



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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FINAL DECISION

April 25, 2007 Government Records Council Meeting

Robert Vessio
Complainant

Complaint No. 2006-70

v.

Township of Barnegat
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 as amended. The Council, therefore, finds that:

1. Based on the broad scope of records requested by Complainant, the Custodian did not unlawfully deny access pursuant to N.J.S.A. 47:1A-11.a with regard to the Complainant’s March 16, 2006 OPRA request for the following information: Township of Barnegat Inspector Rules, Regulations and Ordinances from 1985 to 2006, Township conformity with New Jersey Housing Codes in relation to commercial property from 1985 to 2006, Township Building Inspector Duties from 1985 to 2006, commercial zoning information from 1985 to 2006, and Township requirements to renovate businesses that have a Certificate of Occupancy for office space from 1985 to 2006;
2. Because the Custodian failed to indicate in her March 21, 2006 letter whether the list of commercial office use properties from 1985 to 2006 requested by Complainant was archived or in storage, and failed to provide any time period when the records would be made available, the request for these records is deemed denied and the Custodian has violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i.
3. Because the evidence of record shows that the Custodian would be required to expend an extraordinary amount of time and effort to retrieve for Complainant’s examination the commercial certificates of occupancy from 1985 to 2006 from all of the building and permitting records filed by



block and lot number, the \$400.00 special service charge proposed by Custodian appears to be reasonable and permitted by N.J.S.A. 47:1A-5.c;

4. Custodian's actions do not meet the legal standard for a knowing and willful violation pursuant to OPRA and unreasonable denial of access under the totality of the circumstances in this case. However, the Custodian's actions do appear to be at least negligent regarding her knowledge of OPRA.

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

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, Secretary
Government Records Council

Decision Distribution Date: May 2, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert Vessio¹
Complainant**

GRC Complaint No. 2006-70

v.

**Barnegat Township, Building and Zoning Department²
Custodian of Records**

Records Relevant to Complaint:

1. The Township of Barnegat Building Inspector – Rules, Regulations and Ordinances from (1985-2006),³
2. The Township’s conformity with New Jersey Housing Codes in relation to commercial use from (1985-2006),⁴
3. The Township Building Inspector duties (1985-2006),
4. The Township zoning which came into effect for commercial use (1985-2006),
5. The list of all commercial office use (1985-2006), and
6. The Township requirement to renovate businesses that have a Certificate of Occupancy for office space (1985-2006).⁵

Request Made: March 16, 2006

Response Made: March 21, 2006

Custodian: Veronica Jasina, Clerk

GRC Complaint Filed: March 29, 2006

Background

March 16, 2006

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records listed above.

March 21, 2006

Custodian’s response to the OPRA request. The Custodian informs the Complainant three (3) business days after the OPRA request that the following requested records are available in the Barnegat Township General Code Book Chapter 39:

¹ No attorney is listed in the file.

² Legal representation by Jerry Dasti, Esq. of Dasti, Murphy, McGuckin, Ulaky, Cherkos and Connors (Forked River, NJ).

³ Pursuant to a telephone conversation with the GRC on January 29, 2007, the Custodian said she thought the Complainant might be referring to the UCC.

⁴ Pursuant to a telephone conversation with the GRC on January 29, 2007, the Custodian said she thought the Complainant might be referring to the UCC.

⁵ The Complainant numbered his requests, “1, 2, 3, 4, 5, 7.” For the GRC’s purposes, request “7” has been re-numbered “6.”

- Township of Barnegat Building Inspector – Rules, Regulations and Ordinances,
- Township’s conformity with New Jersey Housing Codes in relation to commercial use,
- Township Building Inspector duties, and
- Township requirement to renovate businesses that have a certificate of occupancy for office space.

The Custodian states that the information requested is diverse and the records Complainant requested are contained in numerous pages. Therefore, the Custodian suggests that the Complainant review the information before copies are made.

Additionally, the Custodian advises the Complainant that the requested zoning information for commercial use from 1985 to 2006 can be found in the Barnegat Township Land Use Book Chapter 55, which the Complainant may also review prior to the Complainant incurring photocopying costs.

The Custodian notifies the Complainant that reproducing the requested list of all commercial office use from 1985 to 2006 would be very costly and time consuming. The Custodian suggests that the Complainant narrow his search to specific addresses.

Finally, the Custodian states that the Complainant “may come into the Clerk’s Office Monday through Friday, 8:30 am to 4:30 pm to review the requested information.”

March 22, 2006

Complainant’s letter to the Custodian. The Complainant informs the Custodian that the law provides seven (7) business days for the Custodian to obtain the requested information. The Complainant states that he will come to the office on March 24, 2006 to review and copy documents. The Complainant also states that if the Custodian does not have the requested records available, Complainant intends to file a complaint with the Government Records Council (“GRC”).

March 29, 2006

Denial of Access Complaint filed with the GRC with the following attachments:

- Complainant’s OPRA request dated March 16, 2006, and
- Custodian’s response to the OPRA request dated March 21, 2006.

The Complainant states that when he arrived at the agency on March 24, 2006 to obtain the documents, the Custodian handed him three (3) books opened to some of the requested information and advised the Complainant to look up the rest of the information himself. The Complainant states that he asked for copies of the requested list of commercial office buildings and the Custodian advised him that a \$400.00 fee to compile the list would apply. The Complainant states that he was informed at that time that the Custodian only files the commercial office use records by block and lot number rather than by street address.

The Complainant asserts that he was denied access to the requested records. The Complainant contends that the Custodian had no intention of providing him with the

requested information and that the Custodian attempted to deter the Complainant from obtaining a list of commercial office buildings by imposing a \$400.00 charge.

April 6, 2006

Offer of Mediation sent to both parties.

April 17, 2006

Custodian's signed Agreement to Mediate. The Complainant did not respond to the Offer of Mediation.

April 17, 2006

Request for Statement of Information sent to the Custodian.

April 20, 2006

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

- Complainant's OPRA request(s)⁶ dated March 16, 2006,
- Custodian's response to the OPRA request dated March 21, 2006,
- Complainant's letter to the Custodian dated March 22, 2006, and
- List of Barnegat Township Commercial Properties.

The Custodian states that the Complainant's March 16, 2006 OPRA request did not specifically request copies of "Records Relevant to Complaint" items 1, 2, 3, 4 and 6. Therefore, based upon the volume of information requested, the Custodian sent a letter to the Complainant on March 21, 2006 inviting him to examine the Barnegat General Code Books and the Township Land Use Books responsive to these portions of his request prior to making copies and incurring copying costs. The Complainant examined these documents on March 24, 2006.

The Custodian states that the Complainant came to the office on March 24, 2006 to examine the requested documents. The Custodian states that the Complainant's requested list of commercial office buildings and certificates of occupancy would require a fee of \$400.00. The Custodian states that Complainant verbally changed his request from a request for a list to a request to view documents. The Custodian asserts that at that time the Complainant was told that the commercial certificates of occupancy were not filed separately and every block and lot file in the Building Department would have to be reviewed in order to pull only commercial certificates of occupancy. The Custodian states that she called the Complainant on March 28, 2006 and left a message informing him of the existence of a list of Barnegat Township commercial properties (provided as part of the SOI) for his review so that he may narrow the search for records. The Custodian states that no response was received from the Complainant.

May 8, 2006

Memo from the Construction Official to the Custodian. The Construction Official states that the Complainant's OPRA request will take at least two (2) full days of investigation which he estimates as 14 hours of work at \$25.00/hour. The Construction Official states that the total estimated cost to fulfill the OPRA request will be \$350.00

⁶ A number of requests filed by the Complainant on the same day, for the same record were provided.
Robert Vessio v. Barnegat Township Zoning and Building, 2006-70 – Findings and Recommendations of the Executive Director

and the Township requires a \$175.00 deposit before it can begin the work. The Construction Official further states that the request may take longer than expected due to the age of some of the requested documents and that the Complainant should be informed that he will be charged accordingly for the time spent to fulfill his request.

November 6, 2006

GRC letter to the Custodian. The GRC requests a certification from the Custodian stating whether or not the list of all commercial office use and certificates of occupancy from 1985 to 2006 was in existence at the time of the Complainant's March 16, 2006 OPRA request. Additionally, the GRC asks that the Custodian provide responses to the following questions regarding the assessment of the \$400.00 special service charge for reproduction of these records:

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.
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 requested.
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.
14. Who in the agency will perform the work associated with each request?

November 15, 2006

Custodian's response to the GRC's letter dated November 6, 2006 with a memo dated May 8, 2006 from the Construction Official to the Custodian.

The Custodian states that the Complainant requested a list of commercial buildings and certificates of occupancy from 1985 to 2006. The Custodian states that she informed the Complainant that no such list exists in the Building Department and that the agency would need to conduct a physical search done by block and lot number. The Complainant was given an estimate of 14 hours of work at \$25.00 per hour for a total of \$350.00 for the fulfillment of his OPRA request. The Custodian states that the building permits and certificates of occupancy are kept numerically by block and lot number and not by the type of occupancy. The Custodian states that all permits are archived, with the exception of open and current permits.

The Custodian provided the following responses to the GRC's inquiry regarding the special service charge assessed to fulfill this OPRA request:

1. The volume, nature, size, number of government records involved.	Approximately 185 storage boxes
2. The period of time over which the records were received.	Approximately 1976 to present ⁷
3. Whether some or all of the records sought are archived.	Only open and current documents are not in storage or archived
4. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying.	14 hours
5. The amount of time, level, rate and number, if any required to be expended by government employees to monitor the inspection or examination.	May take several hours for Complainant to review files. Unable to estimate until files are retrieved.
6. The amount of time required to return documents to their original storage place.	14 hours
7. The size of the agency.	3 clerks
8. The number of employees available to accommodate documents requested.	1
9. The availability of information technology and copying capabilities.	Electronic records available after 1992. Copy machine available if needed.
10. What was requested?	Review of certificates of occupancy issued for commercial properties (1985-2006) ⁸
11. The level(s) of skill necessary to accommodate the request.	Basic
12. The reason(s) that the agency employed, or intends to employ the particular level(s) of skill above.	Agency will use a current clerk on payroll
13. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	Clerks have to review all files and physically retrieve copy of certificates of occupancy
14. Who in the agency will perform the work associated with each request?	Current clerk employed in construction department.

⁷ The Complainant requested records from 1985 to 2006.

⁸ The Complainant did not specifically request merely to “review” records.

November 16, 2006

GRC e-mail to the Custodian. The GRC asks that the Custodian provide a legal certification stating whether or not the Complainant was notified of the amount of the special service charge assessed for the fulfillment of his OPRA request. The GRC also asks the Custodian to indicate 1) the date that the Complainant was notified of the amount of the special service charge, 2) the Complainant's response to the notification, and 3) the method of notification and documentation of same.

November 17, 2006

Complainant's facsimile to the GRC. The Complainant states that based on N.J.S.A. 47:1A-5 and Laufgas v. Barnegat Township Board of Education,⁹ the Complainant should not be charged to inspect public records. The Complainant requests the GRC to fine the Custodian for denying the Complainant access to the requested records.

November 22, 2006

Certification from the Custodian in response to the GRC's e-mail dated November 16, 2006. The Custodian certifies that she verbally informed the Complainant on March 28, 2006, that the cost to retrieve the requested documents would be approximately \$350.00. The Custodian further asserts that this special service charge includes compensation for Barnegat Township employees for the extraordinary amount of time to be spent on a physical search through archived records in order to fulfill the Complainant's OPRA request.

November 29, 2006

Complainant's facsimile to the GRC. The Complainant states that the Custodian requested a check for \$400.00 on or about March 28, 2006 in response to the Complainant's OPRA request. The Complainant asserts that there is no special service charge to look up the requested information and that the Custodian should be fined for denying the Complainant access to the requested records and for imposing a special service charge.

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

⁹ The Complainant provided no citation for this case. No reported case could be found.
Robert Vessio v. Barnegat Township Zoning and Building, 2006-70 – Findings and Recommendations of the Executive Director

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 ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.” N.J.S.A. 47:1A-5.d.

OPRA further 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.

Additionally, 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 ... or deny a request for access ... as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived ... If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available.* If the record is not made available by that time, access shall be deemed denied.” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, N.J.S.A. 47:1A-6 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.

The Complainant states that he submitted his OPRA request on March 16, 2006. The Custodian’s responds to the OPRA request occurs three business (3) days after the request is made. The Custodian’s March 21, 2006 letter to Complainant stated the located

of the rules, regulations and code records requested by Complainant and invited Complainant to come to the Clerk's Office to review the materials which contained the information requested. Given the broad nature of the records request, the Custodian offered the Complainant the opportunity to inspect the records to identify those records the Complainant would be willing to pay to copy. The Custodian's letter further stated that it would be costly and time consuming to produce a list of all commercial office uses from 1985 to 2006 and suggested that Complainant narrow the scope of his search.

Given the broad scope and volume of records requested by the Complainant, the Custodian did not unlawfully deny access pursuant to N.J.S.A. 47:1A-6 with regard to the Complainant's March 16, 2006 OPRA request for the following information:

- Township of Barnegat Building Inspector Rules, Regulations and Ordinances (1985-2006),
- Township's conformity with New Jersey Housing Codes in relation to commercial property,
- Township Building Inspector duties (1985-2006),
- Commercial zoning information (1985-2006), and
- Township requirement to renovate businesses that have a Certificate of Occupancy for office space (1985-2006).

The Custodian's March 21, 2006 letter informed the Complainant of the location of the requested information and invited him to come to the Clerk's office to examine the materials during business hours. When Complainant arrived at the Clerk's office on March 24, 2006, the relevant materials were available for Complainant's inspection. The Custodian offered to make the requested information available for Complainant's inspection and selection of particular documents prior to incurring copying fees for any documents. OPRA requires that a Custodian make government records readily accessible for inspection, copying or examination by citizens. N.J.S.A. 47:1A-1. OPRA also requires that a Custodian grant or deny a request for access to a government record not later than seven (7) business days after receiving the request, as long as the record is currently available. N.J.S.A. 47:1A-5.i. The Custodian's actions in this case are, therefore, consistent with OPRA.

This case is distinguishable from Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-27 (October 19, 2006). There, the Complainant sought to inspect numerous records in eighteen (18) OPRA requests. The Custodian claimed that the Complainant was prohibited from coming to the municipal building, but offered to provide Complainant copies of the documents upon prepayment of a copying fee. The Complainant declined and filed a Denial of Access complaint. The GRC determined that the Custodian unlawfully denied the Complainant access to inspect the requested records pursuant to N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-6.

However, the Custodian herein invited the Complainant to come to the municipal building to review the requested documents prior to copying them because the Custodian recognized that the number of documents requested created the potential for very high copying fees. The Custodian suggested that the Complainant review the requested documents and select those he wished to have copied in order to control the copying costs. This is not prohibited by OPRA.

List of All Commercial Office Buildings and Certificates of Occupancy (1985 – 2006)

Custodian has not borne the burden of proving that there was a lawful basis to deny the Complainant access to the list of all commercial office buildings and certificates of occupancy from 1985 to 2006.

The Custodian did respond to the request within the statutorily required seven (7) business days, stating that the list of commercial office use since from 1985 to 2006 would be costly and time consuming to reproduce. This response, however, made no indication that the requested records were archived or in storage, nor did it provide any time period when the records would be made available. Although the Custodian responded in writing within the statutory time period, under OPRA the Custodians' response to the request for the list of commercial office use from 1985 to 2006 was so vague that it could not be determined if the request was being denied. Therefore, even though on March 24, 2006, the Custodian offered the Complainant copies of the relevant certificates of occupancy upon payment of a \$400.00 special service charge, and even though the list of commercial businesses in Barnegat Township was eventually released to the Complainant on March 28, 2006, the request is deemed denied and the Custodian has violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i.

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. Similarly in this complaint, 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, the Custodian should have obtained a written agreement from the Complainant in order to do so.

Whether the Custodian improperly assessed a special service charge of \$400.00 to retrieve the certificates of occupancy to respond to Complainant's request?

Whenever a records custodian asserts that fulfilling an OPRA records request requires an "extraordinary" expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5.c. In this regard, OPRA provides:

"Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*" (Emphasis added.) N.J.S.A. 47:1A-5.c.

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

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

- The volume of government records involved;
- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble to documents for inspection or copying;
- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination;¹⁰ and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

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

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

1. 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,

¹⁰ With regard to this factor, the court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

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 the complaint now before the Council, The Custodian in this matter certified that the commercial certificates of occupancy responsive to Complainant's OPRA request were not filed separately but were filed by block and lot number. The Custodian further certified that every block and lot file in the Building Department would have to be reviewed in order to identify and separate only commercial certificates of occupancy. The special service charge worksheet incorporating the GRC's 14 point analysis was completed by a Barnegat Township Construction Official and states that the search would involve 185 storage boxes and require approximately 14 hours of work for a clerk in the construction office, which employs a total of three (3) clerks.

The evidence shows that the Custodian would be required to expend an extraordinary amount of time and effort to retrieve for Complainant's examination the commercial certificates of occupancy from 1985 to 2006 from all of the building and permitting records filed by block and lot number. Also, Complainant was given the opportunity to review and object to the charge prior to it being incurred. Based upon the evidence of record, therefore, the special service charge proposed by Custodian is reasonable and permitted by N.J.S.A. 47:1A-5.c.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances?

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly and willfully violates [OPRA], as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states:

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

The Custodian responded to the Complainant’s OPRA request within three (3) business days and informed the Complainant of the availability of the information he requested regarding township Building Inspector duties, rules, regulations and ordinances; township conformity to New Jersey Housing Codes in relation to commercial property, commercial zoning information and township requirements to renovate businesses that have a certificate of occupancy for office space. Because the records requested were voluminous, the Custodian invited the Complainant to inspect these materials to identify specific documents for copying, rather than incurring costs for making copies of all of the documents. Complainant inspected these materials on March 24, 2006.

The Complainant also requested a list of all commercial office use properties from 1985 to 2006. The Custodian’s March 21, 2006 letter to Complainant references a list of all commercial office use certificates of occupancy from 1985 to 2006, the first reference to certificates of occupancy for this specific request. The Custodian’s letter stated that such a search would be very costly and time consuming. On March 24, 2006, upon Complainant’s visit to the Clerk’s office, Complainant apparently verbally revised his OPRA request for examination of these documents and was quoted a special service charge of \$400.00 for retrieval of the certificates of occupancy responsive to Complainant’s request. Complainant did not agree to pay this fee. The Custodian submitted documentation to the GRC that retrieval of the Certificates of Occupancy would require approximately two days’ work. However, on March 28, 2006, the Custodian supplied to Complainant a list of commercial use properties showing the lot and block number and name of each commercial use property in Barnegat Township.

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).

In light of the legal standards set forth above, and because the Custodian responded to Complainant’s OPRA request within the statutorily required seven (7) business day period and made available to the Complainant the rules, regulations,

ordinances and other codes Complainant requested and allowed Complainant to identify particular records for copying, and because the Custodian has released the list of commercial use properties which exists, the Custodian's actions do not meet the legal standard for a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a. However, the Custodian's actions do appear to be at least negligent regarding her knowledge of OPRA.

Conclusions And Recommendations

The Executive Director respectfully recommends the Council find that:

1. Based on the broad scope of records requested by Complainant, the Custodian did not unlawfully deny access pursuant to N.J.S.A. 47:1A-11.a with regard to the Complainant's March 16, 2006 OPRA request for the following information: Township of Barnegat Inspector Rules, Regulations and Ordinances from 1985 to 2006, Township conformity with New Jersey Housing Codes in relation to commercial property from 1985 to 2006, Township Building Inspector Duties from 1985 to 2006, commercial zoning information from 1985 to 2006, and Township requirements to renovate businesses that have a Certificate of Occupancy for office space from 1985 to 2006;
2. Because the Custodian failed to indicate in her March 21, 2006 letter whether the list of commercial office use properties from 1985 to 2006 requested by Complainant was archived or in storage, and failed to provide any time period when the records would be made available, the request for these records is deemed denied and the Custodian has violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i.
3. Because the evidence of record shows that the Custodian would be required to expend an extraordinary amount of time and effort to retrieve for Complainant's examination the commercial certificates of occupancy from 1985 to 2006 from all of the building and permitting records filed by block and lot number, the \$400.00 special service charge proposed by Custodian appears to be reasonable and permitted by N.J.S.A. 47:1A-5.c;
4. Custodian's actions do not meet the legal standard for a knowing and willful violation pursuant to OPRA and unreasonable denial of access under the totality of the circumstances in this case. However, the Custodian's actions do appear to be at least negligent regarding her knowledge of OPRA.

Prepared By:

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Approved By:

Catherine Starghill, Esq.
Executive Director

April 18, 2007