However, the Custodian included the Complainant's OPRA request form which is dated May 16, 2006.

other New Jersey police agencies, the typical cost for ninety (90) minute audio cassettes or CD-ROMs has been \$5.00 to \$10.00. The Complainant further states that considering the size of Guttenberg Police Department and the telephone call volume, a similar fee would be more reasonable than the proposed \$13,825.00.

September 6, 2006

Offer of Mediation sent to both parties. The Complainant declines mediation.

September 6, 2006

Request for Statement of Information sent to the Custodian.

September 7, 2006

Custodian's Statement of Information ("SOI") with the following attachments:⁵

- Complainant's OPRA request dated May 16, 2006
- Letter from the Secretary of Guttenberg's Police Department to the Custodian's Counsel with an attached memo dated June 23, 2006
- Letter from the Custodian to the Complainant dated June 28, 2006

The Custodian certifies that the Complainant did not receive the records that he requested on May 16, 2006. The Custodian also certifies that the GRC should be aware that the Complainant requested all recordings of all telephone conversations between the public and the Guttenberg Police Department for a period of six (6) days, more specifically thirty-three (33) hours and twenty-one (21) minutes of the recordings on those days.

The Custodian asserts that the Complainant was requesting a voluminous amount of audio transcripts, and because the Complainant is currently under indictment in Hudson County Superior Court for matters that arose out of the Town of Guttenberg, the Custodian contacted the Town Attorney, Charles P. Daglian.

The Custodian further asserts that the Town Attorney advised the Custodian to ascertain from the Guttenberg Police Department the cost of transcripts of the telephone recordings for the days in question. The Town Attorney further explained to the Custodian that due to the sensitive nature of calls to the Police Department, that any request had to be transcribed and reviewed by the Police Department before they could be produced to the requestor. The Town Attorney also advised the Custodian that pursuant to N.J.S.A. 47:1A-5.c., any expenses that are reasonable could be passed on to the Complainant for payment prior to the transcripts being obtained.

The Custodian states that he advised the Guttenberg Police Department to have the computer expert review the amount of material in question and provide the Custodian with a written quote of the cost to transcribe the calls. The Custodian advised the Guttenberg Police Department that the cost to put the calls onto a CD-ROM would be approximately \$825.00. The Custodian states that the vendor advised that the cost to transcribe those pages would be approximately \$13,000.00.

⁵ The Custodian included one document that was not relevant to this complaint.

The Custodian asserts that she informed the Complainant that the cost to transcribe the recordings would be \$13,825.00 and upon receipt of a deposit in that amount the office would immediately begin the transcription process. The Custodian asserts that she informed the Complainant that if there were any monies left over, that money would be refunded to the Complainant.

The Custodian further asserts that the Complainant declined to make a deposit and insisted that he would just rather listen to the recordings directly. The Custodian states that the Complainant's request to listen to the recordings would violate the expectation of privacy of the public citizens who made calls to the Guttenberg Police Department and because of this, the Custodian would not allow the Complainant to listen to the unredacted recordings.

The Custodian attests that both she and the Town Attorney believe that pursuant to N.J.S.A. 47:1A-5.c. it is reasonable to request that the Complainant pay a deposit before the transcription can be completed. The Custodian attests that there was no denial of the Complainant's OPRA request.

September 14, 2006

Complainant's response to the Custodian's SOI. The Complainant states that the transcription of audio recordings is not only unnecessary, but was not requested and that the transcription is being done to intentionally withhold public information. The Complainant also states that should the Guttenberg Police Department desire to transcribe the recordings to redact information, the transcription should be done for the Police Department's own use rather than the protection of citizens' privacy. The Complainant further states that he has no use for the transcriptions as they are not required to fulfill the request. The Complainant also states that he has made similar requests of other municipalities larger than Guttenberg with less difficulty.

The Complainant attests that by Guttenberg's own admission a "computer expert" vendor can transfer the audible telephone calls to CD-ROM and would take only five (5) hours to do so. Therefore, the Complainant states that through this letter, he also disputes the \$825.00 charge for transfer from original format to CD-ROM, and if there is another format that Guttenberg can provide other than CD-ROM, it should be offered to the Complainant. The Complainant asserts that in any police agency there should be qualified personnel to handle the recording system which would routinely need maintenance and is used for emergency playback, evidence and future court cases. Therefore, the Complainant states that for a computer expert to be hired by the Township for \$125.00 per hour to fulfill the OPRA request is unreasonable and unnecessary.

The Complainant states that thirty-three (33) hours of requested time does not necessarily translate into thirty-three (33) hours of recorded conversations. Thus, the Complainant states that the estimate of \$13,000.00 for thirty-three (33) hours (2,000 pages) from the vendor is flawed and intentionally used as a ruse to prevent the release of public information. The Complainant further states that while an employee transfers audio from its original format to an agreed upon format for the Complainant, the

employee could listen for information that may need to be redacted and do so while transferring the audio.

The Complainant asserts that as for the inclusion of the indictment on record, the Complainant finds that action unprofessional and questions the motives of its inclusion. The Complainant asserts, however, the matter is not relevant to the OPRA request and is likely the true reason for Guttenberg's withholding of public information in an ongoing pattern of corrupt behavior. Additionally, the Complainant asserts that the recordings can be used in a current federal probe of widespread corruption by Guttenberg officials. The Complainant further asserts that the GRC should obtain copies of the recordings requested for safekeeping and to prevent destruction while deciding how to rule in the matter.

September 19, 2006

Letter from the GRC to the Custodian. The GRC requests that the Custodian specify why any necessary redactions of the requested records cannot be made in house, and specifically requests clarification regarding the Custodian's contention that the records must be transcribed in order to be redacted. The GRC also requests that the Custodian specifically explain the type of personal information disclosed on the recordings requested by Complainant.

The GRC also requests that the Custodian provide a response to the following questions in order to determine whether the special service charge required by the Custodian is properly warranted:

1. The volume, nature, size, number of government records involved,
2. The period of time over which the records were received,
3. Whether some or all of the records sought are archived,
4. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying,
5. The amount of time, level, rate and number if any, required to be expended by government employees to monitor the inspection or examination, and
6. The amount of time required to return documents to their original storage place,
7. The size of the agency,
8. The number of employees available to accommodate document requests,
9. The availability of information technology and copying capabilities,
10. What was requested,
11. The level(s) of skill necessary to accommodate the request,
12. The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill above,
13. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents, and
14. Who in the agency will perform the work associated with each request?

September 28, 2006

Letter from the Custodian to the GRC with an attached certification from a representative of Gologic Company. In response to the GRC's request for information, the Custodian states that the Complainant requested all recorded conversations between the public and the Guttenberg Police Department for a period of six (6) days and specifically a thirty-three hour (33) and twenty-one minute (21) time span. The Custodian also states that the information on the requested records could vary from calls to the Police Department asking for directions to calls for domestic violence and/or criminal investigations. The Custodian further asserts that there would be potential harm due to the expectation of privacy from a person calling the police department and advising the police department of criminal activity. The Custodian asserts that this could put the caller in danger and certainly would be an unexpected invasion of the caller's privacy. The Custodian also asserts that there could be potential harm if the call leads to a pending criminal investigation.

The Custodian attests that the need for the recorded information to be placed on a written transcript was to guarantee that the material could be redacted and the expectations of privacy and criminal investigations could be safeguarded.

Additionally, the Custodian states that the need for the service charge is based upon the fact that the records could be more easily identified if they were reduced to writing, and the only other solution to having the redactions done would be to have a police officer sit and listen to the recordings to prevent any unauthorized disclosure of personal information. The Custodian also states that the Guttenberg Police Department believes that this would be a frivolous waste of a police officer's time to have to listen to each recording, stop, write down which recording needs redactions and then go back and redact the same. The Custodian further states that this is especially true since the Guttenberg Police Department only consists of twenty-one (21) officers.

The Custodian further states that since submitting the SOI, the Guttenberg Police Sergeant met with the representative of the Gologic Company who is also the Information Technology Service person and discovered that the company that installed the computers to record the telephone conversations set up a default in which all computer conversations were automatically deleted from the system after six (6) months. The Custodian asserts that this was discovered by the representative and the Guttenberg Police Sergeant on September 27, 2006, while they were in the process of determining if there could be an alternative method to having an officer listen to the conversations and edit the same.⁶ The Custodian and the Gologic representative also assert that the representative contacted the company that installed the system and, during their conversation was advised that all of the recordings for the month of February have been deleted and could not be retrieved.

⁶ In a Certification to the GRC dated September 28, 2006, Rick Ramos of Gologic Company certified that "[o]n September 26 and 27th ... [he] learned for the first time that the company that has installed the system had set up an automatic default in which the tapes were automatically deleted after six months. This was not known to me at any time prior to this date...."

As a result, the Custodian attests that based upon this new information, there are only three (3) days available of the original six (6) days requested, which now totals eight and a half (8 ½) hours.⁷ The Custodian attests that the cost to place the available records on a CD-ROM has been estimated to be \$450.00, and the cost for the sergeant to listen to those recordings and make proper redaction would be one day's pay, which at his rate of pay would be \$347.00. Therefore, the Custodian further attests that the estimated cost to produce the CD-ROM, review and edit the same for expectation of privacy and criminal investigations is now \$797.00.

Neither the Custodian's certification nor the certification of the Gologic representative addressed the following questions required by the GRC in its letter of September 19, 2006:

- The period of time over which the records were received,
- Whether some or all of the records sought are archived,
- The amount of time required for a government employee to locate, retrieve and assemble the documents for copying,
- The amount of time, level, rate and number if any, required to be expended by government employees to monitor the inspection or examination,
- The amount of time required to return documents to their original storage place,
- The availability of information technology and copying capabilities,
- The level(s) of skill necessary to accommodate the request,
- A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

October 17, 2006

Letter from the GRC to the Custodian. The GRC sent the letter dated September 19, 2006 to the Custodian a second time because the Custodian's prior submission was incomplete.

October 19, 2006

Letter from the Complainant to the GRC in response to the Custodian's submission on September 28, 2006. The Complainant states that even though the Custodian's SOI indicated that he was sent a copy of the SOI, he had not received a copy and therefore was unaware of the destruction of the recordings and of the Custodian's assertions. The Complainant states that it appears that the destruction of the recordings was deliberate and it was a matter of time before the Guttenberg Police Department would engage in concealing the content of the destroyed recordings.

The Complainant attests that he made his original OPRA request on May 15, 2006, and received a letter from the Custodian acknowledging that the requested records had been located on May 22, 2006. The Complainant states that at that time the

⁷ In a Certification which was faxed to the GRC on October 25, 2006, the Custodian certified that "due to the computer deletion there is available for inspection three days and eight and a half hours of computer tape to be inspected."

Guttenberg Police Department should have reasonably known how long the conversations were and that there was an automatic destruction of recorded conversations. The Complainant wishes to know how the police department would be able to conduct investigations without the benefit of original recordings and whether the police department destroys recorded evidence in all of its cases or just in this case.

The Complainant states that in a memo dated June 23, 2006, an information technology consultant advised that the estimated time would be five (5) hours to burn the recordings onto a CD-ROM. The Complainant wishes to know how the consultant arrived at the estimated time if he did not check the recorder before and how he knew that additional equipment was needed to transfer the recordings without first reviewing the recorder.

The Complainant asserts that somehow the consultant or a police officer accessed the recording machine to determine the actual length of recorded conversation, which was far less than thirty-three (33) hours. However, the Complainant asserts that the Gologic representative did not submit an estimate for work, invoice, or other proof to support his professional opinion, whereas the five (5) hours of labor are memorialized on the memo to the Town Attorney. The Complainant also asserts that since all internal correspondence takes place through the Town Attorney's office, the attorney should have noticed the discrepancies in labor time, real time, recordings lengths and records retention schedules. The Complainant further asserts specifically requesting in writing that the recordings be preserved and obviously this request was not heeded. In addition, the Complainant asserts that he personally asked the Town Attorney to safeguard the recordings, and that he made the same request of a Guttenberg police officer.

The Complainant states that, considering the assertion made by the Custodian that Guttenberg's Police Department only has twenty-one (21) members, the length of the recordings should be considerably shorter than the original thirty-three (33) hours and twenty-one (21) minutes previously disputed and the length of time should be shorter than the eight (8) hours the Custodian later stated. The Complainant states that because the February recordings have been destroyed, the actual length of the May conversations should be far less than the real-time eight (8) hour time frame. The Complainant reiterates that the Custodian stated that it would take five (5) hours to reproduce thirty three (33) hours of recordings at the cost of \$825.00. Yet the eight (8) hours that are now only available reflect less than one quarter of the original thirty-three (33) hours but the cost is \$450.00, which is more than half of the original estimated cost of \$825.00.

The Complainant asserts that recording one quarter (1/4) of the original request would now take roughly one hour and twenty-five minutes (1:25). However, there are no written estimates for the new \$450.00 charge. The Custodian also asserts that the Custodian's estimate of \$347.00 is for the second (2nd) highest ranking police officer in the department to redact the recordings for one (1) day based on an eight (8) hour shift.

The Complainant attests that the Gologic Company is not a registered business entity with the State of New Jersey and the representative is not a registered representative of any New Jersey corporation. The Complainant also attests that the representatives' certification does not provide a date in which he was first notified by the

Town of Guttenberg to conduct the records retrieval, but the Gologic representative certifies that on or about September 26, 2006 or September 27, 2006, he learned for the first time that the company set up an automatic default pursuant to which the recordings were automatically deleted after six (6) months. The Complainant wishes to know where the original \$825.00 charges came from if the representative had never looked at the machine in detail prior to September 26, 2006.

Furthermore, the Complainant states that he is willing to pay for one hour and twenty-five minutes (1:25) of labor for the recordings to be produced. The Complainant also states that the Custodian has yet to provide a foundation for its inflated costs and its intentional stalling that led to the deliberate destruction of public records and possibly evidence of wrongdoing. The Complainant further states that the Custodian’s certifications are flawed, contradicting and intentionally misleading, and that both the Custodian and the Town Attorney should be sanctioned by the GRC.

October 23, 2006

Letter from the GRC to the Complainant. The GRC requires answers to specific questions in which the GRC will use in its balancing analysis of the requestor’s need for access versus the privacy interest of the citizens whose personal information is contained in the requested record.

October 23, 2006

Letter from the Complainant to the GRC in response to the GRC’s letter dated October 23, 2006.

Questions	Complainant’s Response
Why do you need the requested record(s) or information?	The record is public domain, names and addresses of persons on the recordings are not being sought.
How important is the requested record(s) or information to you?	Extremely important or the records would not have been requested and asked to be safeguarded.
Do you plan to re-distribute the requested record(s) or information?	No
Will you use the requested record(s) or information for unsolicited contact of the individuals named on the list?	No

October 25, 2006

Letter from the Custodian to the GRC in response to the GRC’s letter dated September 19, 2006.

Questions	Custodian’s Response
Type of record request:	The records requested by the Complainant are recorded

	telephone conversations including 911 calls between the public and the Guttenberg Police Department for various times during a period of six (6) days, specifically thirty-three (33) hours and twenty-one (21) minutes.
The type of information it does or might contain:	The information that is, and could potentially be, contained in these recordings includes criminal activity that is the basis of new criminal investigations. They could also contain information for which the public expected privacy in discussions with the police department. For example, it could be a call about a family member and activity of that family member.
The potential for harm in any subsequent nonconsensual disclosure:	If any of the calls lead to a criminal investigation, then obviously, if the criminal investigation is still pending, that information should not be disclosed. In addition, as stated above, if any of the calls revealed information that the public would consider private and exempt from disclosure, that would be an invasion of the privacy of those people who call the 911 response system of the Guttenberg Police Department.
The injury from disclosure to the relationship in which the record was generated:	As stated above, a criminal investigation could be compromised and/or the public's reasonable expectation of privacy could be denied.
The adequacy of safeguards to prevent unauthorized disclosure:	The Town of Guttenberg has agreed that the audio transcripts of the recordings will be provided to the Complainant. The only issue is that the Complainant wants to listen to the recordings directly and the Town of Guttenberg based upon the above, needs a police officer to review the recordings and redact those parts that are either privileged based upon a pending criminal investigation or where the public would have an expectation of privacy.
The degree of need for access:	N/A
Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access:	Previous decisions have allowed for access of 911 recordings, but only after those recordings have been reviewed.

Special Service Charge Chart:

Questions	Custodian's certifications
1. The volume, nature, size, number of government records involved	The Complainant originally requested thirty three (33) hours and twenty one (21) minutes over six (6) days of recordings. However, three (3) days of the recordings have been deleted by a default setup in the computer system and consequently there are only three (3) days saved with a total of eight and a half (8 ½) hours. Eight

	and a half (8 ½) hours of recordings remain and must be reviewed for redactions by a police officer.
2. The period of time over which the records were received	As stated above, the Complainant requested various parts of six (6) days of recordings from February 19, 2006 until May 4, 2006. ⁸
3. Whether some or all of the records sought are archived	The recordings are on a computer and therefore must be transferred to CD-ROM in order to be transmitted. Once they are on CD-ROM, the CD must be reviewed by a police officer who will mark privileged items for deletion by the computer technician retained as the consultant for the Town of Guttenberg.
4. The amount of time required for a government employee to locate, retrieve, and assemble the documents for copying	As stated in the certification dated September 28, 2006, the cost to place the eight and a half (8 ½) hours of potential conversation on CD-ROM has been estimated by the computer consultant to be \$450.00. The cost for a police officer to review those recordings and edit where needed is approximately the daily rate for each day that the officer is involved in the process. The officer in question would be Sergeant Conversano and his daily rate of pay is \$347.00. ⁹
5. The amount of time, level, rate and number, if any required to be expended by government employees to monitor the inspection or examination	As stated above, Sergeant Conversano would have to be assigned to do nothing else but listen to the recordings and edit where indicated.
6. The amount of time required to return documents to their original storage place	This is not applicable to this situation.
7. The size of the agency	Guttenberg has twenty three (23) police officers and one (1) police officer would have to be assigned this task rather than performing his normal task.
8. The number of employees available to accommodate document requests	This is not applicable to this issue.
9. The availability of information technology and copying abilities	As stated above, the technology is available to transfer these recordings from computer to CD-ROM and the estimated cost is \$450.00.
10. What was requested	As stated above, the original request included portions of six (6) days of recorded conversations between the public and the Guttenberg Police Department, totaling thirty (33) hours and twenty one (21) minutes. However, due to the deletion of some of the computer recordings, only three (3) days or eight and a half (8 ½) hours of recordings are

⁸ However, only three (3) days of recordings are now available.

⁹ The total cost to the Complainant is therefore estimated to be approximately \$797.00.

	available to be inspected.
11. The level(s) of skill necessary to accommodate the request	The computer consultant advises that this can be accomplished.
12. The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill above	All recorded conversations between the police department and the Town of Guttenberg are on a computer. There is no one in the Town of Guttenberg other than the computer consultant that could transfer those computer recordings to CD-ROM to make it available to the Complainant.
13. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents	As stated above, it is estimated that the cost of the computer consultant to transfer the computer recordings to CD-ROM to be available is approximately \$450.00. The cost of the police officer to review those recordings is \$347.00 per day with estimation of at least one (1) day necessary.
14. Who in the agency will perform the work associated with each request	Sergeant Conversano of the Guttenberg Police Department has been assigned this task.

Analysis

Whether the special service charge assessed by the Custodian is reasonable and warranted pursuant to OPRA?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA provides that:

“[t]he custodian of a government record shall permit the record to be inspected, examined and copied by any person during regular business hours...unless a government record is exempt from public access....Prior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security

number, credit card number, unlisted telephone number, or driver's license number of any person....” N.J.S.A. 47:1A-5.a.

OPRA also provides that:

“[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. *If a request is for a record . . . requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special service charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.*” (Emphasis added.) N.J.S.A. 47:1A-5.d.

OPRA further provides that:

“[a] custodian shall promptly comply with a request to inspect, examine, copy or provide a copy of a government record. 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....*If the custodian of a government record asserts that part of a particular record is exempt from public access...the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.*” (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. 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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

OPRA requires that a public agency protect a citizen's reasonable expectation of privacy as follows:

“a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in [OPRA] ... shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.” N.J.S.A. 47:1A-1.

Although 911 recordings are government records pursuant to OPRA, they are subject to disclosure only to the extent that the privacy considerations set forth at N.J.S.A. 47:1A-1 are protected. Serrano v. South Brunswick Twp., 358 N.J. Super. 352 (App.Div. 2003)(permitting disclosure of a 911 recording where the caller agreed to disclosure); Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373 (App.Div. 2003)(finding that a 911 recording was a government record which did not constitute newly discovered evidence and that its release did not create an extreme risk of tainting the jury pool, but noting that no privacy issues had been raised which might alter the court's analysis).; Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312 (Law Div. 2004)(upholding a Custodian's denial of access to a copy of a murder victim's 911 call based on protection of the caller's privacy pursuant to OPRA). 911 recordings, therefore, may be disclosed where a caller has agreed to disclosure of the call or other means have been employed to protect a caller's personal information, such as redaction.

In the complaint before the Council, however, it is not known whether the recordings requested by the Complainant contain personal information or other information in which a caller may have a reasonable expectation of privacy because the Custodian has not reviewed the recordings requested by the Complainant. The Custodian has stated that the Guttenberg Police Department believes that it would be a frivolous waste of a police officer's time to have to listen to each recording, stop, write down which recording needs redactions and then go back and redact the same.

OPRA identifies the responsibilities of the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). New Jersey Builders Ass'n v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 177 (App. Div. 2007). The Custodian is therefore required pursuant to OPRA to identify and complete any necessary redactions in records which are not otherwise exempt from access, and promptly permit access to the remainder of the record. N.J.S.A. 47:1A-5.g. If the Custodian believes that it would be a waste of a police officer's time to identify and complete the necessary redactions, the Custodian may choose another method of accomplishing her statutory duty under OPRA.

Because the Custodian failed to review the recordings requested by the Complainant to identify any necessary redactions, the Custodian has violated N.J.S.A.

47:1A-5.g. The Custodian must review the recordings, identify and make the necessary redactions and provide a redaction index to the Council.

OPRA also requires that a custodian permit access to a government record in the medium requested if the public agency maintains the record in that medium. N.J.S.A. 47:1A-5.d. If the request involves a record which requires a substantial amount of manipulation or programming of information technology, the agency may charge the actual cost of duplication *plus* a special charge which is reasonable and based on the cost of information technology or personnel actually incurred by or attributable to the agency for the programming, clerical and supervisory assistance required to fulfill the request. *Id.*

Where a request for records under OPRA requires additional time, effort or resources to fulfill, OPRA permits the assessment of special charges. For example, OPRA provides:

“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 ...*” (Emphasis added.) 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. These factors were discussed in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. *Id.* at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. *Id.*

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5.c. *Id.* at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA:

- The volume of government records involved;
- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying;

- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination;¹⁰ and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

The court determined that in the context of OPRA, the term “extraordinary” will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. *Id.* at 202. “[W]hat may appear to be extraordinary to one school district might be routine to another.” *Id.*

Recognizing that many different variables may affect a determination of whether a special service charge is reasonable and warranted, the GRC established an analytical framework for situations which may warrant an assessment of a special service charge. This framework incorporates the factors identified in the Courier Post case, as well as additional relevant factors. For the GRC to determine when and whether a special service charge is reasonable and warranted, a Custodian must provide a response to the following questions:

1. The volume, nature, size, number, of government records involved,
2. The period of time over which the records were received,
3. Whether some or all of the records sought are archived,
4. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying,
5. The amount of time, level, rate and number, if any required to be expended by government employees to monitor the inspection or examination, and,
6. The amount of time required to return documents to their original storage place,
7. The size of the agency,
8. The number of employees available to accommodate documents requests,
9. The availability of information technology and copying capabilities,
10. What was requested,
11. The level(s) of skill necessary to accommodate the request,
12. The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill above,
13. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents, and
14. Who in the agency will perform the work associated with each request?

In the complaint now before the Council, the Custodian responded to the above questions in a certification dated October 25, 2006.

The Custodian initially requested that Complainant pay a special service charge deposit in the amount of \$13,825.00 for converting the electronic recordings requested to

¹⁰ With regard to this factor, the court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

CD-ROM and for transcription of the calls. The Custodian claimed that transcription of the electronic recordings was necessary to accomplish any necessary redactions of the records requested. The Custodian provided documentation that indicated \$13,017.50 was attributable to the transcription costs and \$825.00 for the conversion of the electronic recordings to CD-ROM.¹¹

The Custodian subsequently discovered that electronic recordings for three of the dates requested by the Complainant were erased from the system pursuant to an automatic deletion policy programmed into the computer system. The Custodian then revised the estimated special service charge for conversion of the electronic records to CD-ROM, stating that the conversion cost was estimated at approximately \$450.00 and the cost to have a police officer review the CD for possible redactions was \$347.00 per day, with at least one day's review estimated. The revised special service charge proposed by the Custodian was therefore \$797.00.

In Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Appellate Division held that a \$55.00 fee charged by the Township of Edison for conversion to a computer diskette of an electronic recording of meeting minutes was both excessive and unreasonable under OPRA. *Id.* at 139. The court noted that the meeting minutes were maintained in electronic format and that the actual cost of the diskette was far less than the \$55 charged by the Township. *Id.* Moreover, the court stated that “the only discernable rationale for the fee is to discourage the public from requesting the information in this format. Such a policy is not legally sustainable.” *Id.* The court further noted that:

“[t]he imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication. N.J.S.A. 47:1A-5.b. ... Because the minutes are maintained electronically, ... we discern no practical impediment in providing plaintiffs with copies of these records on a computer diskette.” *Id.* at 139-40.

In the complaint before the GRC, the Custodian failed to bear her burden of proof that either of the special service charges quoted to the Complainant were authorized by law pursuant to N.J.S.A. 47:1A-6. The Custodian's initial quote of \$13,825.00 for conversion of the electronic recordings to CD-ROM and transcription of the recordings is clearly excessive and unreasonable under OPRA and the court's holding in Libertarian Party of Central New Jersey. There is no evidence in the record to establish that the actual cost to the Township of transcriptions of approximately thirty three (33) hours of telephone recordings, an amount of time comparable to a short trial in Superior Court, is \$13,017.50. In addition, transcription of the recorded calls is not necessary to accomplish any necessary redactions of the recordings; indeed, the Custodian has not even reviewed

¹¹ The estimate provided by the Custodian to the Complainant contains a mathematical error. Based on the figures provided by the Custodian, the correct total of the estimated special service charge should have been \$13,842.50.

the recordings to ascertain whether redactions are necessary. Finally, the proposed charge of \$825.00 to copy the requested records from an electronic format onto a CD appears to include not only equipment charges of \$200.00 but also an hourly fee of \$125.00 for the technician. The actual cost of a CD is far less than that proposed by the Custodian. The Custodian has, therefore, failed to establish that the \$825.00 special service charge, therefore, is a reasonable or an actual cost pursuant to N.J.S.A. 47:1A-5.d and is reasonable under the court's holding in Libertarian Party of Central New Jersey.

The Custodian has similarly failed to establish that the revised assessment of a special service charge of \$450.00 for the conversion of the remaining electronic records to CD-ROM and \$347.00 per day for the supervision of a police officer for redaction purposes is reasonable under OPRA. As was the case in Libertarian Party of Central New Jersey, the records requested by the Complainant are maintained in electronic format. The actual cost of a CD is far less than the \$450.00 conversion fee assessed by the Custodian. The records which remain after the destruction of some of the requested records are not voluminous. Moreover, the fees seem to include charges for the hourly services of the technician as well as material costs; the Custodian has failed to establish the necessity of the technician's services. Finally, the \$347.00 charge per day assessed by the Custodian for the supervision of redactions by a police officer is unreasonable because the Custodian has failed to establish first that any redactions are required and second, that those redactions may only be accomplished by a police officer. See The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002).

Because the Custodian has failed to establish that the estimated special service charges are reasonable and reflect the actual cost to the Township of the materials and costs necessary to fulfill the Complainant's OPRA request, the estimated special service charges of \$13,825.00 and approximately \$797.00 proposed by the Custodian are unreasonable and unwarranted under N.J.S.A. 47:1A-5.d.

The Custodian must, therefore, prepare a detailed estimate of actual costs to be incurred by the Township for the materials and effort necessary to fulfill the Complainant's OPRA request,¹² including review and any necessary redactions of the recordings requested.

Whether the Custodian unlawfully denied access to the requested records?

OPRA 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 therefore ...” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

¹² The estimate should include a computation of the number of hours required for an employee to fulfill the Complainant's request and that employee's hourly rate.
Richard Rivera v. Town of Guttenberg, Police Department, 2006-154 – Findings and Recommendations of the Executive Director

“[1] [u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, *a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived.* ...

[2] 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....

[3] If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available....

[4] If the record is not made available by that time, access the request is deemed denied” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA requires that a custodian respond in writing to an OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business day time frame. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. See also Kelley v. Rockaway Township, GRC Complaint No. 2006-176 (March 2007). Additionally, failure to respond to an OPRA request in writing within seven (7) business days results in a deemed denial of access. N.J.S.A. 47:1A-5.i.

On May 22, 2006, the Custodian responded in writing to the Complainant’s May 15, 2006 OPRA request. However, the Custodian’s response merely stated that the requested records had been located and an estimate of transcription costs was being prepared. This is not an adequate response under OPRA. In responding to an OPRA request, a Custodian is required to respond in writing within seven (7) business days granting access or denying access to the requested record, requesting clarification of the request or requesting an extension of time to respond. N.J.S.A. 47:1A-5.i.

In this complaint, the Custodian failed to grant access, deny access, request an extension or seek clarification of the requested records, within the statutorily mandated seven (7) business days from receipt of said request. As indicated in N.J.S.A. 47:1-A.5.i., a custodian’s failure to respond within the required seven (7) business days granting access, denying access, requesting clarification of the request or requesting an extension of time within which to respond results in a “deemed” denial. If the Custodian required additional time beyond the seven (7) business day time period required by OPRA in order to satisfy the Complainant’s OPRA request, the Custodian should have obtained a written agreement from the Complainant in order to do so. In Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), the Custodian knew that he needed additional time in order to respond to the Complainant’s request, but failed to obtain a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA to respond. The Council held that the Custodian’s failure to obtain a written agreement extending the seven (7) business day time period resulted in a “deemed” denial of the request. The Custodian has therefore failed to carry her burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-6.

Because the Custodian failed to provide a written response to the Complainant's May 15, 2006 OPRA request within the statutorily mandated seven (7) business days either granting access, denying access, requesting an extension or seeking clarification of the request, the Complainant's OPRA request was "deemed" denied. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Whether the Custodian's delay in access to the requested records 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.

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).

In the complaint before the Council, the evidence of record indicates that the Custodian's actions may rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. First, the Custodian's response to the Complainant's May 15, 2006 OPRA request was timely but insufficient, therefore resulting in a deemed denial, because the Custodian failed to specifically grant access, deny access, request clarification or request an extension of time. Second, to date the Custodian has never reviewed the recordings requested by the Complainant and is not aware whether or to what extent redactions are necessary of

information contained in the recordings which may be exempt from disclosure for privacy concerns. Third, the Custodian has failed to establish that any of the proposed special service charges are reasonable and reflect the actual cost to the Township of the materials and effort necessary to fulfill the Complainant's OPRA request. Fourth, the Custodian failed to provide an estimate of the special service charges until thirty-one (31) days after the May 15, 2006 OPRA request. Fifth, the Custodian did not inform the Complainant that the requested recordings for February 19, 20 and 22, 2006 had been destroyed by an automatic process programmed into the computer system which maintained the recordings until September 28, 2006, ninety-six (96) business days after the OPRA request and twenty three (23) days after the Denial of Access Complaint was filed. Sixth, the Custodian failed to preserve the requested recordings once the Complainant's May 15, 2006 OPRA request was made and after the Complainant specifically requested that the Custodian do so and consequently permitted three (3) days of the requested recordings to be automatically deleted from the system after the Denial of Access Complaint was filed. Seventh, to date, seventeen (17) months after the OPRA request, the Custodian has provided none of the remaining requested records to the Complainant. Finally, the Custodian's inclusion in the SOI of an indictment of the Complainant in Hudson County Criminal Court is not only irrelevant to the determination of whether the Custodian unlawfully denied access to the requested records under OPRA but also appears to indicate a specific animus against the Complainant which could form the basis of an intention to deny access to the requested records.

Therefore, it is possible that the actions of the Custodian were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to review the recordings requested by the Complainant to identify any necessary redactions, the Custodian has violated N.J.S.A. 47:1A-5.g.
2. **The Custodian shall review the recordings requested by the Complainant, identify any necessary redactions and provide a redaction index to the Council within five (5) days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
3. Because the Custodian has failed to establish that the special service charges are reasonable and reflect the actual cost to the Township of the materials and costs necessary to fulfill the Complainant's OPRA request, the special service charges of \$13,825.00 and approximately \$797.00

proposed by the Custodian are unreasonable and unwarranted under N.J.S.A. 47:1A-5.d.

4. **The Custodian shall prepare a detailed estimate of actual costs to be incurred by the Township for the materials and effort (including a computation of the necessary number of hours required for an employee to fulfill the Complainant's request and that employee's hourly rate), to fulfill the Complainant's OPRA request, including review and any necessary redactions of the recordings requested, and provide this estimate to the Complainant and to the Council within five (5) days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. Because the Custodian failed to provide a written response to the Complainant's May 15, 2006 OPRA request within the statutorily mandated seven (7) business days either granting access, denying access, requesting an extension or seeking clarification of the request, the Complainant's OPRA request was "deemed" denied. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
6. Based on the evidence of record, it is possible that the actions of the Custodian were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

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Approved By:

Catherine Starghill, Esq.
Executive Director

October 24, 2007