



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

May 27, 2010 Government Records Council Meeting

Cynthia A. McBride
Complainant

Complaint No. 2009-138

v.

Borough of Mantoloking (Ocean)
Custodian of Record

At the May 27, 2010 public meeting, the Government Records Council (“Council”) considered the May 20, 2010 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. Because the Tax Collector provided the requested tax search export file to the Complainant via e-mail on April 13, 2010 at the actual cost, pursuant to N.J.S.A. 47:1A-5.b., which is \$0.00 because there is no cost incurred by the Borough to transmit the requested records electronically, and because both the Custodian and the Tax Collector provided the GRC’s Executive Director with certified confirmation of compliance on April 13, 2010, which is within the five (5) business days as ordered by the Council, the Custodian has complied with the Council’s April 8, 2010 Interim Order.
2. Although the Custodian improperly assessed a special service charge pursuant to N.J.S.A. 47:1A-5.c. because the estimated seven (7) minutes of time spent on fulfilling an OPRA request does not come close to what the Legislature intended as an ‘extraordinary expenditure of time’ to warrant a special service charge, the Custodian complied with the Council’s April 8, 2010 Interim Order by disclosing to the Complainant the requested tax search export file at actual cost within the five (5) business days as ordered by the Council. 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.

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 27th Day of May, 2010

Robin Berg Tabakin, Chairman
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 3, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 27, 2010 Council Meeting**

**Cynthia A. McBride¹
Complainant**

GRC Complaint No. 2009-138

v.

**Borough of Mantoloking (Ocean)²
Custodian of Records**

Records Relevant to Complaint: Tax search export file from the Tax Collector's office to be sent via e-mail.

Request Made: April 20, 2009

Response Made: April 23, 2009

Custodian: Irene H. Ryan

GRC Complaint Filed: April 23, 2009³

Background

April 8, 2010

Government Records Council's ("Council") Interim Order. At its April 8, 2010 public meeting, the Council considered the April 1, 2010 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. Because the Custodian certified that fulfilling the Complainant's OPRA request would take seven (7) minutes and because seven (7) minutes is not an extraordinary amount of time to fulfill an OPRA request, a special service charge is not warranted pursuant to N.J.S.A. 47:1A-5.c. As such, the Borough's Ordinance No. 564 is invalid and the Custodian must disclose to the Complainant the requested records at the actual cost, pursuant to N.J.S.A. 47:1A-5.b., which is \$0.00 because there is no cost incurred by the Borough to transmit the requested records electronically.

2. **The Custodian shall comply with item # 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the**

¹ No legal representation listed on record.

² Represented by Jill L. Theimann, Esq., of O'Malley, Surman & Michelini (Brick, NJ).

³ The GRC received the Denial of Access Complaint on said date.

lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁴, to the Executive Director.⁵

3. 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.

April 13, 2010

Council's Interim Order distributed to the parties.

April 13, 2010

E-mail from Tax Collector to Complainant. The Tax Collector attaches the tax search export file.

April 13, 2010

E-mail from Complainant to Tax Collector. The Complainant confirms that she received the tax search export file.

April 13, 2010

Custodian's response to the Council's Interim Order. The Custodian certifies that in compliance with paragraph 2 of the Council's Interim Order, the Custodian asked the Tax Collector to deliver to the Complainant on April 13, 2010 via e-mail the requested tax search export file.

April 13, 2010

Certification of Michelle Swisher, Tax Collector. The Tax Collector certifies that in compliance with paragraph 2 of the Council's Interim Order, on April 13, 2010 she delivered to the Complainant via e-mail the requested tax search export file. The Tax Collector certifies that she has included e-mails documenting that the Tax Collector sent said file and that it was received by the Complainant.

April 14, 2010

Letter from Custodian's Counsel to GRC. The Custodian's Counsel states that the Council deferred analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Counsel requests that the Council consider the Custodian's timely compliance with the Council's April 8, 2010 Interim Order in said determination.

⁴ "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."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Analysis

Whether the Custodian complied with the Council's April 8, 2010 Interim Order?

The Council's April 8, 2010 Interim Order directed the Custodian to disclose to the Complainant the requested records at the actual cost, pursuant to N.J.S.A. 47:1A-5.b., which is \$0.00 because there is no cost incurred by the Borough to transmit the requested records electronically. The Council ordered the Custodian to comply within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. The Council distributed said Order to all parties on April 13, 2010, making the Custodian's compliance deadline April 20, 2010.

On April 13, 2010, the Custodian provided the GRC's Executive Director a legal certification in which the Custodian certified that she asked the Tax Collector to deliver to the Complainant on April 13, 2010 via e-mail the requested tax search export file. Also on April 13, 2010, Michelle Swisher, Tax Collector, provided the GRC's Executive Director a legal certification in which the Tax Collector certified that on April 13, 2010 she delivered to the Complainant via e-mail the requested tax search export file. The Tax Collector also provided a copy of her e-mail to the Complainant and the Complainant's confirmation e-mail, both dated April 13, 2010.

Therefore, because the Tax Collector provided the requested tax search export file to the Complainant via e-mail on April 13, 2010 at the actual cost, pursuant to N.J.S.A. 47:1A-5.b., which is \$0.00 because there is no cost incurred by the Borough to transmit the requested records electronically, and because both the Custodian and the Tax Collector provided the GRC's Executive Director with certified confirmation of compliance on April 13, 2010, which is within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's April 8, 2010 Interim Order.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances,

the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

The Custodian responded in writing to the Complainant’s OPRA request on the third (3rd) business day following receipt of such request and stated that the fee to provide the requested records is \$10.00. The Custodian asserted that a special service charge is warranted pursuant to N.J.S.A. 47:1A-5.c. The Custodian certified that only one (1) person, the Tax Collector, has the ability to fulfill the Complainant’s OPRA request, and that such fulfillment will take approximately seven (7) minutes. The Council held that “seven (7) minutes of time spent on fulfilling an OPRA request does not come close to what the Legislature intended as an ‘extraordinary expenditure of time’ to warrant a special service charge.”

Further, the Custodian certified that the \$10.00 copy fee is set forth by the Borough’s Ordinance No. 564 which the Borough adopted on April 20, 2009. The Council held that “paper copies are not at issue in this instant matter and thus the Custodian must follow the rates established in OPRA regarding duplication, which as previously stated are the ‘actual costs of duplication’ pursuant to N.J.S.A. 47:1A-5.b.” As such, the Council invalidated the Borough’s Ordinance No. 564 and ordered the Custodian to disclose to the Complainant the requested records at the actual cost, pursuant to N.J.S.A. 47:1A-5.b., which is \$0.00 because there is no cost incurred by the Borough to transmit the requested records electronically. The Council directed the Custodian to comply with its disclosure order and provide certified confirmation of compliance within five (5) business days from receipt of said Order.

As previously stated, because the Tax Collector provided the requested tax search export file to the Complainant via e-mail on April 13, 2010 at the actual cost, pursuant to N.J.S.A. 47:1A-5.b., which is \$0.00 because there is no cost incurred by the Borough to transmit the requested records electronically, and because both the Custodian and the Tax Collector provided the GRC’s Executive Director with certified confirmation of compliance on April 13, 2010, which is within the five (5) business days as ordered by the Council, the Custodian has complied with the Council’s April 8, 2010 Interim Order.

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 improperly assessed a special service charge pursuant to N.J.S.A. 47:1A-5.c. because the estimated seven (7) minutes of time spent on fulfilling an OPRA request does not come close to what the Legislature intended as an ‘extraordinary expenditure of time’ to warrant a special service charge, the Custodian complied with the Council’s April 8, 2010 Interim Order by disclosing to the Complainant the requested tax search export file at actual cost within the five (5) business days as ordered by the Council. 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Tax Collector provided the requested tax search export file to the Complainant via e-mail on April 13, 2010 at the actual cost, pursuant to N.J.S.A. 47:1A-5.b., which is \$0.00 because there is no cost incurred by the Borough to transmit the requested records electronically, and because both the Custodian and the Tax Collector provided the GRC’s Executive Director with certified confirmation of compliance on April 13, 2010, which is within the five (5) business days as ordered by the Council, the Custodian has complied with the Council’s April 8, 2010 Interim Order.

2. Although the Custodian improperly assessed a special service charge pursuant to N.J.S.A. 47:1A-5.c. because the estimated seven (7) minutes of time spent on fulfilling an OPRA request does not come close to what the Legislature intended as an ‘extraordinary expenditure of time’ to warrant a special service charge, the Custodian complied with the Council’s April 8, 2010 Interim Order by disclosing to the Complainant the requested tax search export file at actual cost within the five (5) business days as ordered by the Council. 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.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 20, 2010



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

INTERIM ORDER

April 8, 2010 Government Records Council Meeting

Cynthia A. McBride
Complainant

Complaint No. 2009-138

v.

Borough of Mantoloking (Ocean)
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council ("Council") considered the April 1, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian certified that fulfilling the Complainant's OPRA request would take seven (7) minutes and because seven (7) minutes is not an extraordinary amount of time to fulfill an OPRA request, a special service charge is not warranted pursuant to N.J.S.A. 47:1A-5.c. As such, the Borough's Ordinance No. 564 is invalid and the Custodian must disclose to the Complainant the requested records at the actual cost, pursuant to N.J.S.A. 47:1A-5.b., which is \$0.00 because there is no cost incurred by the Borough to transmit the requested records electronically.
2. **The Custodian shall comply with item # 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²**

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



3. 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 8th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: April 13, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 8, 2010 Council Meeting**

**Cynthia A. McBride¹
Complainant**

GRC Complaint No. 2009-138

v.

**Borough of Mantoloking (Ocean)²
Custodian of Records**

Records Relevant to Complaint: Tax search export file from the Tax Collector's office to be sent via e-mail.

Request Made: April 20, 2009

Response Made: April 23, 2009

Custodian: Irene H. Ryan

GRC Complaint Filed: April 23, 2009³

Background

April 20, 2009

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

April 23, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that the fee to provide the requested records is \$10.00 and that said records will be available on April 24, 2009.

April 23, 2009

Letter from Complainant to Custodian. The Complainant states that she is in receipt of the Custodian's response wherein the Custodian charged \$10.00 to fulfill said request. The Complainant requests an explanation regarding how the Custodian calculated the \$10.00 fee. The Complainant asks if said fee is the actual cost of duplication.

¹ No legal representation listed on record.

² Represented by Jill L. Theimann, Esq., of O'Malley, Surman & Michelini (Brick, NJ).

³ The GRC received the Denial of Access Complaint on said date.

April 23, 2009

E-mail from Custodian to Complainant. The Custodian states that pursuant to the Borough's Ordinance No. 564, the fee to produce records in the format requested is \$10.00. The Custodian states that the Complainant may access a copy of said ordinance on the Borough's website. Additionally, the Complainant states that she will release the requested records to the Complainant upon receipt of the Complainant's payment.

April 23, 2009

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

- Complainant's OPRA request dated April 20, 2009
- Custodian's response to the Complainant's OPRA request dated April 23, 2009
- Letter from Complainant to Custodian dated April 23, 2009
- E-mail from Custodian to Complainant dated April 23, 2009

The Complainant states that she submitted her OPRA request on April 20, 2009 for a copy of the tax search export file to be provided via e-mail. The Complainant states that she received a written response from the Custodian on April 23, 2009 in which the Custodian charged \$10.00 to fulfill the request without any justification for said charge beyond the Borough's fee ordinance. The Complainant asserts that the fee charged by the Custodian is excessive and does not reflect the actual cost of duplication.

Additionally, the Complainant agrees to mediate this complaint.

May 4, 2009

Offer of Mediation sent to Custodian.

May 8, 2009

Letter from Complainant to GRC. The Complainant states that pursuant to the Borough's Ordinance No. 564, a \$10.00 fee is applied to requests for electronic transfers of Tax Collector's records. The Complainant asserts that said fee is discriminatory because the Borough currently provides said records free of charge to mortgage companies and tax servicing agencies across the country. The Complainant asks that the GRC inquire to the Borough about said practices.

May 8, 2009

Custodian's signed Agreement to Mediate.

May 11, 2009

Complaint transferred to mediation.

September 25, 2009

Complaint referred back to the GRC for adjudication.

October 1, 2009

Letter from GRC to Complainant. The GRC asks the Complainant if she wishes to amend her Denial of Access Complaint in the event that some issues were resolved during the mediation process.

October 5, 2009

Letter from Complainant to GRC. The Complainant states that she does not wish to amend her complaint since she has still not received the requested records and the Borough's fee ordinance at issue is still in place.

October 16, 2009

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

October 19, 2009

E-mail from GRC to Custodian's Counsel. The GRC grants an extension until the close of business on October 27, 2009 for the Custodian to submit her completed SOI to the GRC.

October 27, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 20, 2009
- Custodian's response to the Complainant's OPRA request dated April 23, 2009
- Letter from Complainant to Custodian dated April 23, 2009
- E-mail from Custodian to Complainant dated April 23, 2009
- Ordinance No. 564⁴

The Custodian certifies that she received the Complainant's OPRA request on April 20, 2009. The Custodian certifies that she provided the Complainant with a written response via facsimile on April 23, 2009 indicating that the Complainant's request would be ready on April 24, 2009 upon payment of the \$10.00 copy fee. The Custodian certifies that after the Complainant inquired about the \$10.00 copy fee, the Custodian notified the Complainant that said fee is set forth by the Borough's Ordinance No. 564 which the Borough adopted on April 20, 2009.

The Custodian certifies that she did not conduct any search to locate the requested records because the Complainant failed to submit payment for the requested records. However, the Custodian also certifies that a typical search is not necessary for this type of request, which requires the Tax Collector to run a computer program which generates a report capable of being sent electronically.

The Custodian contends that a special service charge is warranted in this matter pursuant to N.J.S.A. 47:1A-5.c. and has been adopted by Ordinance No. 564. As such, the Custodian provides responses to the 14-point analysis required for the Council to make a determination regarding whether a special service charge is applicable. The Custodian certifies to her responses listed in the table below:

⁴ The Custodian attaches additional records which are not relevant to the adjudication of this Denial of Access Complaint.

Questions	Custodian's Response
1. What records are requested?	Tax search export file from the Tax Collector's office.
2. Give a general nature description and number of the government records requested.	The request encompasses full tax and sewer files on all residents in the Borough including 574 tax accounts and 562 sewer accounts.
3. What is the period of time over which the records extend?	The records are updated on a continuing basis. As daily payments and adjustments are received, they are posted and the account information is updated accordingly.
4. Are some or all of the records sought archived or in storage?	The records are archived as of December 31 st of each year. The data changes on a continuous basis.
5. What is the size of the agency (total number of employees)?	There are seven (7) full time employees and seven (7) part-time employees, excluding police.
6. What is the number of employees available to accommodate the records request?	The Tax Collector is the only person able to fulfill the Complainant's OPRA request.
7. To what extent do the requested records have to be redacted?	N/A
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?	The requested records would be formatted and sent electronically through a module on the Edmunds computer software. The Tax Collector estimates it will take seven (7) minutes to perform the requested action.
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?	N/A
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?	N/A
11. What is the reason that the agency employed, or intends to	Fulfilling the Complainant's OPRA request requires knowledge of and access to the Borough's tax software system. Only the Tax Collector and one (1)

employ, the particular level of personnel to accommodate the records request?	Administrative Assistant maintain said capabilities.
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?	The Tax Collector - \$41.44/day/hour
13. What is the availability of information technology and copying capabilities?	The Borough's tax software has made special provisions in order to electronically send the tax file as requested by the Complainant.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	<p>The Tax Collector's salary calculation is based on 261 working days a year. The Tax Collector is also the Chief Financial Officer so the approximate time spent on Tax Collector duties is one (1) hour a day. It is estimated that it will take seven (7) minutes to complete the task of transmitting the requested records electronically.</p> <p>2009 annual salary \$10,816.00/261 days = \$41.44 a day/hour</p> <p>Hourly rate - \$41.44 Social Security .062 - \$2.57 Medicare .0145 - \$0.60 Pension .0355 - \$1.47 Disability .001 - \$0.04 Health (\$14,078.04/261/7hrs) - \$7.71 Dental (\$500.00/261/7) - \$0.27 TOTAL - \$54.10/hr/60 min = .90 min x 7 min = \$6.30</p> <p>Edmunds Computer System Tax Module - \$2,205.00/year/261 = \$8.45/60 min = .14 x 7 min = \$0.98 Sewer Module - \$2,100.00/year/261 = \$8.05/60 min = .13 x 7 min = \$0.91 TOTAL - \$1.89</p> <p>Computer Maintenance Executive Computer \$312.50/261 = \$1.20/day/7 hrs = .17/hr/60 min x 7 = \$0.02 Osprey Technology - \$1,680.00/261 = \$6.44/day/7 hrs = .92/hr-60 min x 7 = \$0.14</p> <p>Faxed OPRA Form - \$0.75</p> <p>Building Operating Costs NJNG - \$0.02 JCP&L - \$0.07 Janitor - \$13,000.00/13 offices = \$1,000.00/261 days/7 hrs/60 min x 7 = \$0.07</p>

	<p>Insurance Workmen’s Compensation - $.27 \times \\$41.44/\text{hr} = \\$11.19/60 \text{ min} \times 7 = \\1.33 Surety Bond - $\\$868.00/261 = \\$3.33/60 \text{ min} \times 7 = \\0.42</p> <p>GRAND TOTAL - \$11.01</p>
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The Custodian certifies that the assessed special service charge includes costs for building, utility, salary, benefits, hardware, software, insurance and bond expenses. The Custodian asserts that the \$10.00 fee charged to the Complainant is well below the actual cost of duplicating the record and is reasonable pursuant to N.J.S.A. 47:1A-5.c.

The Custodian certifies that the Borough does not electronically transmit any information to any entity free of charge as the Complainant asserted in her letter to the GRC dated May 8, 2009. The Custodian asserts that all fees are governed by the Borough’s ordinance.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”) because said records must be maintained permanently.⁵

October 29, 2009

The Complainant’s response to the Custodian’s SOI. The Complainant asserts that the Custodian’s calculation of seven (7) minutes to fulfill the Complainant’s OPRA request is incorrect. The Complainant contends that fulfilling said request requires a few mouse clicks which should take less than one (1) minute and does not require a special service charge.

Analysis

Whether the \$10.00 fee assessed to fulfill the Complainant’s OPRA request is warranted?

OPRA provides that:

“[t]he actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy *except as provided for in subsection c.*” (Emphasis added.) N.J.S.A. 47:1A-5.b.

OPRA also states that:

“[w]henver the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected,

⁵ The Custodian discusses events surrounding other OPRA requests as well as other records requests submitted by the Complainant which are not the subject of this Denial of Access Complaint.
Cynthia A. McBride v. Borough of Mantoloking (Ocean), 2009-138 – Findings and Recommendations of the Executive Director

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*; provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance. The requestor shall have the opportunity to review and object to the charge prior to it being incurred.” (Emphasis added). N.J.S.A. 47:1A-5.c.

OPRA provides that government records may be purchased upon payment of the actual cost of duplicating the record. N.J.S.A. 47:1A-5.b. Said provision defines “actual cost” as “the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section...”

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 defendant argued that the plaintiff’s assertion is moot because the fee was never imposed and the requested records were available on the Township’s website free of charge. 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-5.b.*”

The court also stated that “...although plaintiffs have obtained access to the actual records requested, the legal question remains viable, because it is clearly capable of repetition. See New Jersey Div. of Youth & Family Servs. v. J.B., 120 N.J. 112, 118-19, 576 A.2d 261 (1990).” Further, the court stated that “...the fee imposed by the Township of Edison creates an unreasonable burden upon plaintiff’s right of access and is not rationally related to the actual cost of reproducing the records.”

Additionally, in Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), the court addressed the issue of the cost of providing copies of requested records to a requestor. The plaintiffs argued that if custodians could set a per page copy fee, arguably custodians could set a rate that would deter the public from requesting records. The court stated that “[w]here the public right to know would thus be impaired the public official should calculate his charge on the basis of actual costs. Ordinarily there should be no charge for labor.” *Id.* at 31.

Further, in Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the court cited Moore, *supra*, by stating that “[w]hen copies of public records are purchased under the common law right of access doctrine, the public officer may charge only the actual cost of copying, which ordinarily should not include a charge for labor... Thus, the fees allowable under the common law doctrine are consistent with those allowable under OPRA.” 376 N.J. Super. at 279.

However, in this instant complaint, the Custodian asserts that a special service charge is warranted pursuant to N.J.S.A. 47:1A-5.c. 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:

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

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

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

- The volume of government records involved;

- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying;
- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination;⁶ and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

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

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

1. What records are requested?
2. Give a general nature description and number of the government records requested.
3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?
12. Who (name and job title) in the agency will perform the work associated with the records request and that person’s hourly rate?

⁶ With regard to this factor, the court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

13. What is the availability of information technology and copying capabilities?
 14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

In the complaint now before the Council, the Custodian responded to the above questions as follows:

Questions	Custodian's Response
1. What records are requested?	Tax search export file from the Tax Collector's office.
2. Give a general nature description and number of the government records requested.	The request encompasses full tax and sewer files on all residents in the Borough including 574 tax accounts and 562 sewer accounts.
3. What is the period of time over which the records extend?	The records are updated on a continuing basis. As daily payments and adjustments are received, they are posted and the account information is updated accordingly.
4. Are some or all of the records sought archived or in storage?	The records are archived as of December 31 st of each year. The data changes on a continuous basis.
5. What is the size of the agency (total number of employees)?	There are seven (7) full time employees and seven (7) part-time employees, excluding police.
6. What is the number of employees available to accommodate the records request?	The Tax Collector is the only person able to fulfill the Complainant's OPRA request.
7. To what extent do the requested records have to be redacted?	N/A
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?	The requested records would be formatted and sent electronically through a module on the Edmunds computer software. The Tax Collector estimates it will take seven (7) minutes to perform the requested action.
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?	N/A
10. What is the level of personnel, hourly rate and	N/A

<p>number of hours, if any, required for a government employee o return records to their original storage place?</p>	
<p>11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?</p>	<p>Fulfilling the Complainant’s OPRA request requires knowledge of and access to the Borough’s tax software system. Only the Tax Collector and one (1) Administrative Assistant maintain said capabilities.</p>
<p>12. Who (name and job title) in the agency will perform the work associated with the records request and that person’s hourly rate?</p>	<p>The Tax Collector - \$41.44/day/hour</p>
<p>13. What is the availability of information technology and copying capabilities?</p>	<p>The Borough’s tax software has made special provisions in order to electronically send the tax file as requested by the Complainant.</p>
<p>14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.</p>	<p>The Tax Collector’s salary calculation is based on 261 working days a year. The Tax Collector is also the Chief Financial Officer so the approximate time spent on Tax Collector duties is one (1) hour a day. It is estimated that it will take seven (7) minutes to complete the task of transmitting the requested records electronically.</p> <p>2009 annual salary \$10,816.00/261 days = \$41.44 a day/hour</p> <p>Hourly rate - \$41.44 Social Security .062 - \$2.57 Medicare .0145 - \$0.60 Pension .0355 - \$1.47 Disability .001 - \$0.04 Health (\$14,078.04/261/7hrs) - \$7.71 Dental (\$500.00/261/7) - \$0.27 TOTAL - \$54.10/hr/60 min = .90 min x 7 min = \$6.30</p> <p>Edmunds Computer System Tax Module - \$2,205.00/year/261 = \$8.45/60 min = .14 x 7 min = \$0.98 Sewer Module - \$2,100.00/year/261 = \$8.05/60 min = .13 x 7 min = \$0.91 TOTAL - \$1.89</p> <p>Computer Maintenance Executive Computer \$312.50/261 = \$1.20/day/7 hrs = .17/hr/60 min x 7 = \$0.02 Osprey Technology - \$1,680.00/261 = \$6.44/day/7 hrs = .92/hr-60 min x 7 = \$0.14</p>

	<p>Faxed OPRA Form - \$0.75</p> <p>Building Operating Costs NJNG - \$0.02 JCP&L - \$0.07 Janitor - \$13,000.00/13 offices = \$1,000.00/261 days/7 hrs/60 min x 7 = \$0.07</p> <p>Insurance Workmen's Compensation - .27 x \$41.44/hr = \$11.19/60 min x 7 = \$1.33 Surety Bond - \$868.00/261 = \$3.33/60 min x 7 = \$0.42</p> <p>GRAND TOTAL - \$11.01</p>
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In summary, the Custodian certified that only one (1) person, the Tax Collector, has the ability to fulfill the Complainant's OPRA request, and that such fulfillment will take approximately seven (7) minutes. Seven (7) minutes of time spent on fulfilling an OPRA request does not come close to what the Legislature intended as an "extraordinary expenditure of time" to warrant a special service charge.

Additionally, the Custodian's calculation of the special charge includes costs for the computer system, building maintenance and fringe benefits. OPRA specifically states that special service charges "shall be based upon the actual direct cost of providing the copy or copies." N.J.S.A. 47:1A-5.c. Further, in Loder v. County of Passaic, GRC Complaint No. 2005-161 (January 2006), the Council held that a special service charge must only reflect the hours spent providing the actual copies and the hourly rate (minus the fringe benefits) of appropriate personnel applied. Thus, the Custodian's charges for the following are not valid charges pursuant to N.J.S.A. 47:1A-5.c.:

- Social Security .062 - \$2.57
- Medicare .0145 - \$0.60
- Pension .0355 - \$1.47
- Disability .001 - \$0.04
- Health (\$14,078.04/261/7hrs) - \$7.71
- Dental (\$500.00/261/7) - \$0.27

Edmunds Computer System

- Tax Module - \$2,205.00/year/261 = \$8.45/60 min = .14 x 7 min = \$0.98
- Sewer Module - \$2,100.00/year/261 = \$8.05/60 min = .13 x 7 min = \$0.91

Computer Maintenance

- Executive Computer \$312.50/261 = \$1.20/day/7 hrs = .17/hr/60 min x 7 = \$0.02
- Osprey Technology - \$1,680.00/261 = \$6.44/day/7 hrs = .92/hr-60 min x 7 = \$0.14

Faxed OPRA Form - \$0.75

Building Operating Costs

- NJNG - \$0.02

JCP&L - \$0.07

Janitor - \$13,000.00/13 offices = \$1,000.00/261 days/7 hrs/60 min x 7 = \$0.07

Insurance

Workmen's Compensation - .27 x \$41.44/hr = \$11.19/60 min x 7 = \$1.33

Surety Bond - \$868.00/261 = \$3.33/60 min x 7 = \$0.42

Therefore, because the Custodian certified that fulfilling the Complainant's OPRA request would take seven (7) minutes and because seven (7) minutes is not an extraordinary amount of time to fulfill an OPRA request, a special service charge is not warranted pursuant to N.J.S.A. 47:1A-5.c.

Further, the Custodian certified that the \$10.00 copy fee is set forth by the Borough's Ordinance No. 564 which the Borough adopted on April 20, 2009. The Council has previously addressed municipal ordinances regarding copy fees. Specifically, in Barile v. Stillwater Township, 2007-92 (September 2009), the Township had an ordinance in place that stated 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... If the request is for a CD, the cost shall be \$5.00 per disc." The Council held that:

"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.c. 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."

However, OPRA does allow municipalities to create ordinances regarding copy fees in some instances. Specifically, OPRA states that "in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance." N.J.S.A. 47:1A-5.c. This means that if a municipality's actual cost of duplicating *paper copies* exceeds the rates

enumerated in N.J.S.A. 47:1A-5.b., then the municipality must establish said rates in advance by ordinance.

Paper copies are not at issue in this instant matter and thus the Custodian must follow the rates established in OPRA regarding duplication, which as previously stated are the “actual costs of duplication” pursuant to N.J.S.A. 47:1A-5.b. As such, the Borough’s Ordinance No. 564 is invalid and the Custodian must disclose to the Complainant the requested records at the actual cost, pursuant to N.J.S.A. 47:1A-5.b., which is \$0.00 because there is no cost incurred by the Borough to transmit the requested records electronically.

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 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified that fulfilling the Complainant’s OPRA request would take seven (7) minutes and because seven (7) minutes is not an extraordinary amount of time to fulfill an OPRA request, a special service charge is not warranted pursuant to N.J.S.A. 47:1A-5.c. As such, the Borough’s Ordinance No. 564 is invalid and the Custodian must disclose to the Complainant the requested records at the actual cost, pursuant to N.J.S.A. 47:1A-5.b., which is \$0.00 because there is no cost incurred by the Borough to transmit the requested records electronically.
2. **The Custodian shall comply with item # 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁷, to the Executive Director.⁸**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the

⁷ "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."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 1, 2010