

Final Decision
December 14, 2006 Government Records Council Meeting

Luis Perez
Complainant

Complaint No. 2006-79

v.

Borough of Glassboro
Custodian of Record

At the December 14, 2006 public meeting, the Government Records Council (“Council”) considered the December 7, 2006 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 the Custodian complied with the Council’s November 15, 2006 Interim Order within the required time frame.

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 14th Day of December, 2006

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: December 19, 2006

**Supplemental Findings and Recommendations of the Executive Director
December 14, 2006 Council Meeting**

Luis Perez¹
Complainant

GRC Complaint No. 2006-79

v.

Borough of Glassboro²
Custodian of Records

Records Relevant to Complaint:

Copy of Municipal Budget 2006

Request Made: March 29, 2006

Response Made: April 3, 2006

Custodian: Patricia Frontino, Municipal Clerk

GRC Complaint Filed: April 19, 2006

Background

November 15, 2006

Government Records Council's ("Council") Interim Order. At its November 15, 2006 public meeting, the Council considered the November 8, 2006 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 fees established in Glassboro Code Book, Article I A(5)(b) do not override the copying rates outlined in OPRA pursuant to N.J.S.A. 47:1A-9.a.
2. Based on the inordinate charge of \$0.75 for legal-sized copies in violation of N.J.S.A. 47:1A-5.b and the Custodian's failure to provide immediate access to the requested 2006 Municipal Budget pursuant to N.J.S.A. 47:1A-5.e., the Custodian has unlawfully denied access to the requested records.
3. The Custodian must charge the enumerated copying fees established in N.J.S.A. 47:1A-5.b. for legal-sized paper copies of the 2006 Municipal

¹ No legal representation indicated.

² Legal representation is Timothy Scaffidi, Esq. from Scaffidi & Scaffidi located in Woodbury, NJ.

Budget requested under the provisions of OPRA and release the requested 2006 Municipal Budget to the Complainant.

- 4. The Custodian shall comply with "3." above within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**

November 21, 2006

Council's Interim Order distributed to the parties.

November 21, 2006

Custodian's response to the Council's Interim Order. The Custodian provided a legal certification attesting to having notified the Complainant via telephone that the requested municipal budget was ready for pick-up and that the copying cost would be calculated in accordance with the enumerated rates provided in OPRA.

November 21, 2006

Custodian Counsel's Certification to the Council. The Custodian's Counsel certifies to having advised the Custodian that OPRA does not require that a free copy of the requested record be provided to the Complainant. Additionally, the Custodian's Counsel attests to recalling the Custodian making the requested municipal budget available immediately to the Complainant for inspection in lieu of the Complainant paying for and receiving a copy of the requested budget.

Analysis

Whether the Custodian complied with the Council's November 15, 2006 Interim Order?

The Custodian provided a legal certification attesting to having notified the Complainant via telephone that the requested municipal budget was ready for pick-up and that the copying cost would be calculated in accordance with the enumerated rates provided in OPRA. Additionally, the Custodian's Counsel certifies to having advised the Custodian that OPRA does not require that a free copy of the requested record be provided to the Complainant. Additionally, the Custodian's Counsel attests to recalling the Custodian making the requested municipal budget available immediately to the Complainant for inspection in lieu of the Complainant paying for and receiving a copy of the requested budget.

Based on the legal certifications of the Custodian and the Custodian's Counsel, the Custodian has complied with the Council's November 15, 2006 Interim Order within the required timeframe. Further and based on same, the Custodian did not unlawfully deny immediate access to the requested budget as was previously determined by the

Council. The Custodian did, however, unlawfully deny access based on the inordinate charge of \$0.75 for legal-sized copies in violation of N.J.S.A. 47:1A-5.b.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian complied with the Council's November 15, 2006 Interim Order within the required time frame.

Prepared and
Approved By:

Catherine Starghill, Esq.
Executive Director

December 7, 2006

INTERIM ORDER
November 15, 2006 Government Records Council Meeting

Luis Perez
Complainant

Complaint No. 2006-79

v.

Borough of Glassboro
Custodian of Record

At the November 15, 2006 public meeting, the Government Records Council ("Council") considered the November 8, 2006 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:

5. The fees established in Glassboro Code Book, Article I A(5)(b) do not override the copying rates outlined in OPRA pursuant to N.J.S.A. 47:1A-9.a.
6. Based on the inordinate charge of \$0.75 for legal sized copies in violation of N.J.S.A. 47:1A-5.b and the Custodian's failure to provide immediate access to the requested 2006 Municipal Budget pursuant to N.J.S.A. 47:1A-5.e., the Custodian has unlawfully denied access to the requested records.
7. The Custodian must charge the enumerated copying fees established in N.J.S.A. 47:1A-5.b. for legal-sized paper copies of the 2006 Municipal Budget requested under the provisions of OPRA and release the requested 2006 Municipal Budget to the Complainant.
- 8. The Custodian shall comply with "3." above within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**

Interim Order Rendered by the
Government Records Council
On The 15th Day of November, 2006

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: November 21, 2006

**Findings and Recommendations of the Executive Director
November 15, 2006 Council Meeting**

Luis Perez³

GRC Complaint No. 2006-79

Complainant

v.

**Borough of Glassboro⁴
Custodian of Records**

Records Relevant to Complaint:
Copy of Municipal Budget 2006

Request Made: March 29, 2006

Response Made: April 3, 2006

Custodian: Patricia Frontino, Municipal Clerk

GRC Complaint Filed: April 19, 2006

Background

March 29, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests a copy of the 2006 Glassboro Municipal Budget.

April 3, 2006

Custodian's response to the OPRA request. The Custodian verbally informs the Complainant three (3) business days after the request, that a copy of the requested budget is available for pick up at the cost of \$41.25.⁵

April 5, 2006

Custodian's written response to the OPRA request. The Custodian advises the Complainant that the requested document is also now available on the Borough's website, where the Custodian states that the Complainant may print whatever pages he needs.

³ No legal representation indicated.

⁴ Legal representation is Timothy Scaffidi, Esq. from Scaffidi & Scaffidi located in Woodbury, NJ.

⁵ According to the Complainant's Denial of Access Complaint.

April 19, 2006

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

- March 28, 2006 Borough Meeting Agenda (lists a resolution to introduce the requested budget), and
- March 29, 2006 Complainant’s OPRA request.

The Complainant asserts that the Custodian has unlawfully charged him \$41.25 for a copy of the requested budget that was to be discussed at the Borough’s May 5, 2006 public meeting. The Complainant states that he has received this document in the past and feels that this document should be provided to him free of charge.

April 25, 2006

Mediation offer sent to parties.

April 25, 2006

Complainant’s e-mailed declination of mediation.

April 25, 2006

E-mail from the GRC to the Complainant. The GRC requests clarification from the Complainant regarding his assertion in the Denial of Access Complaint, that another complaint has been filed with the GRC concerning this records request or any document sought in it.

April 25, 2006

E-mail from the Complainant to the GRC. The Complainant states that in the Denial of Access Complaint, he was referring to a separate request for another document, not related in any way to this complaint.

April 26, 2006

Custodian’s signed Agreement to Mediate.

April 27, 2006

Request for Statement of Information sent to the Custodian.

May 3, 2006

Custodian’s Statement of Information (“SOI”) with the following attachments:

- March 29, 2006 Complainant’s OPRA request,
- March 29, 2006 Complainant’s OPRA request (with notations),
- March 29, 2006 Complainant’s OPRA request (with further notations),
- April 5, 2005 Custodian’s written response to the OPRA request, and
- Glassboro Code Book, Article I A(5)(b) indicating that legal sized copies are \$0.75 per page.

The Custodian confirms that the Complainant's OPRA request was received on March 29, 2006. The Custodian certifies that she consulted with the Solicitor who advised her to charge for the records. After speaking with the Solicitor, the Custodian states that the Complainant was contacted and verbally informed that the cost for the 56 page requested record is \$41.25.⁶

The Custodian asserts that the Complainant came in to pick up the document on April 4, 2006. However, the Custodian states that the Complainant refused to pay the fee for the copying the 56 page budget. The Custodian states the fee was calculated at \$0.75 per page for legal-size copies as provided for in Glassboro Code Book, Article I A(5)(b) (a copy of which the Custodian provided to the GRC). The Custodian certifies that the Complainant was offered the chance to review the document on location free of charge, but was informed that he would be required to pay the fee for the copies if he wished to take them with him. The Custodian states that she also informed the Complainant that both the Glassboro Library and the Gloucester County Library have copies of this document for his convenience if the Complainant wanted to make his own copies. The Custodian asserts that the Complainant then stated that he wanted a free copy and would file a complaint with the GRC to get one. The Custodian then had the requested budget posted to the Borough website for easier access and informed the Complainant, via the April 5, 2005 written response to the OPRA request, that the information was available online if he would like to view and print those pages that he is interested in.

April 28, 2006

E-mail from the Complainant to the GRC. The Complainant states that the Custodian requires all requests for documents be put on an OPRA request form, even if the documents should be free of charge, such as ordinances about to be voted on.

June 1, 2006

E-mail from the Complainant to the GRC. The Complainant asserts that the Custodian wrongfully directed him to the municipal website or the library to obtain the requested documents. The Complainant contends that regarding the Custodian's reliance upon the Solicitor's advice in responding to this OPRA request, the Solicitor is not an expert on the matter of responding to OPRA requests and the Municipal Clerk is the only one qualified to do so.

September 15, 2006

E-mail from the GRC to the Custodian. The GRC requests the following information no later than September 21, 2006 in a certification signed by the Records Custodian:

- The reason(s) the Complainant was not immediately provided access to the requested 2006 Budget, and
- Whether the Complainant was advised of a delay in providing access to the requested budget and the reasons therefore. If a response was made in writing, the Custodian was asked to provide a copy of that correspondence.

⁶ The Custodian states that the number of pages was miscounted and the Complainant was actually only charged for 55 legal-sized pages.

The GRC also advises the Custodian that if no response to this correspondence is received, this case will proceed to adjudication with the record and submissions provided as of this date.

September 18, 2006

E-mail to the GRC from Acting Municipal Clerk, Jo Myers. Ms. Myers informs the GRC that the Custodian named in this complaint is currently out of the office on emergency medical leave for an indefinite period of time. Ms. Myers requests advice on how to handle the GRC's September 15, 2006 request for additional information.

September 19, 2006

E-mail from the GRC to Acting Municipal Clerk, Jo Myers. The GRC requests that Ms. Myers, as Acting Municipal Clerk, provide a legal certification that is true to the best of her knowledge, providing any supporting documentation which may clarify statements made in response to the questions posed in the GRC's September 15, 2006 e-mail. Additionally, Ms. Myers is directed to indicate in her response why she is responding on behalf of the Custodian and to inform the GRC if there is any information that cannot be provided due to the Custodian's absence. (The GRC received no response to this request for a legal certification.)

Analysis

Whether the Custodian's charge of \$0.75 per page for legal-size copies of the requested 2006 Municipal Budget resulted in an unlawful denial of access to the requested documents?

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 allows for immediate access to certain types of records. Specifically, OPRA states that:

“[i]mmediate access ordinarily shall be granted to budgets...” N.J.S.A. 47:1A-5.e.

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, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. *Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following: first page to tenth page, \$ 0.75 per page; eleventh page to twentieth page, \$ 0.50 per page; all pages over twenty, \$ 0.25 per page.* The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses... *[i]f a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.*” (Emphasis added.) N.J.S.A. 47:1A-5.b.

OPRA provides 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, 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.*” (Emphasis added.) N.J.S.A. 47:1A-5.c.

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

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

The Complainant asserts that the Custodian has unlawfully charged him \$41.25 for a copy of the requested budget that was to be discussed at the Borough’s May 5, 2006 public meeting. The Complainant states that he has received this document in the past and feels that this document should be provided to him free of charge. The Custodian

asserts that the Complainant came in to pick up the document on April 4, 2006. However, the Custodian states that the Complainant refused to pay the fee for the copies. The Custodian states the fee was calculated at \$0.75 per page for legal-size copies as provided for in Glassboro Code Book, Article I A(5)(b).

“In 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.*” Libertarian Party of Central New Jersey, Paff v. Reina Murphy, as Custodian for the Township of Edison, 384 *N.J. Super* 136, 139.

OPRA does state that there is an exception to the fee schedule outlined in N.J.S.A. 47:1A-5.b. for those fees otherwise provided by law or regulation. The Custodian has provided an ordinance, Glassboro Code Book, Article I A(5)(b), that allows for the \$0.75 per page copying fee as a law that supersedes the copying rates in OPRA. However, as this is a municipal ordinance it does not fall into the category of a state law, regulation or executive order that supersedes OPRA pursuant to N.J.S.A. 47:1A-9.a. Therefore, the fees established in Glassboro Code Book, Article I A(5)(b) do not override the copying rates outlined in OPRA.

Similarly to the fee for providing records on a computer diskette Libertarian Party of Central New Jersey, Paff, Id. the fee for providing records on legal sized paper in this complaint is inordinate. Copies in legal size do not require anything more to reproduce than copies in regular business size. Ordinary copiers have the capacity to make copies in legal size and the Custodian likely maintains legal sized copying paper for preparing other municipal documents. The only circumstance for which OPRA (N.J.S.A. 47:1A-5.c.) allows a municipality to enact an ordinance regarding the copying costs of records in excess of those enumerated in N.J.S.A. 47:1A-5.b. is one in which a public agency can demonstrate that its *actual costs* for duplication of a government record exceed the foregoing rates. While OPRA allows for a special service charge in those instances where documents cannot be reproduced by ordinary document copying equipment in ordinary business size that charge must be based on the *actual cost* of reproducing the record. In this case, the Custodian has failed to provide any evidence that the “actual cost” of copying legal sized documents is \$0.75 per page pursuant to N.J.S.A. 47:1A-5.c. Therefore, the \$0.75 charge violates OPRA.

Additionally, the Custodian provided access to the requested budget three (3) business days after receipt of the request. OPRA provides that “[i]mmediate access ordinarily shall be granted to budgets...” N.J.S.A. 47:1A-5.e. The Custodian has not provided the GRC or the Complainant with any reason why the requested budget could

not immediately be provided in response to this request. While the Custodian does indicate that she consulted with the Solicitor regarding the charge for these records, this is not a lawful basis for delaying access to the requested budget. Hence, the Custodian violated N.J.S.A. 47:1A-5.e. in not providing immediate access to the requested budget.

While the Glassboro Code Book, Article I A(5)(b) establishes that legal-sized copies are provided at a cost of \$0.75 per page, this ordinance does not override the copying rates outlined in OPRA. Thus, there was an unlawful denial of access to the requested records due to the inordinate charge of \$0.75 for legal sized copies in violation of N.J.S.A. 47:1A-5.b and the Custodian's failure to provide immediate access to the requested 2006 Municipal Budget pursuant to N.J.S.A. 47:1A-5.e. Therefore, the Custodian must charge the enumerated copying fees established in N.J.S.A. 47:1A-5.b. for paper copies of the requested Budget under the provisions of OPRA and release the record to the Complainant.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that

9. The fees established in Glassboro Code Book, Article I A(5)(b) do not override the copying rates outlined in OPRA pursuant to N.J.S.A. 47:1A-9.a.
10. Based on the inordinate charge of \$0.75 for legal sized copies in violation of N.J.S.A. 47:1A-5.b and the Custodian's failure to provide immediate access to the requested 2006 Municipal Budget pursuant to N.J.S.A. 47:1A-5.e., the Custodian has unlawfully denied access to the requested records.
11. The Custodian must charge the enumerated copying fees established in N.J.S.A. 47:1A-5.b. for legal-sized paper copies of the 2006 Municipal Budget requested under the provisions of OPRA and release the requested 2006 Municipal Budget to the Complainant.
- 12. The Custodian shall comply with "3." above within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**

Prepared By:

Colleen C. McGann
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

November 8, 2006

