



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

April 25, 2007 Government Records Council Meeting

Janet Hascup
Complainant

Complaint No. 2005-192

v.

Waldwick Board of Education
Custodian of Record

At the April 25, 2007 public meeting, the Government Records Council (“Council”) considered the April 18, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian violated N.J.S.A. 47:1A-5.e, N.J.S.A. 47:1A-5.g, and N.J.S.A. 47:1A-6 by failing to provide immediate access or an immediate response providing a lawful basis for denial of access to the requested budget, bills, vouchers and contracts pursuant to OPRA.
2. Pursuant to N.J.S.A. 47:1A-5.a., the Custodian did not violate OPRA when he refused to accommodate Complainant’s request to review the requested documents after regular business hours.
3. Consistent with the New Jersey Supreme Court’s holding in Moore v. The Board of Chosen Freeholders of the County of Mercer, 39 N.J. 26 (1962) and its progeny, the Custodian did not violate OPRA when he refused to accommodate Complainant’s request to use her personal copier to photocopy the requested records.
4. Pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority to regulate how a Custodian utilizes its legal representative in its response to a Denial of Access Complaint.
5. The Complainant is not entitled to a refund of the copying charges she paid to obtain the records pursuant to her OPRA request. The statutory copying fees stated in N.J.S.A. 47:1A-5.b apply.



6. Based on the Custodian's delay in providing an immediate response or immediate access to the requested bills, budget, vouchers and contracts, it is clear that the Custodian does not fully understand the legal requirements of OPRA to which he is statutorily mandated to adhere. Therefore, the Custodian's actions appear to be negligent and do not meet the legal standard of a knowing and willful violation of OPRA and unreasonable denial of access pursuant to N.J.S.A. 47:1A-11.a.

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 25th Day of April, 2007

David Fleisher, Vice Chairman
Government Records Council

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

Robin Berg Tabakin, Secretary
Government Records Council

Decision Distribution Date: May 1, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2007 Council Meeting**

**Janet Hascup¹
Complainant**

GRC Complaint No. 2005-192

v.

**Waldwick Township Board of Education²
Custodian of Records**

Records Relevant to Complaint:

Bookkeeping copy of the purchase order and any and all related cancelled checks showing expenditures from Board monies obtained as a result of the referendum voted on in 2002, including budgets, estimates, bills of third parties, purchase orders, invoices, summaries of expenditures for excess funds, vouchers, receipts, etc.³

Request Made: October 7, 2005

Response Made: October 17, 2005

Custodian: Anthony Miller⁴

GRC Complaint filed: October 20, 2005

Background

October 7, 2005⁵

Complainant's Open Public Records Act ("OPRA") request asking for the records listed above.

October 17, 2005

Custodian's response to the OPRA request six (6) business days following receipt of such request. The Custodian states that the agency is gathering and compiling the records requested and that the Complainant will be notified of the projected cost to fulfill the Complainant's request.

¹ No legal representation on record.

² Represented by Andrew Brown, Esq. of Schwartz, Simon, Edelstein, Celso & Kressler (Florham Park, NJ).

³ Original request was for "copies of each and every document showing expenditures from Board monies ... including budgets, estimates, bills of third parties, purchase orders, invoices, summaries of expenditures for excess funds, vouchers, receipts, etc," but the request was revised on December 7, 2005.

⁴ The Complainant lists Business Administrator John Griffin as the Custodian on the Denial of Access Complaint.

⁵ Complainant dated the request October 8, 2005, but the date stamp indicates the request was received October 7, 2005.

October 20, 2006

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

- Certified mail receipt dated October 7, 2005,
- Complainant’s OPRA request dated October 7, 2005, and
- Custodian’s response to the OPRA request dated October 17, 2005.

The Complainant alleges that the Custodian did not provide her with the requested records within the statutory time period pursuant to OPRA. The Complainant states that she called the Waldwick Board of Education (“Board”) on October 18, 2005 and was directed to speak with the Custodian, who informed the Complainant that the agency had sent the Complainant a letter⁶ in response to the OPRA request. The Complainant asserts that the Custodian also informed the Complainant of the contents of the letter. The Complainant states that she asked that the Superintendent of the agency call the Complainant regarding the OPRA request. The Complainant states that when she spoke with the Superintendent later on October 18, 2005, the Superintendent notified the Complainant that the person handling her request was out of the office and that an extensive amount of information existed in response to the OPRA request. The Complainant states that she told the Superintendent that the Board had violated OPRA because it had not provided documents to the Complainant in a timely manner. The Complainant asserts that the Superintendent told her the Board Attorney informed the agency that it had not violated OPRA because the agency had responded to the Complainant in writing regarding the request. The Complainant states that when she asked the Superintendent when the requested documents would be ready, the Superintendent informed the Complainant that they would be prepared “within reason.”

The Complainant states that the Superintendent called her on October 19, 2005 and informed her that the requested documents consisted of approximately 1,500 pages of information. The Complainant further states that the Superintendent offered her the opportunity to come to the agency to review the information. The Complainant states that she declined to review the documents, informed the Superintendent that she was willing to pay for photocopies of the records, and requested an estimate of the copying costs. The Complainant contends that the Superintendent told her that he would call her back with an estimate and never did so.

October 24, 2005

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

October 24, 2005

E-mail from the Complainant to the GRC. The Complainant states that the Board recently contacted her regarding the OPRA request. The Complainant states that the agency originally informed her that the requested information was contained in 1,500 documents. However, the Complainant states that the Custodian has since informed her that the Complainant’s requested records now consist of 3,500 documents.

⁶ Custodian’s response to the OPRA request dated October 17, 2005.

October 25, 2005

Letter from the Complainant to the GRC. The Complainant contends that while the Board has contacted the Complainant regarding her records request, she is concerned that the Custodian has informed her that the requested records consist of 3,500 documents. The Complainant states that there is a dramatic difference between this number and the original number of documents that the Custodian stated to the Complainant. The Complainant contends that the Custodian should make the documents available after the agency's normal business hours for review so that the Complainant does not have to take time off from work to go to the agency to review the requested records. Also, the Complainant contends that she would like the Custodian to allow the Complainant to bring her own copier so that she can avoid photocopying fees.

The Complainant states that it is her understanding that the Custodian has seven (7) business days to comply with a request for records. However, the Complainant did not hear from the agency until she called the Custodian on October 18, 2005 (the eighth (8th) business day after the Custodian's receipt of the OPRA request). The Complainant states that on October 19, 2005 she agreed to pay for the 1,500 copies and then was informed the next day that the number of documents actually amounted to 3,500 copies. The Complainant was offered the opportunity to review the documents during the agency's business hours.

November 1, 2005

Letter to the GRC from the Business Administrator John Griffin.⁷ Mr. Griffin indicates that the Custodian of Records is Board Secretary Anthony Miller.

November 1, 2005

Letter from the Custodian to the GRC. The Custodian states that the Board does not have a problem mediating this matter but does not feel that mediation is necessary. The Custodian indicates that the Board recognizes that the Complainant is entitled to the requested records, but the Board simply wants either to offer the Complainant the opportunity to view the documents without having to undertake the expense of copying them or a guarantee that the Complainant will pay for the copies. The Custodian states that the Complainant may either contact the Custodian to arrange a time to view the documents or provide a check for the copying costs so that the documents may be released to the Complainant.

November 2, 2005

Letter from the Custodian to the GRC in response to the Complainant's October 25, 2005 submission to the GRC. The Custodian asserts that he has not denied the Complainant access to the requested records and that the records are currently available. However, the Custodian further asserts that the Complainant has requested various accommodations so she can review the requested records at her convenience. The Custodian states that the first written request for records was submitted on or around October 8, 2005 and responded to on or around October 18, 2005. In response to the Complainant's concern regarding the discrepancy in the number of pages responsive to the request, the Custodian asserts that the Complainant was originally given an estimate

⁷ Inaccurately listed as the Custodian in the Denial of Access Complaint.

of 1,500 to 2,000 pages of documents responsive to the request and she was later given a detailed count of the documents, which actually encompassed 3,034 pages of correspondence, purchase orders and related documentation and 387 pages of bank statements and checks.

The Custodian also contends that the Complainant is requesting that the agency provide her with an opportunity to review the documents after the normal close of business. The Custodian asserts that pursuant to N.J.S.A. 47:1A-5.a, the Custodian shall permit the record to be inspected, examined, and copied by any person during regular business hours. Therefore, the Custodian contends that the public agency is not required to extend its hours to fulfill an OPRA request. The Custodian further asserts that to ask the Custodian to work overtime to accommodate the request would be unduly burdensome.

Additionally, the Custodian states that although the Complainant objects to the fees associated with this request, she is being charged only those fees provided for in N.J.S.A. 47:1A-5.b. The Custodian further states that the copying fees could be reduced if the Complainant came in to review the documents. The Custodian asserts that the agency is not comfortable allowing the Complainant to bring her own copier to photocopy the requested records due to potential safety and liability issues.

November 4, 2005

Letter from the Complainant to the GRC. The Complainant objects to the Custodian's use of an attorney to respond to the Denial of Access Complaint. Additionally, the Complainant would like the Custodian to explain what safety issues would arise by the Complainant's use of her own copier to photocopy the requested records. The Complainant further suggests having the Custodian escort the Complainant with all the paperwork off the Board's premises to use an outside office's copy machine as an alternative to the Complainant using her own copier. The Complainant also suggests that either the Custodian or other agency staff meet her at the office after business hours and allow her to bring a few people so that they can more quickly review the documents to determine which copies are needed.

November 9, 2005

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

November 15, 2005

Custodian's SOI⁸ with the following attachments:

- Complainant's OPRA request dated October 8, 2005;
- Letter from the Custodian's Counsel to the GRC dated November 2, 2005.

The Custodian states that the Complainant was informed on October 17, 2005 that her records request was being compiled and was subsequently notified on October 20, 2005, that about 3,500 documents were available for her review.

⁸ This document was not originally signed by the Custodian. A signed copy of this document was submitted to the GRC on March 16, 2006.

November 16, 2005

Letter from the Custodian to the GRC. The Custodian asserts that the Board has never disputed the Complainant's right to view or obtain copies of the requested records and that these records have been available at the office for the Complainant's review since October 20, 2005. The Custodian states that the Custodian first responded to the October 8, 2005 request in writing on October 17, 2005, six (6) business days after the Complainant's OPRA request.

The Custodian further asserts that there is no obligation for any staff member of the agency to meet the Complainant so the latter can review the requested records after the agency's regular business hours. Additionally, the Custodian contends that accommodating requests for access to documents after normal business hours would disrupt the agency's operations.

The Custodian alleges that there is no precedent for allowing a requestor to bring their own copy machine. The Custodian also asserts that since the Board would not be able to ensure the safety and energy concerns regarding this option, the Custodian must deny the Complainant's request to photocopy the requested records using her own copier.

December 7, 2005

Letter from the Custodian to the Complainant. The Custodian asserts that the Complainant has agreed to narrow the request for records to include only the bookkeeping copy of the purchase order and any and all related cancelled checks. The Custodian informs the Complainant that the estimated cost for photocopying the requested records is \$82.50.

December 18, 2005

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel states that the Complainant has picked up the documents identified in her revised OPRA request.

December 23, 2005

E-mail from the GRC to the Complainant. The GRC requests confirmation of receipt of the requested documents and asks the Complainant to advise as to how she would like to proceed with her complaint.

January 4, 2006

E-mail from the Complainant to the GRC. The Complainant states that she is in the process of reviewing the documents received and states that she will request further information from the Custodian regarding some questionable items.

January 25, 2006

E-mail from the GRC to the Complainant. The GRC asks the Complainant to inform the GRC as to which documents have been received, when they were received and the status of the records request.

January 26, 2006

E-mail from the Complainant to the GRC. The Complainant states that she has received her requested information and intends to look it over again.⁹ The Complainant states that if she needs additional information she will contact the Custodian again.

March 6, 2006

E-mail from the GRC to the Complainant. The GRC requests clarification as to whether or not the Complainant's request was satisfied.

March 6, 2006

E-mail response from the Complainant to the GRC. The Complainant states that she already informed the GRC as to whether or not the request was satisfied. The Complainant asserts that she does not know what else there is to proceed with but then goes on to assert that the information she requested was distributed to the public at a Board of Education meeting and she feels she should be refunded the copying charges she paid.

March 6, 2006

Letter from the GRC to the Custodian's Counsel. The GRC requests that the Custodian submit a legally certified index of all documents responsive to the request, indicating which documents have been disclosed and in the case of any documents being denied, indicate which exemption is being claimed and an explanation of how the claimed exemption applies to each document.

March 16, 2006

Custodian's certified response to the GRC's March 7, 2006 letter to the Custodian's Counsel with the following attachments:

- Complainant's OPRA request dated October 8, 2005;
- Custodian's response to the OPRA request dated October 17, 2005;
- Letter from the Custodian to the Complainant dated December 7, 2005,
- Index of documents provided to Complainant in response to OPRA request.

The Custodian certifies that he does not oppose the Complainant's right to receive or review the documents requested and that the Custodian has not denied the Complainant access to the requested records. The Custodian asserts that he notified the Complainant in writing on October 17, 2005 that the requested records were being gathered and compiled for the Complainant. Further, the Custodian asserts that the Complainant was notified on October 20, 2005 that the requested records were ready for the Complainant's review.

The Custodian contends that through a number of discussions between the Complainant and employees of the Board, it was determined that many of the documents originally requested contained duplicative information and the parties were able to

⁹ From the Complainant's response, it is unclear as to whether or not she believes that her request has been satisfied.

identify particular documents and records that would provide the Complainant with the information she needed. The Custodian asserts that he forwarded a letter to the Complainant on December 7, 2005 memorializing the clarification of her request, advising her that the documents requested were immediately available for her review and that the approximate cost of copies is \$82.50. The Custodian states that the Complainant picked up the copies around December 19, 2005 and all documents have been provided to the Complainant in response to her revised request.

Analysis

Whether the Custodian unlawfully denied access to the requested documents pursuant to N.J.S.A. 47:1A-1 et. seq.?

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.

OPRA also provides that:

“[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added). N.J.S.A. 47:1A-5.e.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but not later than seven business days after receiving the request ...” (Emphasis added). N.J.S.A. 47:1A-5.i.

Additionally, OPRA provides that:

“...If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor ...” N.J.S.A. 47:1A-5.g.

OPRA places the responsibility for proving a claimed exemption on the Custodian. N.J.S.A. 47:1A-6 states in relevant part:

“... [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 her October 7, 2005 OPRA request, the Complainant asks for copies of each and every document showing expenditures from Board monies obtained as a result of the referendum voted on in 2002, including budgets, estimates, bills of third parties, purchase

orders, invoices, summaries of expenditures for excess funds, vouchers, receipts, etc. The Custodian certifies that the Complainant was informed on October 17, 2005, six (6) business days after the OPRA request, that her records request was being compiled and that she would be advised of the copying costs upon completion of that task. The Custodian states the Complainant was then notified on October 20, 2005, nine (9) days after the OPRA request, that about 3,500 documents were available for her review.

OPRA requires that immediate access be provided to the records requested pursuant to N.J.S.A. 47:1A-5.e. Pursuant to N.J.S.A. 47:1A-5.i, the Custodian should have granted or denied access to the requested records no later than October 18, 2005. In his October 17, 2005 memorandum to Complainant, the Custodian failed to indicate a specific reason why he could not immediately comply with the Complainant's request for access. See N.J.S.A. 47:1A-5.g. If the Custodian required additional time beyond the seven (7) business day time period required by OPRA in order to satisfy the Complainant's request, he should have obtained a written agreement from the Complainant in order to do so. In Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian knew he needed additional time in order to respond to the Complainant's request, but failed to obtain a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA to respond. The Council held that the Custodian's failure to obtain a written agreement extending the seven (7) business day time period resulted in a "deemed" denial of the request.

The Custodian's response to Complainant on October 17, 2005 that the records were being compiled and she would be advised of copying costs does not satisfy the access requirements of OPRA. The Custodian has failed to support his burden of proving that the denial of access is authorized by law. N.J.S.A. 47:1A-6.

Therefore, at the time of the filing of this complaint, the Custodian violated N.J.S.A. 47:1A-5.e, N.J.S.A. 47:1A-5.g, and N.J.S.A. 47:1A-6 by failing to provide immediate access or an immediate response indicating a lawful basis for denial of access to the requested budget, bills, vouchers and contracts pursuant to OPRA.

Whether the Custodian violated OPRA when he refused to make the requested documents available for review after regular business hours?

OPRA specifies the times during which a Custodian must make records available to the public. Specifically, OPRA states:

“[t]he custodian of a government record shall permit the record to be inspected, examined, and copied by any person *during regular business hours...*” (Emphasis added.) N.J.S.A. 47:1A-5.a.

The Complainant asserts that the Custodian should have made the documents available to her after business hours for review so that she did not have to take time off from work to review the requested records. The Custodian contends that accommodating requests for access to documents after normal business hours would be unduly burdensome to the Board.

OPRA specifically states that a custodian is obligated to make records available during the *regular business hours* of the agency. As such, the Custodian is not obligated to make special accommodations for those individuals unable to review documents during those hours. Therefore, pursuant to N.J.S.A. 47:1A-5.a., the Custodian did not violate OPRA when he refused to accommodate Complainant's request to review the requested documents after regular business hours.

Whether the Custodian violated OPRA when he refused to allow the Complainant to bring her own photocopier to make her own copies of the requested records?

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. *The 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...*” (Emphasis added.) N.J.S.A. 47:1A-5.b.

OPRA also states:

“...[a] *custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy* of a government record...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

The Complainant suggests that she should be permitted to bring her own copying machine in order to avoid what she believes to be excessive copying costs. The Complainant contends that the use of her own copying equipment would make the actual cost of reproducing the document negligible because the Custodian would not be using the Board of Education's resources in producing this request. The Custodian alleges that there is no precedent for allowing a requestor to bring their own copy machine and, because the Board could not ensure the safety and energy concerns regarding this option, the Custodian cannot allow the Complainant to use her own copier to copy the requested records.

The issue of allowing citizens to use personal copiers to photocopy government records was first discussed in Moore v. The Board of Chosen Freeholders of the County of Mercer, 39 N.J. 26 (1962). In Moore, the defendant refused to allow the plaintiffs to use personal copiers in order to photocopy government records. The Court determined that the plaintiffs were not permitted to copy records on their personal copiers because doing so would risk damaging the records. Specifically, the Court reasoned:

“It is common knowledge that there are many pieces of equipment capable of producing copies. To permit copying with any machine a particular individual may propose to use, without prior tests as to its capability, would subject the record to the hazard of damage. Although the right to inspect is of vital importance, it is of equal public importance that the original record not be mutilated. Public officials should have the opportunity to select equipment which will assure that the records will not be damaged, and to make suitable arrangements for the availability of such equipment. Hence the result of producing a photocopy can best be obtained by requiring the proper official to furnish such copy at a reasonable cost, rather than by permitting the applicant to make a copy with his own machine.” *Id.* at 30.

Although Moore was decided before the Right-to-Know law became effective, legislators apparently considered the Moore holding when creating the following provision in the Right-to-Know Law in 1963:

“Every citizen of this State shall also have the right, during such regular business hours and under the supervision of a representative of the custodian, to copy such records by hand and shall also have the right to purchase copies of such records...If the custodian of any such records shall find that there is no risk of damage or mutilation of such records and that it would not be incompatible with the economic and efficient operation of the office and the transaction of public business therein, he may permit any citizen who is seeking to copy more than 100 pages of records to use his own photographic process, approved by the Custodian, upon the payment of a reasonable fee, considering the equipment and the time involved, to be fixed by the Custodian of not less than \$5.00 or more than \$25.00 per day.” N.J.S.A. 47:1A-2.

The Legislature subsequently made substantial amendments to the Right-to-Know law and eventually renamed the statute the Open Public Records Act. In the process of creating OPRA as it currently stands, N.J.S.A. 47:1A-2 was specifically repealed. The Assembly State Government Committee stated in so doing, “[t]he bill repeals N.J.S.A. 47:1A-2 which deals with the right of inspection of public records, how copies are to be provided and the fees that may be charged.” Assembly State Government Committee Statement to Assembly, No. 1309 (March 6, 2000). The provisions replacing N.J.S.A. 47:1A-2 do not mention a citizen’s right to photocopy public records using personal copiers.

Administrative agencies, in general, have broad discretion in selecting the appropriate method and process for fulfilling their statutory responsibilities. In Re Adoption of 2003 Low Income Housing Tax Credit, 369 N.J. Super 2, 44 (App.Div. 2004); In re Request for Solid Waste Util. Cust. Lists, 106 N.J. 508, 519 (1987). Specifically, under OPRA, a custodian has the discretion in developing processes so that he or she can best meet his or her obligations under OPRA. For example, a custodian has

the discretion to customize an OPRA request form (so long as the items listed in N.J.S.A. 47:1A-5.f.1-7 are included), to accept, or not accept, requests by e-mail, etc.

A custodian may, in his or her discretion, allow the use of personal photocopiers by requestors depending upon factors including, but not limited to, the specific circumstances of the request, the particular documents requested, the office hours, the available space within the office, the availability of personnel, the availability of appropriate electrical outlets, the consumption of energy, the need to preserve the security of public records or documents and protect them from damage, or other legitimate concerns. A custodian may require that photocopying be done on the agency's photocopier if to allow otherwise would disrupt operations, interfere with the security of public records, or expose records to potential damage.

Therefore, where a custodian believes that the safety, integrity or confidentiality of a document requested pursuant to OPRA may be compromised, or where the custodian has concerns regarding the impact that use of a personal photocopier might have upon any aspect of the operations of the custodian's office, a custodian may, consistent with OPRA, refuse to permit the use of a personal photocopier by a requestor. See, Moore, supra, 39 N.J. at 30; Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 141 (App. Div. 2006)(A municipality may insist upon using its own diskette, rather than allowing the requesting party to supply the diskette, in order to avoid the possibility that the municipality's computer system may be compromised by any outside party in copying Township Council meeting minutes from Township computers).

Because the Custodian in the matter before the Council had safety and energy concerns regarding the Complainant's use of a personal photocopier to copy the requested records, the Custodian's refusal to permit the Complainant to do so did not violate OPRA. N.J.S.A. 47:1A-5.a.

Whether the Custodian may use an attorney to respond to Denial of Access Complaints?

OPRA sets forth the powers and duties of the GRC. Specifically, N.J.S.A. 47:1A-7.b. states that:

“[t]he Government Records Council shall:
establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding

access, which records custodians shall make available to persons requesting access to a government record;
prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and
operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied..." N.J.S.A. 47:1A-7.b.

The Complainant objects to the Custodian's use of an attorney to respond to her Denial of Access Complaint.

In Loigman v. Township of Middletown, GRC Complaint No. 2004-138 (March 2005), the GRC found that OPRA does not give the GRC the authority to regulate how a Custodian utilizes its Counsel in its response to a records request. Pursuant to Loigman and N.J.S.A. 47:1A-7.b, which delineates the Council's powers and duties, the GRC does not have authority to regulate how a Custodian utilizes its Counsel in its response to a Denial of Access Complaint. The Custodian may, therefore, use an attorney to respond to a Denial of Access Complaint.

Whether the Complainant is entitled to a refund of copying fees paid for the requested records?

OPRA states:

"[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation... the fee assessed for the duplication of a government record embodied in the form of printed matter shall 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." (Emphasis added.) N.J.S.A. 47:1A-5.b.

The Complainant made her OPRA request on October 7, 2005. The Complainant received copies of documents responsive to her request on or about December 19, 2005. The Complainant asserts that the documents she requested were distributed to the public at a Board of Education meeting in early 2006. The Complainant therefore believes that she should receive a refund for the photocopying fees she paid to receive her requested records.

The Complainant requested specific documents pursuant to OPRA and received copies of documents responsive to that request from the Custodian. Therefore, the statutory copying fees set forth at N.J.S.A. 47:1A-5.b apply. The Complainant is not

entitled to a refund of the copying charges paid for obtaining the records, notwithstanding the fact that those documents were subsequently made available to the public free of charge.

Whether the Custodian’s delay in access to the requested records 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.

In her October 7, 2005 OPRA request, the Complainant asks for copies of each and every document showing expenditures from Board monies obtained as a result of the referendum voted on in 2002 including budgets, estimates, bills of third parties, purchase orders, invoices, summaries of expenditures for excess funds, vouchers, receipts, etc. The Custodian certifies that the Complainant was informed on October 17, 2005 that her records request was being compiled and she would be advised of the copying costs upon completion of that task. The Custodian states the Complainant was then notified on October 20, 2005 that there were about 3,500 documents available for her review.

The Complainant’s original October 7, 2005 OPRA request included budgets, bills of third parties, and vouchers. The Complainant was informed on October 17, 2005, six (6) business days after the request, that the agency was compiling the records responsive to the request. Contrary to N.J.S.A. 47:1A-5.e., which indicates that “immediate access” must ordinarily be granted to these types of records, the Custodian did not make the requested records available until October 20, 2005.

Although the Complainant later amended her request to only include the bookkeeping copy of the purchase order and cancelled checks, this revision occurred after the Denial of Access Complaint was filed with the GRC.

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).

There is no evidence in the record to support a conclusion that the Custodian’s actions contained the element of conscious wrongdoing necessary to find a knowing and willful violation of OPRA. There is no evidence of record to indicate that the Custodian intentionally and deliberately delayed Complainant’s access to the documents. The parties agree that the documents responsive to the October 7, 2005 OPRA request were voluminous. Moreover, the Custodian made the requested documents available for review at the Board office on October 20, 2005, nine (9) business days from the date of Complainant’s OPRA request.

Here, the Custodian’s delay in providing an immediate response or immediate access to the requested bills, budget, vouchers and contracts pursuant to OPRA indicates that he does not fully understand the legal requirements of OPRA to which he is statutorily mandated to adhere. The Custodian’s actions appear to be negligent or heedless. Therefore, the Custodian’s actions do not constitute a knowing and willful violation of OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian violated N.J.S.A. 47:1A-5.e, N.J.S.A. 47:1A-5.g, and N.J.S.A. 47:1A-6 by failing to provide immediate access or an immediate response providing a lawful basis for denial of access to the requested budget, bills, vouchers and contracts pursuant to OPRA.
2. Pursuant to N.J.S.A. 47:1A-5.a., the Custodian did not violate OPRA when he refused to accommodate Complainant’s request to review the requested documents after regular business hours.
3. Consistent with the New Jersey Supreme Court’s holding in Moore v. The Board of Chosen Freeholders of the County of Mercer, 39 N.J. 26 (1962) and its progeny, the Custodian did not violate OPRA when he refused to accommodate Complainant’s request to use her personal copier to photocopy the requested records.

4. Pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority to regulate how a Custodian utilizes its legal representative in its response to a Denial of Access Complaint.
5. The Complainant is not entitled to a refund of the copying charges she paid to obtain the records pursuant to her OPRA request. The statutory copying fees stated in N.J.S.A. 47:1A-5.b apply.
6. Based on the Custodian's delay in providing an immediate response or immediate access to the requested bills, budget, vouchers and contracts, it is clear that the Custodian does not fully understand the legal requirements of OPRA to which he is statutorily mandated to adhere. Therefore, the Custodian's actions appear to be negligent and do not meet the legal standard of a knowing and willful violation of OPRA and unreasonable denial of access pursuant to N.J.S.A. 47:1A-11.a.

Prepared By:

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Approved By:

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Executive Director

April 18, 2007