



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

September 30, 2009 Government Records Council Meeting

Beth A. Barile
Complainant

Complaint No. 2007-92

v.

Stillwater Township (Sussex)
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian in this complaint delivered to the Council on August 21, 2009 (within five (5) business days from her receipt of the Council’s Interim Order) a legal certification, in accordance with N.J. Court Rule 1:4-4, indicating that the executive session minutes have been disclosed to the Complainant as ordered. Therefore, the Custodian has complied with the Council’s August 11, 2009 Interim Order.
2. Although the Custodian’s response to the Complainant that OPRA does not apply to home computers was improper and not supported by any provisions of OPRA or ensuing case law, and although the Stillwater Township ordinance establishing OPRA request copying fees in excess of the actual cost and enumerated fees authorized by OPRA is invalid, and despite the Custodian’s noncompliance with the Council’s February 25, 2009 Interim Order, the Custodian did comply with the Council’s August 11, 2009 Interim Order by providing the requested executive session minutes with appropriate redactions to the Complainant pursuant to the *in camera* review findings and recommendations. Therefore, 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 “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 30th Day of September, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: October 7, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**Beth A. Barile¹
Complainant**

GRC Complaint No. 2007-92

v.

**Stillwater Township (Sussex)²
Custodian of Records**

Records Relevant to Complaint:

1. January 30, 2007 request - Copies of newspaper notices advertising public meetings for the dates of January 2, 2007, January 20, 2007, and January 23, 2007.
2. February 2, 2007 request - Executive session meeting minutes from October 2006 through February 2007.
3. March 13, 2007 request - All e-mails to and from home computers of the Township Committee members and staff regarding Complainant's position as Chief Financial Officer and Department of Community Affairs charges.
4. March 20, 2008 request - CD-ROM copy of the minutes of the March 18, 2008 meeting of the Township Committee.

Requests Made: January 30, 2007, February 2, 2007, March 13, 2007, March 20, 2008

Responses Made: February 6, 2007, February 8, 2007, March 20, 2007, March 24, 2008

Custodians: Jerald Murphy,³ Susan Best,⁴ Judy Fisher⁵

GRC Complaint Filed: April 10, 2007

Background

August 11, 2009

Government Records Council's ("Council") Interim Order. At its August 11, 2009 public meeting, the Council considered the August 4, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has not complied with the Council's February 25, 2009 Interim Order by providing the Council with all records set forth in Paragraph 1 of the Order within five (5) business days of receiving the Council's Order.

¹ No legal representation listed on record.

² Represented by Michael Garofalo, Esq., of Laddey, Clark & Ryan, LLP (Sparta, NJ).

³ Original Custodian.

⁴ Subsequent Custodian; she only fulfilled the March 20, 2008 OPRA request.

⁵ Current Custodian. The Township replaced Susan Best with Judy Fisher.

2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

August 13, 2009

Council's Interim Order distributed to the parties.

August 21, 2009

Custodian's response to the Council's Interim Order. The Custodian certifies that she is the custodian, that she received the Interim Order on August 14, 2009 and that she disclosed to the Complainant those executive session minutes from October 2006 through February 2007 with redactions on August 21, 2009 per the Council's Interim Order (within five (5) business days of her receipt of said Order).

Analysis

Whether the Custodian complied with the Council's August 11, 2009 Interim Order?

At its August 11, 2009 public meeting, the Council ordered the Custodian to disclose certain redacted executive session minutes from October 2006 through February 2007 requested by the Complainant based on the finding of an *in camera* examination. The Council ordered that the Custodian disclose the executive session minutes to the Complainant within five (5) business days from receipt of the Interim Order which was distributed to the parties on August 13, 2009, with a legal certification, in accordance with N.J. Court Rule 1:4-4, to the Executive Director indicating that the executive session minutes has been disclosed as ordered.

The Custodian in this complaint delivered to the Council on August 21, 2009 (within five (5) business days from her receipt of the Council's Interim Order) a legal certification, in accordance with N.J. Court Rule 1:4-4, indicating that the executive session minutes have been disclosed to the Complainant as ordered. Therefore, the Custodian has complied with the Council's August 11, 2009 Interim Order.

Whether the Custodian's actions rise 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, 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, 107 (App. Div. 1996).

Although the Custodian’s response to the Complainant that OPRA does not apply to home computers was improper and not supported by any provisions of OPRA or ensuing case law, and although the Stillwater Township ordinance establishing OPRA request copying fees in excess of the actual cost and enumerated fees authorized by OPRA is invalid, and despite the Custodian’s noncompliance with the Council’s February 25, 2009 Interim Order, the Custodian did comply with the Council’s August 11, 2009 Interim Orders by providing the requested executive session minutes with appropriate redactions to the Complainant pursuant to the *in camera* review findings and recommendations. Therefore, 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 “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 in this complaint delivered to the Council on August 21, 2009 (within five (5) business days from her receipt of the Council’s Interim Order) a legal certification, in accordance with N.J. Court Rule 1:4-4, indicating that the executive session minutes have been disclosed to the Complainant as ordered. Therefore, the Custodian has complied with the Council’s August 11, 2009 Interim Order.

2. Although the Custodian's response to the Complainant that OPRA does not apply to home computers was improper and not supported by any provisions of OPRA or ensuing case law, and although the Stillwater Township ordinance establishing OPRA request copying fees in excess of the actual cost and enumerated fees authorized by OPRA is invalid, and despite the Custodian's noncompliance with the Council's February 25, 2009 Interim Order, the Custodian did comply with the Council's August 11, 2009 Interim Order by providing the requested executive session minutes with appropriate redactions to the Complainant pursuant to the *in camera* review findings and recommendations. Therefore, 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 "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 and
Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009



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GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
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INTERIM ORDER

August 11, 2009 Government Records Council Meeting

Beth A. Barile
Complainant

Complaint No. 2007-92

v.

Stillwater Township (Sussex)
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 2009 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of the amended findings and recommendations. The Council, therefore, finds that:

1. The Custodian has not complied with the Council’s February 25, 2009 Interim Order by providing the Council with all records set forth in Paragraph 1 of the Order within five (5) business days of receiving the Council’s Order.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**



Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ¹
1.	October 3, 2006 Executive Session Minutes	Discussion of personnel matters.	Open Public Meetings Act exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8).</u>	<p>1. <u>Paragraph 1 (page 1)</u>: The first full sentence (its own paragraph) should be disclosed.</p> <p>2. <u>Paragraph 2 (page 1)</u>: The first two (2) sentences should be disclosed.</p> <p>3. <u>Paragraph 3 (page 1)</u>: The first sentence should be disclosed.</p> <p>4. <u>Paragraph 5 (page 1)</u>: The first ten (10) words before the comma in the first sentence should be disclosed.</p> <p>5. <u>Paragraph 5 (cont'd page 2)</u>: disclose the first full sentence up to and including the comma beginning "Upon" and</p>

¹ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				<p>ending “officer”.</p> <p>6. <u>Paragraph 11 (pages 2-3)</u>: This paragraph is exempt in its entirety as advisory, consultative or deliberative material (<u>N.J.S.A. 47:1A-1.1</u>), and personnel discussions (<u>N.J.S.A. 10:4-12.b(8)</u>). However, the balance of this paragraph on page 3 was previously mistakenly disclosed.</p> <p>7. <u>Closing paragraph (page 3)</u>: This closing paragraph in the middle of the page, at the end of the “First Session” should be disclosed.</p> <p>2. All other redactions are proper because the redacted information is exempt from disclosure pursuant to the OPMA exempts for pending litigation (<u>N.J.S.A. 10:4-12.b(7)</u>) and personnel discussions (<u>N.J.S.A. 10:4-</u></p>
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				12.b(8)), and/or as advisory, consultative or deliberative material (<u>N.J.S.A. 47:1A-1.1</u>).
2.	October 17, 2006 Executive Session Minutes	Discussion of personnel matters.	Open Public Meetings Act exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	<p>1. <u>Closing paragraph (page 2)</u>: This closing paragraph in the middle of the page, at the end of the “First Session” should be disclosed.</p> <p>2. <u>Closing paragraph (page 3)</u>: This closing paragraph at the bottom of the page should be disclosed.</p> <p>2. All other redactions are proper because the redacted information is exempt from disclosure pursuant to the OPMA exemptions for pending litigation (<u>N.J.S.A. 10:4-12.b(7)</u>) and/or personnel discussions (<u>N.J.S.A. 10:4-12.b(8)</u>).</p>
3.	November 14, 2006 Executive Session Minutes	Discussion of personnel matters.	OPMA exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	<p>1. <u>Closing paragraph (page 2)</u>: This closing paragraph in the middle of the page, at the end of the “First Session”</p>

				<p>should be disclosed.</p> <p>2. <u>Closing paragraph (page 2)</u>: This closing paragraph at the bottom of the page should be disclosed.</p> <p>2. All other redactions are proper because the redacted information is exempt from disclosure pursuant to the OPMA exemptions for pending litigation (<u>N.J.S.A. 10:4-12.b(7)</u>), personnel discussions (<u>N.J.S.A. 10:4-12.b(8)</u>), and/or as advisory, consultative or deliberative material (<u>N.J.S.A. 47:1A-1.1</u>).</p>
4.	November 28, 2006 Executive Session Minutes	Discussion of personnel matters.	OPMA exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	<p>1. <u>Closing paragraph (page 2)</u>: This closing paragraph in the middle of the page, at the end of the "First Session" should be disclosed.</p> <p>2. <u>Closing paragraph (page 2)</u>: This closing paragraph at the bottom of the page should be</p>

				disclosed. 2. All other redactions are proper because the redacted information is exempt from disclosure pursuant to the OPMA exemptions for pending litigation (<u>N.J.S.A. 10:4-12.b(7)</u>) and personnel discussions (<u>N.J.S.A. 10:4-12.b(8)</u>), and/or as advisory, consultative or deliberative material (<u>N.J.S.A. 47:1A-1.1</u>).
5.	December 5, 2006 Executive Session Minutes	Discussion of personnel matters.	OPMA exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	1. <u>Closing paragraph (page 2)</u> : This closing paragraph at the bottom of the page should be disclosed. 2. All other redactions are proper because the redacted information is exempt from disclosure pursuant to the OPMA exemptions for pending litigation (<u>N.J.S.A. 10:4-12.b(7)</u>) and personnel discussions

				(<u>N.J.S.A. 10:4-12.b(8)</u>), and/or as advisory, consultative or deliberative material (<u>N.J.S.A. 47:1A-1.1</u>).
6.	December 19, 2006 Executive Session Minutes	Discussion of personnel matters.	OPMA exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	<p>1. <u>Paragraph 5 (page 1)</u>: This paragraph should be disclosed.</p> <p>2. <u>Closing paragraph (page 2)</u>: This closing paragraph in the middle of the page, at the end of the "First Session" should be disclosed.</p> <p>3. <u>Closing Paragraph (page 2)</u>: This closing paragraph at the bottom of the page should be disclosed.</p> <p>3. All other redactions are proper because the redacted information is exempt from disclosure pursuant to the OPMA exemptions for pending litigation (<u>N.J.S.A. 10:4-12.b(7)</u>) and/or personnel discussions (<u>N.J.S.A. 10:4-12.b(8)</u>).</p>
7.	January 2, 2007 Executive	Discussion of personnel	OPMA exemption for	1. <u>Closing paragraph 4 (page</u>

	Session Minutes	matters.	personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	1): This closing paragraph at the bottom of the page should be disclosed. 2. All other redactions are proper because the redacted information is exempt from disclosure pursuant to OPMA exemption for personnel discussions (<u>N.J.S.A. 10:4-12.b(8)</u>).
8.	January 16, 2007 Executive Session Minutes	Discussion of personnel matters.	OPMA exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	This record was previously disclosed in its entirety. No need for the GRC to review this record <i>in camera</i> .
9.	February 6, 2007 Executive Session Minutes	Discussion of personnel matters.	OPMA exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	1. <u>Closing paragraph (page 2)</u> : This closing paragraph at the bottom of the page should be disclosed. 2. All other redactions are proper because the redacted information is exempt from disclosure pursuant to the OPMA exemptions for pending litigation (<u>N.J.S.A. 10:4-12.b(7)</u>) and personnel

				discussions (<u>N.J.S.A. 10:4-12.b(8)</u>), and/or as advisory, consultative or deliberative material (<u>N.J.S.A. 47:1A-1.1</u>).
10.	February 20, 2007 Executive Session Minutes	Discussion of personnel matters.	OPMA exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	<p>1. <u>First Session - Paragraphs 1 and 2 (page 1)</u>: These two (2) paragraphs should be disclosed.</p> <p>3. <u>First Session - Closing Paragraph (page 2)</u>: This closing paragraph at the top of the page at the end of the “First Session” should be disclosed.</p> <p>2. <u>Second Session – Closing Paragraph and Closing Salutations (page 2)</u>: This closing paragraph and the closing salutations should be disclosed.</p> <p>3. All other redactions are proper because the redacted information is exempt from disclosure pursuant to the OPMA exemptions for pending litigation (<u>N.J.S.A. 10:4-12.b(7)</u>) and</p>

				personnel discussions (<u>N.J.S.A.</u> 10:4-12.b(8)), and/or as advisory, consultative or deliberative material (<u>N.J.S.A.</u> 47:1A-1.1).
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Interim Order Rendered by the
Government Records Council
On The 11th Day of August, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: August 13, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
August 11, 2009 Council Meeting**

**Beth A. Barile¹
Complainant**

GRC Complaint No. 2007-92

v.

**Stillwater Township (Sussex)²
Custodian of Records**

Records Relevant to Complaint:

1. January 30, 2007 request - Copies of newspaper notices advertising public meetings for the dates of January 2, 2007, January 20, 2007, and January 23, 2007.
2. February 2, 2007 request - Executive session meeting minutes from October 2006 through February 2007.
3. March 13, 2007 request - All e-mails to and from home computers of the Township Committee members and staff regarding Complainant's position as Chief Financial Officer and Department of Community Affairs charges.
4. March 20, 2008 request - CD-ROM copy of the minutes of the March 18, 2008 meeting of the Township Committee.

Request Made: January 30, 2007, February 2, 2007, March 13, 2007, March 20, 2008

Response Made: February 6, 2007, February 8, 2007, March 20, 2007, March 24, 2008

Custodians: Jerald Murphy,³ Susan Best,⁴ Judy Fisher⁵

GRC Complaint Filed: April 10, 2007

Records Submitted for *In Camera* Examination: Executive session meeting minutes from October 2006 through February 2007.

Background

February 25, 2009

Government Records Council's Interim Order. At the February 25, 2009 public meeting, the Government Records Council ("Council") considered the February 18, 2009 Executive Director's Findings and Recommendations 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 No legal representation listed on record.

² Represented by Michael Garofalo, Esq., of Laddey, Clark & Ryan, LLP (Sparta, NJ).

³ Original Custodian.

⁴ Subsequent Custodian; she only fulfilled the March 20, 2008 OPRA request.

⁵ Current Custodian. The Township replaced Susan Best with Judy Fisher.

1. Because the Custodian has asserted that portions of the requested records were lawfully redacted pursuant to N.J.S.A. 10:4-12, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested records were properly redacted.
2. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁸, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Pursuant to N.J.S.A. 47:1A-1.1, Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005) and Seerey v. Upper Pittsgrove Township, GRC Complaint No. 2005-38 (December 2005) the Custodian's assertion of the confidentiality of the records sought in request Item No. 3 and the Custodian's contention that OPRA does not apply to home computers were improper. The Custodian's response was not supported by any provisions of OPRA or ensuing case law.
4. Pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority to adjudicate whether a Custodian has complied with the Open Public Meetings Act or any statute other than OPRA. *See* Thomas Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006) (holding that based on N.J.S.A. 47:1A-7.b., the GRC does not have the authority to adjudicate whether a Custodian has complied with OPMA or any statute other than OPRA).
5. Because Stillwater Ordinance 2007-22 sets copy fees for OPRA requests in excess of the fees authorized by OPRA, the Ordinance is invalid as applied to OPRA requests. Under OPRA, the Custodian may only charge the actual cost of duplication for the record requested. N.J.S.A. 47:1A-5.b. While the Custodian⁹ has certified in one instance that the actual cost of duplicating the record requested is \$5, she¹⁰ has also certified that the Township purchases 100 CD-ROMs for \$35.00, thereby making the cost per CD-ROM 35¢. Because the Custodian has failed to establish that the Township will incur any additional costs for duplicating the requested record, the Custodian¹¹ has violated N.J.S.A. 47:1A-

⁶ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁷ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁹ Susan Best, prior custodian.

¹⁰ Judy Fisher, current custodian.

¹¹ Susan Best.

5.b. Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006).

6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

March 5, 2009

Council's Interim Order ("Order") distributed to the parties.

July 13, 2009

Letter from the GRC to the Custodian's Counsel. The GRC states that the Interim Order required the Custodian to provide for an in camera examination unredacted copies of the executive session meeting minutes from October 2006 through February 2007. The GRC also states that the Custodian previously only provided unredacted executive session meeting minutes from the January 2, 2007 meeting. The GRC directs that Custodian's Counsel to forward nine (9) copies of executive session meeting minutes from October 2006 through February 2007 within three (3) business days or by July 16, 2009.

July 17, 2009

Certification of the Custodian in response to the Council's Interim Order with nine (9) sealed copies of unredacted executive session meeting minutes from October 2006 through February 2007. The Custodian certifies that she is the custodian and that the documents attached are true copies of requested records for the in camera examination. [Please note that the Custodian previously provided nine (9) copies of unredacted executive session meeting minutes from January 2, 2007 only. The date these documents were delivered to the GRC is unknown.]

Analysis

Whether the Custodian complied with the Council's February 25, 2009 Interim Order?

At its February 25, 2009 public meeting, the Council determined that because the Custodian has asserted that portions of the requested records were lawfully redacted pursuant to N.J.S.A. 10:4-12, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested records were properly redacted.

The Council therefore ordered that the Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted document, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

The Custodian in this complaint provided the Council with only unredacted copies of the January 2, 2007 executive session minutes on a date uncertain. However, on July 17, 2009 (or over four (4) months after compliance with the Interim Order was due), the Custodian provided the Council with nine (9) unredacted copies of the executive session minutes from October 2006 through February 2007 as requested. Additionally, the Custodian provided the appropriate certification indicating that the documents provided were true copies of the records requested. Lastly, the Custodian failed to provide the Council with a redaction index to explain the nature of the redactions and the lawful basis for the redactions made to the minutes.

Therefore, the Custodian has not complied with the Council's February 25, 2009 Interim Order since she did not provide the requested records, redaction index or proper certification for the in camera inspection within five (5) business days from receipt of the Council's Interim Order.

Whether the Custodian unlawfully redacted the executive session minutes from October 2006 through February 2007?

The Custodian asserts that the redactions made to the requested executive session minutes from October 2006 – February 2007 involve discussion between the Township Attorney and the Township Committee regarding disciplinary actions and information exempt pursuant to the Open Public Meetings Act exemptions for pending litigation (N.J.S.A. 10-4-12.b(7)) and personnel matters (N.J.S.A. 10-4-12.b(8)) involving the Complainant.

OPRA provides that its provisions “shall not abrogate any exemption of a public record or government record from public access made pursuant to any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” N.J.S.A. 47:1A-9.a.

The Open Public Meetings Act shields from disclosure information of the following nature:

“b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:

(7) Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.

Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could

be adversely affected request in writing that such matter or matters be discussed at a public meeting.” N.J.S.A. 10:4-12(b).

Therefore, executive session discussions of pending litigation and personnel matters are exempt under OPRA because these discussions are exempt under the Open Public Meetings Act, N.J.S.A. 10:4-12(b).

Further, OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that “neither the statute nor the courts have defined the terms... ‘advisory, consultative, or deliberative’ in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, citing McClain, *supra*, 99 N.J. at 361-62, 492 A.2d 991.

In In Re Liquidation of Integrity, *supra*, 165 N.J. at 84-5, the judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
 - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
 - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
 - i. Deliberative materials do not include purely factual materials.
 - ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
 - c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.

- d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position.*
- e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency.*

Therefore, executive session discussions which are pre-decisional and/or contain opinions and recommendations are exempt under OPRA.

The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination¹²
1.	October 3, 2006 Executive Session Minutes	Discussion of personnel matters.	Open Public Meetings Act exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8).</u>	1. <u>Paragraph 1 (page 1)</u> : The first full sentence (its own paragraph) should be disclosed. 2. <u>Paragraph 2 (page 1)</u> : The first two (2) sentences should be disclosed. 3. <u>Paragraph 3</u>

¹² **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				<p>(page 1): The first sentence should be disclosed.</p> <p>4. <u>Paragraph 5 (page 1)</u>: The first ten (10) words before the comma in the first sentence should be disclosed.</p> <p>5. <u>Paragraph 5 (cont'd page 2)</u>: disclose the first full sentence up to and including the comma beginning "Upon" and ending "officer".</p> <p>6. <u>Paragraph 11 (pages 2-3)</u>: This paragraph is exempt in its entirety as advisory, consultative or deliberative material (<u>N.J.S.A. 47:1A-1.1</u>), and personnel discussions (<u>N.J.S.A. 10:4-12.b(8)</u>). However, the balance of this paragraph on page 3 was previously mistakenly disclosed.</p> <p>7. <u>Closing paragraph (page 3)</u>: This closing paragraph in the middle of the page, at the end of the "First Session" should be disclosed.</p> <p>2. All other</p>
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				redactions are proper because the redacted information is exempt from disclosure pursuant to the OPMA exempts for pending litigation (<u>N.J.S.A. 10:4-12.b(7)</u>) and personnel discussions (<u>N.J.S.A. 10:4-12.b(8)</u>), and/or as advisory, consultative or deliberative material (<u>N.J.S.A. 47:1A-1.1</u>).
2.	October 17, 2006 Executive Session Minutes	Discussion of personnel matters.	Open Public Meetings Act exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	<p>1. <u>Closing paragraph (page 2)</u>: This closing paragraph in the middle of the page, at the end of the “First Session” should be disclosed.</p> <p>2. <u>Closing paragraph (page 3)</u>: This closing paragraph at the bottom of the page should be disclosed.</p> <p>2. All other redactions are proper because the redacted information is exempt from disclosure pursuant to the OPMA exemptions for pending litigation</p>

				(<u>N.J.S.A. 10:4-12.b(7)</u>) and/or personnel discussions (<u>N.J.S.A. 10:4-12.b(8)</u>).
3.	November 14, 2006 Executive Session Minutes	Discussion of personnel matters.	OPMA exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	<p>1. <u>Closing paragraph (page 2)</u>: This closing paragraph in the middle of the page, at the end of the “First Session” should be disclosed.</p> <p>2. <u>Closing paragraph (page 2)</u>: This closing paragraph at the bottom of the page should be disclosed.</p> <p>2. All other redactions are proper because the redacted information is exempt from disclosure pursuant to the OPMA exemptions for pending litigation (<u>N.J.S.A. 10:4-12.b(7)</u>), personnel discussions (<u>N.J.S.A. 10:4-12.b(8)</u>), and/or as advisory, consultative or deliberative material (<u>N.J.S.A. 47:1A-1.1</u>).</p>
4.	November 28, 2006 Executive Session Minutes	Discussion of personnel matters.	OPMA exemption for personnel discussions.	1. <u>Closing paragraph (page 2)</u> : This closing paragraph in the

			<u>N.J.S.A. 10:4-12.b(8).</u>	<p>middle of the page, at the end of the “First Session” should be disclosed.</p> <p>2. <u>Closing paragraph (page 2)</u>: This closing paragraph at the bottom of the page should be disclosed.</p> <p>2. All other redactions are proper because the redacted information is exempt from disclosure pursuant to the OPMA exemptions for pending litigation (<u>N.J.S.A. 10:4-12.b(7)</u>) and personnel discussions (<u>N.J.S.A. 10:4-12.b(8)</u>), and/or as advisory, consultative or deliberative material (<u>N.J.S.A. 47:1A-1.1</u>).</p>
5.	December 5, 2006 Executive Session Minutes	Discussion of personnel matters.	OPMA exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8).</u>	<p>1. <u>Closing paragraph (page 2)</u>: This closing paragraph at the bottom of the page should be disclosed.</p> <p>2. All other redactions are proper because the redacted information is exempt from</p>

				disclosure pursuant to the OPMA exemptions for pending litigation (<u>N.J.S.A. 10:4-12.b(7)</u>) and personnel discussions (<u>N.J.S.A. 10:4-12.b(8)</u>), and/or as advisory, consultative or deliberative material (<u>N.J.S.A. 47:1A-1.1</u>).
6.	December 19, 2006 Executive Session Minutes	Discussion of personnel matters.	OPMA exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	<ol style="list-style-type: none"> 1. <u>Paragraph 5 (page 1)</u>: This paragraph should be disclosed. 2. <u>Closing paragraph (page 2)</u>: This closing paragraph in the middle of the page, at the end of the “First Session” should be disclosed. 3. <u>Closing Paragraph (page 2)</u>: This closing paragraph at the bottom of the page should be disclosed. <p>3. All other redactions are proper because the redacted information is exempt from disclosure pursuant to the OPMA exemptions for pending litigation (<u>N.J.S.A. 10:4-</u></p>

				12.b(7)) and/or personnel discussions (<u>N.J.S.A. 10:4-12.b(8)</u>).
7.	January 2, 2007 Executive Session Minutes	Discussion of personnel matters.	OPMA exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	1. <u>Closing paragraph 4 (page 1)</u> : This closing paragraph at the bottom of the page should be disclosed. 2. All other redactions are proper because the redacted information is exempt from disclosure pursuant to OPMA exemption for personnel discussions (<u>N.J.S.A. 10:4-12.b(8)</u>).
8.	January 16, 2007 Executive Session Minutes	Discussion of personnel matters.	OPMA exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	This record was previously disclosed in its entirety. No need for the GRC to review this record <i>in camera</i> .
9.	February 6, 2007 Executive Session Minutes	Discussion of personnel matters.	OPMA exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	1. <u>Closing paragraph (page 2)</u> : This closing paragraph at the bottom of the page should be disclosed. 2. All other redactions are proper because the redacted information is exempt from disclosure pursuant to the OPMA

				exemptions for pending litigation (<u>N.J.S.A. 10:4-12.b(7)</u>) and personnel discussions (<u>N.J.S.A. 10:4-12.b(8)</u>), and/or as advisory, consultative or deliberative material (<u>N.J.S.A. 47:1A-1.1</u>).
10.	February 20, 2007 Executive Session Minutes	Discussion of personnel matters.	OPMA exemption for personnel discussions. <u>N.J.S.A. 10:4-12.b(8)</u> .	<p>1. <u>First Session - Paragraphs 1 and 2 (page 1)</u>: These two (2) paragraphs should be disclosed.</p> <p>3. <u>First Session - Closing Paragraph (page 2)</u>: This closing paragraph at the top of the page at the end of the “First Session” should be disclosed.</p> <p>2. <u>Second Session – Closing Paragraph and Closing Salutations (page 2)</u>: This closing paragraph and the closing salutations should be disclosed.</p> <p>3. All other redactions are proper because the redacted information is exempt from disclosure pursuant to the OPMA exemptions for</p>

				pending litigation (N.J.S.A. 10:4-12.b(7)) and personnel discussions (N.J.S.A. 10:4-12.b(8)), and/or as advisory, consultative or deliberative material (N.J.S.A. 47:1A-1.1).
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Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not complied with the Council’s February 25, 2009 Interim Order by providing the Council with all records set forth in Paragraph 1 of the Order within five (5) business days of receiving the Council’s Order.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

Prepared and
Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

February 25, 2009 Government Records Council Meeting

Beth A. Barile
Complainant

Complaint No.2007-92

v.

Stillwater Township (Sussex)
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council ("Council") considered the February 18, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian has asserted that portions of the requested records were lawfully redacted pursuant to N.J.S.A. 10:4-12, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested records were properly redacted.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



3. Pursuant to N.J.S.A. 47:1A-1.1, Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005) and Seerey v. Upper Pittsgrove Township, GRC Complaint No. 2005-38 (December 2005) the Custodian's assertion of the confidentiality of the records sought in request Item No. 3 and the Custodian's contention that OPRA does not apply to home computers were improper. The Custodian's response was not supported by any provisions of OPRA or ensuing case law.
4. Pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority to adjudicate whether a Custodian has complied with the Open Public Meetings Act or any statute other than OPRA. *See* Thomas Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006) (holding that based on N.J.S.A. 47:1A-7.b., the GRC does not have the authority to adjudicate whether a Custodian has complied with OPMA or any statute other than OPRA).
5. Because Stillwater Ordinance 2007-22 sets copy fees for OPRA requests in excess of the fees authorized by OPRA, the Ordinance is invalid as applied to OPRA requests. Under OPRA, the Custodian may only charge the actual cost of duplication for the record requested. N.J.S.A. 47:1A-5.b. While the Custodian⁴ has certified in one instance that the actual cost of duplicating the record requested is \$5, she⁵ has also certified that the Township purchases 100 CD-ROMs for \$35.00, thereby making the cost per CD-ROM 35¢. Because the Custodian has failed to establish that the Township will incur any additional costs for duplicating the requested record, the Custodian⁶ has violated N.J.S.A. 47:1A-5.b. Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 25th Day of February, 2009

Robin Berg Tabakin, Chairman
Government Records Council

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

⁴ Susan Best, prior custodian.

⁵ Judy Fisher, current custodian.

⁶ Susan Best.

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: March 5, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 25, 2009 Council Meeting**

**Beth A. Barile¹
Complainant**

GRC Complaint No. 2007-92

v.

**Stillwater Township (Sussex)²
Custodian of Records**

Records Relevant to Complaint:

1. January 30, 2007 request - Copies of newspaper notices advertising public meetings for the dates of January 2, 2007, January 20, 2007, and January 23, 2007.
2. February 2, 2007 request - Executive session meeting minutes from October 2006 through February 2007.
3. March 13, 2007 request - All e-mails to and from home computers of the Township Committee members and staff regarding Complainant's position as Chief Financial Officer and Department of Community Affairs charges.
4. March 20, 2008 request - CD-ROM copy of the minutes of the March 18, 2008 meeting of the Township Committee.

Request Made: January 30, 2007, February 2, 2007, March 13, 2007, March 20, 2008

Response Made: February 6, 2007, February 8, 2007, March 20, 2007, March 24, 2008

Custodians: Jerald Murphy,³ Susan Best,⁴ Judy Fisher⁵

GRC Complaint Filed: April 10, 2007

Background

January 30, 2007

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests copies of the records listed above on an official OPRA request form.⁶

¹ No legal representation listed on record.

² Represented by Michael Garofalo, Esq., of Laddey, Clark & Ryan, LLP (Sparta, NJ).

³ Original Custodian.

⁴ Subsequent Custodian; she only fulfilled the March 20, 2008 OPRA request.

⁵ Current Custodian. The Township replaced Susan Best with Judy Fisher.

⁶ Complainant's official OPRA request sought newspaper advertising for meetings for specific dates.

However, in Complainant's Denial of Access Complaint, Complainant states that she requested affidavits of publication for the specified meetings.

February 2, 2007

Complainant's second (2nd) OPRA request. The Complainant requests copies of executive session meeting minutes from the January 2, 2007 committee meeting on an official OPRA request form.

February 6, 2007

Custodian's response to the first (1st) OPRA request. The Custodian responds in writing to the Complainant's January 30, 2007 OPRA request on the fifth (5th) business day after receipt of same, stating that the records will be made available on February 6, 2007.⁷ Custodian states in his response to the Complainant's request that the agency did not request affidavits for public notices.

February 8, 2007

Custodian's response to the second (2nd) OPRA request. The Custodian responds in writing to the Complainant's February 2, 2007 OPRA request on the fourth (4th) business day after receipt of same, stating that the records will not be made available to the Complainant due to the confidential nature of the records.

March 13, 2007

Complainant's third (3rd) OPRA request. The Complainant requests the records relevant to this complaint listed above on official OPRA request form.

March 20, 2007

Custodian's response to the third (3rd) OPRA request. The Custodian responds in writing to Complainant's March 3, 2007 OPRA request on the fifth (5th) business day after receipt of same, stating that the documents will not be made available to the Complainant because OPRA does not cover home computers.

April 10, 2007

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

- The Complainant's OPRA requests dated January 30, 2007, February 2, 2007, and March 13, 2007
- The Custodian's responses to OPRA requests dated February 6, 2007, February 8, 2007, and March 20, 2007

The Complainant states that if a custodian is unable to comply with a request for access, then the custodian must provide a specific basis for the denial on the request form and promptly return it to the requester. N.J.S.A. 47:1A-5.g. The Complainant contends that when a record is not released, the custodian must reply to the OPRA request and explain the reason for the denial of access. N.J.S.A. 47:1A-5.i.

The Complainant cites to the New Jersey Open Public Meetings Act (OPMA) N.J.S.A. 10:4-14 to support the allegation that the Custodian has violated OPMA. The

⁷ It is unknown whether the records requested were available on February 6, 2007 because the Complainant did not make an attempt to retrieve the requested records until February 8, 2007 at which time the records were available.

Complainant states that the custodian bears the burden of proving that the denial of access was authorized by law pursuant to N.J.S.A. 47:47:1A-6. The Complainant further states that, based on the fact that the Custodian has not provided a specific lawful basis for denying access to the executive session meeting minutes pursuant to N.J.S.A. 47:1A-6, the Custodian should disclose the executive session meeting minutes with appropriate redactions as necessary and provide a legal basis for such redactions pursuant to N.J.S.A. 47:1A-5.g.

April 10, 2007

Offer of Mediation sent to both parties.

April 11, 2007

The Custodian agrees to mediation.

April 13, 2007

Memorandum from the Custodian to the Complainant. The Custodian states that the Complainant requested copies of meetings as advertised in the newspaper.⁸ The Custodian further states, that in an effort to cut cost, the Township only requested affidavits of publication for ordinances and resolutions. The Custodian states that unbeknownst to him, the newspaper sent some affidavits of publication for special meetings. The Custodian states that these affidavits were filed in the vault by the clerk/typist without his knowledge. The Custodian states that he has enclosed the affidavits that were in his possession and has requested additional affidavits from the newspaper.

April 17, 2007

The Complainant agrees to mediation.

October 18, 2007

Complaint referred back to the GRC from mediation.

October 18, 2007

Request for the Statement of Information sent to the Custodian.

November 1, 2007

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

- The Complainant's OPRA requests dated January 30, 2007, February 2, 2007, and March 13, 2007
- The Custodian's responses to the Complainant's OPRA requests dated February 6, 2007, February 8, 2007, and March 20, 2007
- Memorandum from the Custodian to the Complainant dated April 13, 2007

The Custodian contends that all records requested were provided during mediation and have been properly redacted for the reasons provided in the redaction log. The Custodian further contends that the Complainant objects to redactions of the records

⁸The Custodian understood the Complainant's request to mean affidavits of publication.
Beth Barile v. Stillwater Township, 2007-92 – Findings and Recommendations of the Executive Director

provided. The Custodian further argues that all redactions were made in accordance with N.J.S.A. 10:4-12.

March 6, 2008

Amended Denial of Access Complaint filed with the GRC. Complainant amends her Denial of Access Complaint to include the following four (4) issues:

1. The copy of the legal notice sent to the NJ Herald rescheduling the 2007 Stillwater Township (“Township”) Committee reorganization meeting to January 2, 2007 was not published. This meeting was misidentified as a reorganization meeting when it was a regular meeting where decisions were made and the public was not properly informed.
2. The Complainant challenges the redactions made to the January 2006 through March 2007 executive session minutes provided to her. The Complainant states that the reason she was given for the redactions was that the redactions concerned the Complainant as an employee of Stillwater Township. The Complainant states that this reason is illogical since she did not receive any “RICE letters.”⁹ The Complainant also states that she would not have been the subject of any discussion until August 2006 or September 2006. The Complainant further argues that the minutes provided to her contained unresolved confidential discussions pertaining to other Stillwater employees.
3. The Custodian of Record was not Mr. Michael Garofalo, Esq. (the Township’s Attorney).¹⁰
4. The five (\$5) dollars per CD fee Complainant was charged by the Custodian for the copy of the records provided was excessive.

March 20, 2008

Complainant’s fourth (4th) OPRA request. The Complainant requests a CD-ROM copy of meeting minutes from the March 18, 2008 Township Committee Meeting on an official OPRA request form.

March 24, 2008

Custodian’s response to the fourth (4th) OPRA request. The Custodian responds in writing to the Complainant’s March 20, 2008 OPRA request on the second (2nd) business day after receipt of same, stating that the record requested is available for a \$5 copying fee.

⁹ A Rice letter is an acknowledgment of the requirement that the governing body notify an individual employee if said employee will be discussed at a future meeting. *See Rodney Phillips V. Paul Greben, et al.*, 2006 U.S. Dist. LEXIS 78419 (October 2006).

¹⁰ The Complainant has alleged that the SOI was not signed by the Custodian; rather, it was signed by the Township’s attorney. There is no evidence on record to support this claim. All required certifications have been properly signed by the Custodian of Record, Jerald Murphy. Since the filing of the amended Denial of Access Complaint, the Township has replaced the Custodian of Record with Susan Best.

June 24, 2008

Custodian's response to Complainant's Amended Denial of Access Complaint. The Custodian argues that the first two (2) violations alleged by the Complainant are not violations of OPRA. The Custodian states that the Township's attorney assists the Township in responding to OPRA requests. The Custodian further states that the five dollar (\$5) fee quoted is a reasonable fee for the time and material required to reproduce a CD-ROM.

July 17, 2008

Letter from the GRC to the Custodian. The GRC attaches the special service charge 14 point analysis questions. The GRC requests the information necessary for determining the validity of the special service charge.

August 4, 2008

Letter from Custodian to GRC attaching an ordinance which the Custodian asserts authorizes the Custodian to charge \$5.00 for the records provided on CD-ROM. The Custodian states that \$5.00 is the Custodian's actual cost to provide the records requested on a CD-ROM.

October 14, 2008

E-mail from the GRC to the Complainant. The GRC requests a copy of the OPRA request where the Complainant was charged a copying fee of \$5.00 for records provided on CD-ROM. The GRC requests that the Complainant provides this information by October 17, 2008.

October 14, 2008

Facsimile from the Complainant to the GRC. The Custodian submits to the GRC a copy of an OPRA request for March 20, 2008 and a receipt for payment of a \$5.00 copying fee.

October 27, 2008

Telephone call from the GRC to the Custodian. The GRC requests information concerning the Township's fee schedule for CD-ROMs.

October 27, 2008

E-mail from the Custodian to the GRC. The Custodian states that the Township purchases 100 CD-ROMs for \$35.00. The Custodian further states that the ordinance which sets forth the Township's copying fees was changed in September 2007 to reflect the \$5.00 charge.

October 28, 2008

E-mail from the GRC to the Custodian. The GRC requests that the Custodian certifies to the information contained in the October 27, 2008 e-mail. The GRC also requests that the Custodian provide the GRC with a copy of the ordinance mentioned in the October 27, 2008 e-mail.

October 29, 2008

Custodian's certification of the Township's cost for CD-ROMs. The Custodian certifies that the Township adopted an ordinance setting the cost for duplicating records on CD-ROM at \$5. The Custodian certifies that the Township purchases a case of 100 CD-ROMs for \$35.00.¹¹

October 30, 2008¹²

Facsimile from Custodian to GRC. The Custodian submits a copy of Stillwater Township Ordinance 2007-22. Stillwater Township Ordinance 2007-22 sets forth the copying costs for records requests. The Stillwater Township Ordinance 67.2G states in relevant part:

“Where a request is for a copy in a format other than a photocopy, reasonable efforts will be made to provide the information in the format requested. The cost will be based on the costs of producing the format requested If the request is for a CD, then the cost shall be \$5.00 per disc.”

Analysis

Whether the Custodian unlawfully denied access to the requested record?

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 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

¹¹ This means that the actual cost of each CD-ROM is 35¢.

¹² Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
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access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. 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.

Additionally, OPRA provides:

“The provisions of this act, P.L.2001, c.404 (C.47:1A-5 et al.), shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.); any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” N.J.S.A. 47:1A-9.a.

The Open Public Meetings Act shields from disclosure information of the following nature:

“b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:

(1) Any matter which, by express provision of Federal law or State statute or rule of court shall be rendered confidential or excluded from the provisions of subsection a. of this section.

(2) Any matter in which the release of information would impair a right to receive funds from the Government of the United States.

(3) Any material the disclosure of which constitutes an unwarranted invasion of individual privacy such as any records, data, reports, recommendations, or other personal material of any educational, training, social service, medical, health, custodial, child protection, rehabilitation, legal defense, welfare, housing, relocation, insurance and similar program or institution operated by a public body pertaining to any specific individual admitted to or served by such institution or program, including but not limited to information relative to the individual's personal and family circumstances, and any material pertaining to admission, discharge, treatment, progress or condition of any individual, unless the individual concerned (or, in the case of a minor or incompetent, his guardian) shall request in writing that the same be disclosed publicly.

(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body.

(5) Any matter involving the purchase, lease or acquisition of real property with public funds, the setting of banking rates or investment of public funds, where it could adversely affect the public interest if discussion of such matters were disclosed.

(6) Any tactics and techniques utilized in protecting the safety and property of the public, provided that their disclosure could impair such

protection. Any investigations of violations or possible violations of the law.

(7) Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.

Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

(9) Any deliberations of a public body occurring after a public hearing that may result in the imposition of a specific civil penalty upon the responding party or the suspension or loss of a license or permit belonging to the responding party as a result of an act or omission for which the responding party bears responsibility.” N.J.S.A 10:4-12.b.

The Complainant’s Amended Denial of Access Complaint disputed the redactions made to the records disclosed to her by the Custodian. The Custodian certified that the redactions to the executive session meeting minutes from January 2006 to January 2, 2007 and February 6, 2007 concern communications between Stillwater Township and its attorney regarding issues involving disciplinary actions, personnel matters and pending litigation involving the Complainant. The Complainant challenged the redactions made to the executive session meeting minutes. The Complainant stated that she was informed that the redactions concerned the Complainant as an employee of Stillwater Township. The Complainant stated that this reason is illogical since she did not receive any “RICE letters.” She also stated that she would not have been the subject of any discussion until August 2006 or September 2006.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC¹³ in which the GRC dismissed the complaint by accepting the Custodian’s legal conclusion for the denial of access without further review. The court stated that:

“OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The court also stated that:

¹³ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Because the Custodian has asserted that portions of the requested records were lawfully redacted pursuant to N.J.S.A. 10:4-12, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian’s assertion that the requested records were properly redacted.

In her Denial of Access Complaint, the Complainant initially disputed the Custodian’s response to her OPRA request, specifically the Custodian’s assertion of the confidentiality of the records sought in request Item No. 3 and the Custodian’s contention that OPRA does not apply to home computers. The Custodian is incorrect. The definition of a government record is not restricted by the location of the record requested. OPRA defines a government record as a record that is "made, maintained or kept on file ... or that has been received in the course of his or its official business." N.J.S.A. 47: 1A-1.1.

The GRC held in Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005) that government records on home computers were disclosable. The Complainant in Meyers requested records that were government records as defined by N.J.S.A. 47:1A-1.1. The Custodian in Meyers alleged that due to the location of the records, they were not considered government records. The Mayor for the Borough of Fair Lawn utilized his home computer and personal e-mail account to communicate with various individuals regarding Borough business. Relying on Seerey v. Upper Pittsgrove Township GRC Complaint No. 2005-38 (December 2005), the GRC ordered disclosure of the emails on the Mayor’s home computer, holding that to the extent that the records requested fell within the definition of "government records" under

OPRA and were maintained in the Mayor's personal e-mail account, the records were discloseable in accordance with the OPRA. Moreover, the Council found that the location of the records did not inhibit the Custodian from obtaining the records and providing access to the records pursuant to the OPRA.

Pursuant to N.J.S.A. 47: 1A-1.1, Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005) and Seerey v. Upper Pittsgrove Township GRC Complaint No. 2005-38 (December 2005), the Custodian's assertion of the confidentiality of the records sought in request Item No. 3 and the Custodian's contention that OPRA does not apply to home computers were improper. The Custodian's response was not supported by any provisions of OPRA or ensuing case law.¹⁴

Whether the Government Records Council has authority over violations of the Open Public Meetings Act ("OPMA")?

The Complainant objected to the lack of public notice for a Committee meeting held January 2, 2007. The Complainant asserted that the copy of the legal notice sent to the NJ Herald rescheduling the 2007 Stillwater Township Committee Reorganization meeting to January 2, 2007 was not published. The Complainant contended that this meeting was misidentified as a reorganization meeting instead of a regular meeting. The Complainant maintained that this lack of notice violates OPMA, N.J.S.A. 10:4-6 et seq.

OPRA mandates the duties and responsibilities of the GRC. Specifically the GRC is statutorily mandated to:

- establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;

¹⁴ It is unnecessary to order disclosure of the e-mails because the Complainant effectively withdrew this portion of her complaint when she amended her complaint and the disclosability of the e-mails was no longer at issue.

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

Thus, OPRA does not authorize the GRC to adjudicate whether a Custodian has complied with OPMA. Moreover, N.J.S.A. 10:4-17 provides that “[t]he Superior Court shall have the authority to enforce [a] penalty [for violation of the Open Public Meetings Act] upon complaint of the Attorney General or the county prosecutor.” N.J.S.A. 10:4-17.

Therefore, pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority to adjudicate whether a Custodian has complied with OPMA or any statute other than OPRA. *See Thomas Allegretta v. Borough of Fairview*, GRC Complaint No. 2005-132 (December 2006) (holding that based on N.J.S.A. 47:1A-7.b., the GRC does not have the authority to adjudicate whether a Custodian has complied with OPMA or any statute other than OPRA).

Whether the \$5 charge for the CD-ROM assessed by the custodian is warranted and reasonable pursuant to OPRA?

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.

OPRA also states 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...” (Emphasis added). N.J.S.A. 47:1A-5.d.

OPRA authorizes a custodian to charge the actual cost for duplication of a record where the cost of duplication is not enumerated or exceeds the cost set forth in OPRA. N.J.S.A. 47:1A-5.b. OPRA does not explicitly set a cost for duplicating records that are to be delivered to the requester in a non-paper format. *Id.* However, OPRA does allow for the actual cost of duplication to be paid by the requester. *Id.* When the requester has made a request that requires “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.” N.J.S.A. 47:1A-5.c.

Additionally, OPRA provides that when a request for a record in a medium not routinely used by an agency, not routinely developed or maintained by an agency, or 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.

The Custodian¹⁵ sought to charge a \$5 copy fee for providing records on a CD-ROM in response to the Complainant’s March 20, 2008 OPRA request. The Complainant alleges that this fee is excessive and violates OPRA. The Custodian argues that Stillwater Municipal Ordinance No. 2007-22 authorizes the \$5 charge.

In Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Township of Edison charged \$55.00 for a computer diskette containing Township Council meeting minutes. The plaintiff asserted that the fee was excessive and not related to the actual cost of duplicating the record. The court held that “...the appeal is not moot, and the \$55 fee established by the Township of Edison for duplicating the minutes of the Township Council meeting onto a computer diskette is unreasonable and unsanctioned by explicit provisions of OPRA.” The court stated that:

“[i]n adopting OPRA, the Legislature made clear that ‘government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.’ N.J.S.A. 47:1A-1. The imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication. N.J.S.A. 47:1A-5b.”

Stillwater Township Ordinance 2007-22 states in relevant part that “where a request is for a copy in a format other than a photocopy, reasonable efforts will be made

¹⁵ The custodian referenced in this section of the analysis is Susan Best, the current custodian. Beth Barile v. Stillwater Township, 2007-92 – Findings and Recommendations of the Executive Director

to provide the information in the format requested... If the request is for a CD, the cost shall be \$5.00 per disc.” Stillwater Ordinance 2007-22 is in direct conflict with OPRA.

OPRA authorizes a custodian to charge only the actual cost of duplication. N.J.S.A. 47:1A-5.b. A custodian may charge fees in excess of the actual cost of duplication “when a request for a record in a medium not routinely used by an agency, not routinely developed or maintained by an agency, or 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...” N.J.S.A. 47:1A-5.d. A custodian may also charge an additional fee when “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*...” The Stillwater Ordinance 2007-22 sets the cost for reproducing records on a CD-ROM at \$5 per CD-ROM. However, according to the Custodian’s October 29, 2008 certification, the cost of duplication on CD-ROM is actually 35¢.

Because Stillwater Ordinance 2007-22 sets copy fees for OPRA requests in excess of the fees authorized by OPRA, the Ordinance is invalid as applied to OPRA requests. Under OPRA, the Custodian may only charge the actual cost of duplication for the record requested. N.J.S.A. 47:1A-5.b. While the Custodian¹⁶ has certified in one instance that the actual cost of duplicating the record requested is \$5, she¹⁷ has also certified that the Township purchases 100 CD-ROMs for \$35.00, thereby making the cost per CD-ROM 35¢. Because the Custodian has failed to establish that the Township will incur any additional costs for duplicating the requested record, the Custodian¹⁸ has violated N.J.S.A. 47:1A-5.b. Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006).

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?

The Council defers analysis of whether the Custodian¹⁹ knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian has asserted that portions of the requested records were lawfully redacted pursuant to N.J.S.A. 10:4-12, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of

¹⁶ Susan Best, prior custodian.

¹⁷ Judy Fisher, current custodian.

¹⁸ Susan Best.

¹⁹ The custodian referenced in this section is the original custodian, Jerald Murphy. Beth Barile v. Stillwater Township, 2007-92 – Findings and Recommendations of the Executive Director

Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested records were properly redacted.

2. **The Custodian must deliver²⁰ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index²¹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4²², that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Pursuant to N.J.S.A. 47:1A-1.1, Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005) and Seerey v. Upper Pittsgrove Township, GRC Complaint No. 2005-38 (December 2005) the Custodian's assertion of the confidentiality of the records sought in request Item No. 3 and the Custodian's contention that OPRA does not apply to home computers were improper. The Custodian's response was not supported by any provisions of OPRA or ensuing case law.
4. Pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority to adjudicate whether a Custodian has complied with the Open Public Meetings Act or any statute other than OPRA. See Thomas Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006) (holding that based on N.J.S.A. 47:1A-7.b., the GRC does not have the authority to adjudicate whether a Custodian has complied with OPMA or any statute other than OPRA).
5. Because Stillwater Ordinance 2007-22 sets copy fees for OPRA requests in excess of the fees authorized by OPRA, the Ordinance is invalid as applied to OPRA requests. Under OPRA, the Custodian may only charge the actual cost of duplication for the record requested. N.J.S.A. 47:1A-5.b. While the Custodian²³ has certified in one instance that the actual cost of duplicating the record requested is \$5, she²⁴ has also certified that the Township purchases 100 CD-ROMs for \$35.00, thereby making the cost per CD-ROM 35¢. Because the Custodian has failed to establish that the Township will incur any additional costs for duplicating the requested record, the Custodian²⁵ has violated N.J.S.A. 47:1A-5.b. Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006).

²⁰ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

²¹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

²² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

²³ Susan Best, prior custodian.

²⁴ Judy Fisher, current custodian.

²⁵ Susan Best.

6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 18, 2009