



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

October 29, 2013 Government Records Council Meeting

Katalin Gordon
Complainant

Complaint No. 2013-95

v.

City of Orange (Essex)
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian failed to bear her burden of proving that \$10.00 or \$1.00 represented the “actual cost” to provide the Complainant with the responsive recording on a CD. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(b); O’Shea v. Twp. of Vernon (Sussex), GRC Complaint No. 2007-207 (Interim Order dated March 26, 2008); Coulter v. Twp of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009). Thus, the Custodian must disclose to the Complainant the responsive recording on CD upon payment of \$0.54. Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006); Ortiz v. NJ Dep’t of Corrections, GRC Complaint No. 2007-101 (November 2008). If the Custodian already provided the responsive record to the Complainant, she must certify to this fact.
2. **The Custodian shall comply with item No. 1 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 1:4-4,¹ to the Executive Director.²**
3. 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.

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.

Interim Order Rendered by the
Government Records Council
On The 29th Day of October, 2013

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: October 30, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting**

**Katalin Gordon¹
Complainant**

GRC Complaint No. 2013-95

v.

**City of Orange (Essex)²
Custodial Agency**

Records Relevant to Complaint: Copy of an audio recording of the March 5, 2013, City of Orange (“City”) Council meeting provided on the flash drive submitted with the request.

Custodian of Record: Margaret Homere

Request Received by Custodian: March 19, 2013

Response Made by Custodian: March 22, 2013

GRC Complaint Received: March 25, 2013

Background³

Request and Response:

On March 19, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 22, 2013, the Custodian responded in writing offering the responsive record on a CD for \$10.00 because of security concerns of using an outside flash drive on a City computer. On March 25, 2013, the Custodian’s Counsel received legal advice from outside counsel stating that a record must be produced in the medium requested or some other meaningful medium and that production must represent the “actual cost” to produce same.

On March 29, 2013, the Complainant disputed the proposed cost and stated that she may withdraw her denial of access complaint if an agreement regarding the cost was reached. On April 8, 2013, the Custodian advised that although the City granted access to the responsive record on CD, the Complainant refused to accept same because of the proposed cost of \$10.00. The Custodian stated that the Complainant came to the City on April 2, 2013, and still refused to pay the amended cost of \$1.00.

¹ No legal representation listed on record.

² Represented by Dan Smith, Esq. (Orange, NJ).

³ 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.

Denial of Access Complaint:

On March 25, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputes the proposed fee of \$10.00 that the City charged to provide a copy of the responsive audio recording on a CD. The Complainant asserts that although she accepts the City’s concern with security as the reason for not copying the recording to her flash drive, \$10.00 is not the “actual cost” to provide her with a CD. N.J.S.A. 47:1A-5(b); N.J.S.A. 47:1A-5(d). The Complainant asserts that by comparison, Staples charges \$19.99 for a pack of 50 CDs, or about \$0.40 a CD.

Statement of Information:

On May 17, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on March 19, 2013 and responded on March 22, and April 8, 2013.

The Custodian contends that the Complainant was not denied access to the responsive records; rather, she declined to purchase a CD because of the proposed cost of \$10.00. The Custodian certifies that on April 2, 2013, the Complainant met with the original Custodian at which time the City reduced the cost to \$1.00; the Complainant also rejected this cost. The Custodian certifies that as of May 14, 2013, the City’s “actual cost” to provide a CD is \$0.54 based on receipts for recently purchased CDs. The Custodian certifies that the City will offer the Complainant the responsive CD for \$0.54.

Analysis⁴

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.

OPRA provides that a custodian may charge the “actual cost” for duplication of a record where the cost of duplication is not enumerated or exceeds the cost set forth in the statute. N.J.S.A. 47:1A-5(b). OPRA further allows a custodian to charge the “*actual cost* of any supplies such as *computer discs*.” Id. (emphasis added). The GRC has previously determined that a custodian’s failure to charge the “actual cost” for supplies such as CD’s and cassette tapes is a violation of OPRA. O’Shea v. Twp. of Vernon (Sussex), GRC Complaint No. 2007-207 (Interim Order dated March 26, 2008); Coulter v. Twp. of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009).

⁴ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

Here, the Custodian initially charged \$10.00 for duplication of a CD and then subsequently lowered the cost to \$1.00. However, the Custodian certified that the calculated “actual cost” per CD is \$0.54, and that she would offer the responsive record to the Complainant at this cost. The Custodian provided receipts from the City’s purchase of CDs to confirm that \$0.54 represented the “actual cost” the City paid for the CDs. Further, although the Custodian certified that she would offer the CD to the Complainant at \$0.54, it is unclear whether the Complainant paid for and received the recording on CD.

Therefore, the Custodian failed to bear her burden of proving that \$10.00 or \$1.00 represented the “actual cost” to provide the Complainant with the responsive recording on a CD. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(b); O’Shea, GRC 2007-207; Coulter, GRC 2008-220. Thus, the Custodian must disclose to the Complainant the responsive recording on CD upon payment of \$0.54. Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006); Ortiz v. NJ Dep’t of Corrections, GRC Complaint No. 2007-101 (November 2008). If the Custodian already provided the responsive record to the Complainant, she must certify to this fact.

Knowing & 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 failed to bear her burden of proving that \$10.00 or \$1.00 represented the “actual cost” to provide the Complainant with the responsive recording on a CD. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(b); O’Shea v. Twp. of Vernon (Sussex), GRC Complaint No. 2007-207 (Interim Order dated March 26, 2008); Coulter v. Twp of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009). Thus, the Custodian must disclose to the Complainant the responsive recording on CD upon payment of \$0.54. Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006); Ortiz v. NJ Dep’t of Corrections, GRC Complaint No. 2007-101 (November 2008). If the Custodian already provided the responsive record to the Complainant, she must certify to this fact.
2. **The Custodian shall comply with item No. 1 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 1:4-4,⁵ to the Executive Director.⁶**

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⁶ 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

3. 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: Brandon D. Minde, Esq.
Executive Director

October 22, 2013

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.

Katalin Gordon v. City of Orange (Essex), 2013-95 – Findings and Recommendations of the Executive Director