



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER SUSAN BASS LEVIN
ACTING COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

November 15, 2006 Government Records Council Meeting

Cynthia McBride
Complainant

Complaint No. 2005-86

v.

Township of Hamilton
Custodian of Record

At the November 15, 2006 public meeting, the Government Records Council (“Council”) considered the November 8, 2006 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 the parties have complied with the Council’s September 21, 2006 Interim Order.

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 15th Day of November, 2006

Vincent P. Maltese, Chairman
Government Records Council



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

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: November 21, 2006

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 15, 2006 Council Meeting**

**Cynthia McBride¹
Complainant**

GRC Complaint No. 2005-86

v.

**Township of Hamilton²
Custodian of Records**

An electronic copy of various municipal real estate tax records including the billing, payment, property identification, property location, deductions and lien information from the Township of Hamilton.

[It appears that the Complainant's company (Data Trace) partnered with Edmunds & Associates, Inc. (a company that creates computer software for the electronic maintenance and recording of municipal real estate tax records which is utilized by many municipalities in New Jersey) to create a software "bridge" allowing the easy export of these electronic municipal real estate tax records from the existing Edmunds' systems maintained by the municipalities to Data Trace's system. Additionally, it appears that at some time in the past, the Township of Hamilton's Tax Collector added the software bridge to her computer system to accommodate OPRA requests from Data Trace for the exact records subject to this complaint.]

Request Made: April 7, 2005

Response Made: April 12, 2005

Custodian: Joan Anderson (Municipal Clerk) and Renee DeSalvo (Tax Collector)

GRC Complaint Filed: April 28, 2005

Background

September 21, 2006

Government Records Council's ("Council") Interim Order. At its September 21, 2006 public meeting, the Council considered the September 13, 2006 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 denial of access on the ninth business day after receiving the request is a violation of OPRA. Therefore, the Custodian has unlawfully denied access to the requested records in electronic format pursuant to N.J.S.A. 47:1A-5.i.

¹ Complainant represented by Yianni Pantis, Esq., an out-of-state attorney working in association with Ms. Mary Kay Roberts, Esq. of Riker, Danzig, Scherer, Hyland & Perretti LLP (Trenton, NJ).

² No legal representation on record.

2. Since the Custodian has admitted to maintaining the requested record in the medium requested, it is clear that the Custodian is required to provide a copy of the requested record in such medium pursuant to N.J.S.A. 47:1A-5.d. As such, the Custodian has violated OPRA by refusing to give the Complainant the requested electronic file copy which the Custodian does maintain pursuant to N.J.S.A. 47:1A-5.d. The Custodian's offer of providing the Complainant the requested records in paper format in lieu of the requested electronic file maintained by the Custodian is not acceptable under OPRA.
3. The Custodian's assertion that exempt information must be redacted is correct. However, the Custodian unlawfully denied access to the requested records when those records were not made available to the Complainant with the appropriate redactions pursuant to N.J.S.A. 47:1A-5.g.
4. If there is any information in the requested records requiring redaction due to the exemption from disclosure for advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., then such redactions should be made before providing the records to the Complainant. The Custodian should make the redactions in accordance with the legal standard set forth in OPRA and by the Courts.

The Custodian shall disclose such records within a reasonable time given the volume of the records requested not to exceed twenty (20) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of such disclosure to the Executive Director. [This Order will become effective after the GRC approves the special service charge assessed by the Custodian in #6 below.]

5. The Custodian's assertions that disclosing the requested record in electronic format results in discriminatory information sharing in violation of a formal opinion written by the New Jersey Tax Collectors Association and that the value of the records to the Complainant (in terms of the revenue the Complainant may receive by selling the records to its commercial costumers) requires the Custodian to auction the records to the highest bidder to ensure that the municipality receives fair compensation for its assets pursuant to N.J.S.A. 40A:11-36 are misplaced in reference to the Custodian's legal obligations under OPRA.
6. Pursuant to N.J.S.A. 47:1A-5.c. and Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), the Custodian must bear the burden of proving that a special service charge is warranted in this case. However, the special service charge should only reflect the hours spent reviewing the records for exempt information and the hourly rate (minus the fringe benefits) of appropriate personnel utilized.

The Custodian shall within ten (15) business days from receipt of the Council's Interim Order:

- (a) provide the GRC with the amount of the special service charge assessed and answers to the fourteen (14) questions the GRC uses to evaluate a special service charge as established in Janon Fisher v. Division of Law & Public Safety, GRC Complaint No. 2004-55 (December 2004);
 - (b) offer the Complainant the opportunity to review and object to the charge prior to it being incurred pursuant to N.J.S.A. 47:1A-5.c.; and
 - (c) release the requested records with the appropriate redactions made if the Complainant agrees to the special service charge assessed.
7. The Custodian should provide the requested electronic file to the Complainant for the cost it originally determined as the duplication fee for the requested electronic record.

Please note that this cost is separate from the reasonable special service charge that may be charged by the Custodian for the extraordinary time and effort that may be determined as warranted for the review of the records contained in the electronic file to ensure that redactions are made for information exemption from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

8. Given the contested facts regarding this issue, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of the Act under the totality of the circumstances.
9. The Complainant's Counsel is required to submit to the GRC a written application for attorney's fees supported by an attorney affidavit of service pursuant to New Jersey Court Rule 4:42-9(b). The Complainant shall so comply within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director. The GRC reserves the right to make the determination on the issue of prevailing party attorney's fees after all other issues are resolved.

October 4, 2006

Council's Interim Order distributed to the parties.

October 17, 2006

Complainant's E-mail to the GRC. The Complainant e-mailed the Executive Director requesting a two (2) week extension for the parties to comply with the Council's Interim Order. Such request was granted.

October 25, 2006

Complainant's E-mail to the GRC. The Complainant e-mailed a joint certification signed by both parties that indicates:

- (1) the parties have met and have agreed on the time and manner of the provision of the requested records and all issues related thereto, including redaction and cost,
- (2) Complainant respectfully requests a dismissal of the knowing and willful count of the complaint (negating the need to refer the complaint to the Office of Administrative Law),
- (3) the parties have mutually agreed on a resolution concerning attorneys' fees (negating Complainant Counsel's need to submit an application for same to the GRC), and
- (4) the parties agreed on all other matters in dispute.

Analysis

Whether the Custodian complied with the Council's October 4, 2006 Interim Order?

Pursuant to the joint certification from the parties dated October 4, 2006, it may be determined that the parties have complied with the Council's September 21, 2006 Interim Order. Specifically, the parties have resolved all matters that were in dispute.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the parties have complied with the Council's September 21, 2006 Interim Order.

Prepared By:

Catherine Starghill, Esq.
Executive Director

November 8, 2006



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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

September 21, 2006 Government Records Council Meeting

Cynthia McBride
Complainant

Complaint No. 2005-86

v.

Township of Hamilton
Custodian of Record

At the September 21, 2006 public meeting, the Government Records Council ("Council") considered the September 13, 2006 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 with an amendment regarding the custodian's required response time to comply with the Council's Interim Order. The Council, therefore, finds that:

1. The denial of access on the ninth business day after receiving the request is a violation of OPRA. Therefore, the Custodian has unlawfully denied access to the requested records in electronic format pursuant to N.J.S.A. 47:1A-5.i.
2. Since the Custodian has admitted to maintaining the requested record in the medium requested, it is clear that the Custodian is required to provide a copy of the requested record in such medium pursuant to N.J.S.A. 47:1A-5.d. As such, the Custodian has violated OPRA by refusing to give the Complainant the requested electronic file copy which the Custodian does maintain pursuant to N.J.S.A. 47:1A-5.d. The Custodian's offer of providing the Complainant the requested records in paper format in lieu of the requested electronic file maintained by the Custodian is not acceptable under OPRA.
3. The Custodian's assertion that exempt information must be redacted is correct however the Custodian unlawfully denied access to the requested records when those records were not made available to the Complainant with the appropriate redactions pursuant to N.J.S.A. 47:1A-5.g.
4. If there is any information in the requested records requiring redaction due to the exemption from disclosure for advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., then such redactions should be made before providing the records to the Complainant. The Custodian should make



the redactions in accordance with the legal standard set forth in OPRA and by the Courts.

The Custodian shall disclose such records within a reasonable time given the volume of the records requested not to exceed twenty (20) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of such disclosure to the Executive Director. [This Order will become effective after the GRC approves the special service charge assessed by the Custodian in #6 below.]

5. The Custodian's assertions that disclosing the requested record in electronic format results in discriminatory information sharing in violation of a formal opinion written by the New Jersey Tax Collectors Association and that the value of the records to the Complainant (in terms of the revenue the Complainant may receive by selling the records to its commercial costumers) requires the Custodian to auction the records to the highest bidder to ensure that the municipality receives fair compensation for its assets pursuant to N.J.S.A. 40A:11-36 are misplaced in reference to the Custodian's legal obligations under OPRA.
6. Pursuant to N.J.S.A. 47:1A-5.c. and Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), the Custodian must borne the burden of proving that a special service charge is warranted in this case. However, the special service charge should only reflect the hours spent reviewing the records for exempt information and the hourly rate (minus the fringe benefits) of appropriate personnel utilized.

The Custodian shall within ten (15) business days from receipt of the Council's Interim Order:

- (a) **provide the GRC with the amount of the special service charge assessed and answers to the fourteen (14) questions the GRC uses to evaluate a special service charge as established in Janon Fisher v. Division of Law & Public Safety, GRC Complaint No. 2004-55 (December 2004);**
 - (b) **offer the Complainant the opportunity to review and object to the charge prior to it being incurred pursuant to N.J.S.A. 47:1A-5.c.; and**
 - (c) **release the requested records with the appropriate redactions made if the Complainant agrees to the special service charge assessed.**
7. The Custodian should provide the requested electronic file to the Complainant for the cost it originally determined as the duplication fee for the requested electronic record.

Please note that this cost is separate from the reasonable special service charge that may be charged by the Custodian for the extraordinary time and effort that may be determined as warranted for the review of the records contained in the electronic file to ensure that redactions are made for information exemption from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

8. Given the contested facts regarding this issue, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of the Act under the totality of the circumstances.
9. The Complainant's Counsel is required to submit to the GRC a written application for attorney's fees supported by an attorney affidavit of service pursuant to New Jersey Court Rule 4:42-9(b). The Complainant shall so comply within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director. The GRC reserves the right to make the determination on the issue of prevailing party attorney's fees after all other issues are resolved.

Interim Order Rendered by the
Government Records Council
On The 21st Day of September, 2006

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: October 4, 2006

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 21, 2006 Council Meeting**

**Cynthia McBride¹
Complainant**

GRC Complaint No. 2005-86

v.

**Township of Hamilton²
Custodian of Records**

Records Relevant to Complaint:

An electronic copy of various municipal real estate tax records including the billing, payment, property identification, property location, deductions and lien information from the Township of Hamilton.

[It appears that the Complainant's company (Data Trace) partnered with Edmunds & Associates, Inc. (a company that creates computer software for the electronic maintenance and recording of municipal real estate tax records which is utilized by many municipalities in New Jersey) to create a software "bridge" allowing the easy export of these electronic municipal real estate tax records from the existing Edmunds' systems maintained by the municipalities to Data Trace's system. Additionally, it appears that at some time in the past, the Township of Hamilton's Tax Collector added the software bridge to her computer system to accommodate OPRA requests from Data Trace for the exact records subject to this complaint.]

Request Made: April 7, 2005

Response Made: April 12, 2005

Custodian: Joan Anderson (Municipal Clerk) and Renee DeSalvo (Tax Collector)

GRC Complaint Filed: April 28, 2005

Background

April 7, 2005

Complainant's Open Public Records Act ("OPRA") Request. The Complainant requests an electronic copy of various municipal real estate tax records including the billing, payment, property identification, property location, deductions and lien information from the Township of Hamilton.

April 12, 2005

¹ Complainant represented by Yianni Pantis, Esq., an out-of-state attorney working in association with Ms. Mary Kay Roberts, Esq. of Riker, Danzig, Scherer, Hyland & Perretti LLP (Trenton, NJ).

² No legal representation on record.

Custodian's Initial Response to the OPRA Request. The Custodian (Tax Collector) e-mails the Complainant acknowledging receipt of the OPRA request within the seven (7) business days after the OPRA request and states that the fee for the electronic copy of the records requested is \$15.00. Further, the Custodian states that as soon as the check is received, the electronic file would be sent.

April 12, 2005

Complainant's E-mail to the Custodian. The Complainant states that her assistant could stop by the Custodian's office to add the computer software shortcut to the Custodian's computer desktop which will make transmitting the records electronically via e-mail a simple process. The Complainant explains that she [the Complainant] will be requesting these records under OPRA twice a week in the future and asked the Custodian if there were preferable days to make such OPRA request presumably to accommodate operational restraints in the Tax Collector's Office.

April 13, 2005

Custodian's Letter to the Complainant. The Custodian informs the Complainant that the check received for the requested records was being returned to the Complainant. The Custodian states that the Business Administrator directed the Custodian not to send the requested records (which were requested in electronic format) until the Business Administrator had an opportunity to review the electronic file to determine whether there was information contained therein requiring redaction and to determine the number of pages contained within the file. Further, the Custodian states that the Complainant would be charged for the number of pages contained in the electronic file in accordance with the Custodian's fee schedule (presumably the OPRA fees for paper copies of \$0.75/each for pages 1-10, \$0.50/each for pages 11-20 and \$0.25/each for pages 21 and more).

April 19, 2005

Complainant's E-mail to the Custodian. The Complainant states that she had not received the electronic file yet and asked the Custodian if there was a problem in fulfilling the OPRA request.

April 19, 2005

Complainant's Letter to the Custodian. The Complainant acknowledges receipt of the Custodian's April 13, 2006 letter. The Complainant requests clarification regarding why the electronic file was being reviewed to determine the number of pages contained therein and the anticipated determination of the charge for the request based on the number of pages provided in the electronic file. The Complainant states that she requested the records in the electronic format of the records maintained by the Custodian. As such, the Complainant asserts that the fees for paper copies do not apply to this request.

April 21, 2005

Custodian's E-mail to the Complainant. The Custodian reiterates that the Business Administrator directed the Custodian not to send the requested records (which were requested in electronic format) until the Business Administrator had an opportunity to review the electronic file. The Custodian states that there is a fee for preparing the electronic file for disclosure and that such fee was being determined based on the size of

the electronic file. Finally, the Custodian informs the Complainant that all future correspondence be directed to the Business Administrator.

April 21, 2005

Complainant's Letter to the Business Administrator. The Complainant asks the Business Administrator for information regarding the status of the request. The Complainant reiterates that the request was for an electronic file that may be easily exported (or e-mailed) via the computer software presently available on the Tax Collector's computer system. Further, the Complainant asserts that the electronic records requested are similar to the mortgage payment files that the Tax Collector creates and sends to several mortgage servicing agents. The Complainants states that the fee for this OPRA request should be comparable to the fee that another municipality (Township of Atlantic) is charging the Complainant for the same electronic data.

April 26, 2005

Complainant's Letter to the Business Administrator. The Complainant informs the Business Administrator that nine (9) business days have passed since she filed the OPRA request and the records have still not been provided. The Complainant requests a response to this letter and informs the Business Administrator that failure to communicate regarding this OPRA records request will be viewed as a denial of access.

April 26, 2005

Business Administrator's Denial of the OPRA Request. The Business Administrator acknowledges receipt of the OPRA request for an electronic file of the requested records which is maintained by the Custodian in such electronic format pursuant to the computer software utilized by the municipality and purchased from Edmunds.³ The Business Administrator refutes the Complainant's claim that the Custodian has not provided a response to the request given the verbal and written communication that has ensued between the Custodian and the Complainant. Further, the Business Administrator denied the request for the following reasons:

1. The electronic file required special knowledge to open and the Custodian was just able to open it yesterday for review of the file's content.
2. The information contained in the file is in a format not easily read and requires some study to determine if any information should be redacted due to the exemption from disclosure for advisory, consultative or deliberative material and the public's reasonable expectation of privacy.
3. The Custodian is required by OPRA to review all 3,399 pages contained in the file and redact all information that is exempt from disclosure as advisory, consultative or deliberative material and the public's reasonable expectation of privacy.
4. Based on the foregoing, the Township of Hamilton does not choose to provide tax information in this medium.

³ Again, Edmunds & Associates, Inc. is a company that creates computer software for the maintenance and recording of municipal real estate tax records. Many municipalities in New Jersey utilize the Edmunds' systems.

The Business Administrator went on to state that the requested records could be provided using the conventional methods of providing such tax records (in paper format).

April 28, 2005

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

1. April 7, 2005 – Complainant’s OPRA Records Request;
2. April 12, 2005 – Custodian’s Initial Response to the OPRA Request;
3. April 12, 2005 – Complainant’s E-mail to the Custodian;
4. April 13, 2005 – Custodian’s Letter to the Complainant;
5. April 19, 2005 – Complainant’s E-mail to the Custodian;
6. April 19, 2005 – Complainant’s Letter to the Custodian;
7. April 21, 2005 – Custodian’s E-mail to the Complainant;
8. April 21, 2005 – Complainant’s Letter to the Custodian;
9. April 26, 2005 – Complainant’s Letter to the Business Administrator; and
10. April 26, 2005 – Business Administrator’s Denial of Access to the OPRA Request.

The Complainant asserts that the requested record, in electronic format, qualifies as a government record under OPRA and there is no applicable exemption from disclosure under OPRA. Additionally, the Complainant asserts that the Custodian has been providing the identical records to the Complainant in paper format and that the Complainant is currently receiving the same records in electronic format from hundreds of other municipalities throughout New Jersey.

The Complainant also asserts that she is not asking the Custodian to perform a medium conversion since she is willing to accept the records in the electronic format routinely maintained by the Custodian. Further, the Complainant asserts that the Custodian has knowingly and willfully violated OPRA by denying the request in order to protect the Custodian’s revenue stream generated by charging the Complainant the OPRA copying rates for paper copies for the voluminous records request rather than charging the Complainant the actual cost of duplicating the records in electronic format which the Custodian originally stated was \$15.00.

May 2, 2005

Offer of Mediation sent to both parties.

May 3, 2005

Complainant’s Signed Mediation Agreement. The Complainant agreed to mediation.

May 10, 2005

Custodian’s Rejection of Mediation. The Custodian stated that she respectfully declined mediation despite the conversation she had with GRC staff.

May 10, 2005

GRC E-mail to the Custodian. GRC staff apologizes for the Custodian's misunderstanding of a prior telephone conversation in which staff cited prior decisions of the GRC in which the Complainant filed complaints and such complaints were administratively adjudicated because the parties settled and the Complainant received the records requested. Additionally, GRC staff states that every complaint is evaluated by the GRC on its own merits.

May 11, 2005

Custodian's Letter to the GRC. The Custodian declined mediation of this complaint.

May 11, 2005

Request for Statement of Information sent to the Custodian.

May 17, 2005

Custodian's Statement of Information ("SOI") with the following attachments:

1. April 7, 2005 – Complainant's OPRA Records Request;
2. April 12, 2005 – Custodian's Initial Response to the OPRA Request;
3. April 12, 2005 – Complainant's E-mail to the Custodian;
4. April 19, 2005 – Complainant's Letter to the Custodian;
5. April 21, 2005 – Complainant's Letter to the Custodian;
6. April 26, 2005 – Complainant's Letter to the Business Administrator;
7. April 26, 2005 – Business Administrator's Denial of Access to the OPRA Request;
8. April 28, 2005 – Complainant's Denial of Access Complaint (pages 3 and 4);
9. May 16, 2005 – Custodian's E-mail to the Business Administrator;
10. Three (3) example pages from the electronic file in question;
11. Printed photo of the pages contained in the electronic file in question spread on a conference room table;
12. New Jersey Tax Collectors' Association Opinion No. 2004-0002 entitled "Can A Municipality Allow An Outside Search Company Direct Access To Its Municipal Records?"; and
13. Various pages from Data Trace's website.

The Custodian asserts that the records request was denied for several reasons including because no one in the Tax Collector's Office could open the electronic file even with the assistance of Edmunds. Additionally, the Custodian asserts that Edmunds informed the Custodian that the electronic file could not be opened by the Custodian. The Custodian also asserts that when the Custodian was able to open the electronic file, with assistance from a previous Edmunds employee now employed by the Township of Hamilton, it was determined that the file contained 3,400 pages that is not in a format the Custodian uses and the records were not easy to read.

The Custodian further asserts that the records contained in the file have information that the Custodian is required under OPRA to redact due to the exemption from disclosure for advisory, consultative or deliberative material pursuant to N.J.S.A.

47:1A-1.1. The Custodian states that given the volume of the records contained in the electronic file and required to be reviewed for appropriate redactions, special accommodations (presumably a special service charge) are required.

Also, the Custodian asserts that the New Jersey Tax Collectors' Association Opinion No. 2004-0002 states that it is legal to provide tax information in electronic format, however it is not mandatory. Additionally, the Custodian reiterates the offer to provide the requested records using conventional methods. Further, the Custodian asserts that safeguards should be in place to ensure that the Complainant may only view the information and not alter it.

The Custodian states that the above-referenced Opinion mandates that if Tax Collectors participate in this type of information sharing, they do so in a nondiscriminatory manner. The Custodian asserts that the requested electronic file that the Complainant requested is only accessible to the Complainant and therefore cannot be provided to others in a nondiscriminatory manner.

Finally, the Custodian asserts that the Complainant is a commercial user of the records requested and that the Township of Hamilton may be required to auction these records to the highest bidder to ensure that it receives fair compensation for these "assets".

May 25, 2005

Letter of Representation from Yianni Pantis to the GRC. Mr. Pantis (an attorney barred out-of-state) indicates that he represents the Complainant *pro hac vice* pursuant to *N.J.A.C. 1:1-5.2*. Mr. Pantis is working in association with Ms. Mary Kay Roberts, Esq. of the New Jersey firm of Riker, Danzig, Scherer, Hyland & Perretti LLP (Trenton, NJ).

June 10, 2005

Complainant's Response to the Custodian's Statement of Information. The Complainant's Counsel rebuts the Custodian's reasons for denial as follows:

Reasons 1 & 2: *No one in the Custodian's office could initially open the requested electronic file and when opened, the information was not easily readable because the Custodian does not use the records in the format of the electronic file in question.*

The Complainant asserts that the Custodian was ultimately able to open the file and the fact that the Custodian does not "use" the records in the electronic format of the file is irrelevant. Counsel further asserts that the relevant issue for access to government records under OPRA (N.J.S.A. 47:1A-5.d.) is that the Custodian "maintain" the records in the electronic format requested. In this instance, the Custodian does in fact maintain the records in the electronic format requested by Complainant.

Reason 3: *When opened, the information contained information the Custodian is required to redact due to the exemption from disclosure for advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.*

The Complainant states that the redacted copies of a sampling of the records requested (included with the Custodian's Statement of Information) show only the loan numbers redacted. The Complainant asserts that the loan numbers appear on every recorded mortgage filed with the county clerk and is still thus a public record. Additionally, the Complainant asserts that she [the Complainant] routinely receives electronic copies of these records from other New Jersey jurisdictions without any redactions. Further, the Complainant asserts that the Custodian has never redacted any information on the same records provided to her [the Complainant] in paper format. Lastly, the Complainant asserts that the New Jersey Tax Collectors' Association Opinion No. 2004-0002 supports the fulfillment of this request in electronic format without any redactions specifically stating that there is nothing secretive about delinquencies as to a particular piece of real estate owned by an individual within any town. The Complainant further cited the opinion as stating that "there is nothing secretive about the information that would require a municipality to safeguard it from the public. Therefore, it is the opinion of the undersigned that search companies should continue to have access to information in the tax collector's office as they did prior to the enactment of the OPRA."

Reason 4: *The volume of records that require review for determination of redactions due to the exemption from disclosure for advisory, consultative or deliberative material is extraordinary and requires special accommodation.*

The Complainant asserts that no redactions are necessary as discussed above but even if there were, the Custodian cannot deny the entire request because redactions are necessary. The Complainant further asserts that OPRA requires the Custodian to fulfill the request with any necessary redactions pursuant to N.J.S.A. 47:1A-5.a.⁴

Reason 5: *According to the New Jersey Tax Collectors Association Opinion No. 2004-0002, it is legal to provide tax information in electronic format, but not mandatory, as long as a Tax Collector does so in a nondiscriminatory manner.*

The Complainant asserts that the New Jersey Tax Collectors Association Opinion No. 2004-0002 supports the fulfillment of this request in electronic format. Specifically, the Complainant asserts that the above-mentioned opinion discusses "direct access" to a municipality's records by tying in the requestor's computer to the municipality's computer through a separately installed computer software program.

Contrary to the "direct access" allowed pursuant to the above-mentioned opinion, the Complainant asserts that she simply wants the electronic file copy of the records requested e-mailed to her. Further, the Complainant asserts that if the Custodian were allowed to deny access to the requested records because no one other than the Complainant can open the electronic file in question, then there would be absolutely no right of access to public records.

Reason 6: *The Township must auction the requested public records to the highest bidder to ensure that the Township receives fair compensation for such assets.*

⁴ N.J.S.A. 47:1A-5.a. provides that "... [p]rior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security number, credit card number, unlisted telephone number, or driver license number of any person ..."

The Complainant asserts that the true reason for the denial of this request from a commercial user like Data Trace is based on the Custodian's loss of anticipated revenue by disclosing the electronic file for \$15.00 versus charging the OPRA rates for paper copies of the voluminous request. The Complainant also asserts that the Custodian has no authority to discriminate on the basis of the requestor's intended use of public records. Additionally, the Complainant asserts that commercial requestors are members of the public and have the same rights under OPRA as all other requestors. Further, the Complainant asserts that the Custodian's portrayal of the requested records as "assets" that need to be sold to the highest bidder is frivolous and approaches bad faith. In fact, the Complainant asserts that these public records are owned by the people and not the Custodian. Lastly, the Complainant asserts that the above-mentioned opinion of the New Jersey Tax Collectors Association acknowledges that Tax Collectors should encourage requests similar to that of the Complainant because in the long run the municipalities will receive fewer requests⁵ for information and there will be no liability for misinformation with the reduction in certified searches requested of the same records.

July 6, 2005

Custodian's Response to the Complainant's Letter dated June 10, 2005. The Custodian responds to the Complainant's rebuttal of the reasons for denial as follows:

Reasons 1 & 2: No one in the Custodian's office could initially open the requested electronic file and when opened, the information was not easily readable because the Custodian does not use the records in the format of the electronic file in question.

The Custodian asserts that because the electronic file could not be easily opened and once opened could not be easily read since the data is in a format not compatible with the Custodian's word processing software nor can be duplicated for other members of the public if requested, fulfilling the request violates the basic tenant of OPRA which ensures the public's right of access be construed in the public's favor.

The Custodian also asserts that Data Trace surreptitiously installed the Edmunds' software that creates the bridge between the Custodian's tax records system with Data Trace's system. The Custodian asserts that he did not intend to allow a process that would gather all of the Township's tax data into one file so that only one commercial user could access the information thus resulting in a proprietary arrangement with Data Trace. Further, the Custodian asserts that Data Trace is using OPRA to champion its position as the sole beneficiary of the information while others who may wish to gain access to the data are discriminated against.

Reason 3: When opened, the information contained information the Custodian is required to redact due to the exemption from disclosure for advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

⁵ Presumably because the large search companies will make requests for the electronic files of all the tax records and the individual requestors will go to the search companies instead of all making individual requests of the municipalities.

The Custodian asserts that the staff of the Tax Collector's Office have included notes in the tax records which may refer to late payments, bounced checks, phone numbers (some unlisted) and loan numbers which are exempt from disclosure as advisory, consultative or deliberative material. Further, the Custodian states that the Township of Hamilton will not acquiesce to the request simply because other municipalities have done so. Lastly, the Custodian agrees with the Complainant's assertion that there have been no redactions to paper copies of the tax records provided to the Complainant in the past by the Custodian. However, the Custodian qualifies such agreement by asserting that those paper copies were not the entire tax record database and such database may require redactions or at least review to determine if redactions are necessary.

Reason 4: The volume of records that require review for determination of redactions due to the exemption from disclosure for advisory, consultative or deliberative material is extraordinary and requires special accommodation.

The Custodian asserts that this reason remains valid despite the Custodian's agreement that there have been no redactions to paper copies of the tax records provided to the Complainant in the past by the Custodian.

Reason 5: According to the New Jersey Tax Collectors Association Opinion No. 2004-0002, it is legal to provide tax information in electronic format, but not mandatory, as long as a Tax Collector does so in a nondiscriminatory manner.

The Custodian asserts that providing the requested records by conventional methods (i.e. paper copies) as done for the Complainant in the past is not a deviation from the above-mentioned opinion. Additionally, the Custodian asserts that providing the electronic file to the Complainant would be discriminatory toward all other requestors because the electronic file is only readable by Data Trace.

Reason 6: The Township must auction the requested public records to the highest bidder to ensure that the Township receives fair compensation for such assets.

The Custodian asserts the denial of the request was based in part on N.J.S.A. 40A:11-36 which requires the Custodian to sale personal property valued greater than \$2,500 to the highest bidder. The Custodian determines that the requested records are valued greater than \$2,500 because the estimated market value of the real estate tax searches Data Trace provides its consumers at \$20 – \$30/each for over 16,000 line items contained in the electronic file is far greater than \$2,500.

August 3, 2005

Letter from Custodian to the GRC with the following attachment:

- July 28, 2005 – Letter from the Atlantic County Tax Administrator to the all Atlantic County Tax Assessors.

The Custodian submits a copy of a letter from the Atlantic County Tax Administrator in which the Tax Administrator cautions County Tax Assessors about providing assessment

information in light of the alarming increase in identity theft. The Custodian asserts that this letter is corroborating evidence for the Custodian's denial of access due to the information that must be redacted as advisory, consultative, or deliberative material. Further, the Custodian asserts that the release of the entire database of tax information without first examining each record for information that is not considered public under OPRA and which may compromise a taxpayer's reasonable expectation of privacy (leading to identity theft) is contrary to the law.

August 23, 2005

Complainant's Response to the Custodian's Letters dated July 6 and August 3, 2005 with the following attachment:

- August 16, 2006 – Letter from Edmunds & Associates, Inc. to the Complainant.

The Complainant rebuts the Custodian's claims that releasing public assessment information (municipal real estate tax records) in electronic format (as opposed to paper format) will cause a myriad of problems, including identity theft. Specifically, the Complainant asserts that the enclosed letter from Edmunds explains that of the two comment/remark fields that exist in the requested tax records, only one (the smallest one containing two lines of twenty-five (25) characters) is accessible in the electronic file requested by the Complainant. The Complainant further asserts that the larger comment/remark field is only accessible to the Custodian. Lastly, the Complainant asserts that the Custodian would only enter confidential information in the larger comment/remark field that is only accessible by the Custodian and not included in the electronic file requested by the Complainant.

The Complainant requests that the GRC order:

1. the Custodian to provide the records requested in electronic format as requested for \$15.00 (which is the initial charge the Custodian stated); and
2. the Custodian to reimburse the Complainant for reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

Additionally, the Complainant requests that the GRC not accept any further submissions regarding this matter in an effort to expedite the GRC's decision in this matter.

August 29, 2005

Custodian's Response to the Complainant's Letters dated August 23, 2005. The Custodian asserts that his letter dated August 3, 2005 provides corroboration that local tax officials must be cautious when providing tax information to requestors. The Custodian also asserts that notes made by a Tax Collector on real estate tax records are clearly deliberative material and the Complainant's argument that such deliberative notes should be made in the larger comment/remark field of the records (which is not included in the electronic file requested by the Complainant) does not negate the necessity for the Custodian to review such records to determine that no deliberative material was also included in the smaller comment/remark field which is included in the electronic file in question thus requiring redactions.

Additionally the Custodian asserts that while the information previously provided to the Complainant in paper format had no information requiring redactions does not mean that there are no instances in which such records must be appropriately redacted. The Custodian further asserts that only an examination of each record can confirm that no redactions are required under OPRA.

Lastly, the Custodian asserts that the tax records constitute a database that is the property or an asset of the taxpayers which requires the Custodian to manage according to N.J.S.A. 40A:11-36 and auction the asset (i.e. the records) to the highest bidder.

Analysis

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 ... *The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested *if the public agency maintains the record in that medium...*” (Emphasis added.) N.J.S.A. 47:1A-5.d.

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 to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA also provides that:

“[i]f the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access *and shall promptly permit access to the remainder of the record...*” (Emphasis added.) N.J.S.A. 47:1A-5.g.

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.

In the complaint at hand, the Custodian initially responded to the Complainant within the seven (7) business days statutorily mandated under OPRA by indicating that access would be granted for a charge of \$15. Subsequently (one day later), the Custodian informed the Complainant that the check received for \$15 would be returned and that the Business Administrator needed to review the records contained in the electronic file to ensure that no information requiring redaction under OPRA due to the exemption from disclosure for advisory, consultative or deliberative material is contained therein. Further in this subsequent communication, the Custodian informed the Complainant that the charge for the records would be consistent with that for paper copies of records, instead of the electronic format charge previously stated as \$15.

The Custodian formally denied access to the request nine (9) business days after receiving it for the reasons asserted above and because the Custodian asserts that disclosing the requested record in electronic format results in discriminatory information sharing in violation of a formal opinion written by the New Jersey Tax Collectors Association and that the value of the records to the Complainant (in terms of the revenue the Complainant may receive by selling the records to its commercial costumers) requires that the Custodian auction the records to the highest bidder to ensure that the municipality receives fair compensation for its assets.

The Complainant asserts that the requested record, in electronic format, qualifies as a government record under OPRA and there is no applicable exemption from disclosure under OPRA. Additionally, the Complainant asserts that the Custodian has been providing the identical records to the Complainant in paper format without any redactions for information exempt from disclosure as advisory, consultative or deliberative material and that the Complainant is currently receiving the same unredacted records in electronic format from hundreds of other municipalities throughout New Jersey.

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. 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.

Timeliness & Medium Requested

OPRA also provides that unless a shorter time period is otherwise provided by statute, regulation, or executive order, *a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request.* N.J.S.A. 47:1A-5.i. While the Custodian did initially grant access to the Complainant within the statutorily mandated seven (7) business days, the Custodian then subsequently denied access on the ninth business day after receiving the request. This denial of access on the ninth business day after receiving the request is a violation of OPRA. Therefore, the Custodian has unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-5.i.

Additionally, OPRA provides that a custodian shall permit access to a government record and provide a copy thereof *in the medium requested if the public agency maintains the record in that medium.* N.J.S.A. 47:1A-5.d. Since the Custodian has admitted to maintaining the requested record in the medium requested, it is clear that the Custodian is required to provide a copy of the requested record in such medium pursuant to N.J.S.A. 47:1A-5.d. As such, the Custodian has violated OPRA by refusing to give the Complainant the requested electronic file copy which the Custodian does maintain pursuant to N.J.S.A. 47:1A-5.d. The Custodian's offer of providing the Complainant the requested records in paper format in lieu of the requested electronic file maintained by the Custodian is not acceptable under OPRA.

Redactions

The exclusion from the definition of a government record under OPRA for information that is advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., and thus the Custodian's requirement to redact the same is not a lawful basis for denying access to the *entire record* pursuant to N.J.S.A. 47:1A-5.g. The Custodian's assertion that exempt information must be redacted is correct however the Custodian unlawfully denied access to the requested records when those records were not made available to the Complainant with the appropriate redactions pursuant to N.J.S.A. 47:1A-5.g. It is unclear however why there would be any redactions necessary to the requested records when even the New Jersey Tax Collectors Association proclaims that "there is nothing secretive or confidential about delinquencies as to a particular piece of real estate owned by an individual within any town. Therefore, this information is a public record which can be accessed by anyone from the general public."⁶

In any event, if there is any information in the requested records requiring redaction due to the exemption from disclosure for advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., then such redactions should be made before providing the records to the Complainant. The Custodian should make the redactions in accordance with the legal standard set forth in OPRA and by the Courts.

⁶ New Jersey Tax Collectors Association, Opinion No. 2004-0002 "Can A Municipality Allow An Outside Search Company Direct Access To Its Municipal Records?", Keith A. Bonchi, Associate Counsel. Cynthia McBride v. Township of Hamilton, 2005-86 – Findings and Recommendations of the Executive Director

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude, from the definition of a government record, the types of documents that are the subject of the “deliberative process privilege.” That privilege has long been recognized by federal courts. *See Kaiser Alum. & Chem. Corp. v. United States*, 157 F. Supp. 939 (1958); *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 150 (1975). It has also been codified in the federal Freedom of Information Act (“FOIA”). 5 U.S.C. §552(b)(5). Most recently, the New Jersey Supreme Court adopted the privilege. *In re Liquidation of Integrity Insurance Co.*, 165 N.J. 75 (2000).

The judiciary set forth the legal standard for applying the deliberative process privilege as follows⁷:

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
 - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
 - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
 - c. Deliberative materials do not include purely factual materials.
 - d. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
 - e. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.
 - f. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.
 - g. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency*.

Discriminatory Information Sharing & Auctioning of Government Records

Lastly, the Custodian’s assertions that disclosing the requested record in electronic format results in discriminatory information sharing in violation of a formal

⁷ *In re Liquidation of Integrity Insurance Co.*, 165 N.J. 75 (2000).

opinion written by the New Jersey Tax Collectors Association and that the value of the records to the Complainant (in terms of the revenue the Complainant may receive by selling the records to its commercial costumers) requires the Custodian to auction the records to the highest bidder to ensure that the municipality receives fair compensation for its assets pursuant to N.J.S.A. 40A:11-36 are misplaced in reference to the Custodian's legal obligations under OPRA.

OPRA clearly states in its Legislative findings that “government records shall be readily accessible for inspection, copying, or examination by the citizens of the State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by [OPRA] shall be construed in favor of the public's right of access...” N.J.S.A. 47:1A-1. The Custodian's statutory mandate to provide records to a requestor in the medium requested does not appear to conflict with the New Jersey Tax Collectors Association directive not to engage in discriminatory information sharing. In this case, discriminatory information sharing would result if the Custodian refused to provide the same records to any other requestor. Even the Custodian does not refute that the same records, in a different format (i.e. paper copies), is currently being provided to other requestors including the Complainant. Therefore, the assertion that providing the requested records in the electronic format requested by the Complainant is discriminatory is misplaced.

Additionally, the Custodian's assertion that the value of the records to the Complainant (in terms of the revenue the Complainant may receive by selling the records to its commercial costumers) requires that the Custodian auction the records to the highest bidder to ensure that the municipality receives fair compensation for its assets pursuant to N.J.S.A. 40A:11-36 is also misplaced.

The New Jersey statute referenced by the Custodian as obliging him to auction government records is the local public contracts law and provides that “any contracting unit by resolution of its governing body may authorize by sealed bid or public auction the sale of its personal property not needed for public use.” N.J.S.A. 40A:11-36. While OPRA provides that other state statutes may supersede the access allowed under OPRA, the local public contracts law is not one of them since that law does not even address access to government records. Additionally, it is unlikely: (1) that government records could ever be deemed “personal property” of a municipality, (2) that government records is “not needed for public use”, or (3) that the Custodian could obtain a resolution from its governing body to authorize a public auction of the requested records. Thus, the local public contracts law cited by the Custodian as requiring the requested records be auctioned to the highest bidder is not applicable to the denial of access complaint now before the GRC.

Whether a special service charge is warranted to accommodate the Custodian's review of the requested records for required redactions of information exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.?

OPRA provides that:

“[w]henever the...volume of a government record embodied in the form of printed matter to be...copied pursuant to [OPRA] is such that the record...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...The requestor shall have the opportunity to review and object to the charge prior to it being incurred.” (Emphasis added.) N.J.S.A. 47:1A-5.c.

The Custodian asserts that “special accommodation” is required to review the asserted 3,400 pages contained in the electronic file requested to ensure that those records do not contain any information requiring redaction due to the exemption from disclosure for advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

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. The GRC has established criteria for evaluating a special service charge in Janon Fisher v. Division of Law and Public Safety, GRC Complaint No. 2004-55 (December 2004). In order for the GRC to determine whether a special service charge is warranted, the Custodian must provide a response to the following questions:

1. The volume, nature, size, number, of government records involved,
2. The period of time over which the records were received,
3. Whether some or all of the records sought are archived,
4. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying,
5. The amount of time, level, rate and number, if any required to be expended by government employees to monitor the inspection or examination, and,
6. The amount of time required to return documents to their original storage place,
7. The size of the agency,
8. The number of employees available to accommodate documents requests,
9. The availability of information technology and copying capabilities,
10. What was requested,
11. The level(s) of skill necessary to accommodate the request,
12. The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill above,
13. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents, and
14. Who in the agency will perform the work associated with each request?

In Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), the Appellate Division held that it would be appropriate to calculate the hourly wage rates of the clerical and professional staff involved in satisfying a request and multiplying those figures by the total hours spent, if the Custodian can prove that the professional level of human resource was needed to fulfill the request.

Therefore, pursuant to N.J.S.A. 47:1A-5.c. and Lenape, supra, the Custodian must borne the burden of proving that a special service charge is warranted in this case by providing responses to the questions listed above. However, the special service charge should only reflect the hours spent reviewing the records for exempt information and the hourly rate (minus the fringe benefits) of appropriate personnel utilized.

Whether the enumerated copying rates for paper copies provided in OPRA are applicable to this request?

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, or if a fee is not prescribed by law or regulation, upon payment of the *actual cost of duplicating the record*. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record *embodied in the form of printed matter* shall not exceed the following: first page to tenth page, \$0.75 per page; eleventh page to twentieth page, \$0.50 per page; all pages over twenty, \$0.25 per page. *Actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c.* [concerning special service charges]. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.” (Emphasis added.) N.J.S.A. 47:1A-5.b.

Initially, the Custodian informed the Complainant that the charge for the requested electronic file copy of the records would be \$15. Later, the Custodian asserts that the enumerated copying rates for government records “embodied in the form of printed matter” pursuant to N.J.S.A. 47:1A-5.b. will be used as the charge for the requested records in electronic format. The Complainant, in turn, asserts that the charge for the requested electronic file should be the \$15 originally determined by the Custodian and that the enumerated copying rates provided in OPRA for paper copies do not apply to this request.

While OPRA provides that paper copies of government records may be obtained upon payment of the actual cost of duplication not to exceed the enumerated rates of \$0.75/0.50/0.25 per page (N.J.S.A. 47:1A-5.b.), the Act does not provide explicit copy rates for any other medium. In Libertarian Party of Central New Jersey and John T. Paff v. Township of Edison, 384 N.J. Super. 136 (App. Div., March 2006), the plaintiffs argued that the copying fee of \$55 for the requested record (Council meeting minutes on CD-Rom) was unreasonable and did not reflect the municipality's actual cost to duplicate the records in violation of N.J.S.A. 47:1A-5.b. The appellate court agreed. That court held that as it was undisputed that the actual cost of the diskette requested was far less than \$55 charged by the custodian in accordance with a municipal ordinance, the only discernable rationale for the fee was to discourage the public from requesting the

information in this format. Such a policy was not legally sustainable. The court further held that the imposition of a facially inordinate fee placed an unreasonable burden on the right of access guaranteed by OPRA, and violated the principle set by N.J.S.A. 47:1A-5.b. that the fee should reflect actual cost of duplication.

The actual cost of providing the Complainant with the requested *electronic* file that is admittedly maintained by the Custodian is definitely not the enumerated copying rates for paper copies provided in OPRA and is probably less than the \$15 originally determined by the Custodian and in fact had previously mailed a check to the Custodian for that amount. However, the Complainant has not objected to the \$15 cost originally determined by the Custodian. Therefore, the Custodian should provide the requested electronic file to the Complainant for the cost it originally determined as the duplication fee for the requested electronic record.

Please note that this cost is separate from the reasonable special service charge that may be charged by the Custodian for the extraordinary time and effort that may be determined as warranted for the review of the records contained in the electronic file to ensure that redactions are made for information exemption from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

Whether the Custodian’s delay in access to the requested contracts rises 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.

The Complainant asserts that the Custodian has knowingly and willfully violated OPRA by denying the request in order to protect the Custodian’s revenue stream generated by charging the Complainant the OPRA copying rates for paper copies for the voluminous records request rather than charging the Complainant the actual cost of duplicating the records in electronic format which the Custodian originally stated was \$15.00.

The Custodian asserts that the records request was denied for several reasons including because no one in the Tax Collector’s Office could open the electronic file even

with the assistance of Edmunds. Additionally, the Custodian asserts that Edmunds informed the Custodian that the electronic file could not be opened by the Custodian. The Custodian also asserts that when the Custodian was able to open the electronic file, with assistance from a previous Edmunds employee now employed by the Township of Hamilton, it was determined that the file contained 3,400 pages that is not in a format the Custodian uses and the records were not easy to read.

The Custodian further asserts that the records contained in the file have information that the Custodian is required under OPRA to redact due to the exemption from disclosure for advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. The Custodian states that given the volume of the records contained in the electronic file and required to be reviewed for appropriate redactions, special accommodations (presumably a special service charge) are required.

Also, the Custodian asserts that the New Jersey Tax Collectors' Association Opinion No. 2004-0002 states that it is legal to provide tax information in electronic format, however it is not mandatory. Additionally, the Custodian reiterates the offer to provide the requested records using conventional methods. Further, the Custodian asserts that safeguards should be in place to ensure that the Complainant may only view the information and not alter it.

The Custodian states that the above-referenced Opinion mandates that if Tax Collectors participate in this type of information sharing, they do so in a nondiscriminatory manner. The Custodian asserts that the requested electronic file that the Complainant requested is only accessible to the Complainant and therefore cannot be provided to others in a nondiscriminatory manner.

Finally, the Custodian asserts that the Complainant is a commercial user of the records requested and that the Township of Hamilton may be required to auction these records to the highest bidder to ensure that it receives fair compensation for these "assets".

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 at 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 (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 (App. Div. 1996) at 107).

Given the contested facts regarding this issue, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not

merely negligent, heedless or unintentional. As such, the case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of the Act under the totality of the circumstances.

Whether the Complainant is entitled to prevailing party attorney's fees under OPRA?

OPRA provides that:

“... [i]f it is determined that access has been improperly denied, the court or agency [GRC] head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

New Jersey adheres to the strong policy that each litigant bears his own counsel fees, except in those situations specifically designated by statute or court rule. In re Niles, 176 N.J. 282, 293-94 (2003); North Bergen Rex Transport v. TLC, 158 N.J. 561, 569 (1999). OPRA contains such an exception to the general rule; it provides that a "requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6 and 47:1A-7.f.

OPRA permits a requestor to challenge a custodian's denial of access by filing a complaint with either the Superior Court or the GRC. N.J.S.A. 47:1A-6. This section of the statute further states “[i]f it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to reasonable attorneys fees.” *Id.*

The following section of OPRA sets forth the authority of the GRC. After expressly empowering the GRC to render final decisions regarding access to a record, N.J.S.A. 47:1A-7.e., the statute reiterates that a requestor who prevails in a GRC proceeding is entitled to a reasonable attorney's fee. N.J.S.A. 47:1A-7.f.

It is significant that the statutory authorization for attorney's fee awards immediately follows the sentence which provides that a court or the GRC shall issue an order requiring access if it determines that access has been improperly denied. N.J.S.A. 47:1A-6. This indicates an intent to link the two concepts. Nothing else in the statute suggests a contrary intent. Fee-shifting statutory provisions are strictly construed “in light of the general policy disfavoring the award of attorney's fee.” North Bergen Rex Transport, supra, 158 N.J. at 570. Accordingly, we construe OPRA as permitting an attorney's fees award only in cases where the GRC has issued an order determining that access was improperly denied.

In the instant complaint, the Complainant's Counsel is required to submit to the GRC a written application for attorney's fees supported by an attorney affidavit of service pursuant to New Jersey Court Rule 4:42-9(b). The application should include, but not be limited to, a detailed description of the services rendered with the corresponding time expended for each service. Additionally, the GRC requests copies of weekly time sheets for each attorney or other staff in 0.1 time increments (6 minutes) and evidence that the rates charged are in accordance with prevailing market rates in the

relevant legal community. The GRC will then review that application to determine whether the fees requested are reasonable pursuant to OPRA. The GRC reserves the right to make the determination on the issue of prevailing party attorney's fees after all other issues are resolved.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The denial of access on the ninth business day after receiving the request is a violation of OPRA. Therefore, the Custodian has unlawfully denied access to the requested records in electronic format pursuant to N.J.S.A. 47:1A-5.i.
2. Since the Custodian has admitted to maintaining the requested record in the medium requested, it is clear that the Custodian is required to provide a copy of the requested record in such medium pursuant to N.J.S.A. 47:1A-5.d. As such, the Custodian has violated OPRA by refusing to give the Complainant the requested electronic file copy which the Custodian does maintain pursuant to N.J.S.A. 47:1A-5.d. The Custodian's offer of providing the Complainant the requested records in paper format in lieu of the requested electronic file maintained by the Custodian is not acceptable under OPRA.
3. The Custodian's assertion that exempt information must be redacted is correct however the Custodian unlawfully denied access to the requested records when those records were not made available to the Complainant with the appropriate redactions pursuant to N.J.S.A. 47:1A-5.g.
4. If there is any information in the requested records requiring redaction due to the exemption from disclosure for advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., then such redactions should be made before providing the records to the Complainant. The Custodian should make the redactions in accordance with the legal standard set forth in OPRA and by the Courts.

The Custodian shall disclose such records within a reasonable time given the volume of the records requested not to exceed twenty (20) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of such disclosure to the Executive Director. [This Order will become effective after the GRC approves the special service charge assessed by the Custodian in #6 below.]

5. The Custodian's assertions that disclosing the requested record in electronic format results in discriminatory information sharing in violation of a formal opinion written by the New Jersey Tax Collectors Association and that the value of the records to the Complainant (in terms of the revenue the Complainant may receive by selling the records to its commercial costumers) requires the Custodian to auction the records to the highest bidder to ensure that the municipality receives fair compensation for its assets pursuant to

N.J.S.A. 40A:11-36 are misplaced in reference to the Custodian's legal obligations under OPRA.

6. Pursuant to N.J.S.A. 47:1A-5.c. and Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), the Custodian must borne the burden of proving that a special service charge is warranted in this case. However, the special service charge should only reflect the hours spent reviewing the records for exempt information and the hourly rate (minus the fringe benefits) of appropriate personnel utilized.

The Custodian shall within ten (15) business days from receipt of the Council's Interim Order:

- (a) provide the GRC with the amount of the special service charge assessed and answers to the fourteen (14) questions the GRC uses to evaluate a special service charge as established in Janon Fisher v. Division of Law & Public Safety, GRC Complaint No. 2004-55 (December 2004);**
 - (b) offer the Complainant the opportunity to review and object to the charge prior to it being incurred pursuant to N.J.S.A. 47:1A-5.c.; and**
 - (c) release the requested records with the appropriate redactions made if the Complainant agrees to the special service charge assessed.**
7. The Custodian should provide the requested electronic file to the Complainant for the cost it originally determined as the duplication fee for the requested electronic record.

Please note that this cost is separate from the reasonable special service charge that may be charged by the Custodian for the extraordinary time and effort that may be determined as warranted for the review of the records contained in the electronic file to ensure that redactions are made for information exemption from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

8. Given the contested facts regarding this issue, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of the Act under the totality of the circumstances.
9. The Complainant's Counsel is required to submit to the GRC a written application for attorney's fees supported by an attorney affidavit of service pursuant to New Jersey Court Rule 4:42-9(b). The Complainant shall so comply within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the

Executive Director. The GRC reserves the right to make the determination on the issue of prevailing party attorney's fees after all other issues are resolved.

Prepared By:

Catherine Starghill, Esq.
Executive Director

September 13, 2006