



**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  
*Commissioner*

**FINAL DECISION**

**February 24, 2011 Government Records Council Meeting**

Katalin Gordon  
Complainant

Complaint No. 2010-120

v.

City of Orange (Essex)  
Custodian of Record

At the February 24, 2011 public meeting, the Government Records Council (“Council”) considered the February 15, 2011 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 failure to respond in writing to the Complainant’s April 28, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian’s response to the Complainant’s April 28, 2010, OPRA request failed to address each request item and did not provide a lawful basis for a denial, the Custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. Since the Custodian certified that the Complainant’s OPRA request could not be fulfilled using existing software and that the City’s software vendor, FirstByte Corporation would convert the requested files at a cost of \$200.00 and the Complainant has not proffered any sufficient evidence to refute this certification, thus the charge of \$200.00 represents the actual cost of reproducing the records and does not violate N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d.
4. Although the Custodian’s failure to respond in writing to the Complainant’s April 28, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business



days resulted in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., and N.J.S.A. 47:1A-5.i., because the Custodian has certified that the Township lacks the necessary equipment to fulfill the Complainant’s OPRA request and because Mr. Smith has certified that the \$200.00 was the actual cost to engage First Byte Corporation to convert the requested records to the Microsoft Excel format specifically requested by the Complainant, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

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 24<sup>th</sup> Day of February, 2011

Robin Berg Tabakin, Chair  
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: March 1, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 24, 2011 Council Meeting**

**Katalin Gordon<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-120**

v.

**City of Orange (Essex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Taxes paid by all residents of the City of Orange between July 1, 2009 and December 31, 2009 showing name, amount, and payment date in Microsoft Excel format or, alternatively, sent as an e-mail attachment in whatever electronic format is available.<sup>3</sup>

**Request Made:** April 28, 2010

**Response Made:** May 21, 2010

**Custodian:** Dwight Mitchell

**GRC Complaint Filed:** June 17, 2010<sup>4</sup>

**Background**

**April 28, 2010**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant requests that the records be sent to her in Microsoft Excel format.

**May 10, 2010**

Complainant's addendum to the OPRA request.<sup>5</sup> The Complainant states that she will accept the requested records sent to her as an e-mail attachment. The Complainant states that she is not interested in paper printouts of the requested records.

**May 21, 2010**

Memorandum from Carl Smith, Tax Collector, to John Mason, Business Administrator and the Custodian. Mr. Smith states that records responsive to the Complainant's OPRA request dated April 28, 2010 cannot be provided with the current software. Mr. Smith states that after speaking with the software provider, it has been determined that the Complainant's request can be fulfilled by creating a software application. Mr. Smith states that the cost of creating this application would be \$200.00.

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

<sup>2</sup> Represented by Louis Childress, Esq., Senior Assistant City Attorney (Orange, NJ).

<sup>3</sup> The Complainant requested additional records not relevant to this complaint.

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

<sup>5</sup> The Complainant's addendum was submitted on an official OPRA request form.

Mr. Smith also stated that he has informed the Complainant several times that her request cannot be completed using the existing software. Mr. Smith stated that he told the Complainant to pay for the application to expedite the process to receive the records. Lastly, Mr. Smith states that the Complainant has refused to pay for the software application.

**May 21, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the ninth (9<sup>th</sup>) business day following receipt of such request. The Complainant and the Custodian agree in an interoffice memorandum that the Clerk's Office will retain all requested records until the complete request can be fulfilled.

**June 17, 2010**

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

- Complainant's OPRA request dated April 28, 2010
- Complainant's amendment to the OPRA request dated May 10, 2010

The Complainant states that she submitted an OPRA request on April 28, 2010. The Complainant also states that within seven (7) business days of the submission of her OPRA request, she met with the Custodian and the Tax Collector to further clarify her request.

The Complainant states that she was informed that her request for printouts in Excel format of the taxes paid by all residents between July 1, 2009 and December 31, 2009 showing name, amount and payment date would require her to pay for the requested records to be delivered in the requested format. The Complainant states that she did not think she could afford, and was not willing to pay, the cost of delivery.

The Complainant states that on May 10, 2010, she submitted an addendum to her OPRA request in which she requested that the records sought be provided to her as an e-mail attachment. The Complainant also states that she met with the Custodian a few days after submitting the amendment to the OPRA request. The Complainant states that during that meeting, she agreed to wait to pick up the records responsive until all of the records responsive were available. Lastly, the Complainant states that thirty-eight (38) days have elapsed and she has not received the requested material or a formal denial of access to such records.

**June 21, 2010<sup>6</sup>**

Offer of Mediation sent to both parties.

**June 22, 2010**

The Complainant declines mediation.

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<sup>6</sup> The Custodian did not respond to the Offer of Mediation.

**June 22, 2010**

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

**July 1, 2010**

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on June 22, 2010 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

**July 7, 2010**

Custodian’s SOI with the following attachments:<sup>7</sup>

- Complainant’s OPRA request dated April 28, 2010
- Complainant’s amendment to the OPRA request dated May 10, 2010
- Memorandum from Mr. Carl Smith, Tax Collector, to John Mason, Business Administrator, and the Custodian dated May 21, 2010
- Memorandum from the Custodian to the Complainant dated May 21, 2010

The Custodian certifies that he informed the Complainant that the records were unavailable in the requested Microsoft Excel format.<sup>8</sup> Furthermore, the Custodian certifies that Mr. Mason offered to provide the documents in PDF format but the Complainant declined. Lastly, the Custodian certifies that the City’s software vendor would convert the files at a cost of \$200.00 but that the Complainant declined to pay that fee.

The Custodian also asserts that the Complainant requested that any records responsive to her OPRA request be sent to her e-mail address in Excel format. The Custodian states that he is under no obligation to research, analyze, collate and compile information. MAG Entertainment LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). In addition, the Custodian argues that OPRA only allows request for government records, not requests for information. The Custodian also asserts that OPRA does not require a Custodian to re-create government records in a special format so that the requestor may perform any correlations and analysis he/she may desire.

**July 7, 2010**

Letter from the GRC to the Custodian. The GRC returns the incomplete SOI because the Custodian failed to complete the legal certification.

**July 12, 2010**

Custodian submits the missing legal certification from the SOI dated July 7, 2010.

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<sup>7</sup> The Custodian’s SOI was incomplete as submitted because the Custodian failed to include the required legal certification.

<sup>8</sup> The evidence of record is unclear how the Custodian informed the Complainant that the requested records were not available in Microsoft Excel format.

**July 12, 2010**

E-mail from the Complainant to the GRC. The Complainant states that on July 9, 2010 she received a package containing some of the records responsive regarding the OPRA request. The Complainant states that she has an agreement with the Custodian stating that the Custodian will hold all records responsive until the Complainant can pick them up in their entirety.<sup>9</sup> The Complainant disputes the Custodian's argument that he is unable to provide the tax payment records in Excel format and states that last year she visited Mr. Smith regarding a separate issue and during that conversation Mr. Smith pulled up the tax payment file in Microsoft Excel format. The Complainant further states that she and Mr. Smith discussed what percentage of the taxpayers had paid their taxes by that point, and she states that Mr. Smith showed her his Excel calculations in the grid. The Complainant states that without that file containing payment dates and amounts, such calculations would not have been possible. The Complainant also states that because she saw Mr. Smith working in that format, she originally requested that format.

The Complainant states that in her OPRA request dated April 28, 2010 she did specify printouts. The Complainant states that Mr. Smith offered her printouts of property tax information relating to one given property at a time and spanning two quarters, but the Complainant states that it did not contain the taxes actually paid or the date on which the taxes were paid, nor what tax year was referred to. The Complainant states that such materials are not what the Complainant originally requested.

The Complainant also states that she realized the data would be voluminous and thus changed her request to electronic format in the addendum dated May 10, 2010. The Complainant states that she believed that obtaining the records in electronic format would require the least effort and expense. The Complainant also states that she is also willing to receive the requested records in CD format. The Complainant states that although she believes that the Custodian has the records in the format she originally requested, the Complainant cannot prove that this is the case, and therefore changed her request to specify that the records may be provided to her electronically in whatever format they are kept. In addition, the Complainant states that she did not request the Custodian to research, analyze, collate or compile information. Furthermore, the Complainant states that the request seeks government records kept in a database format and does not require provision of the requested records in any specific format.

**August 30, 2010**

Complainant's second (2<sup>nd</sup>) addendum to the OPRA request.<sup>10</sup> The Complainant states that she now accepts and agrees to pay the proposed special service charge of \$200 to cover the cost of the software vendor to develop the necessary software in Microsoft Excel format. The Complainant states that the requested records shall be provided in electronic media either on CD or in an e-mail attachment.

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<sup>9</sup> It appears from the evidence on record that the Complainant is referring to the agreement dated May 21, 2010.

<sup>10</sup> The Complainant's addendum was submitted on an official OPRA request form.

**September 2, 2010**

E-mail from the Complainant to the GRC. The Complainant advises the GRC that on August 30, 2010 she submitted a second addendum to her original request dated April 28, 2010.<sup>11</sup> The Complainant also states that she agreed to pay the \$200 fee originally required by the Custodian. Furthermore, the Complainant states that she has complied with everything the Custodian has asked of her to fulfill the request. Lastly, the Complainant states that she wants to keep the complaint in place until the delivery of the requested records.

**September 22, 2010**

E-mail from the Complainant to the GRC. The Complainant states that after paying \$200.00 she received the records responsive in the format she originally sought. The Complainant states that she feels that she was forced into a purchase that she did not find reasonable or financially feasible. The Complainant also states that she wishes to keep her complaint open with the GRC for two reasons. The Complainant states that first, she wants a decision in her favor to obtain records without any substantial handling charge and to possibly get her \$200.00 reimbursed. The Complainant states that second, she wants herself and the Custodian to receive clear guidelines as to what constitutes a reasonable, free search as opposed to one which requires the Custodian to research, analyze, collate or compile data.

The Complainant also states that her request sought records spanning the last two (2) quarters of 2009. The Complainant states that she could not name the database because the City would not disclose it, but she states that she knew of its existence and at least some of the fields the database contains. The Complainant also states that the database is in electronic format and she asked to receive it in electronic format. Furthermore, the Complainant states that after the submission of her request on April 28, 2010 she was advised that the data was not kept in database format and if the Complainant wanted the records she would have to pay for conversion by an outside service provider.

The Complainant also states that she submitted an amendment to the OPRA request on May 10, 2010 requesting the records be sent electronically in whatever format such records are usually kept. The Complainant states that in the amended request dated May 10, 2010 she did not request any sorting or rearranging of data and provided a date range of records sought. The Complainant states that if she had been properly advised by the Custodian or Mr. Smith as to what the parameters of the database were, she could have more accurately formulated her request for the Custodian.

Furthermore, the Complainant states that the Custodian offered to provide the Complainant with the requested records in PDF format. The Complainant states that a PDF format of the requested tax records is not acceptable because such format does not contain the pertinent data sought such as payment date and amount. Additionally, the Complainant states that she contacted the GRC regarding her request and was informed that requesting electronically kept information in electronic format is an acceptable request. The Complainant states that her question is whether or not asking for a subset of the data selected by its entry cutoff dates constitutes research, analysis, collation or

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<sup>11</sup> The Complainant attaches a copy of this addendum.

compilation for the Custodian. The Complainant states that there should be no research involved because the data was entered in an ascending order and therefore the records are likely kept in that order.

**September 23, 2010**

Letter from the GRC to the Custodian. The GRC states that, in order to the GRC to determine whether a special service charge was warranted in this case, the Custodian must complete the GRC’s 14-point analysis for special service charges pursuant to The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002) and N.J.S.A. 47:1A-5(c). The GRC requests that the Custodian provide a legal certification in response to the following questions regarding the special service charged assessed in this matter:

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.

**October 1, 2010**

Letter from the Custodian to the GRC. The Custodian responds to the GRC’s request for a completed special service charge analysis as follows:

Questions	Custodian’s Response
1. What records are requested?	1. Property tax information.
2. Give a general nature description and number of the government records requested.	2. An electronic file of payments received over 11,000 transactions.
3. What is the period of time over which the records extend?	3. From July 1, 2009 to December 31, 2009.



4. Are some or all of the records sought archived or in storage?	4. These records are not paper records nor do they require storage.
5. What is the size of the agency?	5. I do not know.
6. What is the number of employees available to accommodate the records request?	6. One (Tax Collector)
7. To what extent do the requested records have to be redacted?	7. None.
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?	8. Copying was not required.
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspector or examination of the records requested?	9. The Tax Collector works on salary.
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?	10. Paper records were not required in the OPRA request.
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	11. The OPRA request could not be honored using existing software.
12. Who in the agency will perform the work associated with the records request and that person's hourly rate?	12. The OPRA request was performed by an outside vendor named FirstByte Corp.
13. What is the availability of information technology and copying capabilities?	13. The data was converted into an Excel file as specified in the OPRA request.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	14. The request was given to the outside vendor. I do not know how much time was spent to prepare the file.

### October 6, 2010

E-mail from the Complainant to the GRC. The Complainant states that she has reviewed the Custodian's response to the Special Service Charge Chart. The Complainant states that almost everything Mr. Smith said is true, but that his responses

do not specify the amount of time needed to supply the information requested. The Complainant also states that Mr. Smith stated that the software he works with is supplied by a vendor. Furthermore, the Complainant states that the Tax Collector works with this software and Excel files and is familiar with the Excel commands. In addition, the Complainant states that Mr. Smith must be familiar with the “import” command of Excel and he could have fulfilled the Complainant’s OPRA request and did not need to send it to a vendor for completion. The Complainant also states that Mr. Smith said this was a large file; however, the Complainant states that the file was only 2MB of storage, about the size of a photograph stored in electronic format. Lastly, the Complainant states that the \$200 charge is excessive because the company that created the software would look up the file layout and perform the exporting or importing data command in five (5) minutes and send it back in another five (5) minutes, but at most the process should take fifteen (15) minutes, which would amount to an \$800 or more hourly rate.

### **December 2, 2010**

E-mail from the Complainant to the GRC. The Complainant provides an additional response to the Special Service Chart. The Complainant states that she believes that the Custodian failed to respond to relevant questions. The Complainant states that the City passed the job to First Byte Corporation and did not provide the length of time necessary to do the job nor the vendor’s hourly rate. Furthermore, the Complainant states that she tried to find information to determine if Mr. Smith could have completed the job for free and if not, what the reasonable fee would be. The Complainant states that upon further investigation, Mr. Smith still claims that he has no knowledge of the layout of the file that he works with and the Complainant has no evidence to disprove him. In addition, the Complainant states that First Byte Corporation has a fee agreement of \$100 per hour with the City of Orange. The Complainant states that to convert a file to a different format should not take more than 15 minutes. Lastly, the Complainant states that the firm has a yearly agreement with the City to maintain this software and file system so the firm is familiar with it.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

First the GRC will address the timeliness and sufficiency of the Custodian’s response to the Complainant’s April 28, 2010 OPRA request.

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. As also prescribed under N.J.S.A. 47:1A-5.i, a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>12</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i, and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The evidence of record shows that the Custodian responded in writing to the Complainant’s OPRA request on the ninth (9<sup>th</sup>) business day following receipt of such request. However, the evidence of record indicates that the Custodian’s response took the form of a written agreement between the Custodian and the Complainant pursuant to which the parties agreed that the Custodian would retain all requested records until the complete request could be fulfilled. The Custodian’s response, therefore, failed to grant access, deny access, request clarification of the request or request an extension of time within the statutorily required timeframe under OPRA.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s April 28, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i, and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

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<sup>12</sup> 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.

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

OPRA provides that:

“[t]he 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.*” (Emphasis added.) N.J.S.A. 47:1A-5.b.

The above-referenced subsection provides:

“Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*” (Emphasis added.) N.J.S.A. 47:1A-5.c.

Furthermore, OPRA provides:

“A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record:

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

the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.” N.J.S.A. 47:1A-5.d.

OPRA authorizes a custodian to charge the actual cost for duplication of a record where the cost of duplication is not enumerated or exceeds the cost set forth in OPRA. N.J.S.A. 47:1A-5.b. OPRA does not explicitly set a cost for duplicating records that are to be delivered to the requester in a non-paper format. However, OPRA does allow for the actual cost of duplication to be paid by the requester. *Id.*

Additionally, OPRA provides that when a request for a record in a medium not routinely used by an agency, not routinely developed or maintained by an agency, or requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in *addition to the actual cost of duplication*, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both. N.J.S.A. 47:1A-5.d.

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. 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 the request” 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;<sup>13</sup> and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

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<sup>13</sup> The court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

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

Recognizing that many different variables may affect a determination of whether a special service charge is reasonable and warranted, the GRC established an analytical framework for situations which may warrant an assessment of a special service charge. This framework incorporates the factors identified in the Courier Post, *supra*, 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 each of the following inquiries:

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.

In the complaint now before the Council, the Custodian responded to the above inquiries as follows:

Questions	Custodian’s Response
1. What records are requested?	1. Property tax information.
2. Give a general nature description and number of the government records	2. An electronic file of payments received over 11,000 transactions.

requested.	
3. What is the period of time over which the records extend?	3. From July 1, 2009 to December 31, 2009.
4. Are some or all of the records sought archived or in storage?	4. These records are not paper records no do they require storage.
5. What is the size of the agency?	5. I do not know.
6. What is the number of employees available to accommodate the records request?	6. One (Tax Collector)
7. To what extent do the requested records have to be redacted?	7. None.
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?	8. Copying was not required.
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspector or examination of the records requested?	9. The Tax Collector works on salary.
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?	10. Paper records were not required in the OPRA request.
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	11. The OPRA request could not be honored using existing software.
12. Who in the agency will perform the work associated with the records request and that person's hourly rate?	12. The OPRA request was performed by an outside vendor named FirstByte Corp.
13. What is the availability of information technology and copying capabilities?	13. The data was converted into an Excel file as specified in the OPRA request.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	14. The request was given to the outside vendor. I do not know how much time was spent to prepare the file.

In the instant complaint, it appears from the evidence on record that the Complainant's OPRA request to convert the requested data could not be fulfilled using the City's existing software. Furthermore, the Custodian certified in the SOI that the City's software vendor, FirstByte Corporation would convert the files at a cost of \$200.00. The Custodian also certified that the requested data was converted into Microsoft Excel format, as requested by the Complainant.

Since the Custodian certified that the Complainant's OPRA request could not be fulfilled using existing software and that the City's software vendor, FirstByte Corporation would convert the requested files at a cost of \$200.00 and the Complainant has not proffered sufficient evidence to refute this certification, the charge of \$200.00 represents the actual cost of reproducing the records and does not violate N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d.

**Whether the Custodian's delayed response to the Complainant's April 28, 2010 OPRA request rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).



Although the Custodian's failure to respond in writing to the Complainant's April 28, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulted in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., and N.J.S.A. 47:1A-5.i., because the Custodian has certified that the Township lacks the necessary equipment to fulfill the Complainant's OPRA request and because Mr. Smith has certified that the \$200.00 was the actual cost to engage First Byte Corporation to convert the requested records to the Microsoft Excel format specifically requested by the Complainant, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's April 28, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian's response to the Complainant's April 28, 2010, OPRA request failed to address each request item and did not provide a lawful basis for a denial, the Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. Since the Custodian certified that the Complainant's OPRA request could not be fulfilled using existing software and that the City's software vendor, FirstByte Corporation would convert the requested files at a cost of \$200.00 and the Complainant has not proffered any sufficient evidence to refute this certification, thus the charge of \$200.00 represents the actual cost of reproducing the records and does not violate N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d.
4. Although the Custodian's failure to respond in writing to the Complainant's April 28, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulted in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., and N.J.S.A. 47:1A-5.i., because the Custodian has certified that the Township lacks the necessary equipment to fulfill the Complainant's OPRA request and because Mr. Smith has certified that the \$200.00 was the actual cost to engage First Byte

Corporation to convert the requested records to the Microsoft Excel format specifically requested by the Complainant, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

February 15, 2011