



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**

**June 24, 2014 Government Records Council Meeting**

Kathleen Galano  
Complainant

Complaint No. 2013-293

v.

Borough of Atlantic Highlands  
(Monmouth)  
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council (“Council”) considered the June 17, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s April 29, 2014 Interim Order because he responded in the prescribed time frame and simultaneously provided certified confirmation of compliance to the Executive Director certifying that no responsive records exist.
2. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian complied with the Council’s Order and certified that no responsive records exist. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the 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 24<sup>th</sup> Day of June, 2014

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: June 26, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 24, 2014 Council Meeting**

**Kathleen Galano<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-293**

**v.**

**Borough of Atlantic Highlands<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Regarding 62 Memorial Parkway. Any information in that property file regarding permits, oil tanks, variances, easements.

**Custodian of Record:** Dwayne M. Harris

**Request Received by Custodian:** May 31, 2013

**Response Made by Custodian:** June 12, 2013

**GRC Complaint Received:** October 4, 2013

**Background**

**April 29, 2014 Council Meeting:**

At its April 29, 2014 public meeting, the Council considered the April 22, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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).
2. The Custodian partially lawfully denied access to the requested records because the Complainant made an overly broad request for types of information regarding a particular parcel of property, and OPRA requires the disclosure only of identifiable government records not otherwise exempt. See N.J.S.A. 47:1A-6; MAG

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

<sup>2</sup> No legal representation listed on record.

Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-49 (App. Div. 2005); Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009); LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009). However, the Custodian unlawfully denied access to any permits contained in the property file of the named property and shall thus disclose any responsive documents, making any appropriate redactions. N.J.S.A. 47:1A-6.

3. **The Custodian shall comply with item number two (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>3</sup> to the Executive Director.<sup>4</sup>**
4. 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.

#### Procedural History:

On May 1, 2014, the Council distributed its Interim Order to all parties. The Custodian received the Order on May 5, 2014. On May 6, 2014, the Custodian responded to the Council's Interim Order.

#### Analysis

#### Compliance

At its April 29, 2014 meeting, the Council ordered the Custodian to disclose any responsive permits contained in the property file of the named property within five (5) business days from receipt of same and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 1, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. The Custodian received the Council's Order on May 5, 2014. Thus, the Custodian's response was due by close of business on May 12, 2014.

On May 6, 2014, the first (1<sup>st</sup>) business day after receipt of the Council's Order, the Custodian provided certified confirmation of compliance to the Executive Director. The Custodian certified that:

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<sup>3</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>4</sup> 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.

The Building Department has completed a thorough search for any permits on record [either open or closed] or on file, for the property located at 62 Memorial Parkway located on Block #83 Lot #04 in the Borough of Atlantic Highlands, which resulted in no records being found.

Certification of Dwayne M. Harris, May 6, 2014.

Therefore, the Custodian complied with the Council's April 29, 2014 Interim Order because he responded in the prescribed time frame and simultaneously provided certified confirmation of compliance to the Executive Director.

### **Knowing & Willful**

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian complied with the Council's Order and certified that no responsive records exist. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the 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. The Custodian complied with the Council's April 29, 2014 Interim Order because he responded in the prescribed time frame and simultaneously provided certified confirmation of compliance to the Executive Director certifying that no responsive records exist.
2. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian complied with the Council's Order and certified that no responsive records exist. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the 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: Robert T. Sharkey, Esq.  
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.  
Acting Executive Director

June 17, 2014



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

INTERIM ORDER

April 29, 2014 Government Records Council Meeting

Kathleen Galano  
Complainant

Complaint No. 2013-293

v.

Borough of Atlantic Highlands  
Custodian of Record

At the April 29, 2014 public meeting, the Government Records Council (“Council”) considered the April 22, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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).
2. The Custodian partially lawfully denied access to the requested records because the Complainant made an overly broad request for types of information regarding a particular parcel of property, and OPRA requires the disclosure only of identifiable government records not otherwise exempt. See N.J.S.A. 47:1A-6; MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-49 (App. Div. 2005); Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009); LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009). However, the Custodian unlawfully denied access to any permits contained in the property file of the named property and shall thus disclose any responsive documents, making any appropriate redactions. N.J.S.A. 47:1A-6.
3. **The Custodian shall comply with item number two (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>**

4. 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 29<sup>th</sup> Day of April, 2014

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 1, 2014**

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<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 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.



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 29, 2014 Council Meeting**

**Kathleen Galano<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-293**

v.

**Borough of Atlantic Highlands<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Regarding 62 Memorial Parkway. Any information in that property file regarding permits, oil tanks, variances, easements.

**Custodian of Record:** Dwayne M. Harris

**Request Received by Custodian:** May 31, 2013

**Response Made by Custodian:** June 12, 2013

**GRC Complaint Received:** October 4, 2013

**Background<sup>3</sup>**

**Request and Response:**

On May 31, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 12, 2013, eight (8) business days later, the Custodian responded in writing denying the Complainant’s request for being overbroad.

**Denial of Access Complaint:**

On October 4, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that she received the Custodian’s response outside of OPRA’s mandated deadline. The Complainant further asserts that she was sufficiently specific in her request.

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

### Statement of Information:

On October 22, 2013, the GRC sent the Custodian a Statement of Information (“SOI”) request form. The Custodian did not respond to the GRC.

### Analysis

#### Timeliness

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). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. 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>4</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. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Custodian stated in his initial written response to the Complainant that eight (8) business days had passed since he received the request. The Custodian also did not submit a SOI to the GRC to explain this delay.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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, GRC 2007-11.

#### Unlawful Denial of Access

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 New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful

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<sup>4</sup> 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.

information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.

MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549.

The Court held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt. . . . In short, OPRA does not countenance open-ended searches of an agency's files. . . . Most significantly, the request failed to identify with any specificity or particularity the governmental records sought.” Id. at 549. *See also* Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Further, in LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that held library cards. The GRC determined that the complainant’s request was not for an identifiable government record, but for information. Id. As such, the request was deemed invalid pursuant to MAG. Id.; *see also* Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). Similarly, in Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009), the complainant made an OPRA request in the form of several questions regarding when a property was added to the “tax rolls,” how much tax was owed, and why there was any delay in adding the property to the tax roll. The Council determined that the request was an invalid because it failed to identify government records. Id.

Here, the Complainant requested any information in a certain address’s property file regarding permits, variances, easements, or oil tanks. The request, by its own wording, is mostly one for information. While the Complainant’s request refers to types of documents, she has generally not identified with sufficient particularity the government records sought. *See* MAG, 375 N.J. Super. at 549. For example, the Complainant did not identify a time frame over which

any variances or easements would have been issued. *C.f.*, Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 508-09 (finding request for “[a]ny and all settlements, releases or similar documents entered into, approved or accepted *from 1/1/2006 to present*” valid for seeking specific record and not information obtained through research) (emphasis added). Likewise, the request for information regarding oil tanks is impermissibly open-ended. *See* MAG, 375 N.J. Super. at 549. Rather than narrowing the scope of the inquiry to a discrete and limited subject matter, the Complainant sought information to be extracted from documents instead of the records themselves. *See* Burke v. Brandes, 429 N.J. Super. 169, 177-78 (App. Div. 2012). However, the Complainant’s request for permits regarding the named property, in contrast to that for variances and easements, is for readily identifiable records and would not require the Custodian to perform research.

Therefore, the Custodian partially lawfully denied access to the requested records because the Complainant made an overly broad request for types of information regarding a particular parcel of property, and OPRA requires the disclosure only of identifiable government records not otherwise exempt. *See* N.J.S.A. 47:1A-6; MAG, 375 N.J. Super. at 546-49; Watt, GRC 2007-246; LaMantia, GRC 2008-140. However, the Custodian unlawfully denied access to any permits contained in the property file of the named property and shall thus disclose any responsive documents, making any appropriate redactions. N.J.S.A. 47:1A-6.

### **Knowing and Willful**

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. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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).
2. The Custodian partially lawfully denied access to the requested records because the Complainant made an overly broad request for types of information regarding a particular parcel of property, and OPRA requires the disclosure only of identifiable government records not otherwise exempt. *See* N.J.S.A. 47:1A-6; MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-49 (App. Div. 2005); Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009); LaMantia v. Jamesburg Public Library

(Middlesex), GRC Complaint No. 2008-140 (February 2009). However, the Custodian unlawfully denied access to any permits contained in the property file of the named property and shall thus disclose any responsive documents, making any appropriate redactions. N.J.S.A. 47:1A-6.

3. **The Custodian shall comply with item number two (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>5</sup> to the Executive Director.<sup>6</sup>**
4. 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: Robert T. Sharkey, Esq.  
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

April 22, 2014

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<sup>5</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>6</sup> 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.