



THE OPRA ALERT

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MUNICIPAL ORDINANCES FOR SPECIAL SERVICES CHARGES - ARE THEY NEEDED?

In recent days, the GRC has been asked by news reporters and has also received correspondence directly from Borough Attorneys regarding the proliferation of municipal ordinances delineating special service charges under OPRA.

First, it should be noted that as a matter of law, a state statute such as the New Jersey Open Public Records Act (N.J.S.A. 47:1A-1 et seq.) supersedes a municipal ordinance (meaning OPRA is controlling over an ordinance).

Second, it should be further noted that there is no requirement under OPRA that municipalities create ordinances to establish what municipalities are charging as special service charges.

Admittedly, the statutory language in OPRA at N.J.S.A. 47:1A-5.c. is confusing where it states "that in the case of a municipality, rates for the duplication of particular records **when the actual cost of copying exceeds the foregoing rates** shall be established in advance by ordinance." However, the only "**foregoing rates**" in OPRA as referenced in N.J.S.A. 47:1A-5.c. actually appear in N.J.S.A. 47:1A-5.b. with the enumeration of copy fees for "paper copies."

*** Please note that a municipal ordinance is not the "regulation" described in N.J.S.A. 47:1A-5.b. as following: "... 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 duplication the record..." Despite the definition of an

ordinance in N.J.S.A. 40:49-1, the regulation referred to in OPRA is not a municipal ordinance.

Third, the GRC has a long standing precedent of relying on the Law Division of the New Jersey Superior Court's interpretation of the special service charge provision in OPRA in its decision in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). In that decision, the Court determined that what constitutes an "extraordinary expenditure of time and effort" (the requirement under OPRA for assessing a special service charge) must be made on a **case by case basis** and requires an analysis of a variety of factors. The GRC fashioned these factors as questions a Records Custodian must answer for him- or her-self each time he or she believes a special service charge is warranted. See the Special Service Charge handout on the next page. The GRC's reliance on this court decision was affirmed by the Appellate Division of the New Jersey Superior Court in Janon Fisher v. Division of Law, 400 N.J.Super. 61 (App. Div. 2008).

Fourth and lastly, in recent years the Appellate Division of the New Jersey Superior Court ruled that a \$55 fee charged for conversion to a computer diskette of meeting minutes was both excessive and unreasonable under OPRA. Libertarian Party of Central New Jersey v. Township of Edison (Murphy), 384 N.J. Super. 136 (App.Div. 2006). The court stated that "the only discernable rationale for the fee is to discourage the public from requesting the information in this format. Such a policy is not legally



The Third Edition of the Handbook for Records Custodians is now available!

To access a copy, go to www.nj.gov/grc and click on "OPRA for Records Custodians" then click on "Custodian's Handbook."

A new version of the Model Request Form is also available!

To access a copy, go to www.nj.gov/grc and click on "OPRA for Records Custodians" then click on "Model OPRA Request Form."

All public agencies are encouraged to adopt the Model Request Form.

SPECIAL SERVICES CHARGES CONT'D

sustainable.” Further, the court noted that “[t]he 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. ...”

Instead of establishing special service charges by ordinance, municipal Records Custodians should review the GRC's analysis of special service charges below and use this analytical framework whenever a special service charge is believed to be warranted. And, remember that no special service charge may be set by a municipal ordinance since as the Court stated in The Courier Post decision - what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a **case by case basis** and requires an analysis of a variety of factors.

Please also remember that before a Records Custodian incurs a special service charge, “the requestor shall have the opportunity to review and object to the charge prior to it being incurred.” N.J.S.A. 47:1A-5.c.

GRC ANALYSIS OF SPECIAL SERVICE CHARGES (INCLUDING MEDIUM CONVERSION COSTS)

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.

The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of a variety of factors. These factors were discussed in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. *Id.* at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. *Id.*

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian's time was reasonable and consistent with N.J.S.A. 47:1A-5.c. *Id.* at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA:

- The volume of government records involved;
- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying;
- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

SPECIAL SERVICE CHARGE ANALYSIS CONT'D

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

Recognizing that many different variables may affect a determination of whether a special service charge is reasonable and warranted, the GRC established an analytical framework for situations which may warrant an assessment of a special service charge. This framework incorporates the factors identified in the Courier Post case, as well as additional relevant factors. For the GRC to determine when and whether a special service charge is reasonable and warranted, a Custodian must provide a response to the following questions:

1. What records are requested?
2. Give a general nature description and number of the government records requested.
3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?
13. What is the availability of information technology and copying capabilities?
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

ADDITIONAL OPRA RESOURCES

The following additional resources are located on the GRC's website at <http://www.nj.gov/grc/meetings/present>:

Readable Version of OPRA
OPRA PowerPoint Presentation
Exemptions in OPRA Handout
Special Service Charge Handout
Useful OPRA Cases by Subject
E-Mail Retention—DARM Circular

The Government Records Council (GRC) is committed to making the Open Public Records Act (OPRA) work for the citizens of New Jersey. Since the law's inception, the GRC has worked hard to make government records more easily accessible to the public. The GRC is committed to being the facilitator of open government in New Jersey.

Created under OPRA, the Government Records Council:

- Responds to inquiries and complaints about the law from the public and public agency records custodians
- Issues public information about the law and services provided by the Council
- Maintains a toll-free help-line and Web site to assist the public and records custodians
- Issues advisory opinions on the accessibility of government records
- Delivers training on the law
- Provides mediation of disputes about access to government records
- Resolves disputes regarding access to government records



STATE OF NEW JERSEY

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If you have a question regarding the Open Public Records Act, contact the [GRC information line](#) toll free at 1-866-850-0511 or grc@dca.state.nj.us