



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

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

February 26, 2013 Government Records Council Meeting

Robert Edwards
Complainant

Complaint No. 2010-17

v.

City of Plainfield Planning Board (Union)
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the February 19, 2013 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 failed to appear at a scheduled hearing on January 9, 2013 and further failed to submit to the GRC an explanation for his failure to appear within thirteen (13) days.

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 26th Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 28, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting**

**Robert Edwards¹
Complainant**

GRC Complaint No. 2010-17

v.

**City of Plainfield Planning Board
(Union)²
Custodian of Records**

Records Relevant to Complaint: Copy of the audiotape recording of the July 10, 2009 meeting regarding the razing of Elmwood Gardens.

Request Made: October 30, 2009

Response Made: November 9, 2009

Custodian: William Nierstedt

GRC Complaint Filed: February 1, 2010³

Background

October 25, 2011

Government Records Council's ("Council") Interim Order. At its October 25, 2011 public meeting, the Council considered the October 18, 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, found that:

1. Because the Custodian failed to provide the \$5.00 refund to the Complainant until thirteen (13) business days after receipt of the Council's Order and further failed to provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 with the Council's Order to the Executive Director until August 18, 2011, the Custodian has not complied with the Council's June 28, 2011 Interim Order. Moreover, pursuant to the Council's June 28, 2011 Interim Order, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian unlawfully denied access to a complete copy of the requested recording and a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of circumstances.

¹ No legal representation listed on record.

² Represented by John Motta, Esq. (Plainfield, NJ).

³ The GRC received the Denial of Access Complaint on said date.

2. Because the Complainant failed to establish in his motion for reconsideration of paragraph No. 5 of the Conclusions and Recommendations of the Council's June 28, 2011 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
3. The GRC amends paragraph No. 5 of the Conclusions and Recommendations of its June 28, 2011 Interim Order as follows:

"The Complainant's November 20, 2009 letter is not a valid OPRA request pursuant to LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), and Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009), because the Complainant merely asked for an update regarding his October 30, 2009 OPRA request and did not identify specific government records sought. Moreover, the Custodian violated OPRA by not responding to the Complainant's letter within seven (7) business days of receipt of the Complainant's letter request. N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003)."

October 28, 2011

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

April 19, 2012

Complaint transmitted to the Office of Administrative Law ("OAL").

January 11, 2013

Complaint transmitted back from the OAL because the Complainant failed to appear for a scheduled hearing on January 9, 2013.⁴

Analysis

No analysis required.

⁴ The Complainant failed to submit to the GRC an explanation as to why he did not appear within the required thirteen (13) days as indicated in the OAL's January 11, 2013 notice. The Complainant submitted a two (2) page letter on February 25, 2013 that did not include any explanation for the Complainant's failure to appear.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant failed to appear at a scheduled hearing on January 9, 2013 and further failed to submit to the GRC an explanation for his failure to appear within thirteen (13) days.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

February 19, 2013



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

INTERIM ORDER

October 25, 2011 Government Records Council Meeting

Robert Edwards
Complainant

Complaint No. 2010-17

v.

City of Plainfield Planning Board (Union)
Custodian of Record

At the October 25, 2011 public meeting, the Government Records Council ("Council") considered the October 18, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to provide the \$5.00 refund to the Complainant until thirteen (13) business days after receipt of the Council's Order and further failed to provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 with the Council's Order to the Executive Director until August 18, 2011, the Custodian has not complied with the Council's June 28, 2011 Interim Order. Moreover, pursuant to the Council's June 28, 2011 Interim Order, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian unlawfully denied access to a complete copy of the requested recording and a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of circumstances.
2. Because the Complainant failed to establish in his motion for reconsideration of paragraph No. 5 of the Conclusions and Recommendations of the Council's June 28, 2011 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
3. The GRC amends paragraph No. 5 of the Conclusions and Recommendations of its June 28, 2011 Interim Order as follows:



“The Complainant’s November 20, 2009 letter is not a valid OPRA request pursuant to LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), and Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009), because the Complainant merely asked for an update regarding his October 30, 2009 OPRA request and did not identify specific government records sought. Moreover, the Custodian violated OPRA by not responding to the Complainant’s letter within seven (7) business days of receipt of the Complainant’s letter request. N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003).”

Interim Order Rendered by the
Government Records Council
On The 25th Day of October, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: October 28, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 25, 2011 Council Meeting**

**Robert Edwards¹
Complainant**

GRC Complaint No. 2010-17

v.

**City of Plainfield Planning Board
(Union)²
Custodian of Records**

Records Relevant to Complaint: Copy of the audiotape recording of the July 10, 2009 meeting regarding the razing of Elmwood Gardens.

Request Made: October 30, 2009

Response Made: November 9, 2009

Custodian: William Nierstedt

GRC Complaint Filed: February 1, 2010³

Background

June 28, 2011

Government Records Council's ("Council") Interim Order. At its June 28, 2011 public meeting, the Council considered the June 21, 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, found that:

1. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), and O'Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009), although the Custodian certified that the actual cost to produce the requested recording to the Complainant was \$25.00 and provided an invoice and certified to same in the Statement of Information, the additional charge of \$5.00 for City service charges does not represent part of the actual cost and is in violation of N.J.S.A. 47:1A-5.b. Further, the Custodian failed to bear his burden of proving that the additional \$5.00 charge was part of the actual cost of duplication of the requested record pursuant to N.J.S.A. 47:1A-6.

¹ No legal representation listed on record.

² Represented by John Motta, Esq. (Plainfield, NJ).

³ The GRC received the Denial of Access Complaint on said date.

2. Pursuant to Coulter v. Township of Bridgewater (Somerset), GRC Complaint No. 2008-220 (November 2009), the Custodian shall refund to the Complainant the imposed \$5.00 fee for City service charges, which does not represent part of the actual cost of providing the requested recording to the Complainant.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁴, to the Executive Director.⁵**
4. Based on the contested facts in this complaint, the GRC is unable to determine whether the Custodian provided a CD copy of the requested recording to the Complainant on November 16, 2009. Although the Custodian certified that the Complainant came to the Planning Board office to retrieve the CD, the Complainant sent the Custodian a letter on November 20, 2009 contesting that he had not heard from the Custodian since November 10, 2009. Additionally, the Planning Board retained no evidence to support the Custodian's certifications that the Complainant received the CD on November 16, 2009. Therefore, this complaint should be referred to the Office of Administrative Law upon compliance with this Interim Order for a hearing to resolve the facts. The Council requests of the Office of Administrative Law a determination as to whether the Custodian unlawfully denied access to a complete copy of the requested recording, and a determination as to whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of circumstances. The GRC thus defers referral of this complaint to the Office of Administrative Law pending compliance with the Council's Interim Order. *See* Item No. 3 above.
5. The Complainant's November 20, 2009 letter is not a valid OPRA request pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant asked for an update regarding his October 30, 2009 OPRA request and did not seek identifiable government records. Moreover, the Custodian did not violate OPRA by not responding to the Complainant's letter within seven (7) business days of receipt of the Complainant's letter.

June 29, 2011

Council's Interim Order distributed to the parties.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

July 8, 2011

Complainant's request for reconsideration attaching page 3 of the GRC's OPRA Alert Volume 2, Issue 1 (July 2009).⁶ The Complainant requests that the GRC reconsider paragraph No. 5 of the Conclusions and Recommendations of its June 28, 2011 Interim Order based on mistake, extraordinary circumstances and fraud.

The Complainant requests that the GRC reconsider paragraph No. 5 of the Conclusions and Recommendations of the Interim Order, holding that his November 20, 2009 letter referencing OPRA is invalid because said conclusion is erroneous. The Complainant argues that the Custodian failed to provide a written response to the Complainant's October 30, 2009 OPRA request, therefore, the Complainant submitted a second (2nd) request on November 20, 2009. The Complainant states that this letter request, entitled "2nd OPRA Public Records Act Request, N.J.S.A. 47:1A-1 et seq.[,]" reiterated and identified the recording sought as required pursuant to N.J.S.A. 47:1A-5.f. (providing that an OPRA request must contain "a brief description of the government record sought.")

The Complainant states that the GRC's OPRA Alert Volume No. 2, Issue 1 (July 2009), discussed Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009) and stated that any mention of OPRA in a request not on an agency's official OPRA request form is sufficient. The Complainant further states that the OPRA Alert notes that "[i]t is unlikely that the court meant for requestors to include all of the requisite information prescribed in N.J.S.A. 47:1A-5.f. in a written, non-form OPRA request." The Complainant contends that based on the foregoing, mentioning OPRA is the only requirement of a written non-form OPRA request.

The Complainant further contends that the Custodian failed to respond in writing to the Complainant's November 20, 2009 letter request providing a lawful basis for denying access to the requested record as is required pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-6.

July 19, 2011

E-mail from the GRC to the Custodian. The GRC states that it distributed its June 28, 2011 Interim Order to all parties on June 29, 2011. The GRC states that such Order required the Custodian to:

"... refund to the Complainant the imposed \$5.00 fee for City service charges, which does not represent part of the actual cost of providing the requested recording to the Complainant.

The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance, in

⁶ The Complainant submitted his request for reconsideration on the GRC's request for reconsideration form.
Robert Edwards v. City of Plainfield, Planning Board (Union), 2010-17 – Supplemental Findings and Recommendations of the Executive Director 3

accordance with N.J. Court Rule 1:4-4⁷, to the Executive Director.⁸
Id. at pg. 13.

The GRC states that certified confirmation of compliance with the Council's Order was due by close of business on July 7, 2011. The GRC states that as of this date, the GRC has not yet received the Custodian's certified confirmation of compliance. The GRC request that the Custodian advise as to the status of said compliance.

July 20, 2011

Letter from the Custodian to the Complainant. The Custodian states this letter is in response to the Council's June 28, 2011 Interim Order requiring the City of Plainfield, Planning Board ("Planning Board") to refund \$5.00 to the Complainant.

The Custodian states that upon receipt of the Complainant's concerns regarding the recording initially provided to the Complainant, the Planning Board contacted the Complainant to advise that he could retrieve another copy of the recording on compact disc ("CD") at the Planning Board office. The Custodian states that to date, the Complainant has not retrieved the CD; a copy of such CD is attached.

The Custodian further states that a payment voucher was sent to the Complainant via regular mail on July 19, 2011. The Custodian states that a duplicate copy of the voucher is attached for the Complainant's signature. The Custodian states that pursuant to the City's policy, the Complainant must sign and return the original voucher by mail or in person so that the Audit and Comptroller's office can cut a check for \$5.00.

July 27, 2011

Letter from the Complainant to the Custodian attaching a letter from the Custodian to the Complainant dated July 20, 2011. The Complainant states that he received a package from the Custodian on July 21, 2011 containing a letter dated July 20, 2011. The Complainant states that he is returning the package because the Custodian has continued to make fraudulent representations throughout the pendency of this complaint.

August 5, 2011

E-mail from the Custodian to the GRC attaching a scanned copy of a returned UPS envelope. The Custodian states that he sent a \$5.00 check⁹ and the requested CD to the Complainant last week and received the unopened package returned from the Complainant on this date. The Custodian states that he will formally respond to the GRC on August 8, 2011.

August 18, 2011

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁹ The Custodian certified on August 18, 2011 that he forwarded a check in the amount of \$5.00 to the Complainant on July 28, 2011.

Custodian's legal certification. The Custodian certifies that on July 20, 2011, he forwarded to the Complainant via regular and certified mail a letter attaching another copy of the responsive CD and a payment voucher in the amount of \$5.00 for the Complainant to sign. The Custodian certifies that subsequently, at the direction of the Custodian's Counsel, the Planning Board deviated from standard City accounting practices and asked the Chief Financial Officer ("CFO") to cut a \$5.00 check for the Complainant without requiring a signed payment voucher. The Custodian certifies that he mailed the check to the Complainant on July 28, 2011.

The Custodian certifies that on August 3, 2011, he received from the Complainant the letter and CD initially sent to the Complainant via regular mail inside a stamped envelope from the Complainant postmarked July 29, 2011. The Custodian certifies that the Complainant also returned the \$5.00 check to the Custodian on August 3, 2011. Additionally, the Custodian certifies that on this day the certified package he mailed to the Complainant on July 20, 2011 was returned stamped "Unclaimed."

The Custodian certifies that he believes he has complied with the Council's Interim Order. The Custodian certifies that the Complainant has acknowledged receipt of each mailing but has returned such mailings to the Planning Board.¹⁰

Analysis

Whether the Custodian complied with the Council's June 28, 2011 Interim Order?

The Council's June 28, 2011 Interim Order specifically directed the Custodian to "...refund to the Complainant the imposed \$5.00 fee for City service charges ..." Said Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of said Order, or July 7, 2011.

On July 19, 2011, or thirteen (13) business days after receipt of the Council's Order, the GRC e-mailed the Custodian stating that it had not received the Custodian's certified confirmation of compliance and requested that he advise as to the status of said compliance. The evidence of record indicates that on July 20, 2011, the Custodian sent to the Complainant via regular and certified mail a package containing a letter, a copy of the requested recording on CD and a voucher for \$5.00. The Custodian advised in said letter that the enclosed voucher must be signed and returned to the Planning Board in order for a check to be issued. Thereafter, at the direction of Counsel, the Custodian requested that the CFO cut a check for the required \$5.00 refund, which the Custodian mailed to the Complainant on July 28, 2011.

The evidence of record also indicates that the Complainant returned the Custodian's package to the Custodian on August 3, 2011. The Custodian e-mailed the GRC on August 5, 2011 stating that he sent the Complainant a check for \$5.00 the previous week (July 28, 2011) and that the unopened mailing was returned to him from the Complainant on August 3, 2011. The Custodian further stated that the Planning

¹⁰ The Complainant submitted additional correspondence which restates previous arguments.
Robert Edwards v. City of Plainfield, Planning Board (Union), 2010-17 – Supplemental Findings and Recommendations of the
Executive Director

Board would formally respond to the GRC on August 8, 2011. The evidence of record further indicates that the Custodian received the certified package which he sent to the Complainant on July 20, 2010 returned and marked as “Unclaimed” on August 18, 2011. The Custodian subsequently submitted his certified confirmation of compliance to the Executive Director of the GRC on August 18, 2011.

Although the evidence of record indicates that the Custodian twice attempted to comply with the Council’s Interim Order and that said attempts were rejected by the Complainant, such attempts occurred after the expiration of the deadline to comply with the Council’s Order. Further, the Custodian contacted the GRC on August 5, 2011 stating that he would provide a formal response to the GRC on August 8, 2011. However, the Custodian did not provide certified confirmation of compliance with the Council’s Order to the Executive Director of the GRC until August 18, 2011.

Therefore, because the Custodian failed to provide the \$5.00 refund to the Complainant until thirteen (13) business days after receipt of the Council’s Order and further failed to provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director until August 18, 2011, the Custodian has not timely complied with the Council’s June 28, 2011 Interim Order. Moreover, pursuant to the Council’s June 28, 2011 Interim Order, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian unlawfully denied access to a complete copy of the requested recording and a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of circumstances.

Whether the Complainant has met the required standard for reconsideration of paragraph No. 5 of the Conclusions and Recommendations of the Council’s June 28, 2011 Interim Order?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, the Complainant filed the request for reconsideration of the Council’s June 28, 2011 Order dated six (6) business days after receipt of the Council’s Order. In said request for reconsideration, the Complainant disputed paragraph No. 5 of the Conclusions and Recommendations of the Council’s June 28, 2011 Interim Order which found that his November 20, 2009 letter referencing OPRA was “... not a valid OPRA request pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant asked for an update regarding his October 30, 2009 OPRA request and did not seek identifiable government records.” The Complainant argued that the GRC’s OPRA Alert Volume No. 2, Issue 1 (July 2009) states that any mention of OPRA in a request not made on an agency’s official OPRA request form is sufficient. The Complainant further argued that because

the Custodian failed to respond in writing to the November 20, 2009 letter referencing OPRA, said request is “deemed” denied pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*.

A review of the Complainant’s November 20, 2009 letter shows that the Complainant identified the letter as an OPRA request. Moreover, the record shows that the GRC acknowledged this fact in its analysis in making its determination.¹¹ In said letter, the Complainant states that he submitted a request on October 30, 2009 seeking the recording at issue here. The letter then recapitulates the events leading up to November 20, 2009 and asks the following questions: “Is this conduct purposed to deny [the Complainant] a true, complete public record? When will I receive a complete tape or return of the \$30?” Again, the GRC also acknowledged the foregoing facts in making its decision that the Complainant’s November 20, 2009 letter was an invalid request under OPRA.

The Complainant argued that the GRC’s reliance on Renna, supra, was misapplied and further argued that the November 20, 2009 letter was a valid OPRA request because it referenced OPRA. Although the Complainant’s November 20, 2009 letter to the Custodian references OPRA, such letter contains a recapitulation of the facts

¹¹ The GRC previously noted that, “[t]o this end, the Complainant’s November 20, 2009 letter clearly invokes OPRA on the first page.” *See* Government Records Council’s Interim Order dated June 28, 2011, page 12.

underlying the complaint and asks two (2) specific questions regarding whether the Custodian will satisfy the Complainant's initial OPRA request or refund the Complainant's payment of \$30.00.

Well-settled case law provides that a request that merely asks questions is invalid under OPRA. In LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that hold library cards. The GRC determined that the complainant's request was a request for information, holding that:

“because request Item No. 2 of the Complainant's June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)...” *Id.* at pg. 6.

The GRC also decided a similar issue in Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009). In Watt, the complainant submitted an OPRA request to the Borough on September 13, 2007 seeking answers to five (5) questions regarding a property named the Villa Maria. The GRC held that the Complainant's request was invalid because it failed to identify a specific government record sought. *See also* Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009) and Turner v. Plainfield Municipal Utilities Authority (Union), GRC Complaint No. 2009-176 (January 2011).

Therefore, because the Complainant failed to establish in his motion for reconsideration of paragraph No. 5 of the Conclusions and Recommendations of the Council's June 28, 2011 Interim Order that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Nevertheless, paragraph No. 5 of the Conclusions and Recommendations of the Council's June 28, 2011 Interim Order is not clear because it refers to Renna, *supra*, in determining that the Complainant's November 20, 2009 referencing OPRA is invalid; the GRC therefore amends paragraph No. 5 to accurately reflect that the Complainant's request was invalid under OPRA pursuant to LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), and Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009) because it asked questions instead of identifying specific government records sought.

Moreover, paragraph No. 5 of the Conclusions and Recommendations states that the Custodian did not violate OPRA when he failed to respond to the Complainant's November 20, 2009 letter. However, the GRC has previously held that a custodian has an obligation to respond to a request even if such request is invalid. *See Russomano v. Township of Edison*, GRC Complaint No. 2002-86 (July 2003). Thus, the GRC also amends paragraph No. 5 to indicate that the Custodian should have responded within the statutorily mandated time frame regardless of whether the request was invalid.

Therefore, in order to clarify the Council's determination, the GRC amends paragraph No. 5 of the Conclusions and Recommendations of its June 28, 2011 Interim Order as follows:

"The Complainant's November 20, 2009 letter is not a valid OPRA request pursuant to *LaMantia v. Jamesburg Public Library (Middlesex)*, GRC Complaint No. 2008-140 (February 2009), and *Watt v. Borough of North Plainfield (Somerset)*, GRC Complaint No. 2007-246 (September 2009), because the Complainant merely asked for an update regarding his October 30, 2009 OPRA request and did not identify specific government records sought. Moreover, the Custodian violated OPRA by not responding to the Complainant's letter within seven (7) business days of receipt of the Complainant's letter request. *N.J.S.A. 47:1A-5.g.*, *N.J.S.A. 47:1A-5.i.* and *Russomano v. Township of Edison*, GRC Complaint No. 2002-86 (July 2003)."

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to provide the \$5.00 refund to the Complainant until thirteen (13) business days after receipt of the Council's Order and further failed to provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 with the Council's Order to the Executive Director until August 18, 2011, the Custodian has not complied with the Council's June 28, 2011 Interim Order. Moreover, pursuant to the Council's June 28, 2011 Interim Order, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian unlawfully denied access to a complete copy of the requested recording and a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of circumstances.
2. Because the Complainant failed to establish in his motion for reconsideration of paragraph No. 5 of the Conclusions and Recommendations of the Council's June 28, 2011 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, said motion for reconsideration is denied. *Cummings v. Bahr*, 295 *N.J. Super.* 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 *N.J. Super.* 392 (Ch. Div. 1990); *In The*

Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

3. The GRC amends paragraph No. 5 of the Conclusions and Recommendations of its June 28, 2011 Interim Order as follows:

“The Complainant’s November 20, 2009 letter is not a valid OPRA request pursuant to LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), and Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009), because the Complainant merely asked for an update regarding his October 30, 2009 OPRA request and did not identify specific government records sought. Moreover, the Custodian violated OPRA by not responding to the Complainant’s letter within seven (7) business days of receipt of the Complainant’s letter request. N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003).”

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 18, 2011



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

INTERIM ORDER

June 28, 2011 Government Records Council Meeting

Robert Edwards
Complainant

Complaint No. 2010-17

v.

City of Plainfield Planning Board (Union)
Custodian of Record

At the June 28, 2011 public meeting, the Government Records Council ("Council") considered the June 21, 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. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), and O'Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009), although the Custodian certified that the actual cost to produce the requested recording to the Complainant was \$25.00 and provided an invoice and certified to same in the Statement of Information, the additional charge of \$5.00 for City service charges does not represent part of the actual cost and is in violation of N.J.S.A. 47:1A-5.b. Further, the Custodian failed to bear his burden of proving that the additional \$5.00 charge was part of the actual cost of duplication of the requested record pursuant to N.J.S.A. 47:1A-6.
2. Pursuant to Coulter v. Township of Bridgewater (Somerset), GRC Complaint No. 2008-220 (November 2009), the Custodian shall refund to the Complainant the imposed \$5.00 fee for City service charges, which does not represent part of the actual cost of providing the requested recording to the Complainant.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²**

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



4. Based on the contested facts in this complaint, the GRC is unable to determine whether the Custodian provided a CD copy of the requested recording to the Complainant on November 16, 2009. Although the Custodian certified that the Complainant came to the Planning Board office to retrieve the CD, the Complainant sent the Custodian a letter on November 20, 2009 contesting that he had not heard from the Custodian since November 10, 2009. Additionally, the Planning Board retained no evidence to support the Custodian's certifications that the Complainant received the CD on November 16, 2009. Therefore, this complaint should be referred to the Office of Administrative Law upon compliance with this Interim Order for a hearing to resolve the facts. The Council requests of the Office of Administrative Law a determination as to whether the Custodian unlawfully denied access to a complete copy of the requested recording, and a determination as to whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of circumstances. The GRC thus defers referral of this complaint to the Office of Administrative Law pending compliance with the Council's Interim Order. *See* Item No. 3 above.

5. The Complainant's November 20, 2009 letter is not a valid OPRA request pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant asked for an update regarding his October 30, 2009 OPRA request and did not seek identifiable government records. Moreover, the Custodian did not violate OPRA by not responding to the Complainant's letter within seven (7) business days of receipt of the Complainant's letter.

Interim Order Rendered by the
Government Records Council
On The 28th Day of June, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: June 29, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 28, 2011 Council Meeting**

**Robert Edwards¹
Complainant**

GRC Complaint No. 2010-17

v.

**City of Plainfield Planning Board (Union)²
Custodian of Records**

Records Relevant to Complaint: Copy of the audiotape recording of the July 10, 2009 meeting regarding the razing of Elmwood Gardens.

Request Made: October 30, 2009

Response Made: November 9, 2009

Custodian: William Nierstedt

GRC Complaint Filed: February 1, 2010³

Background

October 30, 2009

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA.

November 9, 2009

Custodian's response to the OPRA request. Ms. Rosalind Miller ("Ms. Miller"), Secretary for the Planning Board, responds verbally on behalf of the Custodian to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. Ms. Miller states that the requested record has been duplicated and is available for disclosure.⁴

November 20, 2009

Letter from Complainant to the Custodian.⁵ The Complainant states that he submitted a letter request to the City of Plainfield Planning Board ("Planning Board") on October 30, 2009. The Complainant states that Ms. Miller contacted him via telephone

¹ No legal representation listed on record.

² Represented by John Motta, Esq. (Plainfield, NJ).

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Complainant paid \$30.00 for the requested record on November 9, 2009 and noted on the receipt that Ms. Miller provided the contact information for the vendor that recorded the meeting.

⁵ The Complainant identifies this correspondence as a second (2nd) OPRA request. Although the Complainant included the note "2nd [OPRA] Request" at the top of the letter, it appears that the letter serves only to recapitulate the events from October 30, 2009 to November 20, 2009; the letter does not refer to OPRA in connection with an additional request for records.

on November 9, 2009 stating that the requested tape was duplicated and available for disclosure. The Complainant states that on the same day he paid \$30.00 for the tape and requested an opportunity to review the tape before departing from the Planning Board offices. The Complainant states that Ms. Miller suggested that the Complainant make an appointment for November 10, 2009 because no secure room was available at the time.

The Complainant states that he subsequently reviewed the tape at home and found that the portion of the meeting regarding the razing of Elmwood Gardens was omitted. The Complainant states that he returned to the Planning Board office on November 10, 2009 advising that the tape was defective and requesting a \$30.00 refund. The Complainant states that the Custodian advised that he would make another copy of the tape but would not refund the \$30.00.

The Complainant questions whether the Custodian is attempting to deny access to a complete copy of the requested recording. The Complainant further requests that the Custodian advise either when a true copy of the tape will be provided or when he will receive a refund of \$30.00.

February 1, 2010

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

- Complainant’s letter request dated October 30, 2009.
- Payment receipt in the amount of \$30.00 dated November 9, 2009 (with the Complainant’s notes thereon).
- Letter from the Complainant to the Custodian dated November 20, 2009.
- Certified mail receipt dated November 25, 2009.

The Complainant states that he submitted a letter request to the Planning Board on October 30, 2009. The Complainant states that on November 9, 2009, Ms. Miller contacted him via telephone stating that the requested tape was available for disclosure. The Complainant states that on the same day, the Complainant remitted \$30.00 to the Planning Board to obtain the tape. The Complainant states that he requested an opportunity to review the tape, but was advised by Ms. Miller to schedule an appointment for November 10, 2009 because the Planning Board did not have a secure room for the Complainant to review the tape.

The Complainant states that he subsequently reviewed the tape at home and found that the portion of the meeting regarding the razing of Elmwood Gardens was omitted. The Complainant states that he returned to the Planning Board office on November 10, 2009 requesting a refund of \$30.00 because the tape was defective. The Complainant states that the Custodian advised that another tape would be made but that the Complainant would not receive a refund.

The Complainant states that he sent a letter to the Custodian on November 20, 2009 requesting that the Custodian advise either when a complete copy of the tape would be provided or when he would receive a refund of \$30.00.

The Complainant does not agree to mediate this complaint.

February 3, 2010

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

February 19, 2010

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until February 26, 2010 to submit the requested SOI.

February 19, 2010

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension until February 26, 2010 to submit the requested SOI.

February 25, 2010

Custodian’s SOI with the following attachments:

- Complainant’s letter request dated October 30, 2009.
- Letter from the Complainant to the Custodian dated November 20, 2009.
- Invoice No. 155716 dated December 1, 2009.
- Purchase Order No. 10-03166 dated February 8, 2010.

The Custodian certifies that prior to the submission of the Complainant’s OPRA request which is at issue in this complaint, the Complainant submitted an OPRA request on October 27, 2009 seeking to listen to a copy of the requested audiotape. The Custodian certifies that the Complainant scheduled an appointment for October 30, 2009 to listen to the tape and reviewed said tape on the same date. The Custodian certifies that the Complainant submitted the OPRA request relevant to this complaint on October 30, 2009, at which time Ms. Miller contacted the vendor, Audio Edge Transcription, and ordered the tape.

The Custodian certifies that the Planning Board received the tape on November 9, 2009 and contacted the Complainant. The Custodian certifies that the Complainant came to the Planning Board office, remitted \$30.00 and departed with the requested tape. The Custodian certifies that on November 10, 2009, the Complainant informed Ms. Miller that the tape was incomplete and did not match the original tape in length. The Custodian states that Ms. Miller listened to the tape and confirmed that it was incomplete. The Custodian certifies that Ms. Miller contacted the vendor who indicated that there was an error in duplication and that the vendor would replace the tape with a recording on CD at no charge.

The Custodian certifies that the Planning Board received the CD on November 16, 2009, at which time the Complainant was contacted and retrieved the CD. The Custodian states that prior to leaving the Planning Board office, both the Complainant and Ms. Miller reviewed the CD to confirm that it was complete.

The Custodian argues that the Complainant was given the requested recording and now insists that he be refunded \$30.00 and that access to the record responsive to his request was denied. The Custodian certifies that the Planning Board was charged \$25.00 for duplicating the requested tape.⁶ The Custodian certifies that the remaining \$5.00 represents the City's service charges. The Custodian finally asserts that Ms. Miller spent a great deal of time addressing the Complainant's request, including listening to the entirety of the tape.⁷

March 2, 2010

Letter from the Complainant to the GRC. The Complainant requests an extension of time until March 9, 2010 to submit a rebuttal to the Custodian's SOI.

March 4, 2010

E-mail from the GRC to the Complainant. The GRC states that *N.J.A.C. 5:105-2* sets forth the complaint process, including which submissions are required to be provided to the GRC. The GRC states that although *N.J.A.C. 5:105-2* does not expressly afford a response to the SOI and is silent as to whether any additional submissions are prohibited, as a matter of practice the GRC will, in its sole discretion, consider additional submissions which provide new information or evidence that was not available at the time of the Complainant's Denial of Access Complaint.

The GRC states that based on the foregoing, the Complainant may submit a rebuttal to the Custodian's SOI which provides new information at this time.

March 9, 2010

The Complainant's rebuttal to the Custodian's SOI, attaching the Custodian's SOI dated February 25, 2010. The Complainant states that according to the certified mail receipt attached to the Denial of Access Complaint, his November 20, 2009 letter to the Custodian, which he considers a second (2nd) OPRA request, was received by the Custodian on or about November 25, 2009.

The Complainant states that OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis* therefor on the request form and *promptly return it to the requestor. 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.

“... a custodian of a government record shall *grant access to a government record or deny a request for access to a government record* as soon as

⁶ The invoice attached the SOI indicates that Audio Edge Transcription charged the Planning Board \$50.00 to duplicate two (2) tapes.

⁷ The Custodian did not certify to the search undertaken. The Custodian also did not certify to whether any records that may have been responsive to the request 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”).

possible, but *not later than seven business days after receiving the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

The Complainant argues that based on the foregoing, the Custodian did not respond to the Complainant’s November 20, 2009 letter request; thus, a “deemed” denial of said request has occurred.

Further, the Complainant asserts that his last contact with the Planning Board occurred on November 10, 2009. The Complainant asserts that his November 20, 2009 letter asks a specific question and that the Custodian failed to respond to same. Moreover, the Complainant contends that he was not contacted by the Planning Board nor received any new tapes or CD’s. The Complainant argues that the Custodian admitted to not responding to the Complainant’s November 20, 2009 letter request, which the Complainant considers to be a valid OPRA request.

The Complainant requests, based on the admitted violations of OPRA, that the GRC find that the Custodian (Ms. Miller) and the Custodian’s Counsel knowingly and willfully violated OPRA by not complying with N.J.S.A. 47:1A-5.g.

April 4, 2011

E-mail from the GRC to Ms. Miller. The GRC states that the Custodian certified in the SOI that the first audio tape recording produced by Audio Edge Transcription and provided to the Complainant on November 9, 2009 was defective. The GRC states that the Custodian further certified that when the Complainant made the Planning Board aware that the tape was defective, the Custodian stated that another recording would be provided.

The GRC states that the Custodian certified that the Planning Board received a CD copy of the recording from Audio Edge Transcription on November 16, 2009, at which time the Complainant was called and came to the Planning Board to retrieve the recording. The GRC states that contrary to the Custodian’s certification, the Complainant argued in a letter to the GRC dated March 9, 2010 that he did not have any contact with the Planning Board regarding the OPRA request at issue after November 10, 2009.

The GRC requests, based on Ms. Miller’s knowledge of this complaint, Ms. Miller legally certify to the following:

1. Whether any evidence exists that the Complainant received the CD recordings on November 16, 2009, such as a sign-out sheet, signed receipt, etc.? If so, please provide a copy of that document.

The GRC requests that Ms. Miller submit the requested legal certification by close of business on April 6, 2011.

April 8, 2011

E-mail from Ms. Miller to the GRC. Ms. Miller states that she has reviewed the Planning Board’s records and found no signed documentation that the CD was provided to the Complainant. Ms. Miller states that the Planning Board continues to maintain an

additional CD and the original cassette tape recording of the July 10, 2009 hearing on file.

May 17, 2011

E-mail from the GRC to the Custodian. The GRC states that it recently contacted the Planning Board attempting to obtain clarification of a conflict of facts in this complaint. The GRC states that the Custodian certified in the SOI that the Complainant received a complete copy of the requested recording on November 16, 2009. The GRC states that, to the contrary, the Complainant argued that he had no contact with the Planning Board after November 10, 2009.

The GRC requests that the Custodian provide a legal certification providing evidence that the requested recording was received by the Complainant on November 16, 2009 or provide a rebuttal to the Complainant's assertions that he did not receive the requested recording. The GRC requests that the Custodian provide the requested legal certification by May 20, 2011.

May 20, 2011

E-mail from the Custodian to the GRC. The Custodian states that he is in receipt of the GRC's request for a legal certification. The Custodian states that he will conference with Counsel and provide the requested legal certification to the GRC. The Custodian states that he stands by his certified statement in the SOI; however, the Planning Board has advised the Complainant that there is a copy of the CD in the office that the Complainant can obtain at any time.

May 20, 2011

Custodian's legal certification. The Custodian certifies that he is the Director of the Planning Division for the City and as such is the Administrative Officer for the Planning Board. The Custodian certifies that both he and Ms. Miller maintain the records of the Planning Board.

The Custodian certifies that he cannot provide physical proof that the Complainant retrieved the requested CD on November 16, 2009 as he is unable to find any supporting documentation showing that the Complainant signed for same. The Custodian certifies that on November 16, 2009, the Planning Board received the CD from the vendor and that the Complainant was notified and picked up the CD on the same date.

8

Analysis

Whether the \$30.00 fee assessed by the Custodian for duplicating the requested recording is warranted and reasonable pursuant to OPRA?

The Custodian herein charged the Complainant \$30.00 to provide a copy of the requested recording. The Complainant paid said fee on November 9, 2009 and received a

⁸ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

copy of the requested recording. Although the Complainant did not dispute the fee imposed by the Custodian, the GRC must address this issue to ensure that the Custodian is in compliance with the provisions of OPRA.

OPRA sets forth the amount to be charged for a government record in printed form. Specifically, OPRA states:

“[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. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.” (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:

“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.

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.

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 allows for the actual cost of duplication to be paid by the requestor. *Id.* OPRA further 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 the cost of labor or other overhead expenses associated with making the copy. N.J.S.A. 47:1A-5.d. When the requestor has made a request that requires “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.” N.J.S.A. 47:1A-5.c.

Thus, it appears that the legislative central theme throughout OPRA is that duplication cost should equal actual cost and when additional effort is required to reproduce the requested record, the cost of such effort should be reasonable. *See Spaulding v. County of Passaic*, GRC Complaint No. 2004-199 (September 2006).

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 (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.” *Id.*

In the instant complaint, the Planning Board utilized Audio Edge Transcription to record and produce copies of meetings on audio cassette and CD. The Custodian certified in the SOI that upon receiving the Complainant’s OPRA request, Ms. Miller contacted Audio Edge Transcription to duplicate and provide a copy of the requested recording. The Custodian further certified that the Planning Board was charged \$25.00 to obtain and provide the requested recording and that the additional \$5.00 represented City

service charges. The Custodian also attached an invoice from Audio Edge Transcription that supported his certification that the vendor charged \$25.00 per audiotape duplication; however, there is no supporting evidence in the record to indicate that the additional \$5.00 charge represented the actual cost of providing the Complainant access to the requested recording.

In O’Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009), the complainant requested a copy of an audio recording and the custodian charged the complainant \$10.00 for the duplication. The complainant objected to the fee asserting that it was excessive. However, the custodian certified that the Board of Education did not possess the capability to complete the duplication in-house and provided the GRC with a cost estimate from outside vendors which charged \$2.49 for the audiotape and \$7.99 for the duplication. The Council held that:

“[b]ecause the Custodian has certified that the Pine Hill Board of Education lacks the equipment necessary to fulfill the OPRA request, and because the vendor invoice submitted by the Custodian is reasonable and based on the cost to be incurred by the agency, and because the Complainant has failed to submit any credible evidence that the vendor invoice submitted by the agency is unreasonable, the proposed estimate of \$10.48 for duplication is reasonable and consistent with N.J.S.A. 47:1A-5.c.” *Id.* See also Wolosky v. Sparta Board of Education (Sussex), GRC Complaint No. 2009-56 (Interim Order dated November 4, 2009).

The facts of this complaint are similar to the facts of O’Shea, supra, in that here, the Planning Board contacted the vendor responsible for recording Planning Board meetings to duplicate the requested recording. Additionally, the Custodian submitted as part of the SOI a copy of an invoice from Audio Edge Transcriptions reflecting the duplication of two (2) cassette tapes at a cost of \$50.00 or \$25.00 per cassette tape. The date of the job was November 2, 2009, which coincides with the submission of the Complainant’s OPRA request. Thus, the evidence of record shows that the actual cost incurred by the Planning Board to provide one (1) audiotape to the Complainant is \$25.00.

However, this complaint differs from O’Shea, supra, in that the Custodian added an additional cost of \$5.00 for what he described as City service charges: the Custodian failed to provide evidence that the additional cost represented part of the actual cost, independent of the cost of labor and overhead. The evidence of record indicates that the Planning Board incurred a cost of \$25.00 and the Planning Board has not asserted that a special service charge is warranted. Thus, the additional \$5.00 charge is in violation of OPRA. N.J.S.A. 47:1A-5.b.

Therefore, pursuant to Spaulding, supra, Libertarian Party of Central New Jersey, supra, and O’Shea, supra, although the Custodian certified that the actual cost to produce the requested recording to the Complainant was \$25.00 and provided an invoice and certified to same in the SOI, the additional charge of \$5.00 for City service charges does not represent part of the actual cost and is in violation of N.J.S.A. 47:1A-5.b. Further, the

Custodian failed to bear his burden of proving that the additional \$5.00 charge was part of the actual cost of the duplication of the requested record pursuant to N.J.S.A. 47:1A-6.

In Coulter v. Township of Bridgewater (Somerset), GRC Complaint No. 2008-220 (November 2009), the Council deliberated on whether it could order a refund in instances where it has been determined that a public agency charged an unreasonable fee. The Council cited to Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (January 2008), in which it ordered Estell Manor City to refund the “amount paid over and above” the Custodian’s hourly rate for one (1) hour. The Council reasoned that Janney, supra, was instructive in Coulter, supra. Specifically, the Council held that:

“[i]n that complaint, the GRC ordered the Custodian to refund money to the Complainant because the special service charge was found to be unreasonable. In this complaint, the GRC has found the Custodian’s fee of \$5.00 for a CD violates OPRA because it is not the actual cost. Subsequently, Mr. Herrera certified that the “actual cost” of one CD (with CD envelope) costs \$0.96. Therefore, pursuant to Janney, supra, the Custodian shall refund to the Complainant the difference between the \$5.00 fee and the “actual cost” of \$0.96 (or \$4.04).”

In the instant complaint, although the Planning Board’s actual cost to provide the record was \$25.00, the Custodian charged an extra \$5.00 in fees and failed to prove that same represented part of the actual cost to provide the requested recording to the Complainant.

Therefore, pursuant to Coulter, supra, the Custodian shall refund to the Complainant the additional \$5.00 fee for City service charges, which does not represent part of the actual cost of providing the requested recording to the Complainant.

Whether the Custodian unlawfully denied access to the requested recording?

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.

In the Denial of Access Complaint, the Complainant stated that the audiotape recording provided by the City on November 9, 2009 was defective. The Complainant stated that he returned to the City on November 10, 2009 requesting that he be refunded the \$30.00 fee paid for the recording. The Complainant stated that the Custodian advised that another recording would be provided and that the Complainant would not be given a refund.

The Complainant stated that he subsequently sent a letter to the Custodian on November 20, 2010, in which the Complainant requested that the Custodian advise whether a copy of the complete recording or a refund would be forthcoming.

The Custodian certified in the SOI that after the Complainant returned to the City with the defective tape, Ms. Miller contacted the vendor, who acknowledged there was an issue with the recording and offered to provide the recording on CD at no charge. The Custodian certified that the City received the CD on November 16, 2009 and immediately contacted the Complainant. The Custodian further certified that both the Complainant and Ms. Miller reviewed the record prior to the Complainant leaving with the new recording.

Conversely, the Complainant responded to the SOI on March 9, 2010 denying the validity of the SOI. The Complainant argued that he had no contact with the Custodian after November 10, 2009. The Complainant argued that this was evidenced by his November 20, 2009 letter request, which asks a specific question: “When will [the Complainant] receive a complete tape or return of the \$30?”

Although the GRC acknowledges that more weight is given to legal certifications over assertions, the evidence of record here brings into doubt the Custodian’s SOI certification and subsequent May 20, 2011 legal certification that the Complainant received the requested record on November 16, 2009. Although the Custodian certified that the Complainant retrieved a copy of the recording on CD on November 16, 2010, the Complainant sent a letter to the Custodian four (4) days later requesting that he be advised whether a complete recording or a refund would be forthcoming. Moreover, the Planning Board was unable to provide any evidence to corroborate the Custodian’s certifications.

Therefore, based on the contested facts in this complaint, the GRC is unable to determine whether the Custodian provided a CD copy of the requested recording to the

Complainant on November 16, 2009. Although the Custodian certified that the Complainant came to the Planning Board office to retrieve the CD, the Complainant sent the Custodian a letter on November 20, 2009 contesting that he had not heard from the Custodian since November 10, 2009. Additionally, the Planning Board retained no evidence to support the Custodian's certifications that the Complainant received the CD on November 16, 2009. Therefore, this complaint should be referred to the Office of Administrative Law ("OAL") upon compliance with this Interim Order for a hearing to resolve the facts. Specifically, the Council requests of OAL a determination as to whether the Custodian unlawfully denied access to a complete copy of the requested recording, and a determination as to whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of circumstances. The GRC thus defers referral of this complaint to the Office of Administrative Law pending compliance with the Council's Interim Order.

Whether the Complainant's November 20, 2009 letter constitutes a valid OPRA request?

The Complainant argued in the Denial of Access Complaint and in subsequent submissions to the GRC that the Custodian violated OPRA by failing to respond in writing to his November 20, 2009 request referencing OPRA, which the Complainant asserts is a valid request for records pursuant to OPRA.

In Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), the Appellate Division held that:

"...all requests for OPRA records must be in writing; that such requests shall utilize the forms provided by the custodian of records; however, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in N.J.S.A. 47:1A-5.f. Where the requestor fails to produce an equivalent writing that raises issues as to the nature or substance of the requested records, the custodian may require that the requestor complete the form generated by the custodian pursuant to N.J.S.A. 47:1A-5.g."

Based on this holding, although a public agency should adopt an official OPRA request form, a custodian of record cannot deny access to an OPRA request if such request does not utilize said form. Therefore, this language requires written non-form records requests to clearly state that the request is a records request made under the provisions of OPRA. Any mention of OPRA in the written non-form records request is sufficient. This is the only requirement of a written non-form OPRA records request.

To this end, the Complainant's November 20, 2009 letter clearly invokes OPRA on the first page. However, a close review of the letter shows that the Complainant asks the following questions: "Is this conduct purposed to deny [the Complainant] a true, complete public record? When will I receive a complete tape or return of the \$30?" Aside from the Complainant posing those two questions, the rest of the letter is simply a recapitulation of the events occurring from the time the Complainant submitted his letter request on October 30, 2009 to the date of the November 20, 2009 letter that the

Complainant asserts to be an OPRA request. The Complainant's letter contains no request for government records, rather, the Complainant simply requests that the Custodian advise as to the status of his October 30, 2009 OPRA request.

Thus, although the Complainant asserts that his November 20, 2009 letter to the Custodian is a request for government records pursuant to OPRA, said letter does not constitute a written non-form records request consistent with the Appellate Division's decision in Renna, supra. Specifically, the Complainant merely asked for an update regarding his October 30, 2009 OPRA request and did not seek identifiable government records.

Therefore, the Complainant's November 20, 2009 letter is not a valid OPRA request pursuant to Renna, supra, because the Complainant asked for an update regarding his October 30, 2009 OPRA request and did not seek identifiable government records. Moreover, the Custodian did not violate OPRA by not responding to the Complainant's letter within seven (7) business days of receipt of the Complainant's letter.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), and O'Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009), although the Custodian certified that the actual cost to produce the requested recording to the Complainant was \$25.00 and provided an invoice and certified to same in the Statement of Information, the additional charge of \$5.00 for City service charges does not represent part of the actual cost and is in violation of N.J.S.A. 47:1A-5.b. Further, the Custodian failed to bear his burden of proving that the additional \$5.00 charge was part of the actual cost of duplication of the requested record pursuant to N.J.S.A. 47:1A-6.
2. Pursuant to Coulter v. Township of Bridgewater (Somerset), GRC Complaint No. 2008-220 (November 2009), the Custodian shall refund to the Complainant the imposed \$5.00 fee for City service charges, which does not represent part of the actual cost of providing the requested recording to the Complainant.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁹, to the Executive Director.¹⁰**

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹⁰ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold
Robert Edwards v. City of Plainfield, Planning Board (Union), 2010-17 – Findings and Recommendations of the Executive Director 13

4. Based on the contested facts in this complaint, the GRC is unable to determine whether the Custodian provided a CD copy of the requested recording to the Complainant on November 16, 2009. Although the Custodian certified that the Complainant came to the Planning Board office to retrieve the CD, the Complainant sent the Custodian a letter on November 20, 2009 contesting that he had not heard from the Custodian since November 10, 2009. Additionally, the Planning Board retained no evidence to support the Custodian's certifications that the Complainant received the CD on November 16, 2009. Therefore, this complaint should be referred to the Office of Administrative Law upon compliance with this Interim Order for a hearing to resolve the facts. The Council requests of the Office of Administrative Law a determination as to whether the Custodian unlawfully denied access to a complete copy of the requested recording, and a determination as to whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of circumstances. The GRC thus defers referral of this complaint to the Office of Administrative Law pending compliance with the Council's Interim Order. *See* Item No. 3 above.

5. The Complainant's November 20, 2009 letter is not a valid OPRA request pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant asked for an update regarding his October 30, 2009 OPRA request and did not seek identifiable government records. Moreover, the Custodian did not violate OPRA by not responding to the Complainant's letter within seven (7) business days of receipt of the Complainant's letter.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 21, 2011

delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.