



## 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

### FINAL DECISION

#### December 19, 2007 Government Records Council Meeting

James Restino  
Complainant

Complaint No. 2007-138

v.

Township of Cherry Hill (Camden)  
Custodian of Record

At the December 19, 2007 public meeting, the Government Records Council (“Council”) considered the December 12, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted to adopt the entirety of said findings and recommendations by majority vote. The Council, therefore, finds that:

1. The Custodian’s failure to grant access, deny access, seek clarification, or request an extension of time in writing within the statutorily mandated seven (7) business days results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., John Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), and Michael DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007).
2. Based on the Council’s decision in John Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), *aff’d*, MOR-A-0579-06T3 (December 13, 2007), the Custodian may charge the copy costs enumerated in N.J.S.A. 47:1A-5.b. for paper copies. As such, the Custodian’s charge of \$69.39 is reasonable pursuant to OPRA because the Custodian charged the enumerated copy costs in N.J.S.A. 47:1A-5.b. for paper copies, and what appears to be the actual cost for copies of audio tapes.
3. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian provided the Complainant with the requested records approximately one (1) month following the date of the Complainant’s request, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful “deemed” denial of access



appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 19<sup>th</sup> Day of December, 2007

Robin Berg Tabakin, Vice Chairman  
Government Records Council

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

Janice Kovach  
Government Records Council

**Decision Distribution Date: December 20, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 19, 2007 Council Meeting**

**James Restaino<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-138**

v.

**Township of Cherry Hill (Camden)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. True copy of any and all documents, including maps and reports, relied upon to create Ordinance 2007-14
2. True copy of the minutes of Mayor and Council meetings from November 20, 2006 to present
3. True copy of the minutes from Planning Board meetings from October 1, 2006 to present.

**Request Made:** May 2, 2007

**Response Made:** May 10, 2007<sup>3</sup>

**Custodian:** Nancy L. Staffos

**GRC Complaint Filed:** May 23, 2007

**Background**

**May 1, 2007**

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

**May 11, 2007<sup>4</sup>**

Telephone conversation between Township employee and Complainant. The Township employee advised the Complainant that additional time is needed to compile the requested meeting minutes which are on audio tape.

**May 23, 2007**

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated May 1, 2007. The Complainant states that he submitted his OPRA request on May 2, 2007.<sup>5</sup> The Complainant states that he received a telephone call from a Township employee on May 14, 2007 indicating that the

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<sup>1</sup> Represented by Sylvia Hall, Esq. (Hackensack, NJ).

<sup>2</sup> Represented by Deborah L. Sanders, Esq. (Cherry Hill, NJ).

<sup>3</sup> Response was verbal.

<sup>4</sup> The Complainant asserts that said telephone conversation took place on May 14, 2007.

<sup>5</sup> OPRA request is dated May 1, 2007.

requested meeting minutes were maintained on audio tape and that the cost of said tapes would be \$40.00. The Complainant states that he agreed to pay said cost, but also states that the employee failed to indicate when the records would be made available or when payment for said records was due.

Additionally, the Complainant states that he received another telephone call from the same employee on or about May 22, 2007 in which the employee provided the Complainant with the same information as in the May 14, 2007 conversation. The Complainant states that the employee also indicated that she is working on getting the additional requested records from other departments. The Complainant states that the employee did not notify him of when the requested records would be made available. The Complainant states that to date, sixteen (16) business days following the date of his OPRA request, he has not yet received the requested records or been made aware of when said records will become available. The Complainant contends that the Custodian is stalling in providing the records.

**June 14, 2007**

Offer of Mediation sent to both parties.

**June 21, 2007**

Custodian's signed Agreement to Mediate. (The Complainant did not agree to mediate this complaint).

**June 22, 2007**

Request for the Statement of Information sent to the Custodian.

**June 25, 2007**

Custodian's Statement of Information ("SOI") attaching the Complainant's OPRA request dated May 1, 2007. The Custodian certifies that she received the Complainant's OPRA request on May 2, 2007 and forwarded it to the Community Development Department on said date. The Custodian states that a Township employee left a voicemail message for the Complainant on May 10, 2007 indicating that additional time was needed to compile the Planning Board meeting minute tapes. The Custodian also states that on May 11, 2007 an employee contacted the Complainant via telephone informing the Complainant that the Custodian needed additional time to compile the meeting minute tapes and that the document portion of the request was available for immediate pickup. The Custodian states that the Complainant consented to the extension of time and references notations written on the Complainant's OPRA request form.<sup>6</sup>

The Custodian asserts that she did not deny any portion of the Complainant's request but sought an extension of time to compile the records. The Custodian contends that the Complainant consented to the extension and chose to pick up the audio tapes and the paper records at the same time. Additionally, the Custodian certifies that she notified the Complainant on June 11, 2007 that the tapes along with all other previously compiled records were available. The Custodian certifies that the Complainant picked up the requested records on June 12, 2007.

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<sup>6</sup> Handwritten notation on Complainant's OPRA request form states "Spoke with requestor on 5-11-07. He understands we will need time."

**November 8, 2007**

Letter from GRC to Custodian. The GRC requests that the Custodian provide a legal certification detailing the amount charged to the Complainant for the records responsive to the Complainant's request dated May 2, 2007, including the breakdown of the per page copy costs and the total number of pages provided, as well as the per tape costs for audio tapes and the number of tapes provided.

**November 16, 2007**

Custodian's certification. The Custodian certifies that the total amount charged to the Complainant for the records responsive to his request was \$69.39. The Custodian certifies that seventy-three (73) pages were copied from the Clerk's Office at \$0.75 per page for pages one (1) through ten (10); \$0.50 per page for pages eleven (11) through twenty (20); and \$0.25 per page for pages twenty-one (21) through seventy-three (73). The Custodian certifies that said copy charges amount to \$25.75.

Additionally, the Custodian certifies that she provided the Complainant with thirty-two (32) audio tapes at \$1.27 per tape, which amounts to \$40.64. The Custodian also certifies that the Complainant was charged \$3.00 for four (4) pages at \$0.75 per page copied from the Office of Community Development.

**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 provides that:

“...*[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...*” (Emphasis added.) 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 ...* 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.

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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, the Custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. The Custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the Complainant’s OPRA request. Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this complaint, the Custodian certifies receiving the Complainant’s OPRA request on May 2, 2007. The Custodian states that an employee contacted the Complainant by phone on May 10, 2007 and May 11, 2007 to advise that the Custodian required additional time to compile the audio tapes of the meeting minutes and also to advise that the requested paper records were available for immediate pickup. The Custodian asserts that the Complainant consented to an extension of time during the May 11, 2007 telephone conversation. The Complainant contends that said conversation took place on May 14, 2007.

In John 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.

Additionally, in Michael DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007), the Custodian verbally advised the Complainant that she would not be able to provide the requested records within the seven (7) business day time frame. The Council held that:

“[w]hile the Custodian may have verbally contacted the Complainant within the statutorily mandated seven (7) business day time frame required to respond to OPRA requests, she failed to do so in writing, therefore creating a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and the Council’s decision in Paff.”

In the complaint currently before the Council, the Custodian failed to respond in writing within seven (7) business days of the Complainant’s OPRA request, requesting to extend the seven (7) business day time frame required under OPRA to respond. Additionally, the Custodian failed to provide the Complainant with a written response granting access to the requested paper records within the statutorily mandated seven (7) business days.

Therefore, the Custodian’s failure to grant access, deny access, seek clarification, or request an extension of time in writing within the statutorily mandated seven (7) business days results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., John Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), and Michael DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007).

**Whether the Custodian’s \$69.39 charge for paper copies and copies of audio tapes is reasonable pursuant to OPRA?**

OPRA sets forth the amount to be charged for a government record. Specifically, 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, 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 except as provided for in subsection c. of this section. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.” (Emphasis added). N.J.S.A. 47:1A-5.b.*

The Custodian certifies that the total amount charged to the Complainant for the records responsive to his request was \$69.39. The Custodian certifies that seventy-three (73) pages were copied from the Clerk’s Office at \$0.75 per page for pages one (1) through ten (10); \$0.50 per page for pages eleven (11) through twenty (20); and \$0.25 per page for pages twenty-one (21) through seventy-three (73). The Custodian certifies that said copying charges amount to \$25.75.

Additionally, the Custodian certifies that she provided the Complainant with thirty-two (32) audio tapes at \$1.27 per tape, which amounts to \$40.64. The Custodian also certifies that the Complainant was charged \$3.00 for four (4) pages at \$0.75 per page copied from the Office of Community Development.

OPRA provides that a requestor may purchase copies of government records upon payment of the actual cost of said copies, unless a fee is prescribed by law or regulation. N.J.S.A. 47:1A-5.b.

In John Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), the Council reviewed a New Jersey Superior Court Trial Division decision that addressed the same or similar issues that are in this complaint currently before the Council. The Council held that:

“[w]hile the Trial Division determined that the actual cost of duplicating the record, which presumably might be less than the enumerated rates listed in OPRA, is the appropriate statutory interpretation of OPRA, the Council should look to other precedential case law to interpret the copying cost provision of OPRA. Specifically, the Supreme Court of New Jersey in Dickinson v. Fund for Support of Free Public School, 95 N.J. 65, 469 A.2d 1 (December 1983) held that it is a ‘golden rule’ of interpretation, fully applicable to constitutional as well as statutory documents, that the unreasonableness of a particular result arising from the selection of one among several possible alternative interpretations strongly militates in favor of the adoption of an interpretation that embraces a reasonable result. 2A Sutherland, Statutory Construction § 45.12 at 37 (4 ed. Sands 1973); Clifton v. Passaic Cty. Bd. of Taxation, 28 N.J. 411, 421 (1958) (‘A construction ‘calling for unreasonable results will be avoided where reasonable results consistent with the indicated purpose of the act as a whole are equally possible,’” quoting Elizabeth Federal Savings & Loan Ass’n v. Howell, 24 N.J. 488, 508 (1957)); see Kervick v. Bontempo, *supra*, 29 N.J. 469.



It is unreasonable to assume that every records custodian, especially those in small municipalities with limited photocopy equipment and other resources, are able to adequately or accurately determine the actual copying cost of government records when doing so requires an estimate of the number of government records which will be requested annually divided by an estimated annual actual cost of photocopy paper and ink. Therefore, it is more likely, and consistent with the ‘golden rule of statutory interpretation’ adopted by the Supreme Court of New Jersey in Dickinson, *supra*, that the unreasonableness of a particular result arising from the selection of one among several possible alternative interpretations strongly militates in favor of the adoption of an interpretation that embraces a reasonable result. Adopting the interpretation of the copying cost provision in OPRA which allows records custodians to charge the enumerated rates for copies of government records is the reasonable result.” Id.

Therefore, based on the Council’s decision in Windish, *supra*, the Custodian may charge the copy costs enumerated in N.J.S.A. 47:1A-5.b. for paper copies. As such, the Custodian’s charge of \$69.39 is reasonable pursuant to OPRA because the Custodian charged the enumerated copy costs in N.J.S.A. 47:1A-5.b. for paper copies, and what appears to be the actual cost for copies of audio tapes.

**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.

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).

Although the Custodian's failure to grant access, deny access, seek clarification, or request an extension of time in writing within the statutorily mandated seven (7) business days resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., John Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), and Michael DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007), the Custodian certifies that the Complainant picked up the requested records on June 12, 2007 (approximately one (1) month following the date of the Complainant's request). It is therefore concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to grant access, deny access, seek clarification, or request an extension of time in writing within the statutorily mandated seven (7) business days results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., John Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), and Michael DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007).
2. Based on the Council's decision in John Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), *aff'd*, MOR-A-0579-06T3 (December 13, 2007), the Custodian may charge the copy costs enumerated in N.J.S.A. 47:1A-5.b. for paper copies. As such, the Custodian's charge of \$69.39 is reasonable pursuant to OPRA because the Custodian charged the enumerated copy costs in N.J.S.A. 47:1A-5.b. for paper copies, and what appears to be the actual cost for copies of audio tapes.
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian provided the Complainant with the requested records approximately one (1) month following the date of the Complainant's request, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access

appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Dara Lownie  
Senior Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

December 12, 2007