



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

ROBIN BERG TABAKIN, Chair
COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

June 25, 2008 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2007-5

v.

Town of Guttenberg (Hudson)
Custodian of Record

At the June 25, 2008 public meeting, the Government Records Council (“Council”) considered the June 18, 2008 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, accepts the Complainant’s request to withdraw this complaint from the Office of Administrative Law. No further adjudication is required.

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 June, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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



David Fleisher, Secretary
Government Records Council

Decision Distribution Date: July 2, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 25, 2008 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2007-05

v.

**Town of Guttenberg (Hudson)²
Custodian of Records**

Records Relevant to Complaint: Police Department tape recordings of telephone conversations dated September 27, 2006 between 8:00 am and 11:00 pm and February 20, 2006 between 2:00 pm and 2:30 pm.

Request Made: October 23, 2006

Response Made: November 1, 2006

Custodian: Linda Martin

GRC Complaint Filed: December 9, 2006

Background

November 28, 2007

Government Records Council's ("Council") Interim Order. At its November 28, 2007 public meeting, the Council considered the November 21, 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, found that the Custodian is in contempt of the Council's April 25, 2007 Interim Order and because the Custodian failed to comply with the GRC's request for additional information and has failed to release any records responsive to the Complainant's OPRA request within the deadline to comply with the Council's April 25, 2007 Interim Order, this complaint be referred to the Office of Administrative Law for a hearing to determine whether a special service charge is warranted and whether the special service charge assessed by the Custodian is reasonable pursuant to The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002). Also, this matter should be referred to the Office of Administrative Law to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

November 29, 2007

Council's Interim Order distributed to the parties.

¹ No representation listed on record.

² Represented by Charles P. Daglian, Esq. (Jersey City, NJ).

May 20, 2008

Letter from the Custodian's Counsel to the GRC attaching a release signed by the Complainant. The Custodian's Counsel states that the Complainant has been provided with the requested records free of charge and has agreed to withdraw this complaint from the Office of Administrative Law ("OAL").

June 4, 2008

This complaint is referred back from OAL.

Analysis

Because the Complainant withdrew this complaint from OAL, no legal analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Complainant's request to withdraw this complaint from the Office of Administrative Law. No further adjudication is required.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

June 18, 2008



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

November 28, 2007 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2007-5

v.

Town of Guttenberg (Hudson)
Custodian of Record

At the November 28, 2007 public meeting, the Government Records Council ("Council") considered the November 21, 2007 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 as amended. The Council, therefore, finds that the Custodian is in contempt of the Council's April 25, 2007 Interim Order and because the Custodian failed to comply with the GRC's request for additional information and has failed to release any records responsive to the Complainant's OPRA request within the deadline to comply with the Council's April 25, 2007 Interim Order, this complaint be referred to the Office of Administrative Law for a hearing to determine whether a special service charge is warranted and whether the special service charge assessed by the Custodian is reasonable pursuant to The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). Also, this matter should be referred to the Office of Administrative Law to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 28th Day of November, 2007

Vincent P. Maltese, Chairman
Government Records Council



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

Government Records Council

Decision Distribution Date: November 29, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 28, 2007 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2007-05

v.

**Town of Guttenberg (Hudson)²
Custodian of Records**

Records Relevant to Complaint: Police Department tape recordings of telephone conversations dated September 27, 2006 between 8:00 am and 11:00 pm and February 20, 2006 between 2:00 pm and 2:30 pm.

Request Made: October 23, 2006

Response Made: November 1, 2006

Custodian: Linda Martin

GRC Complaint Filed: December 9, 2006

Background

April 25, 2007

Government Records Council's ("Council") Interim Order. At its April 25, 2007 public meeting, the 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, found that:

1. Pursuant to N.J.S.A. 47:1A-5.i., the Custodian, though responding within the statutorily mandated seven (7) business days, failed to grant access, deny access, seek clarification or request an extension of the statutorily mandated response time resulting in a deemed denial.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving a lawful denial of access to the police department tape recordings.
3. The Custodian must grant the Complainant access to the requested records or indicate the specific basis on which access to said records is denied.
4. **The Custodian shall comply with (3) above within five (5) business days from receipt of the Council's Order and simultaneously provide certified confirmation of compliance pursuant to *N.J. Court Rules, R. 1:4-4* to the Executive Director.**

¹ No representation listed on record.

² Represented by Charles P. Daglian, Esq. (Jersey City, NJ).

April 30, 2007

Council's Interim Order distributed to the parties.

May 1, 2007

Custodian's response to the Council's Interim Order. The Custodian certifies that GoLogic Technology Corporation estimates the cost of conversion of 15.5 hours plus an additional one half hour of tape to be \$450. The Custodian also certifies that, based on the reasonable expectations of public privacy, a sergeant must review and redact the calls prior to release of the CD-ROM to the Complainant. The Custodian estimates his cost at \$347 a day over an estimated two days to review all material pending how many calls were received in the requested time frame.

The Custodian requests a deposit of \$1,144. The Custodian states that any additional costs will be incurred by the Complainant and any amount not used will be refunded. The Custodian finally states that upon receipt of the deposit, the CD-ROM will be made available up to five (5) days later.

May 4, 2007

Letter from the GRC to the Custodian. The GRC requests that the Custodian complete a 14-point analysis to determine whether or not the special service charge being imposed on the Complainant is warranted.

May 9, 2007

Custodian's response to the GRC's request for additional information.

The Custodian asserts that the tapes requested cover all telephone calls for 15.5 hours of one day and an additional one half hour for another. The Custodian asserts that information contained in the records responsive to this request could do potential harm due to the expectation of privacy when the public contacts the police department regarding criminal activities. The Custodian finally asserts that there is potential harm if any of the calls lead to a pending criminal investigation.

The Custodian reiterates that in order to convert the telephone calls to CD-ROM, the cost would be approximately \$450, as quoted by GoLogic Technology Corporation. Further, the Custodian states that the 15.5 hours of tape plus an additional half hour will need to be reviewed by a sergeant at the cost of \$347 a day. The Custodian presumes that two days will be needed, but that the actual time needed to redact will depend on how many calls were received in the requested time frame. The Custodian finally asserts that the Complainant will need to make a deposit of \$1,144 with the understanding that any money not spent will be refunded.

Analysis

Whether the Custodian complied with the Council's April 25, 2007 Interim Order?

The Custodian submitted a certification containing a letter to the Complainant on May 1, 2007, within the Council's five (5) business day time frame to comply with the Council's Interim Order. The Custodian advised the Complainant in this letter that a special service charge of \$1,144 would need to be deposited in order for the Custodian to proceed with the process of releasing the records.

Pursuant to The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002), the GRC requested that the Custodian submit answers to a 14 point analysis in order to judge whether or not the special service charge was warranted under N.J.S.A. 47:1A-5.c. The Custodian failed to clearly respond to the following points of the analysis:

- Whether some or all of the records sought are archived,
- The amount of time required for a government employee to locate, retrieve and assemble the documents for copying,
- The amount of time required to return documents to their original storage place,
- The availability of information technology and copying capabilities,
- The level(s) of skill necessary to accommodate the request,
- A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

Additionally, in Richard Rivera v. Guttenberg Police Department, GRC Complaint No. 2006-154 (October 2007), the GRC sent requests for additional information to the Custodian on three (3) occasions before the Custodian provided completed responses. The Custodian further failed to provide the remaining requested records after seventeen (17) months. The complaint was subsequently sent the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Similarly in this complaint, the Custodian failed to provide a complete response to the GRC's request for additional information within the deadline to comply with the Council's April 25, Interim Order and has yet to provide the requested records. The Custodian has further failed to provide any records to the Complainant for twelve (12) months.

Because the Custodian failed to comply with the GRC's request for additional information and has failed to release any records responsive to the Complainant's November 1, 2006 OPRA request within the deadline to comply with the Council's April 25, 2007 Interim Order, this complaint should be referred to the Office of Administrative Law for a hearing to determine whether the special service charge assessed by the

Custodian is reasonable pursuant to The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). Also, this matter should be referred to the Office of Administrative Law to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian is in contempt of the Council's April 25, 2007 Interim Order and because the Custodian failed to comply with the GRC's request for additional information and has failed to release any records responsive to the Complainant's OPRA request within the deadline to comply with the Council's April 25, 2007 Interim Order, this complaint be referred to the Office of Administrative Law for a hearing to determine whether a special service charge is warranted and whether the special service charge assessed by the Custodian is reasonable pursuant to The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). Also, this matter should be referred to the Office of Administrative Law to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

November 21, 2007



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

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INTERIM ORDER

April 25, 2007 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2007-5

v.

Town of Guttenberg
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. Pursuant to N.J.S.A. 47:1A-5.i, the Custodian, though responding within the statutorily mandated seven (7) business days, failed to grant access, deny access, seek clarification or request an extension of the statutorily mandated response time resulting in a deemed denial.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving a lawful denial of access to the police department tape recordings.
3. The Custodian must grant the Complainant access to the requested records or indicate the specific basis on which access to said records is denied.
4. **The Custodian shall comply with (3) above within five (5) business days from receipt of the Council's Order and simultaneously provide certified confirmation of compliance pursuant to *N.J. Court Rules, R. 1:4-4* to the Executive Director.**

Interim Order 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: April 27, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Richard Rivera¹
Complainant**

GRC Complaint No. 2007-05

v.

**Town of Guttenberg (Hudson)²
Custodian of Records**

Records Relevant to Complaint: Police Department tape recordings of telephone conversations dated September 27, 2006 between 8:00am and 11:00pm and February 20, 2006 between 2:00pm and 2:30pm.

Request Made: October 23, 2006

Response Made: November 1, 2006

Custodian: Linda Martin

GRC Complaint Filed: December 9, 2006

Background

October 23, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above.

November 1, 2006

Custodian's response to the OPRA request. The Custodian responded to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that the Complainant will be notified about the cost to produce the records relevant to the request upon calculation.

December 9, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching Complainant's OPRA records request dated October 23, 2006.

The Complainant states on November 1, 2006, the Custodian advised the Complainant that he would be notified as soon as the Custodian received an estimated cost to produce the records relevant to the request. The Complainant states that he has not received a response in regards to the estimated cost of production or granting or denying of the records relevant to the request.

¹ No representation listed.

² Represented by Charles P. Daglian, Esq. (Jersey City, NJ).

January 5, 2007

Offer of Mediation sent to both parties.

January 6, 2007

The Complainant declines mediation and requests that the GRC begin a full investigation of this complaint.

January 8, 2007

Request for the Statement of Information sent to the Custodian.

January 10, 2007

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

- Complainant's OPRA records request dated October 23, 2006
- Letter from the Custodian to the Complainant dated November 1, 2006

The Custodian states that no records were supplied based on conversations in which the Custodian and Complainant had agreed to wait until the GRC has decided on a similar complaint filed by the Complainant in order to determine the special service charge that the Custodian would charge the Complainant. The Custodian further states that once the Complainant has paid a deposit to cover the special service charge, all records responsive to the request will be provided. Finally, the Custodian asserts that the Complainant has not agreed at this time to the special service charge for the records responsive to this request.

January 17, 2007

The Complainant's Response to the Custodian's SOI. The Complainant asserts that the Custodian's denial of access is unlawful because it is unreasonable to wait on a ruling from the GRC since the Complainant's current request is separate and distinct. The Complainant also states that the Custodian has yet to inform him of a fee or deposit for copying records relevant to the request.

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

OPRA also 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* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (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, 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.

The Complainant states that he provided the Custodian with an OPRA request on October 23, 2006. The Complainant asserts that in several telephone conversations and a letter dated November 1, 2006, the Custodian informed the Complainant that the cost to produce the records relevant to the request was being calculated. The Complainant also asserts that the Custodian informed the Complainant that as soon as the costs to produce the records relevant to the request were determined, the Complainant would receive notification. The Complainant further contends that the Custodian has yet to inform the Complainant of the costs. Further, the Complainant asserts that waiting to see how a previous GRC case is adjudicated is unreasonable because this complaint is both separate and distinct.

The Custodian states that on October 23, 2006, she received an OPRA request from the Complainant. The Custodian asserts that she informed the Complainant in a letter dated November 1, 2006 that the Custodian was in the process of calculating the costs to provide the records relevant to the request and would notify the Complainant when the total costs became available. The Custodian also asserts that the Complainant had agreed to wait for the adjudication of another complaint with the GRC in order to determine the special service charge applicable to this request.

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.

In this case, the Complainant asserts that the Custodian did not properly respond to his request. OPRA mandates that a Custodian must grant access, deny access, seek clarification or ask for an extension of the statutorily mandated response time within seven (7) business days from receipt of said request under N.J.S.A. 47:1A-5.g. Although the Custodian provided a written response to the Complainant within the statutorily

mandated response time of seven (7) days, the Custodian failed to grant or deny access to the requested records, seek clarification or ask for an extension of the statutorily-mandated response time to provide access to the Complainant resulting in a deemed denial pursuant to N.J.S.A. 47:1A-5.i.

In Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (February 2007), the Custodian responded to the Complainant's request within seven (7) business days, pursuant to N.J.S.A. 47:1A-5.g. The Custodian informed the Complainant that a special service charge would have to be paid by the Complainant in order to obtain copies of the records relevant to the Complainant's request, but the Custodian never explicitly indicated whether or not the Complainant was granted or denied access. The Custodian also failed to ask for an extension of the statutorily mandated response time in order to provide the records relevant to the complaint. The GRC found that the Custodian's initial response was not appropriate pursuant to OPRA because the Custodian never explicitly stated if the request was granted, denied or if the Custodian needed an extension of the statutorily mandated response time. In this case, the Custodian also failed to grant access, deny access, seek clarification or ask for an extension of the statutorily mandated response time; therefore, the Custodian has violated N.J.S.A. 47:1A-5.i.

Additionally, the Custodian contends that a verbal agreement was struck with the Complainant to await a GRC decision before providing access to the records relevant to the request. The Custodian provides no documented evidence that any such agreement exists. The Complainant disputes the existence of an agreement with the Custodian by stating that waiting for a GRC decision in order to calculate a fee for the records relevant to this request is unreasonable because this request is both separate and distinct from the prior request.

In this case, the Custodian failed to bear the burden of proving that a denial of access was authorized by law. The fact that the Custodian withheld records in order to fashion a response based on a pending GRC decision is not a lawful basis for a denial of access; therefore, the Custodian is found to also be in violation of N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-5.i, the Custodian, though responding within the statutorily mandated seven (7) business days, failed to grant access, deny access, seek clarification or request an extension of the statutorily mandated response time resulting in a deemed denial.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving a lawful denial of access to the police department tape recordings.
3. The Custodian must grant the Complainant access to the requested records or indicate the specific basis on which access to said records is denied.
4. **The Custodian shall comply with (3) above within five (5) business days from receipt of the Council's Order and simultaneously provide certified confirmation of compliance pursuant to *N.J. Court Rules, R. 1:4-4* to the Executive Director.**

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

April 18, 2007