



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

November 19, 2008 Government Records Council Meeting

Tina Renna
Complainant

Complaint No.2008-40

v.

Township of Warren (Somerset)
Custodian of Record

At the November 19, 2008 public meeting, the Government Records Council (“Council”) considered the November 13, 2008 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. Although the Engineering Department Inspector provided a written response to the Complainant’s request within the statutorily mandated seven (7) business days granting access to the requested records, said response does not address the Complainant’s preferred method of receiving said records (electronic format) and as such, the response is insufficient. Thus, pursuant to O’Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), the Custodian has violated N.J.S.A. 47:1A-5.g.
2. Because the specific language of OPRA at N.J.S.A. 47:1A-5.c. does not mandate that a custodian put a special service charge in writing, the Council declines to find the Custodian in violation of OPRA. However, best practices dictate that Custodian’s **should** provide requestors with an estimated special service charge in writing based on the Council’s interpretation of the word “review.”
3. Based on the information provided by the Custodian, specifically that only two (2) employees had the authority to convert the requested records to the medium requested and such conversion required three (3) hours of the Engineering Inspector’s time (a reasonable 81 seconds per file), a special service charge is warranted in this matter pursuant to N.J.S.A. 47:1A-5.c.
4. Pursuant to N.J.S.A. 47:1A-5.c. and Loder v. County of Passaic, GRC Complaint No. 2005-161 (January 2006) 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. As such, the actual direct cost of the Engineering Department Inspector's time is \$26.16/hour.

5. The Custodian provided the Complainant with an inaccurate estimate and was obligated to reassess the special service charge when the charge exceeded the estimated amount because all limitations on access shall be construed in favor of the public pursuant to N.J.S.A. 47:1A-1.
6. Pursuant to N.J.S.A. 47:1A-5.b. and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian may only charge the actual cost of the CD-ROM.
7. The Custodian shall disclose the requested records to the Complainant upon payment of the actual direct cost of the special service charge (\$26.16) and the actual cost of the CD-ROM.
8. **The Custodian shall comply with item #7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, 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 1:4-4, to the Executive Director.**
9. 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.
10. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 19th Day of November, 2008

Robin Berg Tabakin, Chair
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: November 20, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 19, 2008 Council Meeting**

**Tina Renna¹
Complainant**

GRC Complaint No. 2008-40

v.

**Township of Warren (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Electronic copies of the most recent scanned images of all Township tax maps.

Request Made: January 11, 2008

Response Made: January 18, 2008 and January 24, 2008³

Custodian: Patricia A. DiRocco

GRC Complaint Filed: February 26, 2008⁴

Background

January 11, 2008

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.

January 18, 2008

Engineering Department Inspector's response to the OPRA request. The Engineering Department Inspector responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request.⁵ The Inspector states that there are a total of 134 maps which cost \$5.00 each and amount to \$670.00. The Inspector asks the Complainant if she wishes to purchase said maps and in what format.

January 24, 2008

E-mail from Complainant to Engineering Department. The Complainant states that N.J.S.A. 47:1A-5.b. provides that "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

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by John P. Belardo, Esq., of McElroy, Deutsch, Mulvaney & Carpenter, LLP (Morristown, NJ).

³ January 24, 2008 response was verbal.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The Custodian certified in her Statement of Information that she received the Complainant's OPRA request on January 14, 2008.

the cost of labor or other overhead expenses associated with making the copy except if a special service charge is warranted.” Additionally, the Complainant states that a recent Appellate Division decision stated that the Township of Edison’s \$55.00 charge for providing records on a computer disk was “facially inordinate” and that “the only discernable rationale for the fee is to discourage the public from requesting the information in [computer readable] format.” The Complainant asks the Engineering Department Inspector to consult with the Township attorney or the Government Records Council (“GRC”) regarding OPRA fees for electronic copies and to advise if there is a change in the Township’s fee for this request.

January 24, 2008

Telephone conversation between Complainant and Custodian. The Custodian states that the requested records are maintained in the AutoCAD system and cannot be copied as is and must be converted to pdf format. The Custodian states that the estimated charge for one (1) hour of time is \$35.00 plus \$5.00 for the CD-ROM which totals \$40.00. The Complainant requests that the Custodian put said charge in writing.

January 24, 2008

Complainant submits a check to the Township in the amount of \$40.00.

January 29, 2008

Telephone conversation between Complainant and Custodian. The Custodian states that the medium conversion actually took three (3) hours of time. As such, the Custodian calculates the special service charge at \$35.00/hour for three (3) hours plus \$5.00 for the CD-ROM which totals \$110.00. The Custodian states that she will return the Complainant’s \$40.00 check. The Complainant objects to the additional \$70.00 charge and requests that the Custodian put said charge in writing.

January 30, 2008

E-mail from Custodian’s Counsel to Complainant. Counsel states that the tax maps are maintained in the AutoCAD system and not in the medium requested. To provide the requested records in the medium requested, Counsel states that the Engineering Department Inspector spent three (3) hours converting the records to CD-ROM. Counsel states that the Custodian advised the Complainant of the copy fee (which includes the cost of the medium conversion) pursuant to N.J.S.A. 47:1A-5.d.

February 12, 2008

Letter from Custodian to Complainant. The Custodian returns the Complainant’s check in the amount of \$40.00.

February 26, 2008

Denial of Access Complaint filed with the GRC with the following attachments:

- Complainant’s OPRA request dated January 11, 2008
- E-mail from Engineering Department Inspector to Complainant dated January 18, 2008
- E-mail from Complainant to Engineering Department Inspector to Complainant dated January 24, 2008

- E-mail from Custodian's Counsel to Complainant dated January 30, 2008
- Letter from Custodian to Complainant dated February 12, 2008

The Complainant states that she submitted her OPRA request on January 11, 2008 in which she requested electronic copies of tax maps. The Complainant states that she received a written response from the Engineering Department Inspector dated January 18, 2008 in which the Inspector requested a \$670.00 copy fee (\$5.00 per map for 134 maps). The Complainant states that she objected to the charge via e-mail dated January 24, 2008 and cited N.J.S.A. 47:1A-5.b. and Libertarian Party v. Murphy, 384 N.J. Super. 136 (App.Div. 2006). The Complainant states that in said e-mail she requested that the Township reconsider its copy charge.

The Complainant also states that on January 24, 2008 she spoke to the Custodian who advised that the Township Engineer spent one (1) hour compiling the tax maps and that the charge for the CD-ROM would be \$40.00. The Complainant states that she asked the Custodian to put her statements in writing but the Custodian did not do so. The Complainant states that she spoke to the Custodian again on January 29, 2008 when the Custodian advised that because it took more than one (1) hour to copy the tax maps the Custodian was charging an additional \$70.00 which brought the total fee to \$110.00. The Complainant states that the Custodian indicated that she would return the Complainant's check for \$40.00. The Complainant states that she again asked the Custodian to put her statements in writing but the Custodian did not do so. Further, the Complainant states that she received an e-mail from the Custodian's Counsel dated January 30, 2008 in which Counsel claimed the fee quoted by the Custodian was proper and reasonable pursuant to N.J.S.A. 47:1A-5.d. The Complainant states that Counsel indicated that the special service charge was based on the three (3) hours of time it took to convert the tax maps from the AutoCAD system to CD-ROM.

The Complainant states that the Custodian did not explain why an engineer was required to copy the electronic files, why the electronic files could not be provided in AutoCAD format instead of being converted, why the Custodian's original one (1) hour estimate was incorrect and exactly how the \$110.00 charge was calculated.

Further, the Complainant requests the following relief from the Council:

1. A finding that the Custodian violated OPRA and denied access by requesting a \$40.00 special service charge and then returning the Complainant's check and not producing the requested records
2. A finding that the Custodian violated OPRA and denied access to records by applying an unwarranted special service charge for copies of records in the medium maintained by the Township
3. A finding that the Custodian violated OPRA by declining to put the special service charge in writing on January 24, 2008 and January 30, 2008
4. An order compelling the Custodian to release the requested records to the Complainant in the medium requested
5. An award of prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6
6. Upon investigation, imposition of a fine against the Custodian for knowingly and willfully violating OPRA.

Additionally, the Complainant did not agree to mediate this complaint.

March 17, 2008

Request for the Statement of Information sent to the Custodian.

March 17, 2008

Letter from GRC to Custodian. The GRC requests that the Custodian respond to the following questions regarding the assessment of a special service charge:

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?
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.

March 19, 2008

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

- Complainant's OPRA request dated January 11, 2008
- E-mail from Engineering Department Inspector to Complainant dated January 18, 2008
- E-mail from Complainant to Engineering Department Inspector dated January 24, 2008
- Custodian's handwritten note dated January 24, 2008 (indicating that she called the Complainant to inform her of the estimated special service charge)
- Copy of Complainant's check in the amount of \$40.00 dated January 24, 2008
- Copy of Engineering Department Inspector's calendar entry dated January 29, 2008 (indicating that he worked on the tax map conversion for 3 hours)

- Custodian's undated "note to file" (indicating that she verbally contacted the Complainant on January 29, 2008 to inform that the actual time to convert the records was three (3) hours and that an additional \$70.00 was due)
- E-mail from Custodian's Counsel to Complainant dated January 30, 2008
- Letter from Custodian to Complainant dated February 12, 2008

The Custodian certifies receiving the Complainant's OPRA request on January 14, 2008. The Custodian states that the Engineering Department Inspector responded to the Complainant's request via e-mail dated January 18, 2008 in which the Inspector quoted the cost for paper copies of the requested tax maps. The Custodian certifies that no electronic format version and no scanned images of the maps exist. The Custodian certifies that the CAD program is utilized by the Township Engineer to compile and update data that create the final tax map. The Custodian states that the Complainant e-mailed the Inspector on January 24, 2008 objecting to the charge and again requesting the maps in electronic format. The Custodian certifies that on January 24, 2008 she called the Complainant to advise that in order to create an electronic copy of the tax maps, the CAD file (which the Township Engineer maintains and uses to create a copy of the paper maps; the CAD file cannot be copied) would need to be converted to a pdf file which can be copied. The Custodian certifies that she advised the Complainant that a special service charge would be assessed at \$35.00 per hour for the file conversion at an estimated time of 1 hour plus \$5.00 for the CD-ROM which equals \$40.00. The Custodian states that the Complainant did not object to the special service charge.

Additionally, the Custodian certifies that she called the Complainant again on January 29, 2008 to advise that the record conversion actually took three (3) hours and so the copy fee is \$110.00 (\$35.00 per hour plus \$5.00 for the CD). The Custodian states that the Complainant objected to the charge of the additional two (2) hours. The Custodian states that the Township Attorney e-mailed the Complainant on January 30, 2008 indicating that the special service charge must be paid in order to receive the requested records. Further, the Custodian certifies that she returned the Complainant's \$40.00 check on February 12, 2008 because she did not receive any additional payment from the Complainant.

The Custodian certifies that her search for the requested records included consulting with the Engineering Department Inspector about the estimated time to complete the file conversion. The Custodian also certifies that no records responsive to the Complainant's request were destroyed.

The Custodian asserts that because an electronic copy of the requested tax map did not exist at the time of the request and required medium conversion, a special service charge is warranted pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. because the conversion required an extraordinary expenditure of time and effort. The Custodian certifies that she notified the Complainant of the estimated special service charge to which the Complainant did not object.

Additionally, the Custodian's responses to the special service charge questions are as follows:

Questions	Custodian's Response
1. What records are requested?	Electronic format of the most recent scanned images of all Township tax maps
2. Give a general nature description and number of the government records requested.	The Township maintains paper copies of the 134 maps which are two feet (2') by 3 feet (3') each. No electronic copy of the maps exists. Such maps were converted from the CAD system.
3. What is the period of time over which the records extend?	The Complainant sought only "the most current scanned images."
4. Are some or all of the records sought archived or in storage?	No
5. What is the size of the agency (total number of employees)?	Approximately 95
6. What is the number of employees available to accommodate the records request?	Only two (2) employees have the training, ability and authorization to utilize the CAD program – Christian Kastrud, Township Engineer, and David Darge, Engineering Department Inspector
7. To what extent do the requested records have to be redacted?	No redactions required
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?	<p>Only Christian Kastrud, Township Engineer, and David Darge, Engineering Department Inspector, have the ability to access the CAD program to convert the tax maps. Christian Kastrud's hourly rate is \$80.00 in-house and \$120.00 at his outside office. David Darge's hourly rate is \$41.86.</p> <p>3 hours of David Darge's time were required to convert the information from the CAD program to 134 pdf files, then copy the pdf files to a CD.</p>
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?	Not applicable
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?	Not applicable
11. What is the reason that the agency employed, or intends to	The Engineering Department Inspector had the level of expertise and experience to convert the records to electronic format. Because the potential exists for

employ, the particular level of personnel to accommodate the records request?	information contained in the CAD program to be altered or deleted, only employees with knowledge and skill can use the CAD program.
12. Who (name and job title) in the agency will perform the work associated with the records request and that person’s hourly rate?	David Darge, Engineering Department Inspector performed the conversion. He is paid \$26.16 per hour by the Township for his regular duties. Based on Township Ordinance § 15.5.3.b.8, for inspections and work where fees are charged and must be reimbursed by applicants and developers, Mr. Darge’s hourly rate is \$41.86 (\$26.16 times 1.6).
13. What is the availability of information technology and copying capabilities?	The Township has a special copy machine to copy the oversized tax maps. The Township also has the CAD program and the technology required to convert the information into pdf and copy the 134 pdf files onto a CD.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	The Engineering Department Inspector required three (3) hours (180 minutes) to convert 134 CAD files to pdf and save them to a CD (an average of 81 seconds per file).

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA provides that:

“...[i]f the custodian is *unable to comply with a request* for access, the custodian shall *indicate the specific basis therefore* on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁶

In this complaint, the Complainant states that she submitted her OPRA request on January 11, 2008 in which she sought access to electronic copies of the Township’s tax maps. The Custodian certifies receiving the Complainant’s OPRA request on January 14, 2008. The Custodian states that the Engineering Department Inspector responded to the Complainant’s request via e-mail on January 18, 2008, the fourth (4th) business day following the Custodian’s receipt of said request. The Complainant acknowledges receiving this response; however, said response grants access to the requested maps in paper form and quotes the paper copy fee. The Complainant states that via e-mail dated January 24, 2008, she notified the Inspector that her request sought access to electronic copies of the tax maps. The Complainant also states that she spoke to the Custodian on the same date, which is the seventh (7th) business day following the Custodian’s receipt of the request, and the Custodian informed the Complainant that a special service charge of \$40.00 would be required to convert the tax maps to electronic format and provide them on a CD-ROM.

⁶ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Although the Engineering Department Inspector responded to the Complainant's request in writing within the statutorily mandated seven (7) business days and granted access to paper copies, the Inspector failed to address the Complainant's preference to receive the requested records in electronic format. The GRC has previously rendered a decision on a similar matter in O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008). In said complaint, the Complainant sought access to records either by e-mail or regular mail, whichever costs less. The Custodian's response only quoted a cost for providing paper copies of the requested records. The Council held that:

“[a]ccording to language of N.J.S.A. 47:1A-5.g., the Custodian was given two ways to comply and should have, therefore, responded acknowledging the Complainant's preferences with a sufficient response for each. Although the Custodian responded in writing granting access...in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g.”

The facts of this complainant are similar to those in O'Shea except that in this current complaint the Custodian did address the Complainant's preferred medium on the seventh (7th) business day; however, said acknowledgement was verbal. Therefore, although the Inspector provided a written response to the Complainant's request within the statutorily mandated seven (7) business days granting access to the requested records, said response does not address the Complainant's preferred method of receiving said records (electronic format) and as such the response is insufficient. Thus, pursuant to O'Shea, supra, the Custodian has violated N.J.S.A. 47:1A-5.g.

Whether the special service charge assessed by the Custodian is warranted and reasonable pursuant to OPRA?

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

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 ... 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 also states that:

"[a] custodian shall permit access to a government record and *provide a copy thereof in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium..." (Emphasis added.) N.J.S.A. 47:1A-5.d.

The Complainant states that during her telephone conversation with the Custodian on January 24, 2008, the Custodian estimated a \$40.00 special service charge for the one (1) hour conversion of the tax maps to electronic format. The Complainant submitted payment for said charge. However, the Complainant also states that on January 29, 2008, the Custodian verbally informed her that the conversion took three (3) hours and an additional \$70.00 was due (totaling \$110.00). The Complainant challenges the special service charge in that the Custodian did not explain why an Engineer was required to copy the electronic files, why the electronic files could not be provided in AutoCAD format instead of being converted, why the Custodian's original one (1) hour estimate was incorrect, exactly how the \$110.00 charge was calculated and did not put the special service charges in writing.

The provision of OPRA that allows for special service charges, N.J.S.A. 47:1A-5.c., requires that custodians provide the Complainant with an opportunity to review and object to the charge prior to it being incurred. OPRA is silent in this provision about whether such review must be provided to the Complainant in writing. The dictionary contains various definitions for the verb "review" including "to view, look at, or look over again," "to inspect, esp. formally or officially" and "to survey mentally; take a survey of."⁷ Applying the first two definitions of "review" to OPRA's special service charge provision implies that the special service charge estimate must be in writing. However, when the third definition is applied, the written implication does not exist. Nevertheless, because OPRA requires custodians to respond to requests in writing, best practices dictate that Custodian's **should** provide requestors with an estimated special service charge in writing so as to have documented proof of such exchange. Relying solely on verbal communication runs the risk of miscommunication. For example, a custodian may verbally estimate a special service charge of \$50.00 and the requestor may hear \$15.00 and agree to the charge. Nevertheless, because the specific language of OPRA at N.J.S.A. 47:1A-5.c. does not mandate that a custodian put a special service charge in writing, the Council declines to find the Custodian in violation of OPRA in this regard.

⁷ "Review." *Dictionary.com Unabridged (v.1.1)*. Random House, Inc.
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Further, 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;⁸ 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.

⁸ 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.

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?
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: The Complainant requested electronic copies of tax maps which the Custodian certifies are not maintained on file in the medium requested. The Custodian certifies that the 2' by 3' maps are maintained in paper form and the information used to create the paper maps is stored in the AutoCAD system. The Custodian certifies that although the Township consists of 95 employees, only two (2) employees, the Township Engineer and the Engineering Department Inspector, have the ability and authority to use the AutoCAD system because of the potential for accidental alterations or deletions to the system. The Custodian certifies that the Engineering Inspector's hourly rate is \$26.16; however, the Custodian certifies that pursuant to Ordinance § 15.5.3.b.8, the Inspector's rate for work where fees are charged is \$41.86 (\$26.16 times 1.6). (It should be noted that the Custodian charged \$35.00 per hour for the special service charge in this complaint). Additionally, the Custodian certifies that Mr. Darge had to convert 134 CAD files to pdf files and save them onto a CD-ROM. The Custodian certifies that said conversion took three (3) hours (180 minutes) which is an average of 81 seconds per file. The Custodian also certifies that the cost of the CD-ROM is \$5.00.

Based on the information provided by the Custodian, specifically that only two (2) employees had the authority to convert the requested records to the medium requested and such conversion required three (3) hours of the Engineering Inspector's time (a reasonable 81 seconds per file), a special service charge is warranted in this matter pursuant to N.J.S.A. 47:1A-5.c. The remaining question here is whether the \$110.00 special service charge assessed by the Custodian is reasonable and based upon the actual direct cost of providing the copies.

In the Custodian's Statement of Information, the Custodian breaks down the special service charge for three (3) hours at \$35.00 per hour plus \$5.00 for the CD-ROM. However, the Custodian certifies in the 14-point special service charge questionnaire that the Engineering Inspector completed the file conversion and his hourly rate is \$26.16. The Custodian also certified that the Inspector's rate when fees are assessed is \$41.86, which is 1.6 times his actual hourly rate. However, the specific wording of OPRA's special service charge provision states that a special service charge shall be based on "the actual direct cost of providing the copy or copies." N.J.S.A. 47:1A-5.c. In Loder v. County of Passaic, GRC Complaint No. 2005-161 (January 2006), the Custodian charged a special service charge that included 30% for fringe benefits. The Council held that a "special service charge should only reflect the hours spent providing the actual copies and the hourly rate (minus the fringe benefits) of appropriate personnel applied." Therefore, the actual direct cost in this instant matter is \$26.16/hour.

Using the actual direct cost of \$26.16/hour for three (3) hours of medium conversion, the special service charge warranted for this request is \$78.48. However, the Custodian only estimated a one (1) hour special service charge at \$35.00/hour. N.J.S.A. 47:1A-1 provides that all limitations on access shall be construed in favor of the public. Based on said provision, the Custodian has an obligation to reassess the special service charge when the charge exceeds the estimated amount. Otherwise, custodians could estimate any amount to which a requestor agrees and actually incur a cost much higher than the estimate, similar to the events in this complaint. Such practice is a violation of OPRA since requestors have the opportunity to object to a special service charge **prior to it being incurred** pursuant to N.J.S.A. 47:1A-5.c. Thus, in this instant matter, the Custodian provided the Complainant with an inaccurate estimate.

Further, in Loder, supra, the Custodian estimated and the Complainant agreed to a \$400 special service charge. The Custodian actually incurred a cost of \$799.32 (as per the GRC's calculation minus the fringe benefits). The Council held that:

"while a reasonable special service charge of \$799.32 is warranted pursuant to OPRA and [The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002)], the Custodian may only charge the \$400.00 special service charge that the Complainant agreed to pay in August 2004 because the Custodian violated N.J.S.A. 47:1A-5.c. by not providing the Complainant the opportunity to review and object to the charge prior to it being incurred."

Similarly in this instant complaint, the Complainant agreed to a lesser charge than what was actually incurred by the Custodian. However, in this complaint the Custodian estimated an incorrect special service charge because said charge was not based on the actual direct cost pursuant to N.J.S.A. 47:1A-5.c. Based on the Council's decision in Loder, the Custodian in this complaint may only charge the estimated special service charge of one (1) hour; however the Custodian must only charge \$26.16 because it is the actual direct cost of providing the copies.

Additionally, the Custodian must charge the actual cost of the CD-ROM pursuant to N.J.S.A. 47:1A-5.b. which is likely not the quoted \$5.00.

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-5b."

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."

Therefore, pursuant to N.J.S.A. 47:1A-5.b. and Libertarian Party of Central New Jersey, supra, the Custodian may only charge the actual cost of the CD-ROM.

In conclusion, although the specific language of OPRA does not expressly direct custodians to provide requestors with an estimated special service charge in writing and thus the Custodian's failure to do so in this matter is not a direct violation of OPRA, best practices dictate that custodians inform requestors of the special service charge breakdown in writing. Because only two (2) Township employees had the capability to complete the medium conversion required for the OPRA request subject of this complaint and because said conversion required a total of three (3) hours of the Engineering Department Inspector's time, a special service charge is warranted pursuant to N.J.S.A. 47:1A-5.c. However, said charge must relate to the actual direct cost of providing the copies. The actual direct cost in this complaint is the Inspector's hourly rate minus fringe benefits, which is \$26.16. Additionally, because the Custodian failed to reassess the inaccurate time estimate for the medium conversion, the Custodian may only charge the Complainant for the time estimated which is one (1) hour. Further, pursuant to N.J.S.A. 47:1A-5.b. and Libertarian Party of Central New Jersey, supra, the Custodian may only charge the actual cost of the CD-ROM. Therefore, the Custodian must release the

requested records to the Complainant upon payment of the actual direct cost of the special service charge (\$26.16) and the actual cost of the CD-ROM.

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.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Engineering Department Inspector provided a written response to the Complainant’s request within the statutorily mandated seven (7) business days granting access to the requested records, said response does not address the Complainant’s preferred method of receiving said records (electronic format) and as such, the response is insufficient. Thus, pursuant to O’Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), the Custodian has violated N.J.S.A. 47:1A-5.g.
2. Because the specific language of OPRA at N.J.S.A. 47:1A-5.c. does not mandate that a custodian put a special service charge in writing, the Council declines to find the Custodian in violation of OPRA. However, best practices dictate that Custodian’s **should** provide requestors with an estimated special service charge in writing based on the Council’s interpretation of the word “review.”
3. Based on the information provided by the Custodian, specifically that only two (2) employees had the authority to convert the requested records to the medium requested and such conversion required three (3) hours of the Engineering Inspector’s time (a reasonable 81 seconds per file), a special service charge is warranted in this matter pursuant to N.J.S.A. 47:1A-5.c.
4. Pursuant to N.J.S.A. 47:1A-5.c. and Loder v. County of Passaic, GRC Complaint No. 2005-161 (January 2006) 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. As such, the actual direct cost of the Engineering Department Inspector’s time is \$26.16/hour.

5. The Custodian provided the Complainant with an inaccurate estimate and was obligated to reassess the special service charge when the charge exceeded the estimated amount because all limitations on access shall be construed in favor of the public pursuant to N.J.S.A. 47:1A-1.
6. Pursuant to N.J.S.A. 47:1A-5.b. and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian may only charge the actual cost of the CD-ROM.
7. The Custodian shall disclose the requested records to the Complainant upon payment of the actual direct cost of the special service charge (\$26.16) and the actual cost of the CD-ROM.
8. **The Custodian shall comply with item #7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, 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 1:4-4, to the Executive Director.**
9. 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.
10. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

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Executive Director

November 13, 2008