



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

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

LORI GRIFA  
*Acting Commissioner*

**FINAL DECISION**

**May 27, 2010 Government Records Council Meeting**

Rashaun Barkley  
Complainant

Complaint No. 2009-128

v.

New Jersey Department of Treasury  
Custodian of Record

At the May 27, 2010 public meeting, the Government Records Council (“Council”) considered the May 20, 2010 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. In the absence of any evidence indicating the Division of Commercial Recording staff member who responded and upon what date the form letter response was sent, the GRC is unable to determine the identity of the staff member of the Division of Commercial Recording that violated OPRA pursuant to N.J.S.A. 47:1A-5.h.
2. The fees imposed under N.J.S.A. 42:2B-65(9) and N.J.S.A. 22A:4-1a, are lawful and not excessive under OPRA pursuant to N.J.S.A. 47:1A-5.b., Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007), and Truland v. Borough of Madison, GRC Complaint No. 2006-88 (September 2007).
3. The Custodian has not unlawfully denied access to the Complainant’s letter request referencing OPRA because he certified that no request was received until the filing of this complaint pursuant to Avila v. Camden County Prosecutor’s Office, GRC Complaint No. 2007-287 (July 2008).

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 27<sup>th</sup> Day of May, 2010

Robin Berg Tabakin, Chairman  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: June 3, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 27, 2010 Council Meeting**

**Rashaun Barkley<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-128**

v.

**New Jersey Department of Treasury<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of articles of incorporation and certificates of incorporation for the following:

1. Little Shields, Inc. (Essex County, New Jersey).
2. Law Offices of Theresa A. Kennedy, LLC (Washington, New Jersey).
3. Big Shields, Inc. (Essex County, New Jersey).

**Request Made:** May 27, 2008

**Response Made:** Unknown<sup>3</sup>

**Custodian:** James J. Fruscione

**GRC Complaint Filed:** April 16, 2009<sup>4</sup>

**Background**

**May 27, 2008**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA and addressed to the New Jersey Department of Treasury ("DOT"), Division of Commercial Recording ("DCR").

**April 16, 2009**

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

- Complainant's OPRA request dated May 27, 2008.
- Letter from the Custodian to the Complainant undated.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by DAG Don E. Catinello, on behalf of the NJ Attorney General.

<sup>3</sup> The evidence of record shows that a form letter response was sent to the Complainant indicating that the request was denied for "missing/incorrect fee." In response to the GRC's request for additional information, the Custodian certified on March 3, 2010 that the Division of Revenue had no record of the identity of the staff member that prepared and sent the form letter or the date the response was sent.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

The Complainant states that he submitted an OPRA request to the DOT on May 27, 2008. The Complainant states that he received an undated response denying access to the requested records because of an incorrect fee.

The Complainant asserts that the Custodian is attempting to enforce a fee schedule for copying that is inconsistent with OPRA and cites to Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 141 (App. Div. 2006).

**April 29, 2009**

Offer of Mediation sent to both parties.

**April 30, 2009**

The Custodian agrees to mediate this complaint. The Complainant did not respond to the Offer of Mediation.

**June 11, 2009**

Request for the Statement of Information (“SOI”) sent to the Custodian.

**June 17, 2009**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated May 27, 2008.
- Letter from the Custodian to the Complainant undated.
- N.J.S.A. 42:2B-65 – Fees
- N.J.S.A. 22A:4-1.a. – Fees for miscellaneous documents.<sup>5</sup>

The Custodian certifies that no search was conducted in response to the Complainant’s request because such request was never received by the Custodian.

The Custodian also certifies that no records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).

The Custodian certifies that the Complainant mailed his letter request to the DCR. The Custodian states that the Complainant’s letter is dated May 28, 2008, contains no identifiable postmarks, and is not addressed to any of the DOT OPRA units.<sup>6</sup> The Custodian certifies that filing staff at the DCR do not handle OPRA requests; however, based on the documents provided as part of the Complainant’s Denial of Access Complaint, the DCR responded using a standard form letter. The Custodian certifies that given the lack of mailing information, the Custodian cannot ascertain the actual date of

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<sup>5</sup> The Custodian also attached an inter-office memorandum advising employees on how to handle requests made pursuant to OPRA and an e-mail regarding making employees aware of OPRA procedure.

<sup>6</sup> Additionally, the Custodian argues that because the request was not properly completed, it could be construed as an invalid anonymous request because the Complainant failed to disclose his status as an inmate pursuant to N.J.S.A. 47:1A-2.2. (“where it shall appear that a person who is convicted of any indictable offense ... seeking government records containing personal information pertaining to the person’s victim or the victim’s family ... the right of access ... shall be denied ... a custodian shall not comply with an anonymous request for a government record which is protected under this section”).

receipt of the Complainant’s request or the DCR’s response. The Custodian avers that the DCR generally responds to routine requests for records within five (5) business days of receipt.

The Custodian states that the Complainant mailed his letter request to a PO Box ordinarily used for submissions of routine business entity filing transactions, not for requests for corporate records. The Custodian states that staff assigned to that office are not trained on responding to routine requests for records let alone responding to OPRA requests. The Custodian notes that, subsequent to the Complainant’s letter request, the Division of Revenue (“DOR”) educated staff about the necessity of referring communications referencing OPRA to the appropriate units within the DOT.

The Custodian asserts that based on the evidence provided in the Complainant’s Denial of Access Complaint, it is apparent that staff responded using a standard form letter that lists the contacts for routine records access services provided by the DOR. The Custodian asserts that although the letter is not dated, staff typically responds to correspondence within five (5) business days; therefore, it is likely that the letter was sent in early June 2008. The Custodian states that the form letter indicates that the request is being rejected due to “missing/incorrect fee” and contains a schedule of fees for various types of documents.

The Custodian certifies that the fees contained on the form letter were prescribed by New Jersey statutes for the requested records access services. The Custodian certifies that the fees that apply to the Complainant’s request can be found at N.J.S.A. 22A:4-1.a. (general certificate fee) and N.J.S.A. 42:2B-65(9)(fees for Liability Company records). The Custodian certifies that the DOR never responded to the Complainant’s OPRA request as it would an OPRA request directed to a custodian, rather the request was handled as a routine request for corporate records.

The Custodian avers that the documents were not denied outright, because a key function of the DOR is to provide such documents to the public when requested. The Custodian certifies that the request was denied because the Complainant did not include the required statutory fees.

The Custodian states that the Complainant is challenging the fees charged. The Custodian states that OPRA provides that copies of government records, “may be *purchased* by any person upon payment of the *fee prescribed by law or regulation...*” N.J.S.A. 47:1A-5.b. The Custodian certifies that the following fees apply to the Complainant’s request:

<b>Services/Records</b>	<b>Statutory Page Copy or Certificate Fee</b>	<b>Statute or Regulation</b>
Limited Liability Company records	\$10.00 for the first page and \$2.00 every page thereafter	<u>N.J.S.A. 42:2B-65(9)</u>
No Records Search Certificate	\$25.00 per certificate	<u>N.J.S.A. 22A:4-1a</u>

The Custodian states that the Complainant requested articles of incorporation or certificates of incorporation for three entities: Little Shields, Inc. (Essex County, New Jersey), Law Offices of Theresa A. Kennedy, LLC (Washington, New Jersey) and Big Shields, Inc. (Essex County, New Jersey). The Custodian certifies that there are no records on file for either Little Shields Inc. or Big Shields, Inc. The Custodian certifies that there is a Certificate of Formation on file for Theresa A. Kennedy, LLC, which consists of one (1) page.<sup>7</sup> The Custodian certifies that the statutory fee for a copy of a Certificate of Formation is \$10.00. Further, the Custodian certifies that if the Complainant wished to obtain a “no records search certificate” for the other two entities, each certificate would cost \$25.00.

The Custodian argues that denying access to government records for failure to provide appropriate fees does not constitute a violation of OPRA pursuant to Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). The Custodian states that in Paff, the GRC held that

“[a]s the Custodian is awaiting payment for the duplication cost of the requested records, she is not required to release said records until payment is received pursuant to N.J.S.A. 47:1A-5.b., Santos v. New Jersey State Parole Board, GRC Case No. 2004-74 (August, 2004), and Cuba v. Northern State Prison, GRC Case No. 2004-146 (February, 2005).”

The Custodian states that the Complainant cites to Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 141 (App. Div. 2006) in support of his argument that the proposed fees are excessive. The Custodian contends that Murphy is distinguishable from this matter because no statutory fee was at issue in that case. The Complainant argues that there is legislation to support the proposed fees in this complaint, which is lawful under OPRA pursuant to N.J.S.A. 47:1A-5.b.

Further, the Custodian asserts that the Complainant’s OPRA request is invalid under OPRA because it was not properly addressed or directed to the Custodian and was not completed properly because it contained no telephone number and did not indicate whether the Complainant had a criminal conviction. The Custodian argues that regardless of the foregoing, the Custodian’s response to the Complainant’s OPRA request would have essentially been the same as the form letter: that the Complainant needed to pay the statutory fees in order to obtain the records responsive.

Finally, the Custodian argues that there is no evidence to suggest a knowing and willful violation of OPRA occurred. The Custodian certifies that he had no knowledge of the Complainant’s OPRA request until receipt of the Denial of Access Complaint. Further, the Custodian asserts that the Complainant failed to properly complete or address the request form and the Complainant failed to authorize enough funds to pay for the statutorily mandated fees. The Custodian respectfully requests that this complaint be dismissed.

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<sup>7</sup> The Custodian notes that a Certificate of Formation is the original charter document for LLC-type entities. Rashaun Barkley v. New Jersey Department of Treasury, 2009-128 – Findings and Recommendations of the Executive Director 4

### **March 1, 2010**

Letter from the GRC to the Custodian. The GRC states that according to the evidence in the above mentioned complaint, the DCR forwarded a response to the Complainant. The GRC states that the Custodian indicated in the SOI that the response from the DCR is not dated. Further, the GRC states that the form letter contains no signature identifying the staff member who responded. The GRC requests that the Custodian legally certify to the following:

1. Whether any record exists that would accurately identify the staff member who responded to the Complainant's May 27, 2008 letter request?
2. Whether any record exists that would accurately identify the date on which the form letter response was prepared and sent to the Complainant?

The GRC requests that the Custodian submit the requested legal certification by no later than Wednesday, March 3, 2010.

### **March 3, 2010**

Custodian's legal certification. The Custodian certifies that the DOR has no record that would accurately identify the staff member who responded to the Complainant's May 27, 2008 letter request. Further, the Custodian certifies that he has no record that would accurately identify the date on which the form letter response was prepared and sent to the Complainant.<sup>8</sup>

### **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.

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<sup>8</sup> The Custodian certifies that he, along with other managers from the DOT's Business Services Branch, took steps in 2009 to educate staff members on the formal procedure of any misdirected requests or correspondence referencing 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...*” (Emphasis added.) N.J.S.A. 47:1A5.b.

Additionally, OPRA provides for the recognition of fees imposed by law or regulation:

“[e]xcept as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following:

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

OPRA provides that:

“[a]ny officer or *employee of a public agency* who receives a request for access to a government record *shall forward* the request to the *custodian of the record* or *direct the requestor* to the *custodian of the record.*” (Emphasis added.) N.J.S.A. 47:1A-5.h.

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 GRC first turns to the issue of the form letter response forwarded to the Complainant by a staff member of the DCR.

In the complaint currently before the Council, the Complainant sent a letter request to the DCR on May 27, 2008. The evidence of record shows that the DCR responded stating that the request was denied because Complainant did not include the appropriate fees; however, the evidence does not contain the identity of the staff member who responded nor the date upon which this response was sent. The Custodian subsequently certified on March 3, 2010 that the DOR has no record to accurately



identifying the DCR staff member who responded nor upon which date the form letter response was sent to the Complainant.

OPRA requires “[a]ny officer or employee of a public agency who *receives a request* for access to a government record *shall forward* the request to the *custodian of the record* or *direct* the requestor to the *custodian of the record*.” (Emphasis added.) N.J.S.A. 47:1A-5.h.

In this complaint, the Complainant’s letter request clearly indicates that this request is being made pursuant to OPRA. As provided in OPRA, an officer or employee of the DCR was required to forward the letter request to the Custodian or return the letter request to the Complainant directing the Complainant to submit the letter request to the Custodian. N.J.S.A. 47:1A-5.h.

However, the evidence of record in this complaint does not identify the staff member of the DCR responsible for responding to the Complainant’s letter request. Additionally, the Custodian certified on March 3, 2010 that the DOR has no record accurately identifying the DCR staff member who responded nor upon which date the form letter response was sent to the Complainant.

Therefore, in the absence of any evidence indicating the DCR staff member who responded and on what date the form letter response was sent, the GRC is unable to determine the identity of the staff member of the DCR who violated OPRA pursuant to N.J.S.A. 47:1A-5.h.

The GRC next turns to the issue of whether the fee schedule provided by the Custodian is excessive under OPRA.

The Custodian stated in the SOI that the Complainant challenged the fees being imposed by the DCR. As the Custodian noted, OPRA provides that copies of government records, “may be *purchased* by any person upon payment of the *fee prescribed by law or regulation...*” N.J.S.A. 47:1A-5.b. The Custodian certified that the following two (2) statutory fees apply to the Complainant’s request:

<b>Services/Records</b>	<b>Statutory Page Copy or Certificate Fee</b>	<b>Statute or Regulation</b>
Limited Liability Company records	\$10.00 for the first page and \$2.00 every page thereafter	<u>N.J.S.A. 42:2B-65(9)</u>
No Records Search Certificate	\$25.00 per certificate	<u>N.J.S.A. 22A:4-1a</u>

The Custodian certifies that there are no records on file for either Little Shields Inc. or Big Shields, Inc. and that the Complainant could obtain a “no records search certificate” for the other two entities, and each certificate would cost \$25.00. Additionally, the Custodian certified that a Certificate of Formation is on file for Theresa A. Kennedy, LLC, which consists of one (1) page, for a statutory fee of \$10.00.

The GRC previously addressed a similar issue in which another law contains a fee for a record. In Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007), the Custodian responded stating that the fees for copies of accidents reports when mailed to a requestor is \$5.00 pursuant to N.J.S.A. 39:4-131; however, if the Complainant received the reports in person, the fees set forth in N.J.S.A. 47:1A-5.b. apply.<sup>9</sup> The GRC held that the fee imposed pursuant to N.J.S.A. 39:4-131 in instances where a request for accident reports was not made in person is appropriate under OPRA.

In Truland v. Borough of Madison, GRC Complaint No. 2006-88 (September 2007), the Custodian imposed a fee of \$5.00 per accident report in addition to the copying cost of \$0.75 per page afforded under N.J.S.A. 47:1A-5.b. The GRC contemplated its previous holding in Donato, *supra* (that a custodian shall charge the enumerated rates under OPRA when a person receives accident reports in person pursuant to N.J.S.A. 47:1A-5.b.), and the plain language of N.J.S.A. 47:1A-131 (“*If copies of reports are requested other than in person, an additional fee of up to \$5.00 for the first three pages and \$1.00 per page thereafter may be added to cover the administrative costs of the report...*” (Emphasis added.)). The GRC held that:

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

In the instant complaint, the Custodian has provided reference to New Jersey statutes that prescribe fees for the records requested by the Complainant. N.J.S.A. 47:1A-5.b. allows for the recognition of fees prescribed by law or regulation. The GRC’s previous holdings in Donato, *supra*, and Truland, *supra*, illustrate the Council’s position regarding statutorily prescribed fees.

Therefore, the fees imposed under N.J.S.A. 42:2B-65(9) and N.J.S.A. 22A:4-1a, are lawful and not excessive under OPRA pursuant to N.J.S.A. 47:1A-5.b., Donato, *supra*, and Truland, *supra*.

Finally, the GRC notes that the Custodian certified in the SOI that he did not receive the Complainant’s request until receipt of the Denial of Access Complaint. In Avila v. Camden County Prosecutor’s Office, GRC Complaint No. 2007-287 (July 2008), the custodian certified that she did not receive the complainant’s request for two (2) records that the complainant took issue with in the Denial of Access Complaint. The GRC held that “the Custodian has not unlawfully denied access to request Items No. 4 and No. 5 because the Custodian certified that no OPRA request was ever received from the Complainant.”

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<sup>9</sup> The Custodian asserted that the charge was allowed pursuant to N.J.S.A. 47:1A-5.c. The GRC ordered the Custodian to provide a fourteen (14) point analysis established to evaluate special service charges. The GRC subsequently held that the Custodian’s imposed fee of \$5.00 per accident report was unlawful, but allowed for imposed fee for providing accident reports to those not requesting such in person pursuant to N.J.S.A. 39:4-131.

The facts of Avila, supra, are consistent with the facts in this complaint; specifically that the Custodian in this matter certified in the SOI that he did not receive the Complainant's letter request referencing OPRA until receipt of the Complainant's Denial of Access Complaint. Therefore, the Custodian has not unlawfully denied access to the Complainant's letter request referencing OPRA because he certified that no request was received until the filing of this complaint pursuant to Avila, supra.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. In the absence of any evidence indicating the Division of Commercial Recording staff member who responded and upon what date the form letter response was sent, the GRC is unable to determine the identity of the staff member of the Division of Commercial Recording that violated OPRA pursuant to N.J.S.A. 47:1A-5.h.
2. The fees imposed under N.J.S.A. 42:2B-65(9) and N.J.S.A. 22A:4-1a, are lawful and not excessive under OPRA pursuant to N.J.S.A. 47:1A-5.b., Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007), and Truland v. Borough of Madison, GRC Complaint No. 2006-88 (September 2007).
3. The Custodian has not unlawfully denied access to the Complainant's letter request referencing OPRA because he certified that no request was received until the filing of this complaint pursuant to Avila v. Camden County Prosecutor's Office, GRC Complaint No. 2007-287 (July 2008).

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

May 20, 2010