



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

August 11, 2009 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2007-253

v.

Stillwater Township (Sussex)
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council ("Council") considered the August 4, 2009 *In Camera* 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 in this complaint delivered to the Council on May 6, 2009 (within five (5) business days from receipt of the Council's Interim Order) in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Therefore, the Custodian has complied with the Council's April 29, 2009 Interim Order.
2. The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.
3. Although the Custodian's failure to release all records responsive to the Complainant, failure to provide a document index which identifies the specific lawful basis for the redacted portions of the requested records, failure to amend the Township's OPRA request form to comply with N.J.S.A. 47:1A-5.f., and failed to provide the Executive Director with certified confirmation of compliance of the November 19, 2008 Interim Order within the ordered five (5) business days, the Custodian did comply with the Council's April 29, 2009 Interim Order, did properly amend the Township OPRA request form by adopting the GRC Model Request Form, and did properly redact the executive session minutes dated August 21, 2007, September 4, 2007 and October 2, 2007. 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 noncompliance with the Council's November 19, 2008 Interim Order 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 11th Day of August, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: August 13, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
August 11, 2009 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2007-253

v.

**Stillwater Township (Sussex)²
Custodian of Records**

Records Relevant to Complaint:

1. A copy of the three (3) resolutions most recently passed by the governing body which, in accordance with N.J.S.A. 10:4-13, authorized the governing body to convene in executive session.
2. A copy of the minutes of each executive session authorized by the resolutions responsive to item # 1.
3. A copy of any ordinance, resolution or other document that sets the fees for the public to purchase copies of government non-paper records, including CDs, audio and video recordings, floppy disks and other types of media.

Request Made: October 3, 2007

Response Made: October 12, 2007

Custodian: Judith Fisher³

GRC Complaint Filed: October 17, 2007

Records Submitted for *In Camera* Examination: Executive session meeting minutes dated August 21, 2007, September 4, 2007 and October 2, 2007.

Background

April 29, 2009

Government Records Council's Interim Order. At the April 29, 2009 public meeting, the Government Records Council ("Council") considered the April 22, 2009 Executive Director's Findings and Recommendations 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 release all records responsive to the Complainant, failed to provide a document index which identifies the specific lawful basis for the redacted portions of the requested records, failed to amend the Township's OPRA request form to comply with N.J.S.A. 47:1A-5.f., and failed to provide the Executive

¹ No legal representation listed on record.

² Represented by Michael S. Garofalo, Esq., of Laddey, Clark & Ryan, LLP (Sparta, NJ).

³ The Custodian at the time of the OPRA request and response was Susan Best.

Director with certified confirmation of compliance within the ordered five (5) business days, the Custodian has not complied with the Council's November 19, 2008 Interim Order.

2. Because the Custodian failed to provide a sufficient document index that includes a general nature description of the redacted portions of the records responsive in addition to the specific lawful basis for said redactions, the GRC does not have enough information to determine whether the redactions are appropriate and warranted pursuant to OPRA. As such, pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the executive session minutes dated August 21, 2007, September 4, 2007 and October 2, 2007 to determine the validity of the redactions made to said records.
3. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see # 2 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁶, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. Pursuant to the Council's decision in Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), as well as the Appellate Division's decision in Windish v. Mount Arlington Board of Education, 2007 WL 4334858 (N.J.Super.A.D.) (Unpublished), small public agencies may charge the enumerated paper copy fees established under N.J.S.A. 47:1A-5.b. rather than determining the actual cost of providing such copies. Because Stillwater's population is less than 5,000 according to the 2000 Census, the Township qualifies as a small municipality pursuant to N.J.S.A. 47:1A-5.a. Additionally, because the Custodian certified that the paper copy fees established in the Township's code were based on the rates of neighboring municipalities, and thus are not based on the Township's actual cost of providing paper copies, the Township may charge OPRA's enumerated rates for paper copies pursuant to the Appellate Division's decision in Windish v. Mount Arlington Board of Education, 2007 WL 4334858 (N.J.Super.A.D.) (Unpublished). As such, the copy cost for the twelve (12) pages received by the Complainant is \$8.50 (\$0.75 for pages 1-10 and \$0.50 for pages 11-12). However, the Custodian only charged the Complainant for ten (10) pages. Said charge is reasonable under OPRA and the Custodian has not violated N.J.S.A. 47:1A-5.b.

May 1, 2009

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

⁴ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

May 6, 2009

Certification of the Custodian in response to the Council's Interim Order with the following attachments:

1. Unredacted executive session minutes dated August 21, 2007;
2. Unredacted executive session minutes dated September 4, 2007;
3. Unredacted executive session minutes dated October 2, 2007; and
4. Redaction Index.

The Custodian certifies that she is the custodian and that the records provided are true copies of the records requested for an *in camera* examination by the Council.

Analysis

Whether the Custodian complied with the Council's April 29, 2009 Interim Order?

At its April 29, 2009 public meeting, the Council determined that because the Custodian has asserted that portions of the requested records were lawfully redacted pursuant to N.J.S.A. 10:4-12, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested records were properly redacted.

The Council therefore ordered that the Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

The Custodian in this complaint delivered to the Council on May 6, 2009 (within five (5) business days from receipt of the Council's Interim Order) in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Therefore, the Custodian has complied with the Council's April 29, 2009 Interim Order.

Whether the Custodian unlawfully redacted the executive session minutes dated August 21, 2007, September 4, 2007 and October 2, 2007?

The Custodian asserts that the redactions made to the requested executive session minutes involve discussions regarding information exempt pursuant to the Open Public Meetings Act exemptions for attorney-client matters (N.J.S.A. 10-4-12.b(7)), contract negotiations (N.J.S.A. 10-4-12.b(7)) and personnel matters (N.J.S.A. 10-4-12.b(8)).

OPRA provides that its provisions “shall not abrogate any exemption of a public record or government record from public access made pursuant to any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” N.J.S.A. 47:1A-9.a.

The Open Public Meetings Act shields from disclosure information of the following nature:

“b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:

(7) Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.

Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.” N.J.S.A. 10:4-12.b.

Therefore, executive session discussions of attorney-client matters, contract negotiations and personnel matters are exempt under OPRA because these discussions are exempt under the Open Public Meetings Act, N.J.S.A. 10:4-12.b.

The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination⁷

⁷ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification *Martin O’Shea v. Stillwater Township (Sussex), 2007-253 – In Camera Findings and Recommendations of the Executive Director*

1.	Executive Session Minutes dated August 21, 2007	Redacted due to personnel matter with the Zoning Officer and Tax Assessor.	<u>N.J.S.A.</u> 47:1A-1.1 and <u>N.J.S.A.</u> 10:4-12(8) allows governing body to exclude the public from discussions of personnel matters.	All redacted information is exempt from disclosure pursuant to <u>N.J.S.A.</u> 10:4-12.b(8) which allows governing body to exclude the public from discussions of personnel matters. No disclosure required.
2.	Executive Session Minutes dated September 4, 2007	First session redacted due to personnel matter and attorney-client privilege. Second session redacted due to contract negotiations with the Chief of Police.	<u>N.J.S.A.</u> 47:1A-1.1, <u>N.J.S.A.</u> 10:4-12(8) allows governing body to exclude the public from discussions of personnel matters, and <u>N.J.S.A.</u> 10:4-12(7) allows governing body to exclude the public from discussions of attorney-client privileged matters and contract negotiations.	All redacted information is exempt from disclosure pursuant to <u>N.J.S.A.</u> 10:4-12(8) which allows governing body to exclude the public from discussions of personnel matters, and <u>N.J.S.A.</u> 10:4-12(7) which allows governing body to exclude the public from discussions of attorney-client privileged matters and contract negotiations. No disclosure required.
3.	Executive Session Minutes dated October 2, 2007	Redacted due to personnel matter regarding the Tax Assessor.	<u>N.J.S.A.</u> 47:1A-1.1 and <u>N.J.S.A.</u> 10:4-12(8) allows governing body to exclude the	All redacted information is exempt from disclosure pursuant to <u>N.J.S.A.</u> 10:4-

before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

			public from discussions of personnel matters.	12.b(8) which allows governing body to exclude the public from discussions of personnel matters. No disclosure required.
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Whether the Custodian’s noncompliance with the Council’s November 19, 2008 Interim Order 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, 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, 107 (App. Div. 1996).

Although the Custodian’s failure to release all records responsive to the Complainant, failed to provide a document index which identifies the specific lawful basis for the redacted portions of the requested records, failed to amend the Township’s OPRA request form to comply with N.J.S.A. 47:1A-5.f., and failed to provide the Executive Director with certified confirmation of compliance within the ordered five (5) business days, the Custodian did comply with the Council’s April 29, 2009 Interim Order, did properly amend the Township OPRA request form by adopting the GRC Model Request Form, and did properly redact the executive session minutes dated August 21, 2007, September 4, 2007 and October 2, 2007. 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 noncompliance with the Council's November 19, 2008 Interim Order 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 in this complaint delivered to the Council on May 6, 2009 (within five (5) business days from receipt of the Council's Interim Order) in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Therefore, the Custodian has complied with the Council's April 29, 2009 Interim Order.
2. The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.
3. Although the Custodian's failure to release all records responsive to the Complainant, failure to provide a document index which identifies the specific lawful basis for the redacted portions of the requested records, failure to amend the Township's OPRA request form to comply with N.J.S.A. 47:1A-5.f., and failed to provide the Executive Director with certified confirmation of compliance of the November 19, 2008 Interim Order within the ordered five (5) business days, the Custodian did comply with the Council's April 29, 2009 Interim Order, did properly amend the Township OPRA request form by adopting the GRC Model Request Form, and did properly redact the executive session minutes dated August 21, 2007, September 4, 2007 and October 2, 2007. 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 noncompliance with the Council's November 19, 2008 Interim Order appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared and
Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

INTERIM ORDER

April 29, 2009 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2007-253

v.

Stillwater Township (Sussex)
Custodian of Record

At the April 29, 2009 public meeting, the Government Records Council ("Council") considered the April 22, 2009 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. Because the Custodian failed to release all records responsive to the Complainant, failed to provide a document index which identifies the specific lawful basis for the redacted portions of the requested records, failed to amend the Township's OPRA request form to comply with N.J.S.A. 47:1A-5.f., and failed to provide the Executive Director with certified confirmation of compliance within the ordered five (5) business days, the Custodian has not complied with the Council's November 19, 2008 Interim Order.
2. Because the Custodian failed to provide a sufficient document index that includes a general nature description of the redacted portions of the records responsive in addition to the specific lawful basis for said redactions, the GRC does not have enough information to determine whether the redactions are appropriate and warranted pursuant to OPRA. As such, pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the executive session minutes dated August 21, 2007, September 4, 2007 and October 2, 2007 to determine the validity of the redactions made to said records.



3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see # 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

4. Pursuant to the Council's decision in Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), as well as the Appellate Division's decision in Windish v. Mount Arlington Board of Education, 2007 WL 4334858 (N.J.Super.A.D.) (Unpublished), small public agencies may charge the enumerated paper copy fees established under N.J.S.A. 47:1A-5.b. rather than determining the actual cost of providing such copies. Because Stillwater's population is less than 5,000 according to the 2000 Census, the Township qualifies as a small municipality pursuant to N.J.S.A. 47:1A-5.a. Additionally, because the Custodian certified that the paper copy fees established in the Township's code were based on the rates of neighboring municipalities, and thus are not based on the Township's actual cost of providing paper copies, the Township may charge OPRA's enumerated rates for paper copies pursuant to the Appellate Division's decision in Windish v. Mount Arlington Board of Education, 2007 WL 4334858 (N.J.Super.A.D.) (Unpublished). As such, the copy cost for the twelve (12) pages received by the Complainant is \$8.50 (\$0.75 for pages 1-10 and \$0.50 for pages 11-12). However, the Custodian only charged the Complainant for ten (10) pages. Said charge is reasonable under OPRA and the Custodian has not violated N.J.S.A. 47:1A-5.b.

Interim Order Rendered by the
Government Records Council
On The 29th Day of April, 2009

Robin Berg Tabakin, Chairwoman
Government Records Council

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

Janice L. Kovach

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Government Records Council

Decision Distribution Date: May 1, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 29, 2009 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2007-253

v.

**Stillwater Township (Sussex)²
Custodian of Records**

Records Relevant to Complaint:

1. A copy of the three (3) resolutions most recently passed by the governing body which, in accordance with N.J.S.A. 10:4-13, authorized the governing body to convene in executive session.
2. A copy of the minutes of each executive session authorized by the resolutions responsive to item # 1.
3. A copy of any ordinance, resolution or other document that sets the fees for the public to purchase copies of government non-paper records, including CDs, audio and video recordings, floppy disks and other types of media.

Request Made: October 3, 2007

Response Made: October 12, 2007

Custodian: Judith Fisher³

GRC Complaint Filed: October 17, 2007

Background

November 19, 2008

Government Records Council's ("Council") Interim Order. At its November 19, 2008 public meeting, the Council considered the November 13, 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:

1. Because items # 1-2 of the Complainant's request identify a type of record within a specific date, the Custodian has not carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (April 2008). Thus, the Custodian shall release the requested records to the Complainant with appropriate redactions, if

¹ No legal representation listed on record.

² Represented by Michael S. Garofalo, Esq., of Laddey, Clark & Ryan, LLP (Sparta, NJ).

³ The Custodian at the time of the OPRA request and response was Susan Best.

- any, including a document index identifying the specific legal basis for any redacted portions pursuant to N.J.S.A. 47:1A-5.g.
2. Because item # 3 of the Complainant's request is not a request for an identifiable government record and because the Custodian is not required to conduct research in response to an OPRA request, said request is invalid and Custodian has carried her burden of proving a lawful denial of access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).
 3. The Township's OPRA request form is in violation of N.J.S.A. 47:1A-5.f. because it fails to include the following required information:
 - a. specific directions and procedures for requesting records;
 - b. a statement as to whether a prepayment of fees or a deposit is required;
 - c. a statement informing requestors of the time period in which the custodian must respond pursuant to OPRA; and
 - d. a statement of the requestor's right to challenge a denial of access and the procedure for filing an appeal. As such, the Township must amend its OPRA request form to include all the required information pursuant to N.J.S.A. 47:1A-5.f.
 4. **The Custodian shall comply with items # 1 and 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
 5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

November 20, 2008

Council's Interim Order distributed to the parties.

November 21, 2008

Letter from Custodian to Complainant. The Custodian states that pursuant to the Council's Interim Order she has enclosed the following records:

- Stillwater Township's revised OPRA Request Form
- Resolution authorizing the governing body to convene in executive session dated September 4, 2007
- Agenda dated September 18, 2007 indicating that no executive session was held on said date
- Resolution authorizing the governing body to convene in executive session dated October 2, 2007

- Executive session minutes dated September 4, 2007 – redacted because content is still pending and minutes have not been released
- Executive session minutes dated October 2, 2007 – redacted because content is still pending and minutes have not been released
- Code of the Township of Stillwater, Chapter 67: Records, Public Access To, Section 67-5 Fees

Additionally, the Custodian states that Susan Best is no longer the Municipal Clerk for the Township.

December 1, 2008

Letter from Complainant to GRC. The Complainant asserts that the Custodian has not complied with the Council's Interim Order. Specifically, the Complainant states that said Order directed the Custodian to release the requested records to the Complainant with appropriate redactions, if any, including a document index which identifies the specific legal basis for any redacted portions pursuant to N.J.S.A. 47:1A-5.g. The Complainant states that the Custodian failed to provide said document index. The Complainant also states that the Council's Interim Order directed the Custodian to amend the Township's OPRA Request Form to correct its deficiencies pursuant to N.J.S.A. 47:1A-5.f. The Complainant contends that the Custodian's revised form is still not in compliance with N.J.S.A. 47:1A-5.f. Additionally, the Complainant states that the Council's Interim Order directed the Custodian to provide certified confirmation of compliance. The Complainant states that he is not in receipt of said certification.

Further, the Complainant states that the Council's Interim Order deferred analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. The Complainant asserts that the original Custodian's response to his request and the current Custodian's response to the Council's Interim Order indicate non-compliance with OPRA. The Complainant contends that the current Custodian's violations of the Council's Interim Order are so blatant that the Council should determine that the Custodian knowingly and willfully violated OPRA without referring this complaint to the Office of Administrative Law. The Complainant also states that the Custodian charged him \$7.50 for ten (10) pages of records at \$0.75 per page, yet the Complainant received twelve (12) pages. The Complainant states that pursuant to 67-2(h) of the Township's fee ordinance, paper copies cost \$0.50 for pages 1-10 and \$0.25 for pages 11-20. Further, the Complainant asserts that since six (6) years have passed since OPRA was enacted, it is reasonable to expect that a custodian is aware of the law and charges fees that are in accordance with his/her municipality. The Complainant contends that failure to do so is additional evidence toward a knowing and willful violation of OPRA.

December 1, 2008

Telephone conversation between the Custodian and the GRC. The Custodian inquires as to the adequacy of her response to the Council's Interim Order. The GRC advises the Custodian that additional information is needed in order for her response to be considered complete.

December 9, 2008

Letter from Custodian to Complainant. The Custodian states that she has enclosed a copy of the executive session minutes dated September 4, 2007 which have been redacted for the following reasons:

1. Personnel: disciplinary action pursuant to N.J.S.A. 10:4:12(8)
2. Attorney-client privilege pursuant to N.J.S.A. 10:4-12(7)
3. Contract negotiations for the Chief of Police pursuant to N.J.S.A. 10:4-12(8)

The Custodian also states that she enclosed a copy of the executive session minutes dated October 2, 2007 which have been redacted because of a personnel matter (disciplinary action) pursuant to N.J.S.A. 10:4-12(8). Additionally, the Custodian states that she has enclosed a copy of the Township's revised OPRA request form.

December 15, 2008

Letter from Complainant to GRC. The Complainant asserts that the Custodian is still not in compliance with the Council's Interim Order. Specifically, the Complainant states that the Custodian failed to provide any of the requested resolutions, failed to provide minutes of one (1) of the three (3) meetings that would have been authorized by the three (3) resolutions and failed to provide certified confirmation of compliance to the GRC's Executive Director.

Additionally, the Complainant states that the Township's code, which the Custodian provided to the Complainant, assesses paper copy fees at \$0.50 for pages 1-10, \$0.25 for pages 11-20 and \$0.15 for pages over 20. However, the Complainant states that the Custodian most recently sent him another revised OPRA Request Form which includes the copying fees enumerated in OPRA. The Complainant states that "[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation" pursuant to N.J.S.A. 47:1A-5.b. The Complainant contends that the Township's code is the Township's law and said code includes fees that are less than OPRA's enumerated rates. The Complainant also states that the Custodian sent him an invoice for ten (10) pages totaling \$7.50 yet he received twelve (12) pages. The Complainant states that the copy fee for twelve (12) pages using the Township's code would be \$5.50.

December 17, 2008

Letter from Custodian to Complainant. The Custodian states that in response to the Complainant's letter dated December 15, 2008, she has enclosed the following records:

- Open session minutes dated August 21, 2007 highlighting resolution to enter into executive session
- Executive session minutes dated August 21, 2007 redacted for personnel matters pursuant to N.J.S.A. 10:4-12(8) and attorney-client privilege pursuant to N.J.S.A. 10:4-12(7)
- Open session minutes dated September 4, 2007 highlighting resolution to enter into executive session

- Executive session minutes dated September 4, 2007 redacted for personnel matters pursuant to N.J.S.A. 10:4-12(8), attorney-client privilege pursuant to N.J.S.A. 10:4-12(7) and contract negotiations pursuant to N.J.S.A. 10:4-12(7)
- Open session minutes dated October 2, 2007 highlighting resolution to enter into executive session
- Executive session minutes dated October 2, 2007 redacted for personnel matters pursuant to N.J.S.A. 10:4-12(8)

Additionally, the Custodian encloses a copy of Ordinance No. 2007-22 which the Custodian states amends Chapter 67 of the Township's code regarding fees for records.

December 22, 2008

Letter from Complainant to the GRC. The Complainant states that he is in receipt of the Custodian's letter dated December 17, 2008. The Complainant asserts that the Custodian is withholding entire sets of executive session minutes of four (4) meeting sessions. Specifically, the Complainant states that the executive session minutes dated September 4, 2007 which the Custodian provided were redacted based on contract negotiations. The Complainant questions whether said negotiations are still ongoing approximately fifteen (15) months later. The Complainant asserts that if said negotiations are finalized, the minutes should no longer require redactions. The Complainant requests that the Council conduct an *in camera* review of the redacted minutes to determine the legitimacy of said redactions.

January 23, 2009

Letter from GRC staff to Custodian. The GRC states that in the Custodian's November 21, 2008 response to the Council's Interim Order, the Custodian provided a portion of the Township's Code regarding fees for copies of government records. The GRC states that the Township's Code, specifically Chapter 67-2(H), lists a fee schedule for copies of records. The GRC requests that the Custodian provide a legal certification indicating whether said fee schedule is based upon the actual cost of providing paper copies.

February 6, 2009

Custodian's Certification. The Custodian certifies that the Township surveyed the surrounding municipalities for their fee schedules and set the Township's fees for both paper copies and CDs accordingly. The Custodian certifies that the Township is currently researching said fees and will be revising its current fee ordinance.

February 7, 2009

E-mail from Complainant to GRC. The Complainant asserts that the Custodian's certification dated February 6, 2009 is insufficient because it makes no mention of the Township's actual costs of providing copies. The Complainant asserts that the Custodian's insufficient certification is another example of the Custodian's failure to properly execute the mandates of OPRA.

Analysis

Whether the Custodian complied with the Council's November 19, 2008 Interim Order?

Via letter dated November 21, 2008, one (1) business day following the Custodian's receipt of the Council's Interim Order, the Custodian provided the Complainant with the following records:

- Executive session resolution dated September 4, 2007
- Executive session minutes dated September 4, 2007, redacted because content is still pending and minutes have not been released
- Agenda dated September 18, 2007 which indicates that no executive session was held
- Executive session resolution dated October 2, 2007
- Executive session minutes dated October 2, 2007, redacted because content is still pending and minutes have not been released
- Township's revised OPRA Request Form
- Stillwater Township Code regarding copying fees⁴

Additionally, via letter dated December 9, 2008, the ninth (9th) business day following the Custodian's receipt of the Council's Interim Order, the Custodian provided the Complainant with another revised OPRA Request Form, as well as the specific legal basis for the redactions to the executive session minutes dated September 4, 2007 and October 2, 2007.

Further, the Custodian again released the September 4, 2007 and October 2, 2007 executive session resolutions and minutes to the Complainant on December 17, 2008. However, on said date the Custodian also released the August 21, 2007 executive session resolution and minutes to the Complainant. The Custodian has not provided any certified confirmation of compliance to the GRC.

The Council's November 19, 2008 Interim Order specifically directed the Custodian to release the three (3) resolutions most recently passed by the governing body at the time of the Complainant's OPRA request, October 3, 2007, that authorized the Township Council to convene in executive session. In response, the Custodian provided executive session resolutions dated August 21, 2007, September 4, 2007 and October 2, 2007.

The Council's Interim Order also specifically directed the Custodian to release the executive session minutes that correspond to the three (3) resolutions most recently passed by the governing body, including a document index which identifies the specific legal basis for any redacted portions of the minutes pursuant to N.J.S.A. 47:1A-5.g. The Custodian released only two (2) sets of executive session minutes to the Complainant. Additionally, the Custodian's initial response to the Council's Interim Order failed to provide any legal basis for the redacted portions of said minutes. In fact, the Custodian's

⁴ The Council's Interim Order did not direct the Custodian to release said record.

response appears to indicate that the governing body had not yet approved said minutes. Pursuant to Parave- Fogg v. Lowers Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), draft meeting minutes are not considered to be government records because said minutes constitute advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. However, in the Custodian's subsequent response to the Complainant dated December 9, 2008, the Custodian provides specific citations for the basis of the redactions made to the executive session minutes. The Custodian's responses are inconsistent with each other. The Custodian subsequently released the August 21, 2007 minutes to the Complainant on December 17, 2008 including the legal basis for the redactions.

Additionally, the Council's Interim Order specifically directed the Custodian to revise the Township's OPRA Request Form to include the following information:

1. specific directions and procedures for requesting records;
2. a statement as to whether a prepayment of fees or a deposit is required;
3. a statement informing requestors of the time period in which the custodian must respond pursuant to OPRA; and
4. a statement of the requestor's right to challenge a denial of access and the procedure for filing an appeal.

The Custodian's initial response to the Interim Order included a revised OPRA Request Form which did not comply with the provisions of N.J.S.A. 47:1A-5.f. The Township's revised OPRA Request Form looks almost identical to the form the GRC reviewed during the investigation and preparation of the initial Findings and Recommendations with the exception of the Custodian's name (changed from Susan Best to Judith Fisher) and the inclusion of the following statement:

“[r]equestor can pick up requested material at the Stillwater Municipal Building (7) seven business days after the date of the request. If the request cannot be delivered within (7) seven business days, requestor will be notified when material will be available.”

Thus, the Custodian's revised OPRA Request Form which she provided to the Complainant on November 21, 2008 is not in compliance with N.J.S.A. 47:1A-5.f. However, the Custodian subsequently revised the request form using the GRC's Model Request Form and provided same to the Complainant via letter dated December 9, 2008. The Custodian's second revised form is in compliance with N.J.S.A. 47:1A-5.f.

Further, the Custodian was specifically directed in the Council's Interim Order to provide certified confirmation of compliance to the GRC's Executive Director. The Interim Order directed the Custodian to provide said certification, as well as to comply with all other portions of the Interim Order, within five (5) business days from receipt of said Order. The Custodian failed to provide any certified confirmation of compliance to the Executive Director and failed to comply with all other portions of the Order within the five (5) business days.

Also, it should be noted that the Custodian contacted the GRC to determine the adequacy of her response to the Council's Interim Order and was advised of the specific deficiencies but failed to remedy her response to meet the requirements of said Order. It should also be noted that the Custodian released Township documents which set forth the fees for purchasing records even though such disclosure was not directed in the Interim Order. In fact, the Council invalidated this item (item # 3) of the Complainant's OPRA request.

Therefore, because the Custodian failed to release all records responsive to the Complainant, failed to provide a document index which identifies the specific lawful basis for the redacted portions of the requested records, failed to amend the Township's OPRA request form to comply with N.J.S.A. 47:1A-5.f., and failed to provide the Executive Director with certified confirmation of compliance within the ordered five (5) business days, the Custodian has not complied with the Council's November 19, 2008 Interim Order.

Whether the Custodian properly redacted the executive session minutes 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.

OPRA also states that:

"...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 records asserts that a part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of a record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record..." 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.

The Custodian states that the redactions made to the executive session minutes dated August 21, 2007, September 4, 2007 and October 2, 2007 are based on the following:

- personnel matters pursuant to N.J.S.A. 10:4-12(8)
- attorney-client privilege pursuant to N.J.S.A. 10:4-12(7)

- contract negotiations pursuant to N.J.S.A. 10:4-12(7)

The Complainant questions the validity of said redactions. Specifically, the Complainant questions whether the redacted negotiations are still ongoing approximately fifteen (15) months later. The Complainant asserts that if said negotiations are finalized, the minutes should no longer require redactions.

The Council's November 19, 2008 Interim Order directed the Custodian to provide a document index to both the Complainant and the GRC's Executive Director which identifies the specific legal basis for any redacted portions of the records responsive to the Complainant's request. A proper document index, as described in the Statement of Information Form which the GRC provided to the Custodian, requires the Custodian to not only provide the specific legal basis for the redacted portions, but also to provide a general nature description of the redacted portions (or records denied in their entirety, whichever the case may be). In this instant matter, the Custodian failed to provide a general nature description of the redacted portions. The Custodian's responses only provide citations to the Open Public Meeting Act as the specific legal basis for the redactions made to the executive session minutes.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁵ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

“OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The court also stated that:

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

Further, the court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the

⁵ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). Martin O'Shea v. Stillwater Township (Sussex), 2007-253 – Supplemental Findings and Recommendations of the Executive Director

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

Therefore, because the Custodian failed to provide a sufficient document index that includes a general nature description of the redacted portions of the records responsive in addition to the specific lawful basis for said redactions, the GRC does not have enough information to determine whether the redactions are appropriate and warranted pursuant to OPRA. As such, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the executive session minutes dated August 21, 2007, September 4, 2007 and October 2, 2007 to determine the validity of the redactions made to said records. When providing the records to the GRC for the *in camera* review, the Custodian must also provide a document or redaction index that identifies the document and/or each redaction asserted as well as the lawful basis for the denial.

Whether the copy fee assessed by the Custodian is proper pursuant to OPRA?

OPRA provides that:

"[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following:

- first page to tenth page, \$0.75 per page;
- eleventh page to twentieth page, \$0.50 per page;
- all pages over twenty, \$0.25 per page..." N.J.S.A. 47:1A-5.b.

Additionally, OPRA states 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..." N.J.S.A. 47:1A-5.c.

The Complainant states that pursuant to Chapter 67-2(h) of the Township's fee ordinance, which the Custodian provided to the Complainant, paper copies cost \$0.50 for pages 1-10, \$0.25 for pages 11-20 and \$0.15 for pages over 20. However, the Complainant states that the Custodian's most recently revised OPRA Request Form includes the copying fees enumerated in OPRA. The Complainant also states that the Custodian sent him an invoice for ten (10) pages totaling \$7.50, yet he received twelve (12) pages. The Complainant states that the copy fee for twelve (12) pages using the Township's code would be \$5.50. The Complainant contends that the Township's code is the Township's law and said code includes fees that are less than OPRA's enumerated

rates. The Custodian certified that the fees established in said code were based on the rates established by neighboring municipalities.

In Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), the Council reviewed a New Jersey Superior Court Trial Division decision that addressed the same or similar issues that are in this complaint currently before the Council. The Council held that:

“[w]hile the Trial Division determined that the actual cost of duplicating the record, which presumably might be less than the enumerated rates listed in OPRA, is the appropriate statutory interpretation of OPRA, the Council should look to other precedential case law to interpret the copying cost provision of OPRA. Specifically, the Supreme Court of New Jersey in Dickinson v. Fund for Support of Free Public School, 95 N.J. 65, 469 A.2d 1 (December 1983) held that it is a ‘golden rule’ of interpretation, fully applicable to constitutional as well as statutory documents, that the unreasonableness of a particular result arising from the selection of one among several possible alternative interpretations strongly militates in favor of the adoption of an interpretation that embraces a reasonable result. 2A Sutherland, Statutory Construction § 45.12 at 37 (4 ed. Sands 1973); Clifton v. Passaic Cty. Bd. of Taxation, 28 N.J. 411, 421 (1958) (‘A construction ‘calling for unreasonable results will be avoided where reasonable results consistent with the indicated purpose of the act as a whole are equally possible,’ quoting Elizabeth Federal Savings & Loan Ass'n v. Howell, 24 N.J. 488, 508 (1957)); see Kervick v. Bontempo, *supra*, 29 N.J. 469.

It is unreasonable to assume that every records custodian, especially those in small municipalities with limited photocopy equipment and other resources, are able to adequately or accurately determine the actual copying cost of government records when doing so requires an estimate of the number of government records which will be requested annually divided by an estimated annual actual cost of photocopy paper and ink. Therefore, it is more likely, and consistent with the ‘golden rule of statutory interpretation’ adopted by the Supreme Court of New Jersey in Dickinson, *supra*, that the unreasonableness of a particular result arising from the selection of one among several possible alternative interpretations strongly militates in favor of the adoption of an interpretation that embraces a reasonable result. Adopting the interpretation of the copying cost provision in OPRA which allows records custodians to charge the enumerated rates for copies of government records is the reasonable result.” Id.

The Complainant appealed the Council’s decision regarding the charge of OPRA’s enumerated rates for paper copies. In Windish v. Mount Arlington Board of Education, 2007 WL 4334858 (N.J.Super.A.D.) (Unpublished), the Appellate Division affirmed the Council’s interpretation of N.J.S.A. 47:1A-5.b. as applied to small public agencies. The court concluded that the Council “properly applied common sense to the

problem of applying an actual cost approach to a small public agency.” The court stated that:

“[t]he GRC recognized this sensible approach when it interpreted the statute in a way that lifted the burden from small public bodies, which have limited equipment and resources. In some cases, as the GRC appropriately determined, the most efficient approach is to allow small public agencies the right to charge the specific monetary amounts contained in the second sentence of the statute⁶ without undertaking onerous determinations of their actual costs.”

OPRA references small public agencies in N.J.S.A. 47:1A-5.a. Said provision provides that municipalities with a population of less than 5,000 may set up OPRA hours, which should be not less than six (6) hours over not less than (3) days a week, or the municipality’s regularly scheduled business hours, whichever is less. According to the League of Municipalities’ 2008 Municipal Directory, the Township of Stillwater’s population is 4,267.⁷ Therefore, because Stillwater’s population is less than 5,000, the Township qualifies as a small municipality pursuant to N.J.S.A. 47:1A-5.a and the Appellate Division’s decision in Windish, supra.

Additionally, N.J.S.A. 47:1A-5.b provides that public agencies must charge the actual cost of duplicating the requested records, not to exceed the enumerated rates (first page to tenth page \$0.75 per page; eleventh page to twentieth page \$0.50 per page; all pages over twenty \$0.25 per page). N.J.S.A. 47:1A-5.c states that when a municipality’s actual cost of duplicating paper copies exceeds the enumerated rates, such fees must be established in advance by ordinance. In this instant complaint, the Custodian certified that the fees established by ordinance did not represent the Township’s actual cost of duplicating paper copies. Thus, OPRA supersedes the Township’s fee ordinance because said ordinance does not reflect the actual cost of duplicating paper copies at rates that exceed OPRA’s enumerated paper copying rates, pursuant to N.J.S.A. 47:1A-5.c.

Therefore, pursuant to the Council’s decision in Windish, supra, as well as the Appellate Division’s decision in Windish, supra, small public agencies may charge the enumerated paper copy fees established under N.J.S.A. 47:1A-5.b rather than determining the actual cost of providing such copies. Because Stillwater’s population is less than 5,000 according to the 2000 Census, the Township qualifies as a small municipality pursuant to N.J.S.A. 47:1A-5.a. Additionally, because the Custodian certified that the paper copy fees established in the Township’s code were based on the rates of neighboring municipalities, and thus are not based on the Township’s actual cost of providing paper copies, the Township may charge OPRA’s enumerated rates for paper copies pursuant to the Appellate Division’s decision in Windish, supra. As such, the copy cost for the twelve (12) pages received by the Complainant is \$8.50 (\$0.75 for pages 1-10 and \$0.50 for pages 11-12). However, the Custodian only charged the

⁶ The second sentence of N.J.S.A. 47:1A-5.b states that paper copy fees “shall not exceed the following: first page to tenth page, \$0.75 per page; eleventh page to twentieth page; \$0.50 per page; all pages over twenty, \$0.25 per page.”

⁷ Based on 2000 Census Bureau Population.

Complainant for ten (10) pages. Said charge is reasonable under OPRA and the Custodian has not violated N.J.S.A. 47:1A-5.b.

Whether the original Custodian's and/or the current Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the original Custodian's and/or the current Custodian's actions rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances pending the outcome of the Council's *in camera* review.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to release all records responsive to the Complainant, failed to provide a document index which identifies the specific lawful basis for the redacted portions of the requested records, failed to amend the Township's OPRA request form to comply with N.J.S.A. 47:1A-5.f., and failed to provide the Executive Director with certified confirmation of compliance within the ordered five (5) business days, the Custodian has not complied with the Council's November 19, 2008 Interim Order.
2. Because the Custodian failed to provide a sufficient document index that includes a general nature description of the redacted portions of the records responsive in addition to the specific lawful basis for said redactions, the GRC does not have enough information to determine whether the redactions are appropriate and warranted pursuant to OPRA. As such, pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the executive session minutes dated August 21, 2007, September 4, 2007 and October 2, 2007 to determine the validity of the redactions made to said records.
3. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see # 2 above), a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁰, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

⁸ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

4. Pursuant to the Council's decision in Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), as well as the Appellate Division's decision in Windish v. Mount Arlington Board of Education, 2007 WL 4334858 (N.J.Super.A.D.) (Unpublished), small public agencies may charge the enumerated paper copy fees established under N.J.S.A. 47:1A-5.b. rather than determining the actual cost of providing such copies. Because Stillwater's population is less than 5,000 according to the 2000 Census, the Township qualifies as a small municipality pursuant to N.J.S.A. 47:1A-5.a. Additionally, because the Custodian certified that the paper copy fees established in the Township's code were based on the rates of neighboring municipalities, and thus are not based on the Township's actual cost of providing paper copies, the Township may charge OPRA's enumerated rates for paper copies pursuant to the Appellate Division's decision in Windish v. Mount Arlington Board of Education, 2007 WL 4334858 (N.J.Super.A.D.) (Unpublished). As such, the copy cost for the twelve (12) pages received by the Complainant is \$8.50 (\$0.75 for pages 1-10 and \$0.50 for pages 11-12). However, the Custodian only charged the Complainant for ten (10) pages. Said charge is reasonable under OPRA and the Custodian has not violated N.J.S.A. 47:1A-5.b.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 22, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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INTERIM ORDER

November 19, 2008 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No.2007-253

v.

Stillwater Township (Sussex)
Custodian of Record

At the November 19, 2008 public meeting, the Government Records Council ("Council") considered the November 13, 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, finds that:

1. Because items # 1-2 of the Complainant's request identify a type of record within a specific date, the Custodian has not carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (April 2008). Thus, the Custodian shall release the requested records to the Complainant with appropriate redactions, if any, including a document index identifying the specific legal basis for any redacted portions pursuant to N.J.S.A. 47:1A-5.g.
2. Because item # 3 of the Complainant's request is not a request for an identifiable government record and because the Custodian is not required to conduct research in response to an OPRA request, said request is invalid and Custodian has carried her burden of proving a lawful denial of access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).
3. The Township's OPRA request form is in violation of N.J.S.A. 47:1A-5.f. because it fails to include the following required information:
 - a. specific directions and procedures for requesting records;
 - b. a statement as to whether a prepayment of fees or a deposit is required;



- c. a statement informing requestors of the time period in which the custodian must respond pursuant to OPRA; and
 - d. a statement of the requestor's right to challenge a denial of access and the procedure for filing an appeal. As such, the Township must amend its OPRA request form to include all the required information pursuant to N.J.S.A. 47:1A-5.f.
4. **The Custodian shall comply with items # 1 and 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
 5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 19th Day of November, 2008

Robin Berg Tabakin, Chair
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: November 20, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 19, 2008 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2007-253

v.

**Stillwater Township (Sussex)²
Custodian of Records**

Records Relevant to Complaint:

1. A copy of the three (3) resolutions most recently passed by the governing body which, in accordance with N.J.S.A. 10:4-13, authorized the governing body to convene in executive session.
2. A copy of the minutes of each executive session authorized by the resolutions responsive to item # 1.
3. A copy of any ordinance, resolution or other document that sets the fees for the public to purchase copies of government non-paper records, including CDs, audio and video recordings, floppy disks and other types of media.

Request Made: October 3, 2007

Response Made: October 12, 2007

Custodian: Susan Best

GRC Complaint Filed: October 17, 2007

Background

October 3, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant states that he wishes to receive the records responsive in the manner that is least costly to him: either via e-mail or regular mail. The Complainant states that if said methods cost the same, he prefers to receive the records via e-mail.

October 12, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that the Complainant's request for the last three (3) resolutions authorizing the governing body to go into executive session is denied because said request is not a valid OPRA request because the Complainant failed to identify

¹ No legal representation listed on record.

² Represented by Michael S. Garofalo, Esq., of Laddey, Clark & Ryan, LLP (Sparta, NJ).
Martin O'Shea v. Stillwater Township (Sussex), 2007-253 – Findings and Recommendations of the Executive Director

specific records. The Custodian states that she is under no obligation to research when the last three (3) executive session resolutions were adopted.

Regarding the Complainant's request for executive session minutes, the Custodian states that said minutes are not available to the public until such time as the governing body feels that the matters discussed are no longer confidential in nature. The Custodian states that if the Complainant resubmits his request for specific minutes, the governing body and the municipal attorney will review such to determine the disclosability of said minutes.

Additionally, the Custodian denies the Complainant's request for any ordinance, resolution or other document that sets forth the fees to purchase copies of government records because the Complainant fails to identify a specific record.

October 17, 2007

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

- Complainant's OPRA request dated October 3, 2007
- Custodian's response to the request dated October 12, 2007
- Stillwater Township's Request for Public Records Form

The Complainant certifies that he submitted his OPRA request on October 3, 2007 on the GRC's model request form because the Complainant asserts that the Township's OPRA request form is not in compliance with OPRA. The Complainant certifies that the Custodian denied his request via letter dated October 12, 2007.

Regarding item # 1 of the Complainant's request, the Complainant certifies that the Custodian denied access by indicating that she is under no obligation to research when the last three (3) resolutions that authorized an executive session were adopted. The Complainant states that at the August 29, 2007 OPRA Seminar for the Public, the GRC indicated that although custodians are not required to research files in response to an OPRA request, custodians are required to search records to satisfy a records request. The Complainant asserts that his request reasonably identifies specific records and that the Custodian in this matter would not need to research her files, but rather search for the requested records.

Additionally, the Complainant certifies that the Custodian denied access to item # 2 of the Complainant's request on the basis that the requested minutes are not available until the governing body feels that the matters discussed are no longer confidential in nature. The Complainant states that in Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006), the Council held that:

"OPRA allows the Custodian to deny access to records under those circumstances in which the records requested are exempt from access, under OPRA or any other law. If a Custodian asserts a privilege under the law the Custodian is required to notify the Complainant in writing of the specific legal basis for the denial. The Complainant cites GRC Case 2003-

139, Gober v. City of Burlington, in which the Council found that ‘the Custodian’s assertion that certain [portions] of the information requested by the Complainant is “privileged” is so vague that the existence of an applicable exemption cannot be ascertained. Because the OPRA presumes that a government record is subject to public access unless an exemption exists, it is appropriate to order that access be granted unless an appropriate exemption is clearly identified by the Custodian.’ The onus rests on the Custodian to prove that ‘the denial of access is authorized by law.’”

Further, the Complainant certifies that the Custodian denied access to item # 3 of his request on the basis that said request does not identify specific records. The Complainant contends that his request does reasonably describe the records sought.

Moreover, the Complainant states that N.J.S.A. 47:1A-5.f. sets forth the requirements for an OPRA request form. The Complainant alleges that the Township’s OPRA request form does not include a statement as to whether a prepayment of fees or a deposit is required, does not include the time period within which the agency is required to respond to the request, does not include any specific directions or procedures for requesting records, and fails to instruct a requestor on the procedure for filing an appeal of a denial of access.

Lastly, the Complainant requests the following relief from the Council:

1. A finding that the Custodian violated OPRA.
2. An order compelling the Custodian to provide the requested records.
3. A finding that the Custodian knowingly and willfully violated OPRA and assessing a \$1,000 civil penalty.
4. An order compelling the Township to revise its request form to comply with N.J.S.A. 47:1A-5.f.

October 25, 2007

Offer of Mediation sent to both parties.

October 26, 2007

The Complainant declines mediation. [The Custodian did not respond to the Offer of Mediation.]

October 31, 2007

Request for the Statement of Information sent to the Custodian.

November 1, 2007

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated October 3, 2007
- Custodian’s response to the OPRA request dated October 12, 2007

The Custodian certifies that she received the Complainant's OPRA request on October 3, 2007 and provided a written response on October 12, 2007. The Custodian certifies that she did not conduct a search for the records requested and certifies that no records that may be responsive to the Complainant's request were destroyed.

The Custodian states that in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J.Super. 166 (App.Div. 2007), the court held that "[t]he requestor must pay the costs of reproduction and **submit the request with information that is essential to permit the custodian to comply with its obligations.**" (Emphasis added).

The Custodian contends that the Complainant should first determine from a review of regular session minutes when the governing body opted to go into executive session so that the Complainant would then be able to request minutes and resolutions by date. The Custodian asserts that OPRA does not require custodians to conduct research in response to an OPRA request pursuant to Reda v. Township of West Milford, GRC Complaint No. 2002-58 (January 2003). Thus, the Custodian contends that she properly denied the Complainant's request because the Complainant did not identify a specific record.

November 6, 2007

The Complainant's response to the Custodian's SOI. The Complainant states that in NJ Builders, *supra*, the Appellate Division held that "[t]he requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. Research is not among the custodian's responsibilities." The Complainant states that the court in NJ Builders, *supra*, cited Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J.Super. 205, 212 (App.Div. 2005), by stating that "OPRA requires a party requesting access to a public record to specifically describe the document sought." The Complainant states that this current complaint provides the Council with an opportunity to decide how strictly the specificity requirement should be applied.

The Complainant also cites Bent v. Township of Stafford Police Department, 381 N.J.Super. 30 (App.Div. 2005) in which the court held:

"[s]ignificantly for present purposes, OPRA only allows requests for records, not requests for information. In this regard, OPRA 'is not intended as a research tool...to force government officials to identify and siphon useful information.' In other words, a records custodian is not required 'to conduct research among its records...and correlate data from various government records in the custodian's possession.' To qualify under OPRA then, the request must reasonably identify a record and not generally data, information or statistics.

Nor does OPRA 'authorize a party to make a blanket request for every document' a public agency has on file. Rather, a party requesting access to a public record under OPRA must specifically describe the document sought. OPRA operates to make identifiable government records 'readily

accessible for inspection, copying, or examination.’ As such, **a proper request under OPRA must identify with reasonable clarity those documents that are desired**, and a party cannot satisfy the requirement by simply requesting all of an agency’s documents.” (Emphasis added).

The Complainant contends that the court’s ruling in Bent, *supra*, supports his interpretation that the Custodian is required to locate within her files the last three (3) executive session resolutions most recently passed. As such, the Complainant requests that the Council rule that his request for said resolutions is specific enough to inform the Custodian of the records sought.

Additionally, the Complainant states that the Appellate Division decisions regarding the specificity of a request all involved very complex and voluminous requests. The Complainant states that in NJ Builders, *supra*, the requestor submitted a “five-page document listing thirty-eight separate requests all of which include a request for ‘any and all documents and data.’” *Id.* at 172. The Complainant states that said request required the Custodian to “speculate about what the requestor seeks, research, survey agency employees to determine what they considered or used, or generate new documents that provide information sought.” *Id.* at 178.

The Complainant also states that in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super., 534, 539-40 (App.Div. 2005), the requestor sought “all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.”

The Complainant states that in Bent, *supra*, the requestor submitted a five part request seeking the “entire file of [Bent’s] criminal investigation conducted jointly by the Stafford Township Police Department (STPD), the United States Attorney for New Jersey, and a special agent of the Internal Revenue Service [and] ‘the factual basis underlying documented action and advice to third parties to act against my interest [having] been credited.’”

Further, the Complainant states that the request in Gannett, *supra*, was for any “federal subpoena[s] issued to the county and all information supplied to the U.S. Attorney or other federal authorities in response to the subpoenas.”

The Complainant states that his request is for an ordinance, three (3) resolutions and three (3) sets of executive session minutes. The Complainant contends that his request is easily distinguishable from the complicated requests at issue in the court cases cited above. The Complainant also states that the court in NJ Builders, *supra*, held that OPRA provisions 5.g. and 5.i. “reflect the Legislature’s intention to balance the requestor’s interest in prompt access to identifiable records and the operational needs of government.” The Complainant contends that his request would not substantially disrupt

the operations of the agency as a minimal amount of searching would be required by the Custodian.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Custodian in this complaint certified that she received the Complainant’s OPRA request on October 3, 2007 and provided a written response on October 12, 2007, the sixth (6) business day following receipt of said request. The Custodian certified that she denied access to the Complainant’s OPRA request because the Complainant failed to identify the specific records sought. The Custodian asserts that OPRA does not require custodians to conduct research in response to an OPRA request pursuant to Reda v. Township of West Milford, GRC Complaint No. 2002-58 (January 2003).

The Complainant, however, contends that his request reasonably identifies specific records and that the Custodian in this matter would not need to research her files, but rather search for the requested records.

The GRC has previously ruled on the distinction between a custodian's search for identifiable records versus a custodian's research to identify records responsive. In Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The Complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The Custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

“[p]ursuant to Mag, the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as ‘to go or look through carefully in order to find something missing or lost.’^[5] The word *research*, on the other hand, means ‘a close and careful study to find new facts or information.’^[6]”

The more important question in this instant complaint is whether the Complainant's requests are for specific identifiable government records. Regarding this issue, the New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’ N.J.S.A. 47:1A-1.*” (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.” (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),³ the Superior Court references MAG, *supra*, in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”⁴

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG,

^[5] “Search.” Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006.

^[6] “Research.” Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd.

³ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁴ As stated in Bent, *supra*.

supra, by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...”

Moreover, the GRC has also ruled on the validity of requests similar to those at issue in this instant complaint. In Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (April 2008), the Complainant requested the following records:

1. The resolutions, as required by N.J.S.A. 10:4-13, that authorized the first two (2) Borough Council’s nonpublic (i.e. closed or executive) meetings that occurred after October 1, 2006.
2. The resolutions, as required by N.J.S.A. 10:4-13, that authorized the Borough Council’s most recent nonpublic (i.e. closed or executive) meeting.
3. The minutes from the three nonpublic (i.e. closed or executive) meetings authorized by the resolutions responsive to Paragraph [1] and Paragraph [2] above.

The Custodian in Paff denied the Complainant’s requests on the basis that the Complainant failed to identify a specific record. The Council held that:

“[b]ecause the Complainant identifies a type of government record (resolutions and executive meeting minutes) within a specific date (the most recent meeting prior to the Complainant’s OPRA request and the first two (2) meetings after October 1, 2006), MAG and Bent do not apply to the request relevant to this complaint. The Custodian’s search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding meetings and provide resolutions and meeting minutes.

Therefore, the Custodian failed to bear her burden of proving that the denial of access to request Items No. 2, No. 3 and No. 4 was authorized under OPRA as required by N.J.S.A. 47:1A-6. The Custodian should, therefore, disclose the responsive records to the Complainant with any necessary redactions and provide a general nature description of those redactions, if necessary, as well as the lawful basis for such redactions, pursuant to N.J.S.A. 47:1A-5.g.”

Items # 1-2 of the Complainant’s request in this instant complaint are similar to the requests in Paff, *supra*. Specifically, items # 1-2 identify a type of record (resolutions and executive session minutes) within a specific date (the three (3) most recent meetings prior to the date of the Complainant’s OPRA request). Said requests are not requests for information, are not requests for “any and all” records and do not require an open-ended search of the Township’s files. As such, MAG, *supra*, Bent, *supra*, and NJ Builders, *supra*, do not apply.

Therefore, because items # 1-2 of the Complainant’s request identify a type of record within a specific date, the Custodian has not carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and Paff, *supra*.. Thus, the Custodian shall release the requested records to the Complainant with appropriate redactions, if any,

including a document index identifying the specific legal basis for any redacted portions pursuant to N.J.S.A. 47:1A-5.g.

Item # 3 of the Complainant's request, however, seeks a copy of any ordinance, resolution or other document that sets the fees for the public to purchase copies of government non-paper records, including CDs, audio and video recordings, floppy disks and other types of media. Although the Complainant identifies the type of record sought, the Complainant fails to identify a specific date or time period for the requested records. There are likely many ordinances on file that are filed by date rather than subject. Fulfilling this portion of the Complainant's request goes beyond the Custodian searching her files to locate the specific record requested. The Custodian here would have to research her files to identify which records, if any, are responsive to the Complainant's request.

Therefore, because item # 3 of the Complainant's request is not a request for an identifiable government record and because the Custodian is not required to conduct research in response to an OPRA request, said request is invalid and the Custodian has carried her burden of proving a lawful denial of access to the requested records pursuant to MAG, supra, Bent, supra, and NJ Builders, supra.

Whether the Township's OPRA request form violates OPRA?

OPRA provides that:

“[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

- (1) specific directions and procedures for requesting a record;
- (2) a statement as to whether prepayment of fees or a deposit is required;
- (3) the time period within which the public agency is required by [OPRA], to make the record available;
- (4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (5) space for the custodian to list reasons if a request is denied in whole or in part
- (6) space for the requestor to sign and date the form;
- (7) space for the custodian to sign and date the form if the request is fulfilled or denied. N.J.S.A. 47:1A-5.f.

The Complainant alleges that the Township's OPRA request form does not include a statement as to whether a prepayment of fees or a deposit is required, does not include the time period within which the agency is required to respond to the request, does not include any specific directions or procedures for requesting records, and fails to instruct a requestor on the procedure for filing an appeal of a denial of access. The Custodian does not address this issue in her SOI.

The GRC printed a copy of the Township's OPRA request form from the Township's website at www.stillwaternj.us/OPRA%20FORM07.htm. According to the homepage of the Township's website (www.stillwaternj.us) at time the GRC downloaded the OPRA request form, said website was last updated on June 27, 2008. As such, it is concluded that the OPRA request form posted to the Township's website is the request form currently in use by the Township.

Based upon the GRC's review of the Township's OPRA request form, it is evident that said form does not comply with all the requirements of N.J.S.A. 47:1A-5.f. Specifically, the Township's form lacks the required specific directions and procedures for requesting records. Said form simply includes a check list of possible records to be requested such as minutes, resolutions, budgets, vouchers, contract, salary or overtime information and a space to list other records requested. The Township's form also lacks a statement as to whether a prepayment of fees or a deposit is required. Said form includes a space labeled "total fee" with no other information or explanation. Additionally, the Township's OPRA request form does not inform requestors of the time period in which the custodian must respond to the request pursuant to OPRA. Further, said form fails to include a statement of the requestor's right to challenge a denial of access and the procedure for filing an appeal. Although the Township's request form does state the following regarding the right to appeal a denial of access, the form fails to include language regarding the procedure for filing an appeal:

"If your request has been denied in whole or in part, you have a right to appeal that decision. You may take your appeal to the Government Records Council or to the New Jersey Superior Court, as provided by N.J.S.A. 47:1A-1 et seq."

Therefore, the Township's OPRA request form is in violation of N.J.S.A. 47:1A-5.f. because it fails to include the following required information:

1. specific directions and procedures for requesting records;
2. a statement as to whether a prepayment of fees or a deposit is required;
3. a statement informing requestors of the time period in which the custodian must respond pursuant to OPRA; and
4. a statement of the requestor's right to challenge a denial of access and the procedure for filing an appeal. As such, the Township must amend its OPRA request form to include all the required information pursuant to N.J.S.A. 47:1A-5.f.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because items # 1-2 of the Complainant's request identify a type of record within a specific date, the Custodian has not carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (April 2008). Thus, the Custodian shall release the requested records to the Complainant with appropriate redactions, if any, including a document index identifying the specific legal basis for any redacted portions pursuant to N.J.S.A. 47:1A-5.g.
2. Because item # 3 of the Complainant's request is not a request for an identifiable government record and because the Custodian is not required to conduct research in response to an OPRA request, said request is invalid and Custodian has carried her burden of proving a lawful denial of access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).
3. The Township's OPRA request form is in violation of N.J.S.A. 47:1A-5.f. because it fails to include the following required information:
 - a. specific directions and procedures for requesting records;
 - b. a statement as to whether a prepayment of fees or a deposit is required;
 - c. a statement informing requestors of the time period in which the custodian must respond pursuant to OPRA; and
 - d. a statement of the requestor's right to challenge a denial of access and the procedure for filing an appeal. As such, the Township must amend its OPRA request form to include all the required information pursuant to N.J.S.A. 47:1A-5.f.
4. **The Custodian shall comply with items # 1 and 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access under the totality of the

circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 13, 2008