

New Jersey Government Records Council Denial of Access Complaint

Please read these instructions before completing this form:

- This form is to be used only for claims of denial of access to government records that you want the Government Records Council (GRC) to decide. Your request must have been made on or after July 8, 2002 under "OPRA," the Open Public Records Act (N.J.S.A. 47:1A-1 et seq.).
- Please print or type your responses, and provide ALL information requested. Incomplete forms will delay processing. This form is available in downloadable format from the GRC web site at www.nj.gov/grc.
- Only one complaint is required for each OPRA request form, regardless of the number of documents sought in the request.
- *The GRC recommends that you keep a copy of this complaint for your own files.*
- **MAIL, FAX, OR E-MAIL THIS COMPLAINT AND ALL SUPPORTING DOCUMENTATION TO:**

Government Records Council
 PO Box 819
 Trenton, NJ 08625-0819

Fax: (609) 633-6337
 E-mail: grc@dca.state.nj.us

1. About the Requester of the Records:

Full Name: Lisa A. Tilton d.b.a. Galloway Township News

Mailing Address: 713 E. Victoria Drive

City: Galloway State: NJ ZIP 08205

Please provide a phone number at which GRC staff can contact you between 8 A.M.-5 P.M., Monday-Friday: 609-839-0012

Fax Number: _____

E-Mail Address: gallowaytwpnews@gmail.com

If you are represented by an attorney in this matter, please provide:

Name: Walter M. Luers, Esq. Phone Number: 908-894-5656

Address: 23 W. Main Street Ste. C202 Fax Number: 908-894-5729

E-mail Address: wluers@luerslaw.com

If you are an attorney who requested records and are filing this complaint **on behalf of a client**, please state the client's name:

2. About the Custodian of Records:

Name of the public agency from which records were requested: City of Cape May

Name of custodian on whom records request was submitted: Louise F. Cummiskey, RMC

Telephone Number: 609-884-9532 E-Mail address (if used): cityclerk@capemaycity.com

Name of custodian who denied records request (if different from above): _____

Telephone Number: _____ E-Mail address (if used): _____

Fax Number: _____

3. About the Record Request:

Date your records request was provided to the custodian:

2/24/16

Did you receive a reply to your request?

Yes [X] No []

If so, state the date your request was denied:

2/29/16

Have you previously filed a complaint with the GRC concerning the record request that is subject of this complaint?

Yes [] No [X]

If yes, provide the GRC complaint number and a copy of the GRC decision in the matter.

Date: _____ Complaint No.: _____

Have you spoken with or written to the GRC about the record request that is subject of this complaint?

Yes [] Date: _____ No [X]

Have you filed an action in the N.J. Superior Court concerning the record request that is subject of this complaint?

No [X] Yes [] If Yes, Docket Number: _____

4. Offer of Mediation (please refer to the attached documents for details):

Are you interested in participating in mediation? Yes [] No [X]

5. Documents to submit with this Form:

- Complete the attached Records Denied List to describe the records to which you were denied access.
Attach a copy of the OPRA Records Request form you filed with the public agency and any correspondence between you and the record custodian(s) or custodial agency staff that concern the portion of your OPRA request that was denied.
Summarize the facts of this complaint by writing the content, time and date of any interaction you had with the custodian regarding the OPRA records request that is the subject of this complaint.
Provide any legal arguments, allegations or other information you would like the GRC to consider in deciding this complaint.
Sign the Agreement to Mediate if you wish to participate in the mediation process.

6. Verification of Complaint:

By signing this complaint, I affirm that:

- I am the person who submitted the OPRA request for records which is the subject of this Complaint;
The information I have provided is true to the best of my knowledge and belief;
The documents submitted with this Complaint are true copies of material which I believe is relevant to my claim;
I am not seeking disclosure of any personal information pertaining to the victim of any crime committed by me, which is an indictable offense under the laws of the State of New Jersey, or any other State, or pertaining to the family of that victim; and
I am simultaneously providing a copy of this complaint to the Custodian of Records.

[Handwritten Signature]

Signature (required)

4-1-16

Date

**New Jersey Government Records Council
Denial of Access Complaint - Detail Summary**

Use this form to summarize the content, time and date of any conversations regarding this complaint, along with the names of the participants and any witnesses.

**New Jersey Government Records Council
Denial of Access Complaint – Records Denied List**

Name of Complainant: _____

This is page ____ of ____.

Please fill out this form describing the record (or portion of it) to which access has been denied, the response to your request, including the reason given for denial of access. Submit additional pages if necessary.

Item #	Description of record (or portion)	Response to request



Galloway Township News <gallowaytwpnews@gmail.com>

Immediate OPRA Request / February 25, 2016

Louise Cummiskey <cityclerk@capemaycity.com>
To: Galloway Township News <gallowaytwpnews@gmail.com>

Tue, Mar 8, 2016 at 10:56 AM

Good Morning Ms. Tilton,

There are no redactions to the legal bills you have requested. Please review our prior communications, as set forth below, which clearly indicate the number of pages copied, the cost per page and the reason for the copying fee.

Regards,

Louise Cummiskey

From: Galloway Township News [mailto:gallowaytwpnews@gmail.com]
Sent: Monday, March 07, 2016 6:43 PM
To: Louise Cummiskey
Subject: Re: Immediate OPRA Request / February 25, 2016

Louise,

Can you please verify, are you assessing a \$1.80 copy fee because of redactions? You have not been clear on the reasoning for the fee. If it is, please confirm how many pages total without redactions and how many with redactions that you are charging for.

Thank you,

On Thursday, March 3, 2016, Louise Cummiskey <cityclerk@capemaycity.com> wrote:

Ms. Tilton,

As I mentioned below, upon my receipt of \$1.80 for copying fees, I will electronically forward you the requested documents.

Regards,

Louise Cummiskey

From: Galloway Township News [mailto:gallowaytwpnews@gmail.com]
Sent: Wednesday, March 02, 2016 9:41 PM
To: Louise Cummiskey; Louis Delollis
Subject: Re: Immediate OPRA Request / February 25, 2016

Ms. Cummiskey,

Although I appreciate your response you are interpreting the Open Public Records Act incorrectly. [Directly from the Custodians Handbook on the GRC Website \(Page 22\)](#) states:

5. "Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs."

"Records provided via e-mail and facsimile are free of charge. Custodians must charge the actual cost to provide access to all other electronic materials such as CD-ROMs, DVDs, videotapes, audiotapes, etc. No specific calculation is required to determine the actual cost of these supplies. The actual cost is the specific fee the agency paid to purchase the materials. For example, if the GRC purchased a package of 100 CD-ROMs for \$100 and provided records to a requestor on 1 CD-ROM, the actual cost of said CD-ROM is \$1.00 ($\$100 \div 100 = \1.00)."

This has been upheld in court as well as in GRC rulings. There is no reason to copy as you can scan the original documents in. Even if you make a copy to maintain in your office as responsive to this request, you can not charge the requestor. This is the law all over the State.

Also I would like to bring to your attention the [OPRA Fee Legislation that Governor Chris Christie signed on September 10, 2010](#) as provided by the GRC!

- Every public agency **must** provide electronic records FREE OF CHARGE (i.e. records sent via e-mail and fax)

I am asking you to review this and again release the records immediately without delay. Failure to do so and I will have no choice but to immediately litigate this and request that you be found to willingly and knowingly violating NJ State Law as I have just provided all the laws and evidence to you.

Thank you for your consideration.

Lisa Tilton

On Wed, Mar 2, 2016 at 10:45 AM, Louise Cummiskey <cityclerk@capemaycity.com> wrote:

Ms. Tilton:

As I previously stated, we are ready to send you the requested records upon receipt of payment. As the records you requested are not maintained electronically, we have to pull those individual records from storage, copy, and then scan them to send them to you electronically. Therefore, we are permitted to charge you a \$0.05 copying fee per page. I direct your attention to N.J.S.A. 47:1A-5. The fact that you have requested these copies electronically does not negate the copying fee.

Again, we are ready to send you these documents upon receipt of payment. I am NOT refusing your request. I am asking that you send me the required payment before I electronically send you the documents.

Thank you.

Louise Cummiskey

From: Galloway Township News [mailto:gallowaytpnews@gmail.com]

Sent: Wednesday, March 02, 2016 4:39 AM

To: Louise Cummiskey

Subject: Re: Immediate OPRA Request / February 25, 2016

Ms. Cummiskey,

You have become unresponsive, please confirm that you refuse to complete this request without payment of \$1.80 for an OPRA request that is for records to be sent electronically. With no response I consider same as a deemed denial for this OPRA request for immediate release.

Thank you,

Lisa Tilton

On Monday, February 29, 2016, Galloway Township News <gallowaytwnews@gmail.com> wrote:

Ms Cummiskey,

Perhaps the GRC is providing ill advised guidance to you. You are not permitted to charge when the requestor requests the records electronically. Review the open public records request act again. There are no copying fees attached to this request. I request you release the documents immediately. If you feel there is then provide me with specific statute stating what you are requiring.

I request the records be released immediately otherwise you will be in violation.

Be guided accordingly,

Lisa Tilton

On Monday, February 29, 2016, Louise Cummiskey <cityclerk@capemaycity.com> wrote:

Dear Ms. Tilton,

The documents you are requesting are not kept electronically and therefore, need to be gathered from storage, copied, scanned and then sent to you. The City is entitled, by law, to charge a copying fee for the production of the documents.

Kindly advise how you would like me to proceed.

Thank you.

Louise Cummiskey

From: Galloway Township News [mailto:gallowaytwnews@gmail.com]

Sent: Monday, February 29, 2016 10:18 AM

To: Louise Cummiskey

Subject: Re: Immediate OPRA Request / February 25, 2016

Please email the documents in PDF format pursuant to OPRA there is no charge for electronic transmission.

Thank you,

On Monday, February 29, 2016, Louise Cummiskey <cityclerk@capemaycity.com> wrote:

Good Morning Ms. Tilton,

In response to your OPRA Request #18:2016, as set forth below, please be advised that there is a \$1.80 copying fee. There are 26 documents @ \$.05 for a total of \$1.80. Please be advised that I do not yet have bills for January and February.

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

Kindly advise how you would like to proceed.

Louise Cummiskey

From: Galloway Township News [mailto:gallowaytwpnews@gmail.com]
Sent: Wednesday, February 24, 2016 9:01 PM
To: Louise Cummiskey
Subject: Immediate OPRA Request / February 25, 2016

Custodian of Records:

Please accept this as my request for Government Records. Please note the Open Public Records Act (OPRA) is not only the basis of my request. I claim entitlement to the records sought under OPRA and the Common Law Right of Access.

Requestor Name: GallowayTwpNews.com

Address: Do Not Use regular mail either for replying to this request or sending me the requested records. Please use email instead.

Email: gallowaytwpnews@gmail.com

Under penalty of NJSA 2C:28-3, I certify that I have not been convicted of any indictable offense under the laws of New Jersey, any other

state or the United States.

REQUESTED RECORDS ESTIMATED DUE BY Immediately:

1. Copy of Legal Bills, including Purchase Order, Invoice and detail billing in Scheeler vs. City of Cape May. Timeframe August 1, 2015 to current.

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Publisher of Galloway Township News

Website: <http://www.gallowaytownshipnews.com>

Email: GallowayTwpNews@gmail.com

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Website:<http://www.gallowaytownshipnews.com>

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April 4, 2016

Walter M. Luers, Esq.*

*Also admitted in New York

Writer's Direct Email: wluers@luerslaw.com

Government Records Council
101 South Broad Street
P.O. Box 819
Trenton, New Jersey 08625-0819

Re: *Tilton v. City of Cape May (Cape May County)*

Dear Member of the Council:

We are submitting this Letter Brief in lieu of a more formal brief in support of this GRC complaint under the Open Public Records Act ("OPRA"), *N.J.S.A. 47:1A-1* to challenge unlawful copying fees.

STATEMENT OF FACTS

On February 24, 2016, Petitioner submitted a written OPRA request to the Records Custodian via email for copies of "Legal bills, including Purchase Order, Invoice and detail billing in Scheeler vs. City of Came May. Timeframe August 1, 2015 to current." (All emails between the Petitioner and Records Custodian are attached as Exhibit A).

In response, on February 29, 2016, the Records Custodian demanded a copying fee of \$1.80, based on five cents per page for 26 pages of records. This request for a copying fee was made even though Petitioner asked for the records by email. That same day, Petitioner objected to the charge because she asked for the records by email. In response, the Records Custodian wrote that the records "need to be gathered from storage, copied, scanned and then

sent to you” and, consequently, the “City is entitled, by law, to charge a copying fee for the production of the documents.” In subsequent email exchanges, the Records Custodian insisted that she had to make copies of the requested records, even though according to her March 8, 2016 email, no redactions needed to be made.

LEGAL ARGUMENT

POINT I

THE RECORDS SOUGHT BY PLAINTIFF SHOULD BE DISCLOSED

Plaintiff seeks records pursuant to OPRA and the common law right of access.

As the Court knows, the Open Public Records Act (“OPRA”) mandates 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.” *Libertarian Party of Cent. New Jersey v. Murphy*, 384 N.J. Super. 136, 139 (App. Div. 2006) (citing *N.J.S.A. 47:1A-1*). “The purpose of OPRA ‘is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” *Times of Trenton Publ’g Corp. v. Lafayette Yard Cmty. Dev. Corp.*, 183 N.J. 519, 535 (2005) (quoting *Asbury Park Press v. Ocean County Prosecutor’s Office*, 374 N.J. Super. 312, 329 (Law Div. 2004)).

These lofty descriptions of the purposes of OPRA are not mere bromides or empty statements of legislative intent. Our Supreme Court has stated that “Those who enacted OPRA understood that knowledge is power in a democracy, and that without access to information contained in records maintained by public agencies citizens cannot monitor the

operation of our government or hold public officials accountable for their actions.” *Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities*, 207 N.J. 489, 502 (2011).

The burden of proof in showing that a denial of access was justified rests solely with the Records Custodian. *N.J.S.A. 47:1A-6; Asbury Park Press v. Monmouth County*, 406 N.J. Super. 1, 7 (App. Div. 2009). Here, the documents sought by Plaintiff are “government records” within the meaning of OPRA. Under OPRA, a “government record”:

means 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 in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. *N.J.S.A. 47:1A-1.1*.

Here, there is no dispute that the requested invoices are public records. The only issue is whether the Records Custodian can charge five cents per page for scans.

For several years now, it has been the law in this State that fax and email copies of documents are to be provided free of charge. “Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge of the actual costs of any needed supplies such as computer discs.” *N.J.S.A. 47:1A-5(b)(1); see also Livecchia v. Borough of Mount Arlington*, 421 N.J. Super. 24, 39 (App. Div. 2011) (“OPRA’s ‘guiding principle’ states that a ‘fee [charged to a requestor] should reflect the actual cost of duplication.”) (citation and internal quotation marks omitted).

Here, without justification or excuse, the Records Custodian is insisting that she needs to make copies of the invoices before scanning them. We simply do not understand the Records Custodian's position. This is not a case where the records must first be redacted before they can be scanned. The Records Custodian already confirmed that the records require no redaction. Therefore, they should be scanned as they are, not copied first.

For these reasons, we request that the GRC hold that the requested copying fee is void and order the Records Custodian to produce the requested records immediately and without any charge.

POINT II

AWARD OF REASONABLE ATTORNEYS' FEES

If the Council orders the Records Custodian to produce the documents at issue, the Council should hold that Petitioner has prevailed and award reasonable attorneys' fees and costs. *N.J.S.A. 47:1A-6; Mason v. Hoboken*, 196 N.J. 51, 79 (2008). The quantum of the fee award may be determined on Plaintiff's subsequent application to the Court.

Respectfully submitted,

/s/ Walter M. Luers

Walter M. Luers