



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

January 30, 2008 Government Records Council Meeting

Linda Janney
Complainant

Complaint No. 2006-205

v.

Estell Manor City (Atlantic)
Custodian of Record

At the January 30, 2008 public meeting, the Government Records Council (“Council”) considered the January 23, 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. The Custodian has complied with the Council’s December 19, 2007 Interim Order by certifying that she provided the Complainant with the reimbursement check and the open public meeting minutes from January 12, 2006, February 1, 2006, February 22, 2006, and October 4, 2006.
2. Because the requested executive session minutes were approved by the governing body as of the date of the Complainant’s OPRA request, the Custodian’s denial of same is unlawful. OPRA does not require the governing body to approve the release of records which have been previously approved as the minutes of a public or closed governing body meeting. While redactions of closed session minutes may be required before such minutes are disclosed pursuant to OPRA, a governing body may not delay access by approving the release of such government records. N.J.S.A. 47:1A-1. et. seq.
3. Although the Custodian’s failure to provide access to the requested executive session minutes was unlawful because such records were approved by the governing body as of the date of the Complainant’s OPRA request, the Custodian did certify that such minutes will be made available to the Complainant on January 9, 2008, if she wishes to purchase them. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the



Custodian's unlawful deemed denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Final Decision Rendered by the
Government Records Council
On The 30th Day of January, 2008

Robin Berg Tabakin, Vice 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: February 1, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 30, 2008 Council Meeting**

**Linda Janney¹
Complainant**

GRC Complaint No. 2006-205

v.

**Estell Manor City (Atlantic)²
Custodian of Records**

Records Relevant to Complaint:

Copies of all city council meeting minutes from November 2005 to October 23, 2006, indicating which minutes have not yet been approved.

Request Made: October 23, 2006

Response Made: October 30, 2006³

Custodian: Allison Bradford

GRC Complaint Filed: November 13, 2006

Background

December 19, 2007

At the December 19, 2007 public meeting, the Government Records Council (“Council”) considered the December 12, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because the Custodian failed to respond in writing to the Complainant’s request within seven (7) business days, resulting in a deemed denial. Kelley v. Rockaway Township, GRC Complaint No 2006-176 (March 2007).
2. The Custodian has failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6. because she did not provide the Complainant with a lawful basis for the non-disclosure of the January 12, 2006, February 1, 2006 and February 22, 2006 meeting minutes.
3. **The Custodian shall disclose the requested meeting minutes with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, within five (5) business days from**

¹No representation listed on record.

² Represented by Richard Carlucci, Esq., (Ocean City, NJ).

³ Response on this date was verbal.

receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director if the requested executive session minutes were approved by the governing body prior to the date of this OPRA request.

4. The Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The Custodian shall provide certified confirmation to the Executive Director that the governing body did not approve the minutes prior to the date of this OPRA request within five (5) business days from receipt of this Interim Order.
5. Based upon the evidence of record, it is reasonable for the Custodian to assess a special service charge for the retrieval of the two (2) months of archived meeting minutes, which the Custodian certifies took her thirty (30) minutes, and the thirty (30) minutes that it took for the Custodian to return the records back into storage. Based on Renna v. County of Union, GRC Complaint No. 2004-134 (April 2006), the Custodian shall charge the Complainant a special service charge of one (1) hour of the Custodian's hourly rate in addition to the copying cost. The Custodian shall refund to the Complainant the amount paid over and above this amount and shall submit proof thereof to the Council consistent with the Council's Interim Order herein. See Cottrell v. Borough of Glassboro, GRC Complaint No. 2003-28 (July 2003), which required the Custodian refund fees to the Complainant.
6. Although the Custodian's failure to provide a written response either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days resulted in a "deemed" denial and the Custodian failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6, the Custodian did ultimately release the requested meeting minutes with the exception of three (3) meeting minutes on which the Custodian needed to seek more clarification. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful deemed denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

December 20, 2007

Council's Interim Order distributed to the parties.

December 21, 2007 and January 3, 2008

Custodian's response to the Council's Interim Order along with a copy of the reimbursement check. The Custodian certifies that she has provided the Complainant with a reimbursement check in the amount of \$37.83 as a result of the GRC's December 19, 2007 Interim Order. The Custodian also certifies that the Custodian's hourly rate as

of October 2006 was \$22.17 per hour. The Custodian further certifies that she provided the Complainant with the open session meeting minutes from January 12, 2006, February 1, 2006, February 22, 2006, and October 4, 2006 on December 22, 2006 because the minutes were previously approved on December 6, 2006.

The Custodian contends that the executive session minutes were approved as follows:

- January 4, 2006- Approved by the governing body on April 5, 2006,
- March 1, 2006- Approved by the governing body on April 5, 2006,
- June 7, 2006- Approved by the governing body on July 5, 2006,
- July 5, 2006- Approved by the governing body on July 5, 2006, and
- September 6, 2006- Approved by the governing body on October 4, 2006.

The Custodian also contends that although the above minutes were approved by the governing body, they were not officially approved for release to the general public. The Custodian further contends that all executive session minutes will be presented to the governing body for their final approval to release the minutes to the general public with the appropriate redactions, if applicable, on January 9, 2008.

The Custodian states that once the records are released, her office will contact the Complainant stating the amount due for the records.

Analysis

Whether the Custodian complied with the Council's December 19, 2007 Interim Order?

The Custodian certifies on December 21, 2007 and January 3, 2008 that she has provided the Complainant with a reimbursement check in the amount of \$37.83 as a result of the GRC's December 19, 2007 Interim Order. The Custodian also certifies that the Custodian's hourly rate as of October 2006 was \$22.17 per hour. The Custodian further certifies that she provided the Complainant with the open session meeting minutes from January 12, 2006, February 1, 2006, February 22, 2006, and October 4, 2006 on December 22, 2006 because the minutes were previously approved on December 6, 2006.

Therefore, the Custodian has complied with the Council's December 19, 2007 Interim Order by certifying that she provided the Complainant with the reimbursement check and the open session meeting minutes from January 12, 2006, February 1, 2006, February 22, 2006, and October 4, 2006.

Additionally, the Custodian certifies that although the executive session meeting minutes from January 4, 2006, March 1, 2006, June 7, 2006, July 5, 2006, and September 6, 2006 were approved by the governing body, they were not officially approved for release to the general public. The Custodian also contends that all executive session minutes will be presented to the governing body for their final approval to release the minutes to the general public with the appropriate redactions, if applicable, on January 9,

2008. The Custodian further contends that once the records are approved for release, her office will contact the Complainant stating the amount due for the records.

Because the requested executive session minutes were approved by the governing body as of the date of the Complainant's OPRA request, the Custodian's denial of same is unlawful. OPRA does not require the governing body to approve the release of records which have been previously approved as the minutes of a public or closed governing body meeting. While redactions of closed session minutes may be required before such minutes are disclosed pursuant to OPRA, a governing body may not delay access by approving the release of such government records. N.J.S.A. 47:1A-1. et. seq.

Whether the delay in access to the requested records rises to the level of a knowing and willful violation of OPRA?

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 under the totality of the circumstances. Specifically OPRA states:

"...[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 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).

Although the Custodian's failure to provide access to the requested executive session minutes was unlawful because such records were approved by the governing body as of the date of the Complainant's OPRA request, the Custodian did certify that such minutes will be made available to the Complainant on January 9, 2008, if she wishes

to purchase them. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful deemed denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's December 19, 2007 Interim Order by certifying that she provided the Complainant with the reimbursement check and the open public meeting minutes from January 12, 2006, February 1, 2006, February 22, 2006, and October 4, 2006.
2. Because the requested executive session minutes were approved by the governing body as of the date of the Complainant's OPRA request, the Custodian's denial of same is unlawful. OPRA does not require the governing body to approve the release of records which have been previously approved as the minutes of a public or closed governing body meeting. While redactions of closed session minutes may be required before such minutes are disclosed pursuant to OPRA, a governing body may not delay access by approving the release of such government records. N.J.S.A. 47:1A-1. et. seq.
3. Although the Custodian's failure to provide access to the requested executive session minutes was unlawful because such records were approved by the governing body as of the date of the Complainant's OPRA request, the Custodian did certify that such minutes will be made available to the Complainant on January 9, 2008, if she wishes to purchase them. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful deemed denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Tiffany L. Mayers
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

January 23, 2008



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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

INTERIM ORDER

December 19, 2007 Government Records Council Meeting

Linda Janney
Complainant

Complaint No. 2006-205

v.

Estell Manor City (Atlantic)
Custodian of Record

At the December 19, 2007 public meeting, the Government Records Council ("Council") considered the December 12, 2007 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because the Custodian failed to respond in writing to the Complainant's request within seven (7) business days, resulting in a deemed denial. Kelley v. Rockaway Township, GRC Complaint No 2006-176 (March 2007).
2. The Custodian has failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6. because she did not provide the Complainant with a lawful basis for the non-disclosure of the January 12, 2006, February 1, 2006 and February 22, 2006 meeting minutes.
3. **The Custodian shall disclose the requested meeting minutes with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director if the requested executive session minutes were approved by the governing body prior to the date of this OPRA request.**
4. **The Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The**



Custodian shall provide certified confirmation to the Executive Director that the governing body did not approve the minutes prior to the date of this OPRA request within five (5) business days from receipt of this Interim Order.

5. Based upon the evidence of record, it is reasonable for the Custodian to assess a special service charge for the retrieval of the two (2) months of archived meeting minutes, which the Custodian certifies took her thirty (30) minutes, and the thirty (30) minutes that it took for the Custodian to return the records back into storage. Based on Renna v. County of Union, GRC Complaint No. 2004-134 (April 2006), the Custodian shall charge the Complainant a special service charge of one (1) hour of the Custodian's hourly rate in addition to the copying cost. The Custodian shall refund to the Complainant the amount paid over and above this amount and shall submit proof thereof to the Council consistent with the Council's Interim Order herein. See Cottrell v. Borough of Glassboro, GRC Complaint No. 2003-28 (July 2003), which required the Custodian refund fees to the Complainant.
6. Although the Custodian's failure to provide a written response either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days resulted in a "deemed" denial and the Custodian failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6, the Custodian did ultimately release the requested meeting minutes with the exception of three (3) meeting minutes on which the Custodian needed to seek more clarification. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful deemed denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Interim Order Rendered by the
Government Records Council
On The 19th Day of December, 2007

Robin Berg Tabakin, Vice 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: December 20, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 19, 2007 Council Meeting**

**Linda G. Janney¹
Complainant**

GRC Complaint No. 2006-205

v.

**Estell Manor City (Atlantic)²
Custodian of Records**

Records Relevant to Complaint:

Copies of all city council meeting minutes from November 2005 to October 23, 2006, indicating which minutes have not yet been approved.

Request Made: October 23, 2006

Response Made: October 30, 2006³

Custodian: Allison Bradford

GRC Complaint Filed: November 13, 2006

Background

October 23, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

October 30, 2006

Custodian's verbal response to the OPRA request on the fifth (5th) business day following receipt of such request. The Custodian calls the Complainant to inform her that the minutes from November and December 2005 are available to be picked up upon payment of the applicable copy fee. The Custodian also informs the Complainant that the remainder of the records responsive would not be available for another week and a half.

During the telephone conversation, the Complainant declines to accept copies of the November and December 2005 council meeting minutes and states that she wants all of the documents at one time.

November 8, 2006⁴

¹ No representation listed on record.

² Represented by Richard Carlucci, Esq., (Ocean City, NJ).

³ Response on this date was verbal.

Memorandum from Custodian to Complainant. The Custodian references an unreturned phone call placed to the Complainant on November 7, 2006. The Custodian also informs the Complainant that pursuant to Estell Manor City Ordinance #03-04:

“if a request involves an extraordinary expenditure of time and effort to accommodate request, the municipal clerk may, in addition to the actual cost of duplicating record, impose a special service charge in the amount of \$20 per hour that any municipal official or employee must dedicate to fulfill the record request.”

Therefore, the Custodian further informs the Complainant that a special service charge of \$60.00 will be added to the copy fees of \$24.40 for a total cost of \$84.40. The Custodian asks the Complainant to inform her when she intends to pick up the records.

November 10, 2006⁵

Letter from Complainant to Custodian. The Complainant acknowledges the Custodian’s telephone call on November 7, 2006 in which the Custodian informed the Complainant that the Custodian was still working on fulfilling the Complainant’s OPRA request. The Complainant states that although the Custodian did ask the Complainant to return her call, the Custodian did not specifically say that the OPRA request needed to be discussed in more detail.

The Complainant acknowledges that in a telephone conversation on October 30, 2006, the Complainant instructed the Custodian to contact her when all of the records responsive were available.

The Complainant further acknowledges that on her OPRA request form she authorized a maximum payment of \$200.00 in order to fulfill this request. The Complainant alleges that the \$84.40 in costs imposed by the Custodian are excessive, however, the Complainant also asserts that this charge is irrelevant because the cost has already been authorized.

The Complainant asks the Custodian to provide her with a date when the records requested can be picked up.

November 13, 2006

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:⁶

- Complainant’s OPRA request dated October 23, 2006
- Memo from the Custodian to the Complainant dated November 8, 2006⁷
- Letter from the Complainant to the Custodian dated November 10, 2006

⁴ Although the memorandum is dated November 8, 2007, the Custodian states within the body of the memo “today, Thursday November 9, 2006.”

⁵ The Complainant’s letter was addressed to the Mayor, Council and Custodian of Estell Manor City.

⁶ The Complainant submitted an additional letter that is not relevant to the adjudication of this complaint.

⁷ Although the memorandum is dated November 8, 2007, the Custodian states within the body of the memo “today, Thursday November 9, 2006.”

The Complainant asserts that on October 23, 2006 she submitted an OPRA request to the Custodian. The Complainant further asserts that on October 30, 2006, five (5) business days after the OPRA request was submitted, the Custodian telephoned the Complainant to inform her that some of the records responsive are now available to be picked up. The Complainant declares that she instructed the Custodian to call back when all of the records responsive are available.

The Complainant asserts that on November 7, 2006 the Custodian telephoned her stating that the request was still being worked on and that it will be ready shortly. The Complainant states that the Custodian requested that the Complainant call her back. The Complainant also asserts that on November 10, 2006 she sent a letter to the Custodian in reference to the Complainant's OPRA request.

November 16, 2006

Letter from Custodian to the GRC. The Custodian asserts that the Complainant received all records responsive to her OPRA request on November 15, 2006. The Custodian also asserts that she has done everything possible to adhere to the timely fulfillment of the Complainant's OPRA request for an entire year's worth of meeting minutes and that the Complainant was never denied access to the records requested.

November 27, 2006

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

November 27, 2006

Letter from the Complainant to the Custodian. The Complainant states that she picked up the requested records on November 15, 2006 for which she was charged \$84.40. The Complainant also states that later on this day, she returned a telephone call from the Custodian's staff; during the conversation, the staff member informed the Complainant that she forgot that several meetings minutes were missing (January 12, 2006; February 1, 2006; and February 22, 2006). The Complainant further states that she asked the staff member why the minutes have not been provided to her and the staff member's response was that the Custodian had to receive clarification on the minutes.

The Complainant contends that the Council already approved these minutes; therefore, these minutes should be available to the public. The Complainant also asserts that she received copies of the resolutions from some of these meetings. The Complainant questions why the minutes are not available to the public nine (9) months after the meetings occurred. The Complaint also contends that she was required to pay \$60.00 for three (3) hours of time it took to provide the requested records and that she would like an itemized bill detailing "the extraordinary expenditure of time and effort to accommodate the request." The Complainant further contends that she does not agree with having to pay a City employee to go back and do what should have already been done since the minutes should be readily available. In addition, the Complainant requests to be contacted when her October 23, 2006 OPRA request has been completed and to provide her with an itemized bill of the charges and an explanation as to why it has taken over a month to received the records.

December 4, 2007

Request for the Statement of Information and Request for a Special Service Charge Chart sent to the Custodian by the GRC.

December 8, 2007

Custodian's Special Service Charge Chart received. The Custodian certifies that she has spent over twelve (12) hours fulfilling the Complainant's OPRA request. The Custodian states that due to the nature and volume of the request and the fact that portions of the records were archived, an extraordinary expenditure of time was spent fulfilling the Complainant's OPRA request. The Custodian further states that the municipality is small and only employs three (3) full time administrative employees; at the time the Complainant's OPRA request was received, one of the three employees was out on disability.

The Custodian provided the following responses to the GRC's inquiry regarding the special service charge assessed to fulfill this OPRA request:

Question	Custodian's Response
1. The volume, nature, size, number of government records involved.	224 pages of minutes and attachments.
2. The period of time over which the records were received.	A portion of the minutes were made available on November 7, 2006. The balance of the records was made available on November 13, 2006. The Complainant received the records responsive on November 15, 2006.
3. Whether some or all of the records sought are archived.	The 2005 minutes are archived. The 2006 minutes and attachments are in a binder in the office.
4. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying.	Eight (8) hours and forty (40) minutes.
5. The amount of time, level, rate and number, if any required to be expended by government employees to monitor the inspection or examination.	Ten (10) minutes to process the delivery of the records requested to the Complainant.
6. The amount of time required to return documents to their original storage place.	Not applicable.
7. The size of the agency.	Three (3) full time administrative employees and one (1) part time administrative employee. Of the four (4) employees there is one (1) full time City Clerk, one (1) full time tax collector, one (1) full time deputy tax collector (out on disability leave) and one (1) part

	time clerk typist.
8. The number of employees available to accommodate documents requested.	One.
9. The availability of information technology and copying capabilities.	The City's copy machine requires that each document be manually fed into the machine.
10. What was requested?	The minutes of all regular and special meetings of City Council from November 2005 through October 2006.
11. The level(s) of skill necessary to accommodate the request.	The Custodian is the only person with the knowledge to process and accommodate the request and to supervise the clerk typist.
12. The reason(s) that the agency employed, or intends to employ the particular level(s) of skill above.	Only the Custodian has the knowledge of which minutes have been approved and which minutes are still in draft form. The Custodian is also the only employee with the knowledge of where the minutes and attachments are stored.
13. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	<p>Receipt and review of request: ten (10) minutes</p> <p>Retrieve records: thirty (30) minutes</p> <p>Identify records: three (3) hours</p> <p>Assemble records for photocopying: one (1) hour</p> <p>Photocopying time: two (2) hours</p> <p>Assembly of records for Complainant: two (2) hours</p> <p>Reassemble records for storage: two (2) hours</p> <p>Store Records: thirty (30) minutes</p> <p>Telephone conversation to notify Complainant of request status: fifteen (15) minutes</p> <p>Correspondence to notify complainant of request status: fifteen (15) minutes</p> <p>Review Complainant's correspondence: thirty (30) minutes</p> <p>Meet with Complainant: ten (10) minutes</p>
14. Who in the agency will perform the work associated with each request?	Custodian with assistance of clerk typist.

December 15, 2005

Custodian's Statement of Information ("SOI") with the following attachments:⁸

- Complainant's OPRA request dated October 23, 2006
- Memorandum from the Custodian to the Complainant dated November 8, 2006⁹

⁸ The Custodian submitted additional letters that were not relevant to the adjudication of this complaint.

⁹ Although the memorandum is dated November 8, 2007, the Custodian states within the body of the memo "today, Thursday November 9, 2006."

The Custodian certifies that this complaint is frivolous as the Complainant received a response within seven (7) business days wherein she was informed that all records responsive would be provided to her.

Analysis

Whether the Custodian unlawfully denied access to the requested copies of all Council Meeting minutes from November 2005 to October 23, 2006?

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 further provides that:

“...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore ...” N.J.S.A. 47:1A-5.g.

OPRA also provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall *grant access ... or deny a request for access ... as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived ... 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.* If the record is not made available by that time, access shall be deemed denied.” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

OPRA 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.

In the matter before the Council, the Complainant asserts that she submitted her OPRA request to the Custodian on October 23, 2006 and received a telephone call from the Custodian on October 30, 2006 indicating that some of the records responsive were available.

The Custodian asserts that she telephoned the Complainant to inform her that some of the requested records were available and the remainder would not be available for another week and a half. The Custodian also asserts that on November 8, 2006 she sent a memorandum to the Complainant informing her that the records responsive were available and pursuant to Estell Manor Ordinance #03-04, a special service charge of \$20.00 per hour for three (3) hours was added to the cost of the copies, for a total of \$84.40.

The evidence of record indicates that the Custodian did not respond in writing to the Complainant’s October 23, 2006 OPRA request. Pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian should have responded in writing no later than November 1, 2006 granting access, denying access, requesting an extension of time, or requesting clarification of the request. In a prior GRC decision, Kelley v. Rockaway Township, GRC Complaint No. 2006-176 (March 2007), the Council found that although the Custodian did ultimately provide the Complainant with all of the records responsive, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response granting access, denying access, seeking clarification or requesting an extension, within the statutorily mandated seven (7) business days.

Similarly in this complaint, the Custodian’s failure to respond in writing to the Complainant’s request within seven (7) business days resulted in a deemed denial. Therefore, the Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Custodian has also failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6. by not providing the Complainant with a lawful basis for the non-disclosure of the January 12, 2006, February 1, 2006 and February 22, 2006 meeting minutes.

However, pursuant to N.J.S.A. 47:1A-1.1. and Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of the OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberate material.

Whether the Custodian improperly assessed a special service charge of \$60.00 pursuant to Estell Manor City Ordinance #03-04 in order to respond to the Complainant’s OPRA request?

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

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.

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 a prior decision, Tina Renna v. County of Union, GRC Complaint No. 2004-134 (April 2006), the Custodian requested a special service charge of \$2,260.00. This proposed charge was based upon an estimated ten thousand (10,000) responsive documents, including thousands of pages of press releases and thousands of photographs, spanning four years from 1999 through 2002, twenty-five percent (25%) of the documents were archived on-site and were maintained in various locations including department binders, staff member files, and in a storage area. The custodian estimated that it would take approximately seventy (70) hours to assemble and copy these records. The billing was based on the average salary of a clerical employee and a photographer at twenty-five dollars (\$25.00) an hour for 70 hours to retrieve, copy, and return the files (approximately \$1,750.00). In addition, approximately ten (10) hours of the custodian’s time at forty-five dollars (\$45.00) an hour would have been required to supervise the compilation and to search the files electronically (approximately \$450).

The Council determined that the level of human resource used and number of hours assessed were not necessary. After applying the 14-point analysis developed by the Council in Janon Fisher v. Division of Law and Public Safety, GRC Complaint No. 2004-55 (November, 2004), the Council found that a special service charge of \$1,035.17 was warranted pursuant to N.J.S.A. 47:1A-5.c., on the basis of utilizing:

- a. Thirty-five (35) hours of Clerical time at an hourly rate of \$21.63,
- b. Five (5) hours of Photographer's time at an hourly rate of \$28.30, and
- c. Three (3) hours of Supervisory time at an hourly rate of \$45.54.

In the complaint currently before the Council, the Custodian has proposed a special service charge of \$60.00 to respond to the Complainant's OPRA request in addition to the \$24.40 charge for copies. This request seeks copies of all city council meeting minutes spanning an eleven (11) month period from November, 2005 to October 23, 2006. The Custodian certified within her responses to the GRC's inquiry regarding the special service charge that there are an estimated two hundred twenty four (224) pages of responsive records, only two (2) months of records for the year 2005 are archived, and the 2006 minutes and their attachments are maintained in a binder in the city's office. The Custodian further detailed the tasks performed in order to fulfill the OPRA request within #13 of her special service charge response to the GRC.

The Custodian certified that she spent more than twelve (12) hours fulfilling the Complainant's OPRA request, including ten (10) minutes reviewing the Complainant's request, thirty (30) minutes retrieving the records, three (3) hours identifying records, one (1) hour assembling the records for copying, two (2) hours for copying, two (2) hours assembling the records for the Complainant and two (2) hours re-assembling the records for storage, as well as thirty (30) minutes to store the records, fifteen (15) minutes to notify the Complainant of the status of her request, fifteen (15) minutes to draft correspondence to notify the Complainant of the status of her request, thirty (30) minutes to review the Complainant's correspondence, and ten (10) minutes to meet with the Complainant. The Custodian also certifies that only she has the knowledge of which minutes have been approved and which are still in draft form, as well as the only employee with knowledge of where the minutes and attachments are stored. The Custodian further certifies that the Clerk Typist assisted her in performing the work associated with the OPRA request.

Based on the evidence of record in this complaint, it appears that the Custodian's estimate of the level of human resources used and the number of hours assessed is excessive. The tasks that the Custodian detailed within her response to the GRC's special service charge analysis chart are those required of any records custodian, and the constant supervision of the Custodian is not necessary to fulfill the Complainant's request for meeting minutes. The Custodian may be the only employee who can determine which minutes are approved or still in draft form, but the Clerk Typist is capable of photocopying the requested records. Therefore, the Custodian's assertion that the Complainant's request required an extraordinary expenditure of time and effort to accommodate the request is unreasonable because as the Custodian certified, the Clerk Typist was available to assist her.

In Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2005), the court specifically noted that:

“In adopting OPRA, the Legislature made clear that ‘government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.’ N.J.S.A. 47:1A-1.1.”

The Custodian certified within her special service charge response to the GRC that only the 2005 minutes were archived; this represents two (2) months’ worth of the Complainant’s requested eleven (11) months of meeting minutes. Moreover, the 2006 meeting minutes were not archived or stored, but were maintained in a binder in the Custodian’s office. Therefore, the evidence of record does not support the Custodian’s assertion that she had to spend three (3) hours to identify the records requested because the majority of the requested records are maintained in the city’s office, making the records easily ascertainable by type of record and date. The evidence of the record, therefore, does not support a conclusion that the Custodian’s response to the Complainant’s OPRA request required an extraordinary expenditure of time and effort.

Additionally, Estell Manor City Ordinance #03-04 does not supersede OPRA to permit the imposition of a special service charge in the amount of \$20.00 per hour for an employee to fulfill a records request. However, pursuant to N.J.S.A. 46:1A-5.c.:

“...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 advanced by ordinance...*”

Thus, the custodial agency cannot set a flat rate cost of \$20.00 an hour for a special service charge because each request is unique and the special service charge should be reasonable for each individual request. The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002). Therefore, the \$60.00 charge is unreasonable and not rationally related to the actual cost of reproducing the records.

Therefore, based upon the evidence of record, it is reasonable for the Custodian to assess a special service charge for the retrieval of the two (2) months of archived meeting minutes, which the Custodian certifies took her thirty (30) minutes, and the thirty (30) minutes that it took for the Custodian to return the records back into storage. Based on Renna v. County of Union, GRC Complaint No. 2004-134 (April 2006), the Custodian shall charge the Complainant a special service charge of one (1) hour of the Custodian’s hourly rate in addition to the copying cost. The Custodian shall refund to the Complainant the amount paid over and above this amount and shall submit proof thereof to the Council consistent with the Council’s Interim Order herein. See Cottrell v.

Borough of Glassboro, GRC Complaint No. 2003-28 (July 2003), which required the Custodian refund fees to the Complainant.

Whether the delay in access to the requested records rises to the level of a knowing and willful violation of OPRA?

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 under the totality of the circumstances. Specifically OPRA states:

“...[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 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).

Although the Custodian’s failure to provide a written response either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days resulted in a “deemed” denial and the Custodian failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6, the Custodian did ultimately release the requested meeting minutes with the exception of three (3) meeting minutes on which the Custodian needed to seek more clarification. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful deemed denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because the Custodian failed to respond in writing to the Complainant's request within seven (7) business days, resulting in a deemed denial. Kelley v. Rockaway Township, GRC Complaint No 2006-176 (March 2007).
2. The Custodian has failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6. because she did not provide the Complainant with a lawful basis for the non-disclosure of the January 12, 2006, February 1, 2006 and February 22, 2006 meeting minutes.
3. **The Custodian shall disclose the requested meeting minutes with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director if the requested executive session minutes were approved by the governing body prior to the date of this OPRA request.**
4. **The Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The Custodian shall provide certified confirmation to the Executive Director that the governing body did not approve the minutes prior to the date of this OPRA request within five (5) business days from receipt of this Interim Order.**
5. Based upon the evidence of record, it is reasonable for the Custodian to assess a special service charge for the retrieval of the two (2) months of archived meeting minutes, which the Custodian certifies took her thirty (30) minutes, and the thirty (30) minutes that it took for the Custodian to return the records back into storage. Based on Renna v. County of Union, GRC Complaint No. 2004-134 (April 2006), the Custodian shall charge the Complainant a special service charge of one (1) hour of the Custodian's hourly rate in addition to the copying cost. The Custodian shall refund to the Complainant the amount paid over and above this amount and shall submit proof thereof to the Council consistent with the Council's Interim Order herein. See Cottrell v. Borough of Glassboro, GRC Complaint No. 2003-28 (July 2003), which required the Custodian refund fees to the Complainant.
6. Although the Custodian's failure to provide a written response either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days resulted in a "deemed" denial and the Custodian failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6, the Custodian did ultimately release the requested meeting minutes with the

exception of three (3) meeting minutes on which the Custodian needed to seek more clarification. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful deemed denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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December 12, 2007