



**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**

**April 8, 2010 Government Records Council Meeting**

Keith A. Werner  
Complainant

Complaint No. 2009-95

v.

New Jersey Department of Treasury,  
Division of Revenue  
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 entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because Ms. Harrington failed to forward the Complainant’s January 28, 2009 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, Ms. Harrington has violated N.J.S.A. 47:1A-5.h. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007)
2. The fees imposed under N.J.S.A. 22A:4-1a, N.J.S.A. 12A:9-525, and N.J.A.C. 17:33-1 et seq. are lawful and not excessive under OPRA pursuant to N.J.S.A. 47:1A-5.b., Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007) and Truland v. Borough of Madison, GRC Complaint No. 2006-88 (September 2007).
3. Ms. Harrington violated N.J.S.A. 47:1A-5.h. by failing to direct the Complainant’s OPRA request to the Custodian or direct the Complaint to the Custodian. However because Ms. Harrington responded to the Complainant’s request in a timely manner and subsequently certified that she did not understand that the request was an official OPRA request, it is concluded that Ms. Harrington’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 8<sup>th</sup> 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**

**Keith A. Werner<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-95**

v.

**New Jersey Department of Treasury,  
Division of Revenue<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of corporate records, including articles of incorporation and amendments, business licenses and Uniform Commercial Codes (“UCC”) records for:

1. University Correction Health Care Inc.
2. University of Medicine & Dentistry of New Jersey (“UMDNJ”).
3. Correctional Dental Association.

**Request Made:** January 28, 2009

**Response Made:** February 18, 2009

**Custodian:** James Fruscione

**GRC Complaint Filed:** March 16, 2009<sup>3</sup>

**Background**

**January 28, 2009<sup>4</sup>**

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 of the New Jersey Department of Law & Public Safety.

**February 18, 2009<sup>5</sup>**

Ms. Pamela Harrington’s (“Ms. Harrington’s”), Technical Assistant, Division of Revenue (“DOR”), Business Support Services Bureau, response to the OPRA request. Ms. Harrington responds in writing to the Complainant’s OPRA request on the second (2<sup>nd</sup>) business day following receipt of such request. Ms. Harrington states that the Complainant has not authorized a fee to cover the charge of \$50.00 for two (2) “No

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by DAG Robert Purcell, on behalf of the NJ Attorney General.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The Complainant states in the Denial of Access Complaint that he mailed his request dated January 28, 2009 on February 7, 2009.

<sup>5</sup> Ms. Harrington’s response to the Complainant was clarified in a legal certification dated November 25, 2009.

Record” certificates. Ms. Harrington states that the Complainant’s return address is difficult to read.

**March 16, 2009**

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

- Complainant’s OPRA request dated January 28, 2009.
- The DOR’s undated response.<sup>6</sup>

The Complainant states that he mailed a copy of his January 28, 2009 OPRA request to the New Jersey Department of Treasury (“Treasury”), Division of Commercial Recording on February 7, 2009. The Complainant states that he received a response on March 3, 2009.

The Complainant first challenges the vagueness of the response from Treasury. The Complainant states that the response simply stated “not enough fee.” The Complainant contends that the other written note was both illegible and unintelligible.

The Complainant finally contends that the fee schedule at the bottom of the response is wholly excessive compared to the copy costs set forth in OPRA. The Complainant asserts that it appears from the response that a requestor must pay \$25.00 to \$50.00 to obtain a simple document.

The Complainant does not agree to mediate this complaint.

**March 31, 2009**

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

**April 3, 2009**

E-mail from the Custodian’s Counsel to the GRC. Counsel requests an extension of twelve (12) business days to submit the SOI.

**April 6, 2009**

E-mail from the GRC to the Custodian’s Counsel. The GRC states that it will generally grant one five (5) business day extension to submit the SOI. The GRC states that the SOI is now due on April 15, 2009.

**April 14, 2009**

Letter from the Custodian’s Counsel to the Complainant. Counsel states that he has reviewed the Complainant’s OPRA request for corporate records for University Correction Health Care, Inc., UMDNJ and Correctional Dental Associates. Counsel notes that the Complainant authorized a copying cost limited to \$15.00.

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<sup>6</sup> The Complainant also attaches the envelope he mailed his request in and the envelope in which the response was received.

Counsel states that in order to obtain access to government records filed with the DOR, the Complainant may use the free online name browsing service at <http://www.accessnet.state.nj.us>. Counsel states that the Complainant should be able to find all of the business entities requested and UCC financing statements that are relevant to the Complainant's request. Counsel states that the Complainant should then write down the associated identification ("ID") numbers for each of the three (3) entities and send a revised request to the DOR. Counsel advises that the costs for the records responsive to the Complainant's request are not determined by the fee schedule set forth in OPRA. Counsel states that he has enclosed a chart showing the fee schedule that applies to the Complainant's request pursuant to N.J.S.A. 22A:4-1.a. et seq.

Counsel states that in order to resolve this matter, Counsel advises the following:

Counsel states that DOR does possess corporate records for Correctional Dental Associates, Inc. Counsel states that the cost of copying those records, which consist of seven (7) pages, is \$7.00. Counsel requests that the Complainant forward a check for \$7.00 made payable to the DOR.

Counsel states that the DOR has no records of University Correction Health Care, Inc. or UMDNJ. Counsel advises that if the Complainant wishes to obtain a "No Record" certificate<sup>7</sup> for those entities, the cost is \$25.00 a certificate for a total fee of \$50.00. Counsel states that the Complainant may either forward a letter to the DOR withdrawing the request for records regarding those two entities or increase the cost authorization by another \$50.00.

Further, Counsel states that the Complainant requested UCC searches for the three (3) entities. Counsel states that there is a statutory fee of \$25.00 for a UCC search for each entity unless the DOR is provided with the UCC filing number. Counsel requests that the Complainant either increase his cost authorization so that the DOR may begin the search or forward a letter withdrawing this request.

Counsel requests that the Complainant contact the DOR at his earliest convenience to advise how the DOR should proceed.

#### **April 15, 2009**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated January 28, 2009.
- The DOR's undated response.
- DOR work log of Ms. Pamela Harrington ("Ms. Harrington").
- Letter from the Custodian's Counsel to the Complainant dated April 14, 2009 attaching a fee schedule chart pursuant to N.J.S.A. 22A:4-1.a. et seq.
- N.J.S.A. 12A:9-525 – Fees for UCC debtor search and copy services.
- N.J.S.A. 14A:15-3 – Corporate status report fees.
- N.J.S.A. 22A:4-1.a. – Fees for copies of and certificates (general).

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<sup>7</sup> Counsel notes that a "No Records Certificate" is an official DOR document that says there are no records for the entity requested.

- *N.J.A.C.* 17:33-2.8 – Fees.
- *N.J.A.C.* 17:33-8.2 – Written search requests.

The Custodian states that the Complainant mailed an OPRA request to the Division of Commercial Recording on February 7, 2009. The Custodian states that the Complainant used the request form created by the Office of the Attorney General of New Jersey, Department of Law and Public Safety. The Custodian states that although the Complainant failed to identify whether he had a criminal conviction, the New Jersey Department of Corrections website shows that the Complainant has been in New Jersey State Prison since March 28, 2007.

The Custodian states that the Complainant requested articles of incorporation and amendments thereto, business licenses and UCC records for three (3) entities: University Correction Health Care Inc., UMDNJ and Correctional Dental Association. The Custodian states that the attached work log of Ms. Harrington from the Business Services Branch of the DOR shows that the request was received on February 13, 2009 and responded to on February 18, 2009 by Ms. Harrington. The Custodian certifies that he had no knowledge of the Complainant's request until receipt of the Complainant's Denial of Access Complaint.

The Custodian states that the DOR's response indicated that the Complainant's fee was insufficient because no records responsive existed for two (2) of the entities and that there would be a \$50.00 fee for two (2) "No Record" certificates. The Custodian certifies that this fee is based on the statutory fee of \$25.00 per certificate. See N.J.S.A. 22A:4-1a(11)(a). The Custodian contends that although the DOR's response was abbreviated, the DOR's personnel had no way of contacting the Complainant because he did not include a telephone number on the form and a subsequent investigation revealed that the Complainant did not reside at the return address provided.

The Custodian certifies that since the Complainant's OPRA request was not received by him, the request was handled as a normal request for copies of commercial records by the Records Unit of the DOR. The Custodian certifies that although he never received the request, a response was forwarded to the Complainant immediately following initial notice of same upon receipt of the Denial of Access Complaint.<sup>8</sup>

The Custodian avers that OPRA at N.J.S.A. 47:1A-5.f. requires a public agency to adopt a request form "providing space for the name, address and phone number of the requestor..." Further, the Custodian states that OPRA provides that "[a] request for access to a government record shall be in writing and ... conveyed to the appropriate custodian..." N.J.S.A. 47:1A-5.g. The Custodian asserts that the Complainant's OPRA request is invalid under OPRA because it was not properly addressed or directed to the Custodian and was not completed properly because it contained no telephone number and did not indicate whether the Complainant had a criminal conviction. Further, the

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<sup>8</sup> See Letter from the Custodian's Counsel to the Complainant dated April 14, 2009.  
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Custodian argues that the Complainant even erroneously identified his place of residence.<sup>9</sup>

The Custodian avers that the Complainant is challenging the amount of fees that are being charged in this Denial of Access Complaint. The Custodian argues that OPRA is clear in providing that the fees charged for copying of a government record are those established by statute or regulation. N.J.S.A. 47:1A-5.b. The Custodian asserts that there may be at least four (4) statutory fees applicable to the Complainant’s request.

The Custodian certifies that the following are the fees that apply to the Complainant’s request:

<b>Services/Records</b>	<b>Statutory Page Copy or Certificate Fee</b>	<b>Statute or Regulation</b>
UCC Debtor Name Search	\$25.00 per search	<u>N.J.S.A.</u> 12A:9-525 sets the fee. <i>N.J.A.C.</i> 17:33-1 et seq. restates the fee and establishes the rules for submitting written UCC search and copy requests.
UCC Copies of Statements	\$1.00 per page	See above.
Corporate (Charter) Documents	\$1.00 per page	<u>N.J.S.A.</u> 22A:4-1a
No Records Search Certificate	\$25.00 per certificate	<u>N.J.S.A.</u> 22A:4-1a
Corporate Status Report	\$5.00 per corporation	<u>N.J.S.A.</u> 14A:15-3

The Custodian certifies that the fee for the official “No Record” certificates responsive to the Complainant’s request, one (1) for UMDNJ and one (1) for University Correction Health Care Inc., is \$25.00 per certificate pursuant to N.J.S.A. 22A:4-1a. The Custodian certifies that the fees for copies of commercial documents regarding Correctional Dental Associates, Inc., of which seven (7) pages exist, is \$7.00 (or \$1.00 per page) also pursuant to N.J.S.A. 22A:4-1a(11)(a). The Custodian certifies that the fee for a Uniform Commercial Code (“UCC”) search to show whether or not there is a financing statement naming a particular debtor on file with the filing office is \$25.00 pursuant to N.J.S.A. 12A:9-525(c) and *N.J.A.C.* 17:33-1 et seq. Further, the Custodian certifies that there is a fee of \$1.00 per page for a copy of any filed financing statement pursuant to N.J.S.A. 12A:9-525(a)(7).

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<sup>9</sup>Additionally, the Custodian argues that because the request was not properly completed, it could be construed as an invalid anonymous request because the Complainant failed to disclose his status as an inmate pursuant to N.J.S.A. 47:1A-2.2. (“where it shall appear that a person who is convicted of any indictable offense ... seeking government records containing personal information pertaining to the person’s victim or the victim’s family ... the right of access ... shall be denied ... a custodian shall not comply with an anonymous request for a government record which is protected under this section”).  
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The Custodian states that the Complainant only authorized a maximum cost of \$15.00. The Custodian contends that while the DOR's response was abbreviated, the Complainant did not authorize a sufficient copying charge.

Finally, the Custodian argues that there is no evidence to suggest a knowing and willful violation of OPRA has taken place. The Custodian reiterates that he had no knowledge of the Complainant's OPRA request until receipt of the Denial of Access Complaint. Further, the Custodian asserts that the Complainant failed to properly complete or address the request form and the Complainant failed to authorize enough funds to pay for the statutorily mandated fees. The Custodian requests that the GRC dismiss the instant complaint with prejudice.<sup>10</sup>

### **November 20, 2009**

E-mail from the GRC to the Custodian's Counsel. The GRC states that after examining the evidence of record, additional information is needed. The GRC states that the Complainant and the Custodian provided a copy of an undated form letter from the DOR to the GRC. The GRC states that the Custodian also included in the SOI a work log of Ms. Harrington showing that she worked on the Complainant's request and provided the undated written response to the Complainant on February 18, 2009. The GRC requests that Ms. Harrington certify to the following:

1. On what date did Ms. Harrington receive the Complainant's January 28, 2009 OPRA request?
2. Whether the work log accurately shows that the undated form letter response was sent to the Complainant on February 18, 2009?
3. Identify Ms. Harrington's written notations contained within the undated form letter, as they are currently difficult to decipher.

The GRC requests that the legal certification be provided by November 25, 2009. The GRC further requests that Ms. Harrington's full job title be included within the certification.

### **November 25, 2009**

Legal certification of Ms. Pamela Harrington. Ms. Harrington certifies that she is employed by the DOR in the Records Unit of the Business Support Services Bureau and that her official title is Technical Assistant 3. Ms. Harrington certifies that her responsibilities include copying corporate records, assessing and charging the proper fee and mailing the requested documents to the name and address of the person indicated on the request. Ms. Harrington certifies that she handles several thousand requests for corporate filing documents a year and for commercial documents for which the statutory fee is charged, none of which are requests pursuant to OPRA.

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<sup>10</sup> The Custodian does not certify to the search undertaken. Further, the Custodian did not certify as to whether any records that may have been 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").  
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Ms. Harrington certifies that a review of her work log for February 18, 2009 shows that she processed a batch of work in response to a request from the Complainant. Ms. Harrington certifies that the original receipt date for the request was February 13, 2009. Ms. Harrington certifies that she processed the Complainant's request as regular work (expedited work requires payment of an additional fee). Ms. Harrington certifies that her work log indicates that she rejected the Complainant's request since it did not contain the required \$50.00 payment for two (2) "No Record" certificates. Ms. Harrington certifies that she noted only two (2) requests from the Complainant in her work log on February 18, 2009, although a recent review of the Complainant's request brought to light the fact that he made three (3) requests for corporate information.

Ms. Harrington certifies that her written notations contained within the undated form letter are as follows:

1. "not enough fee"
2. "50 for 2 no record"
3. "Plus you cannot read this address"

Ms. Harrington certifies that her comment about the address refers to the fact that the return address was difficult to read. Ms. Harrington certifies that she did not process the Complainant's request as an OPRA request because she did not understand that it was a request under OPRA. Ms. Harrington certifies that she processed the request as a standard request for copies of commercial filing documents regularly received by her office.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also states that:

"[i]f the custodian is *unable to comply* with a request for access, the custodian *shall indicate the specific basis therefor* on the request form and

promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy therefor ...” N.J.S.A. 47:1A-5.g.

OPRA provides that:

“[a]ny officer or *employee* of a *public agency* who receives a request for access to a government record *shall forward* the request to the *custodian of the record* or *direct the requestor* to the *custodian of the record*.” (Emphasis added.) N.J.S.A. 47:1A-5.h.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. 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.

In the complaint currently before the Council, the Complainant sent a request to the Division of Commercial Recording on January 28, 2009.<sup>11</sup> Ms. Harrington responded in writing to the Complainant on the second (2<sup>nd</sup>) business day after receipt of the request; however, the reasons for which Ms. Harrington denied access to the Complainant’s request were unclear. The Custodian subsequently certified in the SOI that he did not receive the request until receipt of the instant complaint from the GRC; however, Counsel did forward a response to the Complainant on April 14, 2009.

Additionally, Ms. Harrington’s February 18, 2009 written response to the Complainant was contained within a form letter and was difficult to decipher. The GRC subsequently requested that Ms. Harrington provide a legal certification clarifying her written statements. Ms. Harrington subsequently certified that she processed the request as a standard request for copies of commercial filing documents, as her department does not handle any OPRA requests. Ms. Harrington also certified that her response advised the Complainant that he had not authorized enough copying fees for the records requested and that the Complainant’s return address was difficult to read.

OPRA requires a custodian to indicate the specific basis thereof if he/she is unable to comply with a request for government records. N.J.S.A. 47:1A-5.g. OPRA further requires “[a]ny officer or employee of a public agency who *receives a request* for access to a government record *shall forward* the request to the *custodian of the record* or

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<sup>11</sup> The Complainant states in the Denial of Access Complaint that the request was actually mailed out on February 7, 2009.

*direct the requestor to the custodian of the record.”* (Emphasis added.) N.J.S.A. 47:1A-5.h.

Although Ms. Harrington’s duties do not include responding to requests made pursuant to OPRA, she still has an obligation to forward any OPRA requests she receives to the Custodian or direct the requestor to the Custodian pursuant to N.J.S.A. 47:1A-5.h. In the instant complaint, Ms. Harrington failed to comply with N.J.S.A. 47:1A-5.h. Because the Complainant’s request was on the official OPRA request form of the New Jersey Department of Law & Public Safety, Ms. Harrington was alerted to the fact that this was a request for records pursuant to OPRA.

Therefore, because Ms. Harrington failed to forward the Complainant’s January 28, 2009 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, Ms. Harrington has violated N.J.S.A. 47:1A-5.h. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007)(holding that Lt. Caroline Clark violated OPRA by failing to forward the request or direct the requestor to the proper Custodian of record pursuant to N.J.S.A. 47:1A-5.h.).

### **Whether the fee schedule provided by the Custodian is excessive pursuant to OPRA?**

OPRA provides that:

*“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation...”* (Emphasis added.) N.J.S.A. 47:1A5.b.

Additionally, OPRA provides for the recognition of fees imposed by law or regulation:

*“Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following:*

- first page to tenth page, \$0.75 per page;
  - eleventh page to twentieth page, \$0.50 per page;
  - all pages over twenty, \$0.25 per page.”
- (Emphasis added.) N.J.S.A. 47:1A-5.b.

The Complainant asserts in the Denial of Access Complaint that the fee schedule contained within Ms. Harrington’s form letter response is wholly excessive compared to the copy costs set forth in OPRA. The Custodian certified in the SOI that there are at least four (4) statutory fee schedules that apply to the records being requested by the Complainant.

The Custodian certified in the SOI that the fee for the official “No Record” certificates responsive to the Complainant’s request, one (1) for UMDNJ and one (1) for University Correction Health Care Inc., is \$25.00 per certificate pursuant to N.J.S.A.

22A:4-1a(11)(a). The Custodian also certified that the fees for copies of commercial documents regarding Correctional Dental Associates, Inc., of which seven (7) pages exist, is \$7.00 (or \$1.00 per page) also pursuant to N.J.S.A. 22A:4-1a(11)(a). The Custodian additionally certified that the fee for a UCC search to show whether or not there is a financing statement naming a particular debtor on file with the filing office is \$25.00 pursuant to N.J.S.A. 12A:9-525(c) and *N.J.A.C. 17:33-1 et seq.* Further, the Custodian certified that there is a fee of \$1.00 per page for a copy of any filed financing statement pursuant to N.J.S.A. 12A:9-525(a)(7).

The GRC previously addressed a similar issue in which another law contains a fee for copies of records. In Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007), the Custodian responded stating that the fees for copies of accidents reports when mailed to a requestor is \$5.00 pursuant to N.J.S.A. 39:4-131; however, if the Complainant received the reports in person, the fees set forth in N.J.S.A. 47:1A-5.b. apply.<sup>12</sup> The GRC held that the fee imposed pursuant to N.J.S.A. 39:4-131 in instances where a request for accident reports was not made in person is appropriate under OPRA.

In Truland v. Borough of Madison, GRC Complaint No. 2006-88 (September 2007), the Custodian imposed a fee of \$5.00 per accident report in addition to the copying cost of \$0.75 per page afforded under N.J.S.A. 47:1A-5.b. The GRC contemplated its previous holding in Donato, supra (that a custodian shall charge the enumerated rates under OPRA when a person receives accident reports in person pursuant to N.J.S.A. 47:1A-5.b.), and the plain language of N.J.S.A. 47:1A-131 (“*If copies of reports are requested other than in person, an additional fee of up to \$5.00 for the first three pages and \$1.00 per page thereafter may be added to cover the administrative costs of the report...*” (Emphasis added.)). The GRC held that:

“... the provisions of OPRA do not abrogate the provisions of N.J.S.A. 39:4-131. Consequently, the Custodian has lawfully charged the Complainant \$40.25 for the requested accident reports pursuant to N.J.S.A. 39:4-131.”

In the instant complaint, the Custodian has provided statutes that prescribe fees for the records requested by the Complainant. N.J.S.A. 47:1A-5.b. allows for the recognition of fees prescribed by law or regulation.. The GRC’s previous holdings in Donato, supra, and Truland, supra, illustrate the Council’s position regarding statutorily prescribed fees. In the instant complaint, the Custodian provided both laws and regulations that prescribe a fee for copies of the records being requested.

Therefore, the fees imposed under N.J.S.A. 22A:4-1a, N.J.S.A. 12A:9-525, and *N.J.A.C. 17:33-1 et seq.* are lawful and not excessive under OPRA pursuant to N.J.S.A. 47:1A-5.b., Donato, supra, and Truland, supra.

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<sup>12</sup> The Custodian asserted that the charge was allowed pursuant to N.J.S.A. 47:1A-5.c. The GRC ordered the Custodian to provide a fourteen (14) point analysis established to evaluate special service charges. The GRC subsequently held that the Custodian’s imposed fee of \$5.00 per accident report was unlawful, but allowed for imposed fee for providing accident reports to those not requesting such in person pursuant to N.J.S.A. 39:4-131.

**Whether Ms. Harrington’s violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.h. rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 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).

In the instant complaint, Ms. Harrington violated N.J.S.A. 47:1A-5.h. by failing to direct the Complainant’s OPRA request to the Custodian or direct the Complaint to the Custodian. However because Ms. Harrington responded to the Complainant’s request in a timely manner and subsequently certified that she did not understand that the request was an official OPRA request, it is concluded that Ms. Harrington’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 Ms. Harrington failed to forward the Complainant’s January 28, 2009 OPRA request to the Custodian or direct the Complainant to submit the OPRA

request directly to the Custodian, Ms. Harrington has violated N.J.S.A. 47:1A-5.h. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007)

2. The fees imposed under N.J.S.A. 22A:4-1a, N.J.S.A. 12A:9-525, and N.J.A.C. 17:33-1 et seq. are lawful and not excessive under OPRA pursuant to N.J.S.A. 47:1A-5.b., Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007) and Truland v. Borough of Madison, GRC Complaint No. 2006-88 (September 2007).
3. Ms. Harrington violated N.J.S.A. 47:1A-5.h. by failing to direct the Complainant's OPRA request to the Custodian or direct the Complaint to the Custodian. However because Ms. Harrington responded to the Complainant's request in a timely manner and subsequently certified that she did not understand that the request was an official OPRA request, it is concluded that Ms. Harrington'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: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 1, 2010