



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

FINAL DECISION

April 29, 2009 Government Records Council Meeting

Tina Renna
Complainant

Complaint No. 2008-40

v.

Township of Warren (Somerset)
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 this complaint should be dismissed because the Complainant voluntarily withdrew her complaint from the Office of Administrative Law via letter to the GRC dated April 7, 2009. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 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



Government Records Council

Decision Distribution Date: May 4, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Tina Renna¹
Complainant**

GRC Complaint No. 2008-40

v.

**Township of Warren (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Electronic copies of the most recent scanned images of all Township tax maps.

Request Made: January 11, 2008

Response Made: January 18, 2008 and January 24, 2008³

Custodian: Patricia A. DiRocco

GRC Complaint Filed: February 26, 2008⁴

Background

February 25, 2009

Government Records Council's ("Council") Interim Order. At its February 25, 2009 public meeting, the Council considered the February 18, 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, found that:

1. The Custodian's Counsel made the requested records available to the Complainant within the ordered five (5) business days and assessed the actual cost of the CD-ROM. However, the Custodian did not provide certified confirmation of compliance to the Executive Director until the five (5) business days had expired. Therefore, the Custodian has not fully complied with the Council's November 19, 2008 Interim Order.
2. The evidence of record indicates that the Custodian was aware of the statutorily mandated seven (7) business day response time because the Engineering Inspector provided a written response granting access to the requested records on the fourth (4th) business day, although said response was insufficient because it failed to address the Complainant's preferred method of receiving electronic copies of said

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

² Represented by Jeffrey B. Lehrer, Esq., of DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis & Lehrer, P.C. (Warren, NJ).

³ January 24, 2008 response was verbal.

⁴ The GRC received the Denial of Access Complaint on said date.

records. The evidence of record also indicates that the Custodian was aware of OPRA's provision allowing for the imposition of special service charges because the Custodian provided the Complainant with an estimated special service charge on the seventh (7th) business day, although the Custodian failed to charge the actual cost of duplicating the records. However, there is no evidence to support the notion that the Custodian's actions were intentional or willfully ignorant of OPRA. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances. However, the Custodian's insufficient response, inaccurate estimated special service charge and failure to charge the actual cost of duplicating the records appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

3. Pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Complainant is a "prevailing party" entitled to an award of reasonable attorney's fees. The complaint brought about a change (voluntary or otherwise) in the Custodian's conduct. Specifically, the Custodian made the requested records available to the Complainant at the actual direct cost of providing said copies. Additionally, using the catalyst theory, there is a factual causal nexus between the filing of the Complainant's Denial of Access Complaint and the relief ultimately achieved because the Custodian made the requested records available to the Complainant at the actual direct cost of providing said copies. Further, the relief ultimately secured by the Complainant had a basis in law because N.J.S.A. 47:1A-5.b. provides that custodians must charge the actual cost of duplicating the records and N.J.S.A. 47:1A-5.c. provides that special service charges must relate to the actual direct cost of providing the copies. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

March 6, 2009

Council's Interim Order distributed to the parties.

March 11, 2009

Complaint transmitted to the Office of Administrative Law.

March 20, 2009

Letter of Representation from Custodian's Counsel.

March 26, 2009

Stipulation of Settlement signed by the parties.

April 7, 2009

Letter from Complainant's Counsel to the GRC. Counsel states that the parties have reached a settlement regarding reasonable attorney's fees and as part of the settlement the Complainant is to withdraw her complaint. Thus, Counsel states that the Complainant wishes to withdraw this Denial of Access Complaint.

Analysis

No analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant voluntarily withdrew her complaint from the Office of Administrative Law via letter to the GRC dated April 7, 2009. Therefore, no further adjudication is required.

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

INTERIM ORDER

February 25, 2009 Government Records Council Meeting

Tina Renna
Complainant

Complaint No.2008-40

v.

Township of Warren (Somerset)
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council ("Council") considered the February 18, 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. The Custodian's Counsel made the requested records available to the Complainant within the ordered five (5) business days and assessed the actual cost of the CD-ROM. However, the Custodian did not provide certified confirmation of compliance to the Executive Director until the five (5) business days had expired. Therefore, the Custodian has not fully complied with the Council's November 19, 2008 Interim Order.
2. The evidence of record indicates that the Custodian was aware of the statutorily mandated seven (7) business day response time because the Engineering Inspector provided a written response granting access to the requested records on the fourth (4th) business day, although said response was insufficient because it failed to address the Complainant's preferred method of receiving electronic copies of said records. The evidence of record also indicates that the Custodian was aware of OPRA's provision allowing for the imposition of special service charges because the Custodian provided the Complainant with an estimated special service charge on the seventh (7th) business day, although the Custodian failed to charge the actual cost of duplicating the records. However, there is no evidence to support the notion that the Custodian's actions were intentional or willfully ignorant of OPRA. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances. However, the Custodian's insufficient response, inaccurate estimated special service charge and failure to charge the actual cost of



duplicating the records appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

3. Pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Complainant is a “prevailing party” entitled to an award of reasonable attorney’s fees. The complaint brought about a change (voluntary or otherwise) in the Custodian’s conduct. Specifically, the Custodian made the requested records available to the Complainant at the actual direct cost of providing said copies. Additionally, using the catalyst theory, there is a factual causal nexus between the filing of the Complainant’s Denial of Access Complaint and the relief ultimately achieved because the Custodian made the requested records available to the Complainant at the actual direct cost of providing said copies. Further, the relief ultimately secured by the Complainant had a basis in law because N.J.S.A. 47:1A-5.b. provides that custodians must charge the actual cost of duplicating the records and N.J.S.A. 47:1A-5.c. provides that special service charges must relate to the actual direct cost of providing the copies. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees.

Interim Order Rendered by the
Government Records Council
On The 25th Day of February, 2009

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: March 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 25, 2009 Council Meeting**

**Tina Renna¹
Complainant**

GRC Complaint No. 2008-40

v.

**Township of Warren (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Electronic copies of the most recent scanned images of all Township tax maps.

Request Made: January 11, 2008

Response Made: January 18, 2008 and January 24, 2008³

Custodian: Patricia A. DiRocco

GRC Complaint Filed: February 26, 2008⁴

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. Although the Engineering Department Inspector provided a written response to the Complainant's request within the statutorily mandated seven (7) business days granting access to the requested records, said response does not address the Complainant's preferred method of receiving said records (electronic format) and as such, the response is insufficient. Thus, pursuant to O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), the Custodian has violated N.J.S.A. 47:1A-5.g.
2. Because the specific language of OPRA at N.J.S.A. 47:1A-5.c. does not mandate that a custodian put a special service charge in writing, the Council declines to find the Custodian in violation of OPRA. However, best practices dictate that Custodians **should** provide requestors with an estimated special service charge in writing based on the Council's interpretation of the word "review."

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

² Represented by John P. Belardo, Esq., of McElroy, Deutsch, Mulvaney & Carpenter, LLP (Morristown, NJ).

³ January 24, 2008 response was verbal.

⁴ The GRC received the Denial of Access Complaint on said date.

3. Based on the information provided by the Custodian, specifically that only two (2) employees had the authority to convert the requested records to the medium requested and such conversion required three (3) hours of the Engineering Inspector's time (a reasonable 81 seconds per file), a special service charge is warranted in this matter pursuant to N.J.S.A. 47:1A-5.c.
4. Pursuant to N.J.S.A. 47:1A-5.c. and Loder v. County of Passaic, GRC Complaint No. 2005-161 (January 2006), a special service charge must only reflect the hours spent providing the actual copies and the hourly rate (minus the fringe benefits) of appropriate personnel applied. As such, the actual direct cost of the Engineering Department Inspector's time is \$26.16/hour.
5. The Custodian provided the Complainant with an inaccurate estimate and was obligated to reassess the special service charge when the charge exceeded the estimated amount because all limitations on access shall be construed in favor of the public pursuant to N.J.S.A. 47:1A-1.
6. Pursuant to N.J.S.A. 47:1A-5.b. and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian may only charge the actual cost of the CD-ROM.
7. The Custodian shall disclose the requested records to the Complainant upon payment of the actual direct cost of the special service charge (\$26.16) and the actual cost of the CD-ROM.
8. **The Custodian shall comply with item #7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
10. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees 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's Counsel to Complainant's Counsel. The Custodian's Counsel states that the Township researched its invoices from 2007 and determined that the actual cost of a CD-ROM is \$0.97. As such, Counsel states that if the Complainant still wishes to receive the requested tax maps in pdf format on CD-ROM, she may submit

a check to the Custodian in the amount of \$27.13 payable to Warren Township. Counsel states that the Custodian will release the requested records once payment is received.

December 3, 2008⁵

Custodian's response to the Council's Interim Order. The Custodian certifies that she made the requested records available to the Complainant upon payment of the requisite fee for a CD-ROM, pursuant to the Council's Interim Order. Specifically, the Custodian states that the Township Attorney notified the Complainant's Counsel via letter dated November 21, 2008 that the requested records will be provided upon the Complainant's payment of the appropriate fee. The Custodian certifies that she attached a copy of the Township Attorney's letter dated November 21, 2008.⁶

December 9, 2008

E-mail from GRC to Custodian's Counsel. The GRC requests a copy of Counsel's letter to the Complainant's Counsel dated November 21, 2008.

December 9, 2008

Letter from Custodian's Counsel to GRC. Counsel submits to the GRC his letter to the Complainant's Counsel dated November 21, 2008.

December 10, 2008

Telephone call from GRC to Custodian. The GRC asks the Custodian whether Township offices were open for business on November 28, 2008 (the day after Thanksgiving). The Custodian states that Township offices were closed.

Analysis

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

In the Custodian's certification dated December 3, 2008, the Custodian states that the Township Attorney notified the Complainant's Counsel via letter dated November 21, 2008 that the requested records will be provided upon the Complainant's payment of the \$26.16 special service charge and \$0.97 for the actual cost of the CD-ROM, as ordered by the Council in its November 19, 2008 Interim Order.

The Council's Interim Order directed the Custodian to disclose the requested records upon payment of the \$26.16 special service charge and actual cost of the CD-ROM within five (5) business days from receipt of said Order. Additionally, said Order directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within the five (5) business days. Because the Township offices were closed on November 27-28, 2008, the five (5) business day deadline expired on December 1, 2008 (all parties received the Council's Interim Order via e-mail on November 20, 2008).

⁵ The GRC received said response on December 5, 2008.

⁶ The GRC is not in receipt of said letter.

The Custodian's Counsel made the requested records available to the Complainant within the ordered five (5) business days and assessed the actual cost of the CD-ROM. However, the Custodian did not provide certified confirmation of compliance to the Executive Director until the five (5) business days had expired. Therefore, the Custodian has not fully complied with the Council's November 19, 2008 Interim Order.

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

OPRA states that:

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

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

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

The Engineering Inspector provided the Complainant with a written response to the Complainant's request on the fourth (4th) business day following the Custodian's receipt of said request in which the Inspector granted access to the requested tax maps but failed to address the Complainant's preferred method of receiving said records in electronic format. On the seventh (7th) business day, the Custodian spoke to the Complainant and estimated a \$40.00 special service charge in order for the Inspector to convert the tax maps to pdf format and save them onto a CD-ROM. The Custodian's \$40.00 charge consisted of one (1) hour of time at \$35.00 an hour and \$5.00 for the CD-ROM. The Custodian improperly assessed the special service charge pursuant to N.J.S.A. 47:1A-5.c. because said charge must relate to the actual direct cost of providing the records, which in this matter is \$26.16 per hour for the Inspector's time, as well as the actual cost of the CD-ROM which is \$0.97. Additionally, the actual medium conversion took the Inspector three (3) hours and the Custodian subsequently charged the Complainant \$110.00. The Custodian has an obligation to reassess the special service charge when the charge exceeds the estimated amount which the Custodian failed to do in this matter. Ultimately, in response to the Council's November 19, 2008 Interim Order, the Custodian's Counsel made the requested records available for the actual cost of the estimated one (1) hour of time and the actual cost of the CD-ROM. However, the Custodian failed to provide certified confirmation of compliance to the Executive Director within the ordered time frame.

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 her 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)).

In this matter, the evidence of record indicates that the Custodian was aware of the statutorily mandated seven (7) business day response time because the Engineering Inspector provided a written response granting access to the requested records on the fourth (4th) business day, although said response was insufficient because it failed to address the Complainant's preferred method of receiving electronic copies of said records. The evidence of record also indicates that the Custodian was aware of OPRA's provision allowing for the imposition of special service charges because the Custodian provided the Complainant with an estimated special service charge on the seventh (7th) business day, although the Custodian failed to charge the actual cost of duplicating the records. However, there is no evidence to support the notion that the Custodian's actions were intentional or willfully ignorant of OPRA. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances. However, the Custodian's insufficient response, inaccurate estimated special service charge and failure to charge the actual cost of duplicating the records appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

OPRA provides that:

"[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the Complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the Complainant. The Complainant received the records she requested upon entering into a settlement with DYFS. The court found that the Complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the Complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The court in Mason, *supra*, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, cert denied (1984).”

In this instant matter, the crux of the Complainant’s Denial of Access Complaint challenged the Custodian’s special service charge. The Custodian estimated a special service charge of \$40.00 - \$35.00 for one (1) hour of medium conversion and \$5.00 for the CD-ROM. The Council, in its November 19, 2008 Interim Order, stated that the Custodian incorrectly assessed the special service charge because the Custodian failed to charge the actual cost of duplicating the records which is \$26.16 per hour and the actual cost of the CD-ROM, which is \$0.97. The Council ordered the Custodian to disclose the requested records to the Complainant upon payment of the actual direct cost of the

special service charge (\$26.16) and the actual cost of the CD-ROM. The Custodian's Counsel notified the Complainant via letter dated November 21, 2008 that the Custodian would provide the requested records upon payment of the \$26.16 special service charge and the actual cost of \$0.97 for the CD-ROM.

Therefore, pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra, the Complainant is a "prevailing party" entitled to an award of reasonable attorney's fees. The complaint brought about a change (voluntary or otherwise) in the Custodian's conduct. Specifically, the Custodian made the requested records available to the Complainant at the actual direct cost of providing said copies. Additionally, using the catalyst theory, there is a factual causal nexus between the filing of the Complainant's Denial of Access Complaint and the relief ultimately achieved because the Custodian made the requested records available to the Complainant at the actual direct cost of providing said copies. Further, the relief ultimately secured by the Complainant had a basis in law because N.J.S.A. 47:1A-5.b. provides that custodians must charge the actual cost of duplicating the records and N.J.S.A. 47:1A-5.c. provides that special service charges must relate to the actual direct cost of providing the copies. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's Counsel made the requested records available to the Complainant within the ordered five (5) business days and assessed the actual cost of the CD-ROM. However, the Custodian did not provide certified confirmation of compliance to the Executive Director until the five (5) business days had expired. Therefore, the Custodian has not fully complied with the Council's November 19, 2008 Interim Order.
2. The evidence of record indicates that the Custodian was aware of the statutorily mandated seven (7) business day response time because the Engineering Inspector provided a written response granting access to the requested records on the fourth (4th) business day, although said response was insufficient because it failed to address the Complainant's preferred method of receiving electronic copies of said records. The evidence of record also indicates that the Custodian was aware of OPRA's provision allowing for the imposition of special service charges because the Custodian provided the Complainant with an estimated special service charge on the seventh (7th) business day, although the Custodian failed to charge the actual cost of duplicating the records. However, there is no evidence to support the notion that the Custodian's actions were intentional or willfully ignorant of OPRA. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances. However, the Custodian's insufficient response, inaccurate estimated special service charge and failure to charge the actual cost of

duplicating the records appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

3. Pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Complainant is a “prevailing party” entitled to an award of reasonable attorney’s fees. The complaint brought about a change (voluntary or otherwise) in the Custodian’s conduct. Specifically, the Custodian made the requested records available to the Complainant at the actual direct cost of providing said copies. Additionally, using the catalyst theory, there is a factual causal nexus between the filing of the Complainant’s Denial of Access Complaint and the relief ultimately achieved because the Custodian made the requested records available to the Complainant at the actual direct cost of providing said copies. Further, the relief ultimately secured by the Complainant had a basis in law because N.J.S.A. 47:1A-5.b. provides that custodians must charge the actual cost of duplicating the records and N.J.S.A. 47:1A-5.c. provides that special service charges must relate to the actual direct cost of providing the copies. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 18, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

INTERIM ORDER

November 19, 2008 Government Records Council Meeting

Tina Renna
Complainant

Complaint No.2008-40

v.

Township of Warren (Somerset)
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. Although the Engineering Department Inspector provided a written response to the Complainant's request within the statutorily mandated seven (7) business days granting access to the requested records, said response does not address the Complainant's preferred method of receiving said records (electronic format) and as such, the response is insufficient. Thus, pursuant to O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), the Custodian has violated N.J.S.A. 47:1A-5.g.
2. Because the specific language of OPRA at N.J.S.A. 47:1A-5.c. does not mandate that a custodian put a special service charge in writing, the Council declines to find the Custodian in violation of OPRA. However, best practices dictate that Custodian's **should** provide requestors with an estimated special service charge in writing based on the Council's interpretation of the word "review."
3. Based on the information provided by the Custodian, specifically that only two (2) employees had the authority to convert the requested records to the medium requested and such conversion required three (3) hours of the Engineering Inspector's time (a reasonable 81 seconds per file), a special service charge is warranted in this matter pursuant to N.J.S.A. 47:1A-5.c.
4. Pursuant to N.J.S.A. 47:1A-5.c. and Loder v. County of Passaic, GRC Complaint No. 2005-161 (January 2006) a special service charge must only



reflect the hours spent providing the actual copies and the hourly rate (minus the fringe benefits) of appropriate personnel applied. As such, the actual direct cost of the Engineering Department Inspector's time is \$26.16/hour.

5. The Custodian provided the Complainant with an inaccurate estimate and was obligated to reassess the special service charge when the charge exceeded the estimated amount because all limitations on access shall be construed in favor of the public pursuant to N.J.S.A. 47:1A-1.
6. Pursuant to N.J.S.A. 47:1A-5.b. and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian may only charge the actual cost of the CD-ROM.
7. The Custodian shall disclose the requested records to the Complainant upon payment of the actual direct cost of the special service charge (\$26.16) and the actual cost of the CD-ROM.
8. **The Custodian shall comply with item #7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
10. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees 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**

**Tina Renna¹
Complainant**

GRC Complaint No. 2008-40

v.

**Township of Warren (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Electronic copies of the most recent scanned images of all Township tax maps.

Request Made: January 11, 2008

Response Made: January 18, 2008 and January 24, 2008³

Custodian: Patricia A. DiRocco

GRC Complaint Filed: February 26, 2008⁴

Background

January 11, 2008

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.

January 18, 2008

Engineering Department Inspector's response to the OPRA request. The Engineering Department Inspector responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request.⁵ The Inspector states that there are a total of 134 maps which cost \$5.00 each and amount to \$670.00. The Inspector asks the Complainant if she wishes to purchase said maps and in what format.

January 24, 2008

E-mail from Complainant to Engineering Department. The Complainant states that N.J.S.A. 47:1A-5.b. provides that "the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include

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

² Represented by John P. Belardo, Esq., of McElroy, Deutsch, Mulvaney & Carpenter, LLP (Morristown, NJ).

³ January 24, 2008 response was verbal.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The Custodian certified in her Statement of Information that she received the Complainant's OPRA request on January 14, 2008.

the cost of labor or other overhead expenses associated with making the copy except if a special service charge is warranted.” Additionally, the Complainant states that a recent Appellate Division decision stated that the Township of Edison’s \$55.00 charge for providing records on a computer disk was “facially inordinate” and that “the only discernable rationale for the fee is to discourage the public from requesting the information in [computer readable] format.” The Complainant asks the Engineering Department Inspector to consult with the Township attorney or the Government Records Council (“GRC”) regarding OPRA fees for electronic copies and to advise if there is a change in the Township’s fee for this request.

January 24, 2008

Telephone conversation between Complainant and Custodian. The Custodian states that the requested records are maintained in the AutoCAD system and cannot be copied as is and must be converted to pdf format. The Custodian states that the estimated charge for one (1) hour of time is \$35.00 plus \$5.00 for the CD-ROM which totals \$40.00. The Complainant requests that the Custodian put said charge in writing.

January 24, 2008

Complainant submits a check to the Township in the amount of \$40.00.

January 29, 2008

Telephone conversation between Complainant and Custodian. The Custodian states that the medium conversion actually took three (3) hours of time. As such, the Custodian calculates the special service charge at \$35.00/hour for three (3) hours plus \$5.00 for the CD-ROM which totals \$110.00. The Custodian states that she will return the Complainant’s \$40.00 check. The Complainant objects to the additional \$70.00 charge and requests that the Custodian put said charge in writing.

January 30, 2008

E-mail from Custodian’s Counsel to Complainant. Counsel states that the tax maps are maintained in the AutoCAD system and not in the medium requested. To provide the requested records in the medium requested, Counsel states that the Engineering Department Inspector spent three (3) hours converting the records to CD-ROM. Counsel states that the Custodian advised the Complainant of the copy fee (which includes the cost of the medium conversion) pursuant to N.J.S.A. 47:1A-5.d.

February 12, 2008

Letter from Custodian to Complainant. The Custodian returns the Complainant’s check in the amount of \$40.00.

February 26, 2008

Denial of Access Complaint filed with the GRC with the following attachments:

- Complainant’s OPRA request dated January 11, 2008
- E-mail from Engineering Department Inspector to Complainant dated January 18, 2008
- E-mail from Complainant to Engineering Department Inspector to Complainant dated January 24, 2008

- E-mail from Custodian's Counsel to Complainant dated January 30, 2008
- Letter from Custodian to Complainant dated February 12, 2008

The Complainant states that she submitted her OPRA request on January 11, 2008 in which she requested electronic copies of tax maps. The Complainant states that she received a written response from the Engineering Department Inspector dated January 18, 2008 in which the Inspector requested a \$670.00 copy fee (\$5.00 per map for 134 maps). The Complainant states that she objected to the charge via e-mail dated January 24, 2008 and cited N.J.S.A. 47:1A-5.b. and Libertarian Party v. Murphy, 384 N.J. Super. 136 (App.Div. 2006). The Complainant states that in said e-mail she requested that the Township reconsider its copy charge.

The Complainant also states that on January 24, 2008 she spoke to the Custodian who advised that the Township Engineer spent one (1) hour compiling the tax maps and that the charge for the CD-ROM would be \$40.00. The Complainant states that she asked the Custodian to put her statements in writing but the Custodian did not do so. The Complainant states that she spoke to the Custodian again on January 29, 2008 when the Custodian advised that because it took more than one (1) hour to copy the tax maps the Custodian was charging an additional \$70.00 which brought the total fee to \$110.00. The Complainant states that the Custodian indicated that she would return the Complainant's check for \$40.00. The Complainant states that she again asked the Custodian to put her statements in writing but the Custodian did not do so. Further, the Complainant states that she received an e-mail from the Custodian's Counsel dated January 30, 2008 in which Counsel claimed the fee quoted by the Custodian was proper and reasonable pursuant to N.J.S.A. 47:1A-5.d. The Complainant states that Counsel indicated that the special service charge was based on the three (3) hours of time it took to convert the tax maps from the AutoCAD system to CD-ROM.

The Complainant states that the Custodian did not explain why an engineer was required to copy the electronic files, why the electronic files could not be provided in AutoCAD format instead of being converted, why the Custodian's original one (1) hour estimate was incorrect and exactly how the \$110.00 charge was calculated.

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

1. A finding that the Custodian violated OPRA and denied access by requesting a \$40.00 special service charge and then returning the Complainant's check and not producing the requested records
2. A finding that the Custodian violated OPRA and denied access to records by applying an unwarranted special service charge for copies of records in the medium maintained by the Township
3. A finding that the Custodian violated OPRA by declining to put the special service charge in writing on January 24, 2008 and January 30, 2008
4. An order compelling the Custodian to release the requested records to the Complainant in the medium requested
5. An award of prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6
6. Upon investigation, imposition of a fine against the Custodian for knowingly and willfully violating OPRA.

Additionally, the Complainant did not agree to mediate this complaint.

March 17, 2008

Request for the Statement of Information sent to the Custodian.

March 17, 2008

Letter from GRC to Custodian. The GRC requests that the Custodian respond to the following questions regarding the assessment of a special service charge:

1. What records are requested?
2. Give a general nature description and number of the government records requested.
3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?
13. What is the availability of information technology and copying capabilities?
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

March 19, 2008

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

- Complainant's OPRA request dated January 11, 2008
- E-mail from Engineering Department Inspector to Complainant dated January 18, 2008
- E-mail from Complainant to Engineering Department Inspector dated January 24, 2008
- Custodian's handwritten note dated January 24, 2008 (indicating that she called the Complainant to inform her of the estimated special service charge)
- Copy of Complainant's check in the amount of \$40.00 dated January 24, 2008
- Copy of Engineering Department Inspector's calendar entry dated January 29, 2008 (indicating that he worked on the tax map conversion for 3 hours)

- Custodian's undated "note to file" (indicating that she verbally contacted the Complainant on January 29, 2008 to inform that the actual time to convert the records was three (3) hours and that an additional \$70.00 was due)
- E-mail from Custodian's Counsel to Complainant dated January 30, 2008
- Letter from Custodian to Complainant dated February 12, 2008

The Custodian certifies receiving the Complainant's OPRA request on January 14, 2008. The Custodian states that the Engineering Department Inspector responded to the Complainant's request via e-mail dated January 18, 2008 in which the Inspector quoted the cost for paper copies of the requested tax maps. The Custodian certifies that no electronic format version and no scanned images of the maps exist. The Custodian certifies that the CAD program is utilized by the Township Engineer to compile and update data that create the final tax map. The Custodian states that the Complainant e-mailed the Inspector on January 24, 2008 objecting to the charge and again requesting the maps in electronic format. The Custodian certifies that on January 24, 2008 she called the Complainant to advise that in order to create an electronic copy of the tax maps, the CAD file (which the Township Engineer maintains and uses to create a copy of the paper maps; the CAD file cannot be copied) would need to be converted to a pdf file which can be copied. The Custodian certifies that she advised the Complainant that a special service charge would be assessed at \$35.00 per hour for the file conversion at an estimated time of 1 hour plus \$5.00 for the CD-ROM which equals \$40.00. The Custodian states that the Complainant did not object to the special service charge.

Additionally, the Custodian certifies that she called the Complainant again on January 29, 2008 to advise that the record conversion actually took three (3) hours and so the copy fee is \$110.00 (\$35.00 per hour plus \$5.00 for the CD). The Custodian states that the Complainant objected to the charge of the additional two (2) hours. The Custodian states that the Township Attorney e-mailed the Complainant on January 30, 2008 indicating that the special service charge must be paid in order to receive the requested records. Further, the Custodian certifies that she returned the Complainant's \$40.00 check on February 12, 2008 because she did not receive any additional payment from the Complainant.

The Custodian certifies that her search for the requested records included consulting with the Engineering Department Inspector about the estimated time to complete the file conversion. The Custodian also certifies that no records responsive to the Complainant's request were destroyed.

The Custodian asserts that because an electronic copy of the requested tax map did not exist at the time of the request and required medium conversion, a special service charge is warranted pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. because the conversion required an extraordinary expenditure of time and effort. The Custodian certifies that she notified the Complainant of the estimated special service charge to which the Complainant did not object.

Additionally, the Custodian's responses to the special service charge questions are as follows:

Questions	Custodian's Response
1. What records are requested?	Electronic format of the most recent scanned images of all Township tax maps
2. Give a general nature description and number of the government records requested.	The Township maintains paper copies of the 134 maps which are two feet (2') by 3 feet (3') each. No electronic copy of the maps exists. Such maps were converted from the CAD system.
3. What is the period of time over which the records extend?	The Complainant sought only "the most current scanned images."
4. Are some or all of the records sought archived or in storage?	No
5. What is the size of the agency (total number of employees)?	Approximately 95
6. What is the number of employees available to accommodate the records request?	Only two (2) employees have the training, ability and authorization to utilize the CAD program – Christian Kastrud, Township Engineer, and David Darge, Engineering Department Inspector
7. To what extent do the requested records have to be redacted?	No redactions required
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?	<p>Only Christian Kastrud, Township Engineer, and David Darge, Engineering Department Inspector, have the ability to access the CAD program to convert the tax maps. Christian Kastrud's hourly rate is \$80.00 in-house and \$120.00 at his outside office. David Darge's hourly rate is \$41.86.</p> <p>3 hours of David Darge's time were required to convert the information from the CAD program to 134 pdf files, then copy the pdf files to a CD.</p>
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?	Not applicable
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?	Not applicable
11. What is the reason that the agency employed, or intends to	The Engineering Department Inspector had the level of expertise and experience to convert the records to electronic format. Because the potential exists for

employ, the particular level of personnel to accommodate the records request?	information contained in the CAD program to be altered or deleted, only employees with knowledge and skill can use the CAD program.
12. Who (name and job title) in the agency will perform the work associated with the records request and that person’s hourly rate?	David Darge, Engineering Department Inspector performed the conversion. He is paid \$26.16 per hour by the Township for his regular duties. Based on Township Ordinance § 15.5.3.b.8, for inspections and work where fees are charged and must be reimbursed by applicants and developers, Mr. Darge’s hourly rate is \$41.86 (\$26.16 times 1.6).
13. What is the availability of information technology and copying capabilities?	The Township has a special copy machine to copy the oversized tax maps. The Township also has the CAD program and the technology required to convert the information into pdf and copy the 134 pdf files onto a CD.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	The Engineering Department Inspector required three (3) hours (180 minutes) to convert 134 CAD files to pdf and save them to a CD (an average of 81 seconds per file).

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 provides that:

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

Additionally, OPRA provides that:

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

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

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

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁶

In this complaint, the Complainant states that she submitted her OPRA request on January 11, 2008 in which she sought access to electronic copies of the Township’s tax maps. The Custodian certifies receiving the Complainant’s OPRA request on January 14, 2008. The Custodian states that the Engineering Department Inspector responded to the Complainant’s request via e-mail on January 18, 2008, the fourth (4th) business day following the Custodian’s receipt of said request. The Complainant acknowledges receiving this response; however, said response grants access to the requested maps in paper form and quotes the paper copy fee. The Complainant states that via e-mail dated January 24, 2008, she notified the Inspector that her request sought access to electronic copies of the tax maps. The Complainant also states that she spoke to the Custodian on the same date, which is the seventh (7th) business day following the Custodian’s receipt of the request, and the Custodian informed the Complainant that a special service charge of \$40.00 would be required to convert the tax maps to electronic format and provide them on a CD-ROM.

⁶ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Although the Engineering Department Inspector responded to the Complainant's request in writing within the statutorily mandated seven (7) business days and granted access to paper copies, the Inspector failed to address the Complainant's preference to receive the requested records in electronic format. The GRC has previously rendered a decision on a similar matter in O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008). In said complaint, the Complainant sought access to records either by e-mail or regular mail, whichever costs less. The Custodian's response only quoted a cost for providing paper copies of the requested records. The Council held that:

“[a]ccording to language of N.J.S.A. 47:1A-5.g., the Custodian was given two ways to comply and should have, therefore, responded acknowledging the Complainant's preferences with a sufficient response for each. Although the Custodian responded in writing granting access...in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g.”

The facts of this complainant are similar to those in O'Shea except that in this current complaint the Custodian did address the Complainant's preferred medium on the seventh (7th) business day; however, said acknowledgement was verbal. Therefore, although the Inspector provided a written response to the Complainant's request within the statutorily mandated seven (7) business days granting access to the requested records, said response does not address the Complainant's preferred method of receiving said records (electronic format) and as such the response is insufficient. Thus, pursuant to O'Shea, supra, the Custodian has violated N.J.S.A. 47:1A-5.g.

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

OPRA 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, or if a fee is not prescribed by law or regulation, upon payment of the *actual cost* of duplicating the record...*The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section.*” (Emphasis added). N.J.S.A. 47:1A-5.b.

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

“[w]henever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary

business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ... The requestor shall have the opportunity to review and object to the charge prior to it being incurred.*” (Emphasis added.) N.J.S.A. 47:1A-5.c.

OPRA also states that:

“[a] custodian shall permit access to a government record and *provide a copy thereof in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium...” (Emphasis added.) N.J.S.A. 47:1A-5.d.

The Complainant states that during her telephone conversation with the Custodian on January 24, 2008, the Custodian estimated a \$40.00 special service charge for the one (1) hour conversion of the tax maps to electronic format. The Complainant submitted payment for said charge. However, the Complainant also states that on January 29, 2008, the Custodian verbally informed her that the conversion took three (3) hours and an additional \$70.00 was due (totaling \$110.00). The Complainant challenges the special service charge in that the Custodian did not explain why an Engineer was required to copy the electronic files, why the electronic files could not be provided in AutoCAD format instead of being converted, why the Custodian’s original one (1) hour estimate was incorrect, exactly how the \$110.00 charge was calculated and did not put the special service charges in writing.

The provision of OPRA that allows for special service charges, N.J.S.A. 47:1A-5.c., requires that custodians provide the Complainant with an opportunity to review and object to the charge prior to it being incurred. OPRA is silent in this provision about whether such review must be provided to the Complainant in writing. The dictionary contains various definitions for the verb “review” including “to view, look at, or look over again,” “to inspect, esp. formally or officially” and “to survey mentally; take a survey of.”⁷ Applying the first two definitions of “review” to OPRA’s special service charge provision implies that the special service charge estimate must be in writing. However, when the third definition is applied, the written implication does not exist. Nevertheless, because OPRA requires custodians to respond to requests in writing, best practices dictate that Custodian’s **should** provide requestors with an estimated special service charge in writing so as to have documented proof of such exchange. Relying solely on verbal communication runs the risk of miscommunication. For example, a custodian may verbally estimate a special service charge of \$50.00 and the requestor may hear \$15.00 and agree to the charge. Nevertheless, because the specific language of OPRA at N.J.S.A. 47:1A-5.c. does not mandate that a custodian put a special service charge in writing, the Council declines to find the Custodian in violation of OPRA in this regard.

⁷ “Review.” *Dictionary.com Unabridged (v.1.1)*. Random House, Inc.
Tina Renna v. Township of Warren (Somerset), 2008-40 – Findings and Recommendations of the Executive Director

Further, the determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of a variety of factors. These factors were discussed in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. *Id.* at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. *Id.*

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

- The volume of government records involved;
- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying;
- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination;⁸ and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

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

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

1. What records are requested?
2. Give a general nature description and number of the government records requested.

⁸ With regard to this factor, the court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?
13. What is the availability of information technology and copying capabilities?
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

In the complaint now before the Council, the Custodian responded to the above questions as follows: The Complainant requested electronic copies of tax maps which the Custodian certifies are not maintained on file in the medium requested. The Custodian certifies that the 2' by 3' maps are maintained in paper form and the information used to create the paper maps is stored in the AutoCAD system. The Custodian certifies that although the Township consists of 95 employees, only two (2) employees, the Township Engineer and the Engineering Department Inspector, have the ability and authority to use the AutoCAD system because of the potential for accidental alterations or deletions to the system. The Custodian certifies that the Engineering Inspector's hourly rate is \$26.16; however, the Custodian certifies that pursuant to Ordinance § 15.5.3.b.8, the Inspector's rate for work where fees are charged is \$41.86 (\$26.16 times 1.6). (It should be noted that the Custodian charged \$35.00 per hour for the special service charge in this complaint). Additionally, the Custodian certifies that Mr. Darge had to convert 134 CAD files to pdf files and save them onto a CD-ROM. The Custodian certifies that said conversion took three (3) hours (180 minutes) which is an average of 81 seconds per file. The Custodian also certifies that the cost of the CD-ROM is \$5.00.

Based on the information provided by the Custodian, specifically that only two (2) employees had the authority to convert the requested records to the medium requested and such conversion required three (3) hours of the Engineering Inspector's time (a reasonable 81 seconds per file), a special service charge is warranted in this matter pursuant to N.J.S.A. 47:1A-5.c. The remaining question here is whether the \$110.00 special service charge assessed by the Custodian is reasonable and based upon the actual direct cost of providing the copies.

In the Custodian's Statement of Information, the Custodian breaks down the special service charge for three (3) hours at \$35.00 per hour plus \$5.00 for the CD-ROM. However, the Custodian certifies in the 14-point special service charge questionnaire that the Engineering Inspector completed the file conversion and his hourly rate is \$26.16. The Custodian also certified that the Inspector's rate when fees are assessed is \$41.86, which is 1.6 times his actual hourly rate. However, the specific wording of OPRA's special service charge provision states that a special service charge shall be based on "the actual direct cost of providing the copy or copies." N.J.S.A. 47:1A-5.c. In Loder v. County of Passaic, GRC Complaint No. 2005-161 (January 2006), the Custodian charged a special service charge that included 30% for fringe benefits. The Council held that a "special service charge should only reflect the hours spent providing the actual copies and the hourly rate (minus the fringe benefits) of appropriate personnel applied." Therefore, the actual direct cost in this instant matter is \$26.16/hour.

Using the actual direct cost of \$26.16/hour for three (3) hours of medium conversion, the special service charge warranted for this request is \$78.48. However, the Custodian only estimated a one (1) hour special service charge at \$35.00/hour. N.J.S.A. 47:1A-1 provides that all limitations on access shall be construed in favor of the public. Based on said provision, the Custodian has an obligation to reassess the special service charge when the charge exceeds the estimated amount. Otherwise, custodians could estimate any amount to which a requestor agrees and actually incur a cost much higher than the estimate, similar to the events in this complaint. Such practice is a violation of OPRA since requestors have the opportunity to object to a special service charge **prior to it being incurred** pursuant to N.J.S.A. 47:1A-5.c. Thus, in this instant matter, the Custodian provided the Complainant with an inaccurate estimate.

Further, in Loder, supra, the Custodian estimated and the Complainant agreed to a \$400 special service charge. The Custodian actually incurred a cost of \$799.32 (as per the GRC's calculation minus the fringe benefits). The Council held that:

"while a reasonable special service charge of \$799.32 is warranted pursuant to OPRA and [The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002)], the Custodian may only charge the \$400.00 special service charge that the Complainant agreed to pay in August 2004 because the Custodian violated N.J.S.A. 47:1A-5.c. by not providing the Complainant the opportunity to review and object to the charge prior to it being incurred."

Similarly in this instant complaint, the Complainant agreed to a lesser charge than what was actually incurred by the Custodian. However, in this complaint the Custodian estimated an incorrect special service charge because said charge was not based on the actual direct cost pursuant to N.J.S.A. 47:1A-5.c. Based on the Council's decision in Loder, the Custodian in this complaint may only charge the estimated special service charge of one (1) hour; however the Custodian must only charge \$26.16 because it is the actual direct cost of providing the copies.

Additionally, the Custodian must charge the actual cost of the CD-ROM pursuant to N.J.S.A. 47:1A-5.b. which is likely not the quoted \$5.00.

In Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Township of Edison charged \$55.00 for a computer diskette containing Township Council meeting minutes. The plaintiff asserted that the fee was excessive and not related to the actual cost of duplicating the record. The defendant argued that the plaintiff's assertion is moot because the fee was never imposed and the requested records were available on the Township's website free of charge. The court held that "...the appeal is not moot, and the \$55 fee established by the Township of Edison for duplicating the minutes of the Township Council meeting onto a computer diskette is unreasonable and unsanctioned by explicit provisions of OPRA." The court stated that:

"[i]n adopting OPRA, the Legislature made clear that 'government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public's right of access.' N.J.S.A. 47:1A-1. The imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication. N.J.S.A. 47:1A-5b."

The court also stated that "...although plaintiffs have obtained access to the actual records requested, the legal question remains viable, because it is clearly capable of repetition. See New Jersey Div. of Youth & Family Servs. v. J.B., 120 N.J. 112, 118-19, 576 A.2d 261 (1990)." Further, the court stated that "...the fee imposed by the Township of Edison creates an unreasonable burden upon plaintiff's right of access and is not rationally related to the actual cost of reproducing the records."

Therefore, pursuant to N.J.S.A. 47:1A-5.b. and Libertarian Party of Central New Jersey, supra, the Custodian may only charge the actual cost of the CD-ROM.

In conclusion, although the specific language of OPRA does not expressly direct custodians to provide requestors with an estimated special service charge in writing and thus the Custodian's failure to do so in this matter is not a direct violation of OPRA, best practices dictate that custodians inform requestors of the special service charge breakdown in writing. Because only two (2) Township employees had the capability to complete the medium conversion required for the OPRA request subject of this complaint and because said conversion required a total of three (3) hours of the Engineering Department Inspector's time, a special service charge is warranted pursuant to N.J.S.A. 47:1A-5.c. However, said charge must relate to the actual direct cost of providing the copies. The actual direct cost in this complaint is the Inspector's hourly rate minus fringe benefits, which is \$26.16. Additionally, because the Custodian failed to reassess the inaccurate time estimate for the medium conversion, the Custodian may only charge the Complainant for the time estimated which is one (1) hour. Further, pursuant to N.J.S.A. 47:1A-5.b. and Libertarian Party of Central New Jersey, supra, the Custodian may only charge the actual cost of the CD-ROM. Therefore, the Custodian must release the

requested records to the Complainant upon payment of the actual direct cost of the special service charge (\$26.16) and the actual cost of the CD-ROM.

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

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

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Engineering Department Inspector provided a written response to the Complainant’s request within the statutorily mandated seven (7) business days granting access to the requested records, said response does not address the Complainant’s preferred method of receiving said records (electronic format) and as such, the response is insufficient. Thus, pursuant to O’Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), the Custodian has violated N.J.S.A. 47:1A-5.g.
2. Because the specific language of OPRA at N.J.S.A. 47:1A-5.c. does not mandate that a custodian put a special service charge in writing, the Council declines to find the Custodian in violation of OPRA. However, best practices dictate that Custodian’s **should** provide requestors with an estimated special service charge in writing based on the Council’s interpretation of the word “review.”
3. Based on the information provided by the Custodian, specifically that only two (2) employees had the authority to convert the requested records to the medium requested and such conversion required three (3) hours of the Engineering Inspector’s time (a reasonable 81 seconds per file), a special service charge is warranted in this matter pursuant to N.J.S.A. 47:1A-5.c.
4. Pursuant to N.J.S.A. 47:1A-5.c. and Loder v. County of Passaic, GRC Complaint No. 2005-161 (January 2006) a special service charge must only reflect the hours spent providing the actual copies and the hourly rate (minus the fringe benefits) of appropriate personnel applied. As such, the actual direct cost of the Engineering Department Inspector’s time is \$26.16/hour.

5. The Custodian provided the Complainant with an inaccurate estimate and was obligated to reassess the special service charge when the charge exceeded the estimated amount because all limitations on access shall be construed in favor of the public pursuant to N.J.S.A. 47:1A-1.
6. Pursuant to N.J.S.A. 47:1A-5.b. and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian may only charge the actual cost of the CD-ROM.
7. The Custodian shall disclose the requested records to the Complainant upon payment of the actual direct cost of the special service charge (\$26.16) and the actual cost of the CD-ROM.
8. **The Custodian shall comply with item #7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
10. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

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Approved By: Catherine Starghill, Esq.
Executive Director

November 13, 2008