



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  
Acting Commissioner

**FINAL DECISION**

**May 29, 2012 Government Records Council Meeting**

Tucker Kelley  
Complainant

Complaint No. 2010-269

v.

Rockaway Township (Morris)  
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 2012 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 current Custodian provided the Complainant with a copy of the responsive receipts as required by the Council’s March 27, 2012 Interim Order, and because the current Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the five (5) business days required by the Council’s Interim Order, the current Custodian has complied with the Council’s Order.
2. The original Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a date certain on which she would advise the Complainant of the Rockaway Township Police Department’s response regarding the requested receipts and further failed to bear her burden under N.J.S.A. 47:1A-6 of proving a lawful denial of access to the responsive receipts. However, the original Custodian’s charge of \$1.78 for a CD was reasonable and warranted pursuant to N.J.S.A. 47:1A-5.b. and the current Custodian timely complied with the Council’s March 27, 2012 Interim Order by providing the responsive receipts to the Complainant and providing certified confirmation of compliance to the Executive Director within the prescribed deadline to comply with said Order. Additionally, the evidence of record does not indicate that the original Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 29<sup>th</sup> Day of May, 2012

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 4, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
May 29, 2012 Council Meeting**

**Tucker Kelley<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-269**

v.

**Rockaway Township (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of:

1. Receipts for purchase of Police Report IR No. 2010-029786 on August 25, 2010.
2. Receipts for purchase of Police Report IR No. 2010-029786 on August 26, 2010.
3. CD copy of radio transmission and recorded telephone calls to/from dispatch in reference to Police Report IR No. 2010-029786.<sup>3</sup>

**Request Made:** September 14, 2010

**Response Made:** September 23, 2010

**Custodian:** Mary Cilurso<sup>4</sup>

**GRC Complaint Filed:** October 13, 2010<sup>5</sup>

**Background**

**March 27, 2012**

Government Records Council's ("Council") Interim Order. At its March 27, 2012 public meeting, the Council considered the March 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian provided a proper written response to the Complainant's OPRA request within the extended time frame to respond in which the Custodian advised that she would contact the Rockaway Township Police Department regarding the receipts, the Custodian's written response was insufficient pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide an anticipated date upon which she would advise the Complainant of the Rockaway Township Police

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

<sup>2</sup> Represented by Tiena M. Cofoni, Esq., of The Buzak Law Group, LLC (Montville, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> The current Custodian of record is Susan Best.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

Department's response regarding the requested receipts. *See also Bentz v. Borough of Paramus (Bergen)*, GRC Complaint No. 2008-89 (June 2011).

2. The Custodian has failed to bear her burden of proving a lawful denial of access to the responsive receipts. N.J.S.A. 47:1A-6. Specifically, the Custodian has failed to provide sufficient evidence to prove that she actually provided the responsive receipts to the Complainant on September 27, 2010. Therefore, the Custodian must disclose same 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 with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> to the Executive Director.<sup>7</sup>**
4. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian's charge of \$1.78 for the responsive CD is the "actual cost" and is appropriate and warranted under N.J.S.A. 47:1A-5.b. Moreover, there is no evidence in the record to refute the fee charged by the Custodian. Therefore, the Custodian has not violated OPRA.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### **March 29, 2012**

Council's Interim Order distributed to the parties.

#### **March 30, 2012**

E-mail from the current Custodian to the Complainant attaching the following:

- Receipt No. 14197 dated August 25, 2010.
- Receipt No. 324002 dated August 26, 2010.

The Custodian states that attached are the two (2) receipts responsive to the Complainant's OPRA request.

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<sup>6</sup> "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."

<sup>7</sup> 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 records have 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.

**March 30, 2012**

E-mail from the Complainant to the GRC. The Complainant asks whether he may submit additional documentation regarding whether the Custodian knowingly and willfully violated OPRA.

**March 30, 2012**

E-mail from the GRC to the Complainant. The GRC states that its regulations at *N.J.A.C. 5:105-2* set forth the complaint process, including which submissions a party must provide. The GRC states that although *N.J.A.C. 5:105-2* does not expressly provide for additional submissions 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 if the Complainant wishes to submit additional correspondence that provides new information or proof such as evidence or a certification, he may do so at this time.<sup>8</sup>

**April 5, 2010**

Current Custodian's response to the Council's Interim Order attaching the following:

- E-mail from the current Custodian to the Complainant dated March 30, 2012.
- Receipt No. 14197 dated August 25, 2010.
- Receipt No. 324002 dated August 26, 2010.
- Current Custodian's certified confirmation of compliance.
- Legal certification of Ms. Kathleen Mahony ("Ms. Mahony"), Senior Police Records/Payroll Clerk.

The Custodian certifies that she began working for Rockaway Township ("Township") on September 21, 2011 and now serves as Custodian and Township Clerk. The Custodian certifies that Item No. 3 of the Council's Order required her to disclose to the Complainant receipts responsive to his September 14, 2010 OPRA request. The Custodian certifies that she forwarded two (2) receipts to the Complainant via e-mail on March 30, 2012. The Custodian certifies that these two (2) receipts are the only receipts found to be responsive to the Complainant's OPRA request.

Ms. Mahony certifies that although she did not personally respond to the OPRA request at issue herein, she is familiar with the processes and procedures of the Township Police Department in responding to OPRA requests.

Ms. Mahony certifies that on August 25, 2010 and August 26, 2010, when the Complainant purchased a copy of Police Report IR No. 2010-029786, the Police Department pulled and copied the hard copy of the report and hand wrote receipts. Ms. Mahony certifies that in September 2010, the Police Department began using a new records management computer system. Ms. Mahony certifies that the system

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<sup>8</sup> The Complainant did not submit additional material to the GRC.

automatically tracks and logs when a document on the Police Department computer system is accessed, revised or printed. Ms. Mahony certifies that at that time, all documents were to be accessed via the computer system so that the system could track the activity.

Ms. Mahony certifies that it is possible that at the time of the Complainant's September 14, 2010 OPRA request, the Police Department searched the new system, determined that Police Report IR No. 2010-029786 had not been accessed or printed and determined that no receipts existed. Ms. Mahony certifies that the Police Department must have overlooked the fact that hard copies of records were still in use at the time the Complainant received copies of Police Report IR No. 2010-029786 because the system had not yet been fully implemented. Ms. Mahony certifies that she and Captain John M. Janosec realized this oversight on March 30, 2012. Ms. Mahony certifies that she thus searched through the hard copy receipts instead of reviewing the system and was able to locate the requested receipts.

Ms. Mahony certifies that this oversight was inadvertent and unintentional. Ms. Mahony certifies that the Police Department had no reason to withhold the responsive receipts: this is especially apparent because the receipts were originally issued to the Complainant.

### Analysis

#### **Whether the current Custodian complied with the Council's March 27, 2012 Interim Order?**

The Council's March 27, 2011 Interim Order specifically directed the original Custodian to disclose to the Complainant the responsive receipts. The Council further ordered that "[t]he Custodian shall comply ... within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>9</sup>, to the Executive Director." (Emphasis in original).

The original Custodian's response to the Council's Interim Order was due to the Complainant by close of business on April 5, 2012. The current Custodian forwarded the responsive receipts to the Complainant via e-mail on March 30, 2012 and provided certified confirmation of compliance with the Council's Order to the GRC on April 5, 2012.

Therefore, because the current Custodian provided the Complainant with a copy of the responsive receipts as required by the Council's March 27, 2012 Interim Order, and because the current Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the five (5) business

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<sup>9</sup> "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."  
Tucker Kelley v. Rockaway Township (Morris), 2010-269 – Supplemental Findings and Recommendations of the Executive Director 4

days required by the Council's Interim Order, the current Custodian has complied with the Council's Order.

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

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 (Felder 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)).

The original Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a date certain on which she would advise the Complainant of the Rockaway Township Police Department's response regarding the requested receipts and further failed to bear her burden under N.J.S.A. 47:1A-6 of proving a lawful denial of access to the responsive receipts. However, the original Custodian's charge of \$1.78 for a CD was reasonable and warranted pursuant to N.J.S.A. 47:1A-5.b. and the current Custodian timely complied with the Council's March 27, 2012 Interim Order by providing the responsive receipts to the Complainant and providing certified confirmation of compliance to the Executive Director within the prescribed deadline to comply with said Order. Additionally, the evidence of record does not indicate that the original

Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the current Custodian provided the Complainant with a copy of the responsive receipts as required by the Council's March 27, 2012 Interim Order, and because the current Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the five (5) business days required by the Council's Interim Order, the current Custodian has complied with the Council's Order.
2. The original Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a date certain on which she would advise the Complainant of the Rockaway Township Police Department's response regarding the requested receipts and further failed to bear her burden under N.J.S.A. 47:1A-6 of proving a lawful denial of access to the responsive receipts. However, the original Custodian's charge of \$1.78 for a CD was reasonable and warranted pursuant to N.J.S.A. 47:1A-5.b. and the current Custodian timely complied with the Council's March 27, 2012 Interim Order by providing the responsive receipts to the Complainant and providing certified confirmation of compliance to the Executive Director within the prescribed deadline to comply with said Order. Additionally, the evidence of record does not indicate that the original Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

May 22, 2012





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  
Acting Commissioner

INTERIM ORDER

March 27, 2012 Government Records Council Meeting

Tucker Kelley  
Complainant

Complaint No. 2010-269

v.

Rockaway Township (Morris)  
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council ("Council") considered the March 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian provided a proper written response to the Complainant's OPRA request within the extended time frame to respond in which the Custodian advised that she would contact the Rockaway Township Police Department regarding the receipts, the Custodian's written response was insufficient pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide an anticipated date upon which she would advise the Complainant of the Rockaway Township Police Department's response regarding the requested receipts. *See also Bentz v. Borough of Paramus (Bergen)*, GRC Complaint No. 2008-89 (June 2011).
2. The Custodian has failed to bear her burden of proving a lawful denial of access to the responsive receipts. N.J.S.A. 47:1A-6. Specifically, the Custodian has failed to provide sufficient evidence to prove that she actually provided the responsive receipts to the Complainant on September 27, 2010. Therefore, the Custodian must disclose same 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 with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

<sup>1</sup> "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."

<sup>2</sup> 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

4. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian's charge of \$1.78 for the responsive CD is the "actual cost" and is appropriate and warranted under N.J.S.A. 47:1A-5.b. Moreover, there is no evidence in the record to refute the fee charged by the Custodian. Therefore, the Custodian has not violated OPRA.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 27<sup>th</sup> Day of March, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Catherine Starghill, Executive Director  
Government Records Council

**Decision Distribution Date: March 29, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 27, 2012 Council Meeting**

**Tucker Kelley<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-269**

v.

**Rockaway Township (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of:

1. Receipts for purchase of Police Report IR No. 2010-029786 on August 25, 2010.
2. Receipts for purchase of Police Report IR No. 2010-029786 on August 26, 2010.
3. CD copy of radio transmission and recorded telephone calls to/from dispatch in reference to Police Report IR No. 2010-029786.<sup>3</sup>

**Request Made:** September 14, 2010

**Response Made:** September 23, 2010

**Custodian:** Mary Cilurso

**GRC Complaint Filed:** October 13, 2010<sup>4</sup>

**Background**

**September 14, 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.

**September 23, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request. The Custodian states that the records responsive to the Complainant's OPRA request are partially ready. The Custodian states that all responsive records will be ready on September 27, 2010.

**September 27, 2010**

Note from the Custodian to the Complainant. The Custodian provides access to the requested recordings on a CD for \$1.78.<sup>5</sup> The Custodian notes on the Complainant's

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

<sup>2</sup> Represented by Tiena M. Cofoni, Esq., of The Buzak Law Group, LLC (Montville, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

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

<sup>5</sup> The Custodian also provided to the Complainant with three (3) pages of records.

OPRA request form that she will check with the Rockaway Township Police Department (“RPD”) for the receipts.

### **October 1, 2010**

E-mail from the Custodian to the Complainant. The Custodian states that the Complainant received four (4) pages of records<sup>6</sup> and one (1) CD on September 27, 2010. The Custodian states that the Complainant noted at that time that the responsive receipts were missing. The Custodian states that she contacted RPD and was informed that the Complainant was provided with all records responsive to his OPRA request and no other records exist.

### **October 13, 2010**

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

- Police Report IR No. 2010-029786 dated August 24, 2010.
- Initial General Complaint Report for IR No. 2010-029786 dated August 24, 2010.
- Public session minutes of the Rockaway Township Board of Education (“BOE”) dated August 25, 2010.
- Complainant’s OPRA request dated September 14, 2010 with the Custodian’s notes thereon.
- E-mail from the Custodian to the Complainant dated September 23, 2010.
- Complainant’s receipt dated September 27, 2010.
- E-mail from the Custodian to the Complainant dated October 1, 2010.

The Complainant states that he submitted an OPRA request to the Custodian via facsimile on September 14, 2010. The Complainant states that the Custodian e-mailed him on September 23, 2010 indicating that the responsive records would be ready for pickup on September 27, 2010.

The Complainant states that he went to the Rockaway Township (“Township”) offices on September 27, 2010 to review the responsive records and immediately noticed that the Township’s response omitted the receipts. The Complainant states that he questioned Ms. Phyllis Auerbach (“Ms. Auerbach”), Assistant Clerk, regarding the missing receipts. The Complainant states that he informed Ms. Auerbach that he purchased IR No. 2010-029786 on August 25, 2010 and August 26, 2010 but accidentally misplaced both receipts. The Complainant states that Ms. Auerbach consulted with the Custodian, who wrote on the Complainant’s OPRA request form that she would check with RPD about the receipts. The Complainant states that the Custodian e-mailed him on October 1, 2010 indicating that he received four (4) pages of records and one (1) CD on September 27, 2010 and confirming that the Township provided all responsive records.

The Complainant states that the attached receipt dated September 27, 2010 shows that the Complainant only received three (3) pages of records; thus, there is a discrepancy

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<sup>6</sup> The evidence of record indicates that the Complainant actually received three (3) pages of records. These pages consisted of the Incident report and general complaint report. The evidence further indicates that no receipts were provided as part of the Custodian’s response.

in the number of pages provided. The Complainant states that he previously purchased IR No. 2010-029786 on two (2) occasions at a cost of \$1.50 each time. The Complainant states that the BOE's August 25, 2010 minutes confirm that the BOE also purchased a copy of the report because the BOE Special Counsel read the police report into the record. The Complainant thus states that three (3) receipts should exist.

The Complainant asserts that the Custodian failed to provide all responsive records and did not charge the "actual cost" for the CD. The Complainant further asserts that the Custodian violated OPRA by not providing a date certain on which she would provide access to the receipts.

**October 20, 2010**

Offer of Mediation sent to both parties.

**October 22, 2010**

The Custodian agrees to mediation.

**October 22, 2010**

The Complainant declines mediation

**November 5, 2010**

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

**November 10, 2010**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until November 15, 2010 to submit the requested SOI.

**November 10, 2010**

E-mail from the GRC to the Custodian. The GRC states that it will generally grant an extension of five (5) business days to submit an SOI. The GRC thus grants the Custodian an extension of time until November 19, 2010 to submit the requested SOI.

**November 19, 2010**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 14, 2010.
- E-mail from the Custodian to the Complainant dated September 23, 2010.
- Complainant's receipt dated September 27, 2010.
- E-mail from the Custodian to the Complainant dated October 1, 2010.

The Custodian certifies that her search for the requested records included contacting RPD on September 14, 2010 to retrieve the responsive records. The Custodian certifies that on September 22, 2010, RPD provided a portion of the responsive records and informed the Custodian that the CD would be available on September 24, 2010. The Custodian certifies that RPD provided to the Custodian the CD on September 24, 2010. The Custodian certifies that on September 27, 2010, the Complainant expressed concern that he did not receive the requested receipts. The Custodian certifies that on September

30, 2010, she received confirmation from RPD that the Complainant received all responsive records.

The Custodian also certifies that receipts of purchase of police reports are required to be maintained for six (6) years in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that she received the Complainant's OPRA request on September 14, 2010. The Custodian certifies that she responded in writing via e-mail on September 23, 2010 stating that the records would not be available until September 27, 2010. The Custodian certifies that she provided the Complainant with all responsive records on September 27, 2010. The Custodian certifies that in response to the Complainant's concerns about the missing receipts, she confirmed with RPD that the receipts were provided to the Complainant on September 27, 2010. The Custodian certifies that the following record was provided in its entirety:

- CD of Police radio transmission from August 24, 2010.<sup>7</sup>

The Custodian further certifies that the Complainant was charged \$1.78 for the CD. The Custodian certifies that this cost represents the "actual cost" of the CD.

The Custodian asserts that she makes every effort to respond promptly and completely to every OPRA request received. The Custodian asserts that she demonstrated her efforts by the attention given to the Complainant's OPRA request and his subsequent concerns. The Custodian asserts that there is no evidence that she knowingly and willfully violated OPRA.

#### **November 24, 2010**

E-mail from the Complainant to the GRC. The Complainant states that the Custodian certified in the SOI that the Township provided the receipts at issue to the Complainant on September 27, 2010. *See* Custodian's SOI, Item No. 12. The Complainant notes that the document index provided as part of the SOI fails to identify any receipts.

### **Analysis**

#### **Whether the Custodian's response to the Complainant's OPRA request was sufficient under OPRA?**

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 ..." N.J.S.A. 47:1A-5.g.

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<sup>7</sup> The Custodian listed two (2) other records that are not at issue in this complaint.  
Tucker Kelley v. Rockaway Township (Morris), 2010-269 – Findings and Recommendations of the Executive Director

Further, OPRA provides that:

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

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>8</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 (Interim Order October 31, 2007).

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian provided the complainant with a written response to the complainant’s OPRA request on the seventh (7<sup>th</sup>) business day following receipt of said request. In the response, the custodian requested an extension of time to respond to said request but failed to provide an anticipated deadline date upon which the requested records would be provided. The Council held that the custodian’s request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5.i.

Here, the Custodian responded on the seventh (7<sup>th</sup>) business day stating that the responsive records would be ready for pickup on September 27, 2010. The Custodian appropriately provided the Complainant with records before the expiration of the extended deadline. The Complainant subsequently advised the Custodian that she did not provide him with the requested receipts. The Custodian responded that she would contact RPD about the receipts; however, the Custodian failed to provide a date certain on which she would advise the Complainant of RPD’s response.

Therefore, although the Custodian provided a proper written response to the Complainant’s OPRA request within the extended time frame to respond in which the

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<sup>8</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.

Custodian advised that she would contact RPD regarding the receipts, the Custodian's written response was insufficient pursuant to N.J.S.A. 47:1A-5.i. and Hardwick, supra, because the Custodian failed to provide an anticipated date upon which she would advise the Complainant of RPD's response regarding the requested receipts. *See also Bentz v. Borough of Paramus (Bergen)*, GRC Complaint No. 2008-89 (June 2011).

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

The Complainant filed the instant complaint arguing that the Custodian failed to provide him with any receipts responsive to his OPRA request. The Complainant noted that although the Custodian asserted that he received four (4) pages of records, the receipt he received on September 27, 2010 indicated that he received three (3) pages of records. The Complainant argued that he purchased a copy of IR No. 2010-029786 on August 25, 2010 and August 26, 2010 and misplaced the receipts. The Complainant further noted that the BOE read a copy of IR No. 2010-029786 into its minutes on August 25, 2010; therefore, three (3) responsive receipts should exist.

The Custodian certified in the SOI that the Township provided the responsive receipts to the Complainant on September 27, 2010. The Custodian certified that the Complainant paid for and received four (4) pages of records and one (1) CD on



September 27, 2010. The Custodian further certified that RPD confirmed on September 30, 2010 that all responsive records, including the receipts, were provided to the Complainant on September 27, 2010.

The Complainant sent an e-mail to the GRC on November 24, 2010 noting that the receipt dated September 27, 2010 and attached to the Denial of Access Complaint only shows three (3) pages of records provided to him. The Complainant further noted that the Custodian's document index indicated that the Township provided the Complainant with only a police report, an investigation report and a CD.

When a Denial of Access Complaint is filed, a custodian of record bears the burden of proving a denial of access was lawful. N.J.S.A. 47:1A-6. The facts herein do not indicate that the Complainant was provided with the receipts at issue. Specifically, the Custodian certified in the SOI that said receipts were provided, but failed to identify them in the document index. Additionally, the evidence is clear that there is a discrepancy in the number of pages actually provided to the Complainant September 27, 2010. The Complainant provided the receipt he received from the Township for purchase of said records as part of his Denial of Access Complaint. Thus, the Custodian has failed to bear her burden of proof that she provided the responsive records as part of her September 27, 2010 response.

Therefore, the Custodian has failed to bear her burden of proving a lawful denial of access to the responsive receipts. N.J.S.A. 47:1A-6. Specifically, the Custodian has failed to provide sufficient evidence to prove that she actually provided the responsive receipts to the Complainant on September 27, 2010. Therefore, the Custodian must disclose same to the Complainant.

### **Whether the fee assessed by the Custodian to provide a CD in response to the Complainant's OPRA request is warranted?**

OPRA provides that:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation ... the fee assessed for the duplication of a government record *embodied in the form of printed matter* shall be \$ 0.05 per letter size page or smaller, and \$ 0.07 per legal size page or larger ... Access to electronic records and non-printed materials shall be provided free of charge, but the public agency *may charge for the actual costs* of any needed supplies such as *computer discs*.” (Emphasis added.) N.J.S.A. 47:1A-5.b.

OPRA provides that government records may be purchased upon payment of the actual cost of duplicating the record. N.J.S.A. 47:1A-5.b. Said provision defines “actual cost” as “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...” Moreover, public agencies may “charge for the actual costs of any needed supplies such as computer discs.” *Id.*

Thus, it appears that the Legislature included the central theme throughout OPRA that duplication cost should equal actual cost and when actual cost cannot be applied, the duplication cost 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-5.b."

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

The case law above was considered in several GRC complaints where a custodian asserted a cost for providing a record on a medium other than on paper copies. *See Coulter v. Township of Bridgewater (Somerset)*, GRC Complaint No. 2008-220 (Interim Order dated November 18, 2008), *Paff v. Borough of Wildwood Crest (Cape May)*, GRC Complaint No. 2009-54 (Interim Order dated June 29, 2010) and *Wolosky v. Sparta Board of Education (Sussex)*, GRC Complaint No. 2009-56 (November 2009).

Additionally, in *O'Shea v. Township of Vernon (Sussex)*, GRC Complaint No. 2007-207 (April 2008), the custodian responded to the complainant's OPRA request for an audio recording of the Council's May 14, 2007 public and executive session in a timely manner stating that the cost for the recording would be \$35.00. The custodian also requested that the complainant indicate whether he would like the custodian to prepare the record. Subsequently, the complainant filed a Denial of Access Complaint arguing

that the proposed fee did not represent the “actual cost,” and that copying fees prescribed in a Township ordinance, Chapter 250, Article II § 250.9(E), violate OPRA.

Based on the evidence in that complaint, the Council was tasked with deciding on whether the custodian violated OPRA by charging the fee enumerated in the Township’s ordinance rather than the actual cost of duplication of the requested record. The Council held that:

“... pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006) [and] Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) ... the Custodian must charge the actual cost of duplicating the requested records. As such, the Custodian’s charge of \$35.00 for an audio recording of the requested meeting minutes is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must provide the requested records to the Complainant and charge the actual cost of the audiotape and shall not include the cost of labor or other overhead expenses associated with making the copy.”

Here, the Custodian charged \$1.78 for a copy of a CD, which the Complainant paid on September 27, 2010. In the Denial of Access Complaint, the Complainant subsequently disputed the fee and argued that he believed it did not represent the “actual cost” of the CD. However, the Custodian certified in the SOI that \$1.78 was the “actual cost” for providing CDs to requestors. Moreover, there is no evidence in the record to refute said certification.

Therefore, pursuant to Spaulding, *supra*, and Libertarian Party of Central New Jersey, *supra*, the Custodian’s charge of \$1.78 for the responsive CD is the “actual cost” and is appropriate and warranted under N.J.S.A. 47:1A-5.b. Moreover, there is no evidence in the record to refute the fee charged by the Custodian. Therefore, the Custodian has not violated OPRA.

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

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian provided a proper written response to the Complainant’s OPRA request within the extended time frame to respond in which the Custodian advised that she would contact the Rockaway Township Police Department regarding the receipts, the Custodian’s written response was insufficient pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February

2008), because the Custodian failed to provide an anticipated date upon which she would advise the Complainant of the Rockaway Township Police Department's response regarding the requested receipts. *See also Bentz v. Borough of Paramus (Bergen)*, GRC Complaint No. 2008-89 (June 2011).

2. The Custodian has failed to bear her burden of proving a lawful denial of access to the responsive receipts. N.J.S.A. 47:1A-6. Specifically, the Custodian has failed to provide sufficient evidence to prove that she actually provided the responsive receipts to the Complainant on September 27, 2010. Therefore, the Custodian must disclose same 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 with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>9</sup> to the Executive Director.<sup>10</sup>**
4. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian's charge of \$1.78 for the responsive CD is the "actual cost" and is appropriate and warranted under N.J.S.A. 47:1A-5.b. Moreover, there is no evidence in the record to refute the fee charged by the Custodian. Therefore, the Custodian has not violated OPRA.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

March 20, 2012

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<sup>9</sup> "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."

<sup>10</sup> 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 records have 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.