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Attorneys for Plaintiff,
Steven Wronko

 STEVEN WRONKO,

Plaintiff,

v.

BOROUGH OF CARTERET and CARMELA
 POGORZELSKI, in her official capacity as
 records custodian for the Borough of Carteret,

Defendants.

SUPERIOR COURT OF NEW JERSEY
 LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO.: **7613-19**

Civil Action

ORDER TO SHOW CAUSE

THIS MATTER being brought before the court by Pashman Stein Walder Hayden, a Professional Corporation, attorneys for Plaintiff Steven Wronko, Michael J. Zoller, Esq. appearing, seeking relief by way of summary action pursuant to R. 4:67-1(a), based upon the facts set forth in the Verified Complaint filed herewith; and the court having determined that this matter may be commenced by Order to Show Cause as a summary proceeding pursuant to the Open Public Records Act, N.J.S.A. 47:1A-6, and for good cause shown:

IT IS on this 12 day of November, 2019, **ORDERED** that Defendants Borough of Carteret and Carmela Pogorzelski, in her official capacity as Records Custodian for the Borough of Carteret, shall appear and show cause on the 11 day of December, 2019 before the Honorable Alberto Rivas, A.J.S.C., at the

Middlesex County Courthouse, 56 Paterson Street, 2nd Floor, New Brunswick, New Jersey, at 10:00 a.m./p.m., or as soon thereafter as counsel can be heard, why judgment should not be entered:

1. Declaring said actions of Defendants to be in violation of OPRA, N.J.S.A. 47:1A-1 et seq. by asserting an unlawful special service charge before releasing non-exempt records;
2. Ordering Defendants to release the requested records pursuant to OPRA without charging a special service charge;
3. Ordering Defendants to preserve the requested records pending resolution of these proceedings or as otherwise required by law;
4. Awarding counsel fees and costs pursuant to N.J.S.A. 47:1A-6; and
5. For such other relief as the Court may deem just and equitable.

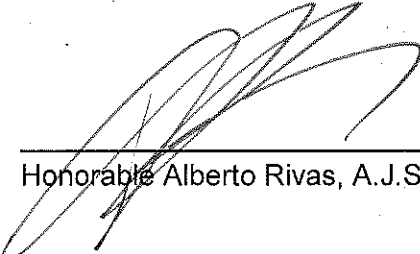
AND IT IS FURTHER ORDERED that:

1. A copy of this Order to Show Cause, Verified Complaint and all supporting affidavits or certifications, letter brief, and proposed form of Order submitted in support of this application be served upon Defendants personally or by Certified Mail, Return Receipt Requested, within ____ days of the date the Plaintiff received this Order, in accordance with R. 4:4-3 and R. 4:4-4, this being original process.
2. The Plaintiff must file with the court its proof of service of the pleadings on the Defendants no later than three (3) days before the return date.
3. Defendants shall file and serve a written answer and opposition papers to this Order to Show Cause and the relief requested in the Verified Complaint and proof of service of the same by _____, 2019. The reply papers must be filed with the Clerk of the Superior

IT IS FURTHER ORDERED AS FOLLOWS:

- A. A copy of this order to show cause, verified complaint and all supporting affidavits or certifications submitted in support of this application be served upon the defendant(s) **PERSONALLY OR BY OVERNIGHT DELIVERY WITH SIGNATURE CONFIRMATION ONLY** within seven (7) days of the date hereof, in accordance with Rules 4:4-3 and R. 4:4-4, this being original process. **DELIVERY BY REGULAR MAIL AND CERTIFIED MAIL, RETURN RECEIPT REQUESTED, SHALL NOT CONSTITUTE EFFECTIVE SERVICE.**
- B. The plaintiff must file with the court his/her/its proof of service of the pleadings on the defendant(s) no later than three (3) days before the return date, in accordance with Rule 1:3-1.
- C. Defendant(s) shall file and serve a written answer, an answering affidavit or a motion returnable on the return date to this order to show cause and the relief requested in the verified complaint and proof of service of the same within fifteen (15) days of service. The answer, answering affidavit or a motion, as the case may be, must be filed with the Clerk of the Superior Court in Middlesex County and a courtesy copy of the papers must be sent directly to the chambers of Assignment Judge Rivas by hand delivery or overnight carrier.
- D. The plaintiff must file and serve any written reply to the defendant's order to show cause opposition by no later than three (3) days before the return date, in accordance with Rule 1:3-1. The reply papers must be filed with the Clerk of the Superior Court in Middlesex County and a courtesy copy of the reply papers must be sent directly to the chambers of Assignment Judge Rivas by hand delivery or overnight carrier.
- E. If the defendant(s) do/does not file and serve opposition to this order to show cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the plaintiff files a proof of service and a proposed form of order at least three (3) days prior to the return date, in accordance with Rule 1:3-1.
- F. If the plaintiff has not already done so, a proposed form of order addressing the relief sought on the return date (along with a self-addressed return envelope with return address and postage) must be submitted to the court no later than three (3) days before the return date, in accordance with Rule 1:3-1.
- G. Defendant(s) take notice that the plaintiff has filed a lawsuit against you in the Superior Court of New Jersey. The verified complaint attached to this order to show cause states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer, an answering affidavit or a motion returnable on the return date to the order to show cause and proof of service before the return date of the order to show cause.

- H. These documents must be filed with the Clerk of the Superior Court in Middlesex County. A directory of these offices is available in the Civil Division Management Office of Middlesex County and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf. Include the appropriate filing fee, if any, payable to the "Treasurer, State of New Jersey." You must also send a copy of your answer, answering affidavit or motion to the plaintiff's attorney whose name and address appear above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your answer, answering affidavit or motion with the appropriate filing fee, if any, or judgment may be entered against you by default.
- I. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office of Middlesex County and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf.
- J. The Court will entertain argument, but not testimony, on the return date of the order to show cause, unless the Court is advised by the parties to the contrary no later than three (3) days before the return date or no opposition to the order to show cause is filed, in accordance with Rule 1:3-1.
- K. **ABSENT A SHOWING OF EXCEPTIONAL AND UNFORESEEN CIRCUMSTANCES, THE COURT WILL NOT ENTERTAIN ADJOURNMENT REQUESTS RECEIVED ON THE DAY BEFORE THE RETURN DATE.**



Honorable Alberto Rivas, A.J.S.C.

For future reference, please refer to Form 10704 (Order to Show Cause Summary Action), which is available online at <http://www.judiciary.state.nj.us/forms.htm>, for an example of a properly-formatted order to show cause.

2. This lawsuit challenges an unlawful special service charge asserted by Defendants in response to Plaintiff's OPRA request and asks that the Court order the production of the records to Plaintiff at no cost.

PARTIES

3. Plaintiff Steven Wronko is a taxpayer and open government activist who resides in Spotswood, New Jersey 08884.

4. Defendant Borough of Carteret (“Carteret”) is a municipal entity formed under the laws of the State of New Jersey, with its primary place of business located at 61 Cooke Avenue, Carteret, New Jersey 07008.

5. Defendant Carmela Pogorzelski is the Borough Clerk and statutory Records Custodian for the Borough of Carteret. Upon information and belief, the Clerk maintains an office at 61 Cooke Avenue, Carteret, New Jersey 07008.

6. Carteret “ma[kes], maintain[s] or ke[eps] on file,” or “receive[s] in the course of ... its official business” government records, and is thereby subject to the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 to -13.

VENUE

7. Venue is properly laid in Middlesex County because Defendant Carteret is located in Middlesex County and because the cause of action arose in Middlesex County. R. 4:3-2(a).

FACTUAL ALLEGATIONS

8. Plaintiff, Steven Wronko, is a concerned taxpayer and open government activist who routinely monitors government spending and government action.

9. On October 4, 2019, Plaintiff, submitted a request for government records pursuant to OPRA and the common law right of access to Carteret. [Attached hereto as **Exhibit A** is a true and accurate copy of Plaintiff’s October 4th OPRA request to Carteret].

10. Plaintiff’s OPRA request requested sought “a copy of the mayors email logs for January 1, 2019 through January 15, 2019.” More specifically, Plaintiff stated that he was

seeking “Name of sender, senders email address, subject, if the message was forwarded and if there are any attachments to the email.” [Exhibit A].

11. On October 17, 2019, Defendants responded to Plaintiff’s OPRA request by attempting to assert a several hundred dollar fee for the production of the requested records. Defendants stated:

A review of this requested material will require more than a substantial effort by the Borough Attorney to determine if this material will implicate individual privacy concerns, public safety issues, attorney client privilege and / or other exceptions under OPRA and, as such, his initial cost estimate to undertake the review of the details of your request is \$640.00 based on an hourly rate of \$110.00 an hour. It will also take an extended period of time to accomplish. If you wish to post an escrow for this amount, he can begin the necessary review as time permits, and advise you if this amount will need to be increased, or can be reduced. It is his initial belief that this amount will more likely increase due to the need to review some of the emails themselves, conduct any implicated research, and would most likely require an additional substantial effort by the Borough’s IT personnel which would be in addition to the attorney’s effort, for which there will be an additional cost.

[Attached hereto as **Exhibit B** is a true and accurate copy of Defendants’ October 17th response].

12. Plaintiff objects to Defendants’ attempt to assert a special service charge for the records he requested, so he has not paid the charge.

13. As of the date of this filing, Carteret has not produced any records responsive to Plaintiff’s Request.

FIRST COUNT
(Violation of OPRA)

14. Plaintiff repeats and incorporates by reference the allegations set forth in the preceding paragraphs as though fully set forth at length herein.

15. Pursuant to N.J.S.A. 47:1A-1, all government records must be “readily accessible” to the citizens of this state unless specifically exempted by law.

16. Plaintiff submitted a valid request for specifically identifiable government records, pursuant to OPRA, N.J.S.A. 47:1A-1 *et seq.*

17. The records requested by Plaintiff are “government records” as that term is defined by OPRA because they were “made, maintained or kept on file,” or “received in the course of ... [Carteret’s] official business” and constitute “electronically stored information.” N.J.S.A. 47:1A-1.1.

18. The records requested, therefore, should have been produced within seven business days of Plaintiff’s request.

19. Plaintiff requested government records and they were not produced. Instead, Carteret imposed a special service charge of over \$640 for its Borough Attorney to ostensibly review the responsive records before they are produced.

20. OPRA only allows for the implementation of a special service charge for electronic records when:

[A] request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.

N.J.S.A. 47:1A-5(d).

21. The records requested by Plaintiff are email logs that are a medium routinely used and maintained by Carteret and the production of the logs does not require a “substantial amount of manipulation or programming of information technology.”

22. The responsibility to review and redact responsive records, if necessary, belongs to the Records Custodian. If Carteret chooses to pass that responsibility to its Borough Attorney, it is not allowed to pass along the Borough Attorney's fees to Plaintiff.

23. Accordingly, Defendants have violated OPRA by:

- a. Failing to make the records requested "readily accessible for inspection, copying, or examination" in violation of N.J.S.A. 47:1A-1;
- b. Failing to grant access to government records within seven business days, in violation of N.J.S.A. 47:1A-5(g);
- c. Failing to produce non-exempt portions of government records, in violation of N.J.S.A. 47:1-5(g);
- d. Unlawfully imposing a service charge in violation of N.J.S.A. 47:1A-5(d); and
- e. Failing to prove that the denial of access is authorized by law, in violation of N.J.S.A. 47:1A-6.

WHEREFORE, Plaintiff demands judgment against Defendants:

- a. Declaring said actions of Defendants to be in violation of OPRA, N.J.S.A. 47:1A-1 et seq. by failing to provide access to government records and unlawfully imposing a special service charge;
- b. Directing Defendants to release the requested records to Plaintiff forthwith at no charge;
- c. Ordering Defendants to preserve the requested records pending resolution of these proceedings or as otherwise required by law;
- d. Awarding counsel fees and costs pursuant to N.J.S.A. 47:1A-6; and

e. For such other relief as the Court may deem just and equitable.

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation,
Attorneys for Plaintiff
Steven Wronko

Dated: November 6, 2019

By: /s/ Michael J. Zoller
Michael J. Zoller

CERTIFICATION PURSUANT TO R. 4:5-1

Plaintiff, by his attorney, hereby certifies that the matter in controversy is not the subject of any other action pending in any Court and is likewise not the subject of any pending arbitration proceeding. Plaintiff further certifies that he has no knowledge of any contemplated action or arbitration regarding the subject matter of this action and that Plaintiff is not aware of any other parties who should be joined in this action.

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation,
Attorneys for Plaintiff
Steven Wronko

Dated: November 6, 2019

By: /s/ Michael J. Zoller
Michael J. Zoller

VERIFICATION

I, Steven Wronko, of full age, deposes and say:

1. I am a citizen of the State of New Jersey, Plaintiff in the foregoing Verified Complaint.

2. The allegations of the Verified Complaint contained in Paragraphs 2 and 8-13 are true. The said Verified Complaint is made in truth and good faith and without collusion, for the causes set forth herein.

3. All documents attached to the Verified Complaint and Brief are true copies and have not been redacted, changed, modified, adjusted or otherwise altered in any manner by me or my agents unless so stated.

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.

A handwritten signature in black ink, appearing to read 'Steven Wronko', is written over a horizontal line.

STEVEN WRONKO

Dated: November 6, 2019

EXHIBIT A

From: Steven Wronko <wronko@hotmail.com>
Sent: Friday, October 4, 2019 1:23 PM
To: oteroj@carteret.net Otero <oteroj@carteret.net>
Subject: OPRA REQUEST

This is a request for public records under opra and common law. please send all correspondence to this email address

i would like a copy of the mayors email logs for January 1, 2019 through January 15 2019. Please provide "Name of sender, senders email address, subject, if the message was forwarded and if there are any attachments to the email" thank you

EXHIBIT B

From: Otero Jennifer <oteroj@carteret.net>
Sent: Thursday, October 17, 2019 4:03 PM
To: Steven Wronko <wronko@hotmail.com>
Subject: OPRA Re: Mayor email logs 1/1/19-1/15/19

A review of this requested material will require more than a substantial effort by the Borough Attorney to determine if this material will implicate individual privacy concerns, public safety issues, attorney client privilege and / or other exceptions under OPRA and, as such, his initial cost estimate to undertake the review of the details of your request is \$640.00 based on an hourly rate of \$110.00 an hour. It will also take an extended period of time to accomplish. If you wish to post an escrow for this amount, he can begin the necessary review as time permits, and advise you if this amount will need to be increased, or can be reduced. It is his initial belief that this amount will more likely increase due to the need to review some of the emails themselves, conduct any implicated research, and would most likely require an additional substantial effort by the Borough's IT personnel which would be in addition to the attorney's effort, for which there will be an additional cost.

Very Respectfully,

Jennifer K. Otero
Administrative Clerk
Borough of Carteret
732-541-3803
oteroj@carteret.net

Civil Case Information Statement

Case Details: MIDDLESEX | Civil Part Docket# L-007613-19

Case Caption: WRONKO STEVEN VS BOROUGH OF CARTERET

Case Initiation Date: 11/08/2019

Attorney Name: MICHAEL J ZOLLER

Firm Name: PASHMAN STEIN WALDER HAYDEN, PC

Address: COURT PLAZA SOUTH 21 MAIN ST STE 200

HACKENSACK NJ 076017054

Phone: 2014888200

Name of Party: PLAINTIFF : Wronko, Steven

Name of Defendant's Primary Insurance Company

(if known): None

Case Type: OPEN PUBLIC RECORDS ACT (SUMMARY ACTION)

Document Type: Verified Complaint

Jury Demand: NONE

Is this a professional malpractice case? NO

Related cases pending: NO

If yes, list docket numbers:

Do you anticipate adding any parties (arising out of same transaction or occurrence)? NO

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

Do parties have a current, past, or recurrent relationship? NO

If yes, is that relationship:

Does the statute governing this case provide for payment of fees by the losing party? NO

Use this space to alert the court to any special case characteristics that may warrant individual management or accelerated disposition:

According to NJSA 47 1A 6 this lawsuit should be assigned to the designated OPRA Judge. This lawsuit "shall proceed in a summary or expedited manner."

Do you or your client need any disability accommodations? NO

If yes, please identify the requested accommodation:

Will an interpreter be needed? NO

If yes, for what language:

Please check off each applicable category: Putative Class Action? NO

Title 59? NO

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule 1:38-7(b)*

11/08/2019

Dated

/s/ MICHAEL J ZOLLER

Signed

Michael J. Zoller
Counsel
mzoller@pashmanstein.com
Direct: 201.270.4923



November 8, 2019

Via ECF

Honorable Alberto Rivas, A.J.S.C.
Middlesex County Courthouse
56 Paterson Street
New Brunswick, New Jersey 08903

Re: Steven Wronko v. Borough of Carteret, et al.
Our File No. 09840-033

Dear Judge Rivas:

This firm represents Plaintiff, Steven Wronko, in the above-captioned matter. Please accept this letter brief, in lieu of a more formal brief, in support of Plaintiff's application for an Order to Show Cause seeking relief from Defendants' denial of the Open Public Records Act ("OPRA") request identified in the Verified Complaint and discussed in detail below.

PRELIMINARY STATEMENT

In modern times, a lot of government business is conducted via email. Every time an email is sent or received utilizing a government email system, the system tracks the emails in a log that records such information as the date the email was sent/received, the sender, the recipient, the subject line of the email, and whether there were any attachments to the email. This log contains information that is useful for tracking government emails.

This matter concerns Plaintiff's right to access portions of that email log. Instead of requesting individual emails in full, here, Plaintiff simply requested portions of the email tracking log itself limited to the emails of one specifically identified individual, the Mayor, over a limited two week period. Plaintiff's request is one of the simplest ones that can be made for electronically stored information. Yet, instead of producing the records responsive to Plaintiff's

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request, Defendants have attempted to assert a special service charge of at least \$640 before it will produce the responsive records. For the reasons set forth below, the special service charge Carteret has attempted to implement is unlawful.

Accordingly, Plaintiff files this lawsuit asking the Court to compel Carteret to produce the requested government records at no cost to Plaintiff. Additionally, the Court should declare Plaintiff a prevailing party entitled to an award of attorney's and costs of suit.

STATEMENT OF FACTS

Plaintiff, Steven Wronko, is a concerned taxpayer and open government activist who routinely monitors government spending and government action.

On October 4, 2019, Plaintiff, submitted a request for government records pursuant to OPRA and the common law right of access to Carteret. See Verified Complaint, Exhibit A. Plaintiff's OPRA request sought "a copy of the mayors email logs for January 1, 2019 through January 15, 2019." Id. More specifically, Plaintiff stated that he was seeking "'Name of sender, senders email address, subject, if the message was forwarded and if there are any attachments to the email.'" Id.

On October 17, 2019, Defendants responded to Plaintiff's OPRA request by attempting to assert a several hundred dollar service charge for the production of the requested records. See Verified Complaint, Exhibit B. In their response, Defendants stated:

A review of this requested material will require more than a substantial effort by the Borough Attorney to determine if this material will implicate individual privacy concerns, public safety issues, attorney client privilege and / or other exceptions under OPRA and, as such, his initial cost estimate to undertake the review of the details of your request is \$640.00 based on an hourly rate of \$110.00 an hour. It will also take an extended period of time to accomplish. If you wish to post an escrow for this amount, he can begin the necessary review as time permits, and advise you if this amount will need to be increased, or can be reduced. It is his initial belief that this amount will more likely increase due to

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the need to review some of the emails themselves, conduct any implicated research, and would most likely require an additional substantial effort by the Borough's IT personnel which would be in addition to the attorney's effort, for which there will be an additional cost.

Id.

Plaintiff objects to Defendants' attempt to assert a special service charge for the records he requested, so he has not paid the charge. As of the date of this filing, Carteret has not produced any records responsive to Plaintiff's Request.

LEGAL ARGUMENT

I. CARETERET VIOLATED OPRA BY FAILING TO PRODUCE THE REQUESTED EMAIL LOGS

"An informed citizenry is essential to a well-functioning democracy." Paff v. Twp. of Galloway, 229 N.J. 340 (2017). "OPRA's promise of accessible records enables "citizens and the media [to] play a watchful role in curbing wasteful government spending and guarding against corruption and misconduct.'" Sussex Commons Associates, LLC v. Rutgers, 210 N.J. 531, 541 (2012) (quoting Burnett v. Cty. of Bergen, 198 N.J. 408, 414 (2009)). In fact, the "bedrock principle" underlying OPRA is that "our government works best when its activities are well-known to the public it serves." Burnett, 198 N.J. at 414.

OPRA provides that "*any* limitations on the right of access . . . shall be construed *in favor of the public's right of access*." N.J.S.A. 47:1A-1 (emphasis added). Thus, a citizen's right to access public records has been deemed to be nearly "*unfettered*." Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003) (emphasis added). Where OPRA is unclear, "any ambiguities [must be resolved] in a manner consistent with [OPRA's] broad purpose." Paff v. Ocean Cty. Prosecutor's Office, 446 N.J. Super. 163, 181 (App. Div. 2016) (citing Fair Share Hous. Ctr., Inc. v. N.J. State League of

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Municips., 207 N.J. 489, 502 (2011); Sussex Commons Assocs. v. Rutgers, 210 N.J. 531, 540–41 (2012)). At all times, the public agency bears the burden of proving the denial of access is lawful. N.J.S.A. 47:1A-6.

For the reasons argued below, Defendants have violated OPRA.

A. The Email Logs of a Government Official are Government Records

Under OPRA, the first question to be addressed is whether the requested records are, in fact, government records. OPRA broadly defines the term to include:

[A]ny 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. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[N.J.S.A. 47:1A-1.1 (emphasis added)].

A government record is subject to public access unless one of OPRA’s exemptions applies. Here, the requested email logs meet the general definition of “government record” as they are made, maintained, and kept on file in the course of Carteret’s official business. In their denial, Defendants did not even attempt to argue that the requested logs are not government records. Moreover they did not cite any exemption that would justify withholding the records. Accordingly, Defendants were obligated to produce the electronically stored email logs and the failure to do was a violation of OPRA.

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B. The Imposition of a Special Service Charge Was Unlawful

Carteret responded to Plaintiff's OPRA request by stating that in order to obtain the records, Plaintiff would need to pay at least a \$640 special service charge¹. See Verified Complaint, Exhibit B. According to Carteret, this charge was calculated based on the estimated number of hours Carteret's Borough Attorney would need to review and redact the responsive records multiplied by the attorney's hourly billable rate. Id. While not explicitly stated in the response, \$640 at the attorney's rate of \$110/hour works out to approximately an estimate of 5.8 hours for the Borough Attorney to perform the review and redact function.

For printed records, OPRA envisions the implantation of a special service charge when "an extraordinary expenditure of time and effort" is needed to duplicate the records. N.J.S.A. 47:1A-5(c). This provision of the statute is not implicated in this matter because the records Plaintiff requested are digital email logs. With regard to digital records, OPRA provides that:

If a request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.

[N.J.S.A. 47:1A-5(d) (emphasis added).]

¹ \$640 is the service charge quoted in the response, but the response makes clear that the final service charge is likely to be higher because an additional fee is going to be tacked on for the efforts of the Borough's IT personnel. Even if it were proper to implement a service charge to respond to Plaintiff's request in this matter, which for the reasons set forth in this brief, it is not, this undefined charge is in and of itself unlawful. OPRA states that when a service charge is implemented, "[t]he requestor shall have the opportunity to review and object to the charge prior to it being incurred." N.J.S.A. 47:1A-5(c). Carteret's unspecified charge that will only be determined after the responsive records have been retrieved deprives Plaintiff of his statutory right to review and object to the charge prior to it being incurred.

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Absent the need for a “substantial amount of manipulation or programming of information technology,” OPRA otherwise provides that “[a]ccess to electronic records and non-printed materials shall be provided free of charge.” N.J.S.A. 47:1A-b(1). Carteret cannot meet its burden to show that a special service charge is warranted to respond to Plaintiff’s request.

i. A Substantial Amount of Manipulation or Programming of Information Technology is not needed to Respond to Plaintiff’s Request

Plaintiff’s request sought two weeks of email logs from one individual. See Verified Complaint, Exhibit A. The email logs Plaintiff sought are automatically generated by the email system every time an email is sent or received by the Mayor. From that log, Plaintiff specifically sought “[n]ame of sender, senders email address, subject, if the message was forwarded and if there are any attachments to the email.” Id. In Paff v. Galloway Twp., 229 N.J. 340 (2017) the New Jersey Supreme Court ruled that this information should be provided to a requester.

In Galloway, the plaintiff requested fields of information from all emails sent by the Township Clerk and the Township Police Chief between specified dates. Id. at 344. The information sought in Galloway is similar to the information requested by Plaintiff in this matter, namely the “sender,” “recipient,” “date,” and “subject” of the emails. Id. The Court determined that “the fields of information covering ‘sender,’ ‘recipient,’ ‘date,’ and ‘subject’ in the emails sent by the Galloway Township Chief of Police and Clerk over a two-week period are government records under OPRA.” Id. at 357.

In reaching its final decision, the Galloway Court contemplated that a special service charge may be warranted if a substantial amount of manipulation or programming of information technology was necessary to produce the records, but it found that no such charge was warranted because it would only take minutes to produce the requested information. Id. at 354. The same

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finding is true here. As the email logs requested by Plaintiff are automatically generated, it should not take a substantial manipulation of information technology to produce the logs with the requested information. Consequently, the implementation of a special service charge is not warranted.

ii. An Extortionary Expenditure of Time and Effort is not Needed to Respond to Plaintiff's Request

Defendants' attempt to assert a special service charge appears to evoke the standard for producing paper records in that they claim that responding to Plaintiff's request will require "substantial effort." See Verified Complaint, Exhibit B. As discussed above, that standard does not apply to the production of electronic records, but even if it did, no extraordinary expenditure of time and effort is required to respond to Plaintiff's request.

Carteret has estimated that it will take its Borough Attorney approximately 5.8 hours to review and redact the responsive records. There is no reason it should take Defendants that long to respond to Plaintiff's request. Plaintiff requested a computer generated log of the Mayor's emails that identified the "[n]ame of sender, senders email address, subject, if the message was forwarded and if there are any attachments to the email." See Verified Complaint, Exhibit A. Notably, Plaintiff did not request full emails. Plaintiff's request does not seek the actual written contents of any emails. From the information Plaintiff did request, which as noted above the Galloway Court held should be produced to a requester, there is likely very little information that would need to be redacted. As the records Plaintiff requested are simply logs, the Borough Attorney should have to do little more than provide a cursory glance over the records. There is surely no need to review full emails or conduct research as suggested in Defendants' response to the request. See Verified Complaint, Exhibit B. Even if the review performed by the Borough

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Attorney did for some reason take 5.8 hours, this amount of time does not constitute an extraordinary expenditure of time and effort.

Plaintiff is unaware of any decisions that found such minimal amount of time was “extraordinary” and warranted a special service charge. While there is no exact amount of time that must be spent to render responding to an OPRA request to be “extraordinary,” courts of this State and the Government Records Council (“GRC”) have generally only permitted a government agency to assess a special service charge when the volume of responsive records was massive and preparing the response would take a substantial amount of time. See Burnett v. County of Bergen, 198 N.J. 408 (2009)(permitting special service fee for request for *millions of realty records, spanning decades*, that were stored on microfilm and would need to be transferred to an electronic format prior to producing them to the requestor.); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 199 (Law. Div. 2002) (permitting special service fee when staff spent approximately *100 hours over the course of ten to fifteen days* to assemble *thousands of records*.); Fisher v. Dep't of Law and Public Safety, GRC Complaint No.: 2004-55 (August 10, 2006) (permitting special service charge of \$1877.93 when attorneys and their staff *spent between 52.5 and 88.5 hours* to review *15,540 documents*)². Conversely, the courts and the GRC have held that requests that only require a few hours of time to fulfill do not warrant a special service charge. See Steven Wronko v. Borough of North Arlington, docket no. BER-L-2744-19, *12 (Sup. Ct., June 28, 2019) (two hours to produce responsive records is “not the kind of substantial time envisioned by OPRA”)³; Diamond v. Twp. of Old Bridge, GRC Complaint No. 2003-15 (Feb. 18, 2004) (4 hours does not warrant a service charge)⁴; Carter v.

² A copy of the GRC's decision is attached to the Zoller Cert. Ex. 1.

³ A copy of the court's unpublished decision is attached to the Zoller Cert. Ex. 2.

⁴ A copy of the GRC's decision is attached to the Zoller Cert. Ex. 3.

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Franklin Fire District No. 1, GRC Complaint No. 2013-281/2013-282/2013-283 (Oct. 28, 2014) (8 hours does not warrant service charge)⁵. Here, the 5.8 hour estimate offered by Defendants is less than the 8 hours necessitating a special service charge that was rejected by the GRC in Carter.

Thus, even if it did take 5.8 hours to respond to Plaintiff's OPRA request, the case law and GRC decisions are clear that such an amount of time does not warrant the imposition of a special service charge. Accordingly, it is clear that Carteret's attempt to assert a special service charge is simply an unlawful attempt at placing an obstacle in the way of Plaintiff gaining access to the responsive records. See Livecchia v. Borough of Mount Arlington, 421 N.J. Super. 24, 40 (App. Div. 2011) (agencies cannot charge fees for public records "as a tool to discourage access"); Smith v. Hudson Cnty. Register, 411 N.J. Super. 538, 570 (App. Div. 2010) (holding fees "must be reasonable, and cannot be used as a tool to discourage access."); Higg-Arella, Inc. v. Cnty. of Essex, 141 N.J. 35, 53 (1995) (holding special service fee for computer tape cannot be used as a tool to discourage access). Accordingly, Carteret violated OPRA by imposing a special service charge and refusing to produce records until Plaintiff paid the charge.

iii. The Borough Attorney's Hourly Rate is Not a Proper Calculation of a Special Service Charge

Even if Carteret were allowed to impose a special service charge to respond to Plaintiff's request in this matter, which it is not, the charge set forth by Defendants is improper. Defendants determined the amount of service charge to impose based on their estimate of the amount of time the Borough Attorney would need to review and redact the responsive records.

⁵ A copy of the GRC's decision is attached to the Zoller Cert. Ex. 4.

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See Verified Complaint, Exhibit B. It is improper to attempt to pass on the hourly rate of the Borough Attorney to Plaintiff.

In Courier Post, supra, 360 N.J. Super. 191, the Appellate Division addressed how a special service charge should be calculated when one is actually warranted. After determining that a special service charge was warranted when staff spent approximately 100 hours over the course of ten to fifteen days to assemble thousands of records, the court analyzed the proper way to calculate the service charge. In doing so, the court held that “[t]he Legislature could have enacted an attorney review clause, but it did not...It appears rather conclusively that the *custodian* is responsible for asserting the privilege and making the redaction.” Id. at 203-204. Therefore, “review and redaction by the custodian, not counsel, may be made a part of the special service charge.” Id. at 204. “[T]he Legislature made no provision for a pass-through of attorneys’ fees to members of the public who request government documents. Attorneys’ fees will not be allowed to be charged to the Post or to any other requestor of documents for review and redaction of exempt material.” Id. at 207. Accordingly, here, Carteret’s attempt to pass on its Borough Attorney’s hourly rate as a special service charge is unlawful and a violation of OPRA.

II. PLAINTIFF IS ENTITLED TO AN AWARD OF ATTORNEY’S FEES AND LITIGATION COSTS

Plaintiff is statutorily entitled to reasonable attorney’s fees and litigation costs. Pursuant to OPRA:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may . . . institute a proceeding to challenge the custodian's decision by filing an action in Superior Court The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied,

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the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6 (emphasis added).]

New Jersey law has long recognized the “catalyst theory” in regards to an award of attorney’s fees. Mason v. City of Hoboken, 196 N.J. 51, 73 (2008). A plaintiff is entitled to attorney’s fees if he can demonstrate “1) a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved; and 2) that the relief ultimately secured by plaintiffs had a basis in law.” Id. at 76; See also Smith v. Hudson Cnty. Register, 422 N.J. Super. 387, 394 (App. Div. 2011) (“A plaintiff may qualify as a prevailing party, and thereby be entitled to a fee award, by taking legal action that provides a ‘catalyst’ to induce a defendant’s compliance with the law.”).

Here, Plaintiff made a valid OPRA request for government records and Defendants unlawfully denied access to those records. This litigation, if successful, will serve as the catalyst for Plaintiff obtaining the unlawfully withheld records. Therefore, Plaintiff is entitled to an award of attorney’s fees and costs of suit.

CONCLUSION

For the foregoing reasons, Plaintiffs ask the Court to grant his Order to Show Cause and Order Defendants to produce the responsive government records free of charge. Additionally, Plaintiff also asks for an award of attorney’s fees and costs of litigation for prevailing in this proceeding.

Respectfully Submitted,

Michael J. Zoller

MICHAEL J. ZOLLER

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Attorneys for Plaintiff,
Steven Wronko

STEVEN WRONKO,

Plaintiff,

v.

BOROUGH OF CARTERET and CARMELA
 POGORZELSKI, in her official capacity as
 records custodian for the Borough of Carteret,

Defendants.

: SUPERIOR COURT OF NEW JERSEY
 : LAW DIVISION: MIDDLESEX COUNTY
 :

: DOCKET NO:
 :
 :

: Civil Action
 :

: **CERTIFICATION OF**
 : **MICHAEL J. ZOLLER, ESQ.**
 :
 :
 :

I, Michael J. Zoller, Esq. of full age, certify as follows:

1. I am an attorney at law of the State of New Jersey and Counsel at Pashman Stein Walder Hayden, P.C., counsel for Plaintiff Steven Wronko, in the above-referenced matter. As the attorney responsible for the handling of this matter, I am fully familiar with the facts herein.

2. A true and accurate copy of the Government Records Council's decision in Fisher v. Dep't of Law and Public Safety, GRC Complaint No.: 2004-55 (August 10, 2006) is attached hereto as **Exhibit 1**.

3. A true and accurate copy of the court's unpublished opinion in Steven Wronko v. Borough of North Arlington, docket no. BER-L-2744-19 (Sup. Ct., June 28, 2019) is attached hereto as **Exhibit 2**.

4. A true and accurate copy of the Government Records Council's decision in Diamond v. Twp. of Old Bridge, GRC Complaint No. 2003-15(Feb. 18, 2004) is attached hereto as **Exhibit 3**.

5. A true and accurate copy of the Government Records Council's decision in Carter v. Franklin Fire District No. 1, GRC Complaint No. 2013-281/2013-282/2013-283 (Oct. 28, 2014) is attached hereto as **Exhibit 4**.

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

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation
Attorneys for Plaintiff,
Steven Wronko

Dated: November 8, 2019

/s Michael J. Zoller
By: _____
MICHAEL J. ZOLLER

EXHIBIT 1



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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PO Box 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0811
Fax: 609-633-6337

E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

2004-55

- [Final Decision](#)
- [Interim Decision](#)
- [Supplemental Findings and Recommendations of the Executive Director](#)
- [Interim Decision on Request for Stay](#)
- [Supplemental Findings and Recommendations of the Executive Director](#)
- [Final Decision on Special Service Charge of \\$1877.93](#)
- [Supplemental Findings and Recommendations of the Executive Director](#)
- [Interim Decision on Access](#)
- [Findings and Recommendations of the Executive Director](#)

Final Decision

REVISED FINAL DECISION

August 10, 2006 Government Records Council Meeting

Janon Fisher

Complaint No. 2004-55

Complainant

v.

Department of Law & Public Safety, Division of Law

Custodian of Record

Procedural History

The Government Records Council ("Council") considered this complaint at the November 9, 2004 public meeting, in conjunction with all related documents submitted by the parties and the November 3, 2004 Findings and Recommendations of the Executive Director. The Council voted unanimously to adopt the entirety of said findings and recommendations, changing only a few words of the conclusion. The Council therefore issued an Interim Decision on Access finding, in pertinent part, that:

1. The Custodian is to use the following ten factors in determining whether this case involves an "extraordinary" situation and whether the Custodian's actions needed to satisfy this Open Public Records Act ("OPRA") request should be classified as an "extraordinary effort". For the Council to consider the Custodian's submissions, the Custodian must provide a certification that outlines the answers to each of the following:
 - a. The volume, nature, size, number, of government records involved,
 - b. The period of time over which the records were received,
 - c. Whether some or all of the records sought are archived,
 - d. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying,
 - e. The amount of time, level, rate and number, if any, required to be expended by government employees to monitor the inspection or examination, and,
 - f. The amount of time required to return documents to their original storage place.
 - g. The size of the agency,
 - h. The number of employees available to accommodate document requests, and

i. The availability of information technology, copying capabilities.

2. The Custodian shall provide a certification outlining the following:
 - a. What was requested;
 - b. The level(s) of skill necessary to accommodate the request;
 - c. The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill in #2 above;
 - d. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents; and
 - e. Identify who in the agency will perform the work associated with each request.

At its December 9, 2004 public meeting, the Council considered the December 7, 2004 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. Therefore, the Council issued a Final Decision on the special service charge of \$1,877.93 and found that:

1. The Custodian has met the burden of justifying that the OPRA request was "extraordinary" pursuant to N.J.S.A. 47:1A-5.c.
2. The Custodian has not met the burden of justifying the use of attorneys for document compilation that comprises the assessed special service charge of \$1,877.93.
3. The Custodian shall fulfill the subject OPRA request and charge the Complainant in accordance with OPRA's routine copy charges outlined in N.J.S.A. 47:1A-5.b.

At the January 13, 2005 public meeting, the Council considered the January 6, 2005 Findings and Recommendations of the Executive Director and all related documents submitted by the parties, including the January 12, 2005 supplemental submission from the Custodian. The Council voted unanimously to adopt the entirety of said findings and recommendations with an amendment to grant a Stay of the Council's decision on the basis that an appeal is filed to the Appellate Division of the Superior Court of New Jersey on or before January 28, 2005 and provide evidence of same to the Executive Director. Therefore, the Council issued an Interim Decision on Request for Stay and found that:

1. The Custodian's request for a stay to assemble the requested documents and to apply the special service charges is denied.
2. The Council's December 9, 2004 Interim Decision is reaffirmed. However, a stay of the Council's decision will be granted should the Custodian file an appeal to the Appellate Division of the Superior Court of New Jersey on or before January 28, 2005 and provide evidence of same to the Executive Director.
3. The stay shall be automatically dissolved should the Custodian not take action to file an appeal in the time frame provided and, in which case, the Council's December 9, 2004 Interim Decision will remain in effect.

At the February 10, 2005 public meeting, the Council considered the February 3, 2005 Supplemental Findings and Recommendations of the Executive Director and all related documents submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. Therefore, the Council issued an Interim Decision granting the Custodian's request for stay and found that:

1. The Custodian has fully complied with the Council's January 21, 2005 Interim Decision on Request for Stay by filing the January 27, 2005 Notice of Appeal with the Appellate Division of the New Jersey Superior Court,
2. The Council now does not have any jurisdiction over this complaint and shall forego any further action pending the outcome of the appeal.

On May 8, 2006, the Council motioned the Court to remand this complaint back to the Council for further consideration. The Council asserts in its letter brief in support of the motion to remand that its rejection of the Custodian's special service charge of \$1,877.93 was made without the benefit of an *in camera* inspection of the relevant documents pursuant to the same court's admonishment of the Council in Paff v. New Jersey Department of Labor, 379 N.J. Super. 346, 355 (App. Div. 2005) ("we hold ... that the GRC has and should exercise its discretion to conduct an *in camera* review when necessary to resolution of the appeal.") Such motion was granted by the Court on June 5, 2006.

At the August 10, 2006 public meeting, the Council conducted an *in camera* inspection of the requested records in closed session. Present during the *in camera* inspection were:

Council Members: Vincent Maltese, Chairman, Robin Berg Tabkin, Vice Chairman & Secretary, Kathryn Forsyth, and Michelle Richardson.

Council Staff: Catherine Starghill, Executive Director, Brigitte Hairston, and Barry Roy, Designated Outside Counsel.

After conducting an *in camera* inspection and seeking legal advice in closed session, the Council concluded that a special service charge to compile the requested records and review them for necessary redactions due to the exemption from disclosure for advisory, consultative or deliberative materials and the attorney-client privilege is warranted. Additionally, the Council determined that the human resource level necessary to review the attorneys' records to identify those records responsive to the request and any information contained therein requiring redactions due to the exemption from disclosure for advisory, consultative or deliberative materials and attorney-client privilege is the Deputy Attorneys General by who such records were made, maintained, kept on file or received in the course of official governmental business. However, the special service charge originally assessed by the Custodian (\$1,877.93) shall be reduced by the amount of fringe benefit (pursuant to The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191 (Law Div. 2002)) included in

the hourly rate of the least senior Deputy Attorney General, whose hourly rate the Custodian used to calculate such charge.

Background

Records Relevant to the Complaint:

1. All emails, correspondence, memoranda and other records concerning the assignment of Deputy State Attorney Generals as GRC staff, temporary or permanent, and their involvement in OPRA cases where the Department of Law and Public Safety or any of its entities is a party.
2. All emails, correspondence, memoranda and other records addressing GRC complaint response times and backlogs.
3. All outgoing and incoming emails, correspondence, memoranda and other communication between GRC staff members and the Department of Law and Public Safety concerning GRC backlogs and staffing matters.
4. All internal meeting minutes of non-public meetings of GRC staff and the staff of the Department of Law and Public Safety.
5. All correspondence between the Department of Law and Public Safety and the Governor's Office regarding staffing of the GRC, the processing of OPRA requests and any OPRA exemptions.

Complainant's Case Position

The Complainant asserts he filed the subject OPRA request on March 10, 2004. The Custodian requested a two-week extension of time to respond on March 19, 2004. The Complainant granted same.

On April 2, 2004, in response to the special service charge assessment, the Complainant asked the Custodian the number of pages responsive to the request. The Complainant restated that request on April 7, 2004.

The Complainant asserts that he has been misled by the Custodian and that the method the Custodian used to calculate the \$1,877.93 special service charge remains unclear. Further, he asserts that pursuant to Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191 (Law Div. 2002) "requestors may not be charged for attorney time in reviewing and redacting material."

The Complainant has not agreed to the special service charge. Rather, he filed a second OPRA request for documentation regarding the need for the special service charge. This second OPRA request was addressed in Janon Fisher v. Department of Law & Public Safety, Division of Law, GRC Complaint No. 2004-82 (February 2005).

Public Agency's Position

On April 2, 2004, the Custodian advised the Complainant "because the Division of Law made an extraordinary expenditure of time and effort to accommodate this request, there will be a special service charge of \$1,877.93. Several Division of Law attorneys had to search through thousands of e-mails as well as numerous files to locate documents responsive to your request. The total time spent by these attorneys was 52.5 hours and the hourly rate is based on the salaries of the Deputy Attorneys General involved."

By e-mail dated April 7, 2004, the Custodian stated that the special service charge is for the attorneys' time to search e-mails. The Custodian then explained that his earlier communication stating that the total hours had already been expended was a mistake due to an internal miscommunication. He explained that once it was determined that a special service charge would be assessed, the Custodian advised the Complainant of same before applying the charge.

The Custodian asserts that the Complainant has only been charged for the estimated time to identify documents responsive to his request. Further, the Custodian asserts that it acted in accordance with N.J.S.A. 47:1A-5.c. by advising the Complainant the amount of the special service charge prior to incurring same.

The Custodian estimates that it will take 52.5 hours to process the request and that the total cost would be \$1,877.93. The Custodian informed the Complainant that the total cost was based on an hourly attorney rate of \$35.77.

The Custodian confirms in a September 8, 2004 Statement of Information submitted in the matter of Janon Fisher v. Department of Law & Public Safety, Division of Law, GRC Complaint No. 2004-82 (February 2005) that the \$1,877.93 special service charge represents incurred and projected time for the Division of Law's ("DOL") attorneys to identify documents responsive to the request. The Custodian further asserts that the special service charge determined so far does not include estimated costs for reviewing said documents for any pertinent exemptions and privileges.

The Custodian responded to the Council's November 16, 2004 Interim Decision on November 23, 2004. The Custodian submitted certifications from each attorney involved in responding to the Complainant's request in response to the Council's November 16, 2004 Interim Decision on Access which assert that combined, the attorneys must review approximately 15,540 documents received over as many as 21 months and expend between 52.5 and 88.5 personnel hours (attorney and secretarial time included) to satisfy this request.

Analysis

Whether the Custodian's imposition of a \$1,877.93 special service charge is warranted and reasonable pursuant to N.J.S.A. 47:1A-5.c.?

OPRA permits public agencies to charge special service charges when a records request requires an extraordinary expenditure of time and

effort to accommodate the request pursuant to N.J.S.A. 47:1A-5.c. Specifically, OPRA provides that:

"[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 [emphasis added], the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ; provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance. The requestor shall have the opportunity to review and object to the charge prior to it being incurred." N.J.S.A. 47:1A-5.c.

Special Service Charge Warranted

OPRA does not define "extraordinary" in the context of special service charges. In making a determination whether this request warrants a special service charge, the Council depends on the following six (6) factors outlined in Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 199 (Law Div. 2002) as a framework for analysis:

1. The volume of government records involved,
2. The period of time over which the records were received,
3. Whether some or all of the records sought are archived,
4. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying,
5. The amount of time, if any, required to be expended by government employees to monitor the inspection or examination, and,
6. The amount of time required to return documents to their original storage place.

In addition to the factors above, the Council considers the following factors for use in making a determination whether this request is consistent with the Custodian's assertion that satisfaction of this OPRA request will require an extraordinary expenditure of time and effort:

1. The size of the agency,
2. The number of employees available to accommodate documents requests,
3. The availability of information technology, copying capabilities, and,
4. The nature, size, and number of documents sought.

Lenape 360 N.J. Super. at 203.

First, the Council considered the above ten (10) factors in making a determination of whether this OPRA request involves an "extraordinary" situation and whether the Custodian's actions needed to satisfy this request should be classified as an "extraordinary effort." The Council concluded that a special service charge was warranted.

Though, as stated, OPRA does not define the word "extraordinary," the volume of documents and the personnel hours needed to review same in the instant matter clearly places this records request in the "extraordinary" category. The certifications from the attorneys who made, maintained, kept on file or received the requested records in the course of official government business assert that combined, the attorneys must review approximately 15,540 documents received over as many as 21 months and expend between 52.5 and 88.5 personnel hours (attorney and secretarial time included) to satisfy this request.

Second, the Council considered whether the Custodian is justified in utilizing attorneys to compile the records they made, maintained, kept on file or received in the course of official government business and which may contain attorney-client privileged information relating to the requested records and others maintained in their e-mail accounts at \$35.77 per hour.

In doing so, the Council adopted the standard that public agencies should use the appropriate level of skill commensurate with the records requested in the request. Further, public agencies should provide certifications to support their determinations of the human resource level required. However, the Council erroneously determined that the Custodian had not sufficiently justified its use of attorneys to review their own records to identify the records responsive to the request and further review the responsive records for any redactions necessary due to the advisory, consultative or deliberative materials exemption and the attorney-client privilege. In fact, only the attorneys who made, maintained, kept on file or received the requested records could review their records to identify those records responsive and further determine the necessary redactions due to the attorney-client privilege.

Exemption from Disclosure for Advisory, Consultative or Deliberative Material

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude, from the definition of a government record, the types of documents that are the subject of the "deliberative process privilege." That privilege has long been recognized by federal courts. See Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958); NLRB v. Sears, Roebuck, & Co., 421 U.S. 132, 150 (1975). It has also been codified in the federal Freedom of Information Act ("FOIA"). 5 U.S.C. §552(b)(5). Most recently, the New Jersey Supreme Court adopted the privilege. In re Liquidation of Integrity Ins. Co., 165 N.J. 75 (2000).

The judiciary set forth the legal standard for applying the deliberative process privilege as follows:

The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.

1. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.

Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.

Deliberative materials do not include purely factual materials.

Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.

The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency.*

Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position.*

To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency.*

Thus, to the extent that the requested records qualify as advisory, consultative or deliberative material as is outlined above, such records or information contained therein must be redacted pursuant to OPRA. After conducting an *in camera* inspection, the Council concluded that the information contained in the requested records are exemption from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

Attorney-Client Privileged Information

OPRA provides that "... a government record shall not include the following information which is deemed to be confidential ... any record within the attorney-client privilege..." N.J.S.A. 47:1A-1.1. The attorney-client privilege is one of the oldest of the privileges for confidential communications.[1] It is intended to encourage a client's free and full disclosure of information to the client's attorney to facilitate the attorney's best advice in return.[2] Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel.[3]

In general, the attorney client privilege renders confidential communications between a lawyer and a client made in the course of that professional relationship.[4] Discussion of litigation strategy, evaluation of liability, potential monetary exposure and settlement recommendations (and documents in which such matters are discussed) are generally considered privileged.[5] Mental impressions, legal conclusions, opinions or theories of attorneys and communications between clients and their attorneys are also confidential.[6]

Because it results in the exclusion of evidence from court proceedings, the privilege "runs counter to the fundamental theory of our judicial system that the fullest disclosure of the facts will best lead to the truth and ultimately to the triumph of justice." [7] Application of the privilege is therefore, to be strictly construed to achieve its underlying purpose, in light of the reason for its assertion and the attorney's ethical obligations under the unique circumstances of each case.[8] That said, however, "[w]here the privilege is applicable it must be given as broad a scope as rationale requires." [9]

The Legislature, when enacting the Open Public Meetings Act, dealt directly with the attorney-client privilege in N.J.S.A. 10:4-12(b), by providing that:

A public body may exclude the public only from that portion of a meeting at which the public body discusses: (7).. Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

Thus, the Legislature recognized that matters falling within the privilege should be free from public review notwithstanding that a governmental entity is a client and despite the strong public policy favoring maximum access to governmental deliberations.[10] Any discussion by the public body with respect to pending or anticipated litigation in which the public body is or may become a party is exempt from disclosure.[11]

Only the portion of a document containing privileged communications is protected. Generally, litigants are required to provide access to the non-privileged portions of documents. Thus, to the extent that the requested records qualify as attorney-client privileged information as is outlined above, such records or information contained therein must be redacted pursuant to OPRA and may only be redacted by the attorney who made, maintained, kept on file or received such records without waiver of the privilege. The Council concluded after

conducting an *in camera* inspection that the requested records are exempt from disclosure due to the attorney-client privilege.

Reasonable Special Service Charge

Further, the Custodian obtained certifications from the attorneys involved in satisfying the request which stated that the secretarial time required to make copies of the properly identified and redacted records responsive to the request would be less than one (1) hour for most, if not all of the seven (7) attorneys involved.

Finally, the Council considered the amount of the special service charge assessed by the Custodian. OPRA states that a special service charge "shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies." N.J.S.A. 47:1A-5.c.

The Custodian asserts that the hourly rate being charged against all personnel hours represents that of the "lowest salaried attorney working on the project" – \$35.77/hour. The Custodian further asserts that the court in Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 202 (Law Div. 2002) [Lenape] "suggested that it would be appropriate to calculate the hourly wage rates of the clerical and professional employees involved in all tasks related to accommodating the request, and to multiply those figures by the total hours spent by the employee."

The Custodian's special service charge was assessed at the hourly rate of the least senior, and presumably lowest paid, Deputy Attorney General involved, despite the actual involvement of one Assistant Attorney General and one very senior Deputy Attorney General who serves as the Section Leader for all Deputy Attorneys General in the unit. Therefore, the special service charge is consistent with the Court's suggested calculation for the same except for the inclusion of the fringe benefit component of the hourly rate used.

Documents Reviewed

1. May 3, 2004 – Denial of Access Complaint
 - i. April 2, 2004 – Records Request Receipt #8252
 - ii. April 8, 2004 – Custodian response to request
2. May 4, 2004 – Complainant's e-mail refusal to mediate
3. June 2, 2004 – Statement of Information
 - i. June 2, 2004 – Letter response to the Statement of Information request
 - ii. March 10, 2004 – OPRA Request
 - iii. March 19, 2004 – Custodian response to OPRA Request
 - iv. March 22, 2004 – Complainant's acceptance of extension requested by Custodian
 - v. April 7, 2004 – Complainant's request for the number of documents involved
 - vi. April 8, 2004 – Custodian response to request
 - vii. April 12, 2004 – Complainant's response to OPRA request clarification
 - viii. April 12, 2004 – Complainant's request for further documents for clarification of the special service charge
 - ix. April 20, 2004 – Records Request Receipt #8741
 - x. April 20, 2004 – Documents responsive to the request
 - xi. April 1, 2004 – Custodian e-mail entitled "OPRA Request"
 - xii. May 3, 2004 – Records Request Receipt #8741
4. June 16, 2004 – Complainant's letter to the Government Records Council
5. November 23, 2004 – Custodian's response to the Council's November 16, 2004 Interim Decision
6. December 21, 2004 – Letter brief in support of the DOL's motion for reconsideration
7. December 22, 2004 – Notice of Motion for Reconsideration provided to Complainant
8. January 27, 2005 – Notice of Appeal to the Appellate Division of the New Jersey Superior Court
9. May 8, 2006 – Motion to Remand
10. June 5, 2006 – Order Granting Remand
11. July 19, 2006 – Motion for Extension to Issue Final Decision
12. August 30, 2006 – Second Motion for Extension to Issue Final Decision

Conclusion and Order

Based on the foregoing, the Council concluded that a special service charge to compile the requested records and review them for necessary redactions due to the exemption from disclosure for advisory, consultative or deliberative materials and the attorney-client privilege is warranted.

Additionally, the Council determined that the human resource level necessary to review the attorneys' records to identify those records responsive to the request and any information contained therein requiring redactions due to the exemption from disclosure for advisory, consultative or deliberative materials and attorney-client privilege is the Deputy Attorneys General by who such records were made, maintained, kept on file or received in the course of official governmental business.

However, the special service charge originally assessed by the Custodian (\$1,877.93) shall be reduced by the amount of fringe benefit included in the hourly rate of the least senior Deputy Attorney General, whose hourly rate the Custodian used to calculate such charge pursuant to The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191 (Law Div. 2002).

[Please note that any additional special service charge assessed by the Custodian to fulfill this records request must be submitted to the Council for approval and must comply with this Revised Final Decision.]

Revised Final Decision Rendered by the

Government Records Council

On The 10th Day of August, 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 17, 2006

[1] In re Advisory Opinion No. 544, 103 N.J. 399, 405 (1986) (quoting 8 J. Wigmore, Evidence §2290, at 542) (McNaughton rev. 1961); Fellerman v. Bradley, 99 N.J. 493, 498 (1985).

[2] In re Advisory Opinion No. 544, 103 N.J. 399, 405 (1986); In re Selser, 15 N.J. 393, 405 (1954); Hannan v. St. Joseph's Hosp. and Med. Ctr., 318 N.J. Super. 22, 27 (App.Div. 1999); United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 561 (App.Div. 1984).

[3] Swidler & Berlin v. United States, 524 U.S. 399, 407, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998).

[4] N.J.S.A. 2A:84A-20; Fellerman, *supra*, 99 N.J. at 499; Wolosoff, *supra*, 196 N.J. Super. at 562 (noting that "the privilege accords the shield of secrecy only with respect to confidential communications made within the context of the strict relation of attorney and client.").

[5] Press of Atlantic City v. Ocean County Joint Ins. Fund, 337 N.J. Super. 480, 487 (Law Div. 2000) [Serpentelli, J.].

[6] In Re Environmental Ins. Actions, 259 N.J. Super. 308, 317 (App.Div. 1992).

[7] Seler, *supra*, 15 N.J. at 405. See also Wolosoff, *supra*, 196 N.J. Super. at 561-62.

[8] In re Jackson, 221 N.J. Super. 187, 197 (App.Div. 1987), *aff'd*, 114 N.J. 527 (1989); Fellerman, *supra*, 99 N.J. at 497, 502.

[9] Wolosoff, *supra*, 196 N.J. Super. at 561; Dontzin v. Myer, 301 N.J. Super. 501, 506 (App.Div. 1997).

[10] Pillsbury v. Bd. of Chosen Freeholders of Monmouth County, 133 N.J. Super. 526, 535 (Law Div. 1975), *aff'd* 140 N.J. Super. 410 (App.Div. 1976).

[11] Englewood Cliffs v. Englewood, 257 N.J. Super. 413, 457 n.5 (App.Div. 1992), *aff'd* 132 N.J. 327 (1993).

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Interim Decision

Janon Fisher,
Complainant
v.

Complaint No. 2004-55

**Division of Law,
Custodian of Record**

At the February 10, 2005 public meeting, the Government Records Council ("Council") considered the February 3, 2005 Executive Director's Supplemental Findings and Recommendations and all related documents submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. Therefore, the Council hereby finds that:

1. The DOL has fully complied with the Council's January 21, 2005 Interim Decision on Request for Stay by filing the January 27, 2005 Notice of Appeal with the Superior Court of New Jersey – Appellate Division,
2. The Council now does not have any jurisdiction of this complaint and shall forego any further action pending the outcome of the Appeal.

Interim Decision Rendered by the
Government Records Council
On The 10th Day of February, 2005

Vincent P. Maltese, Chairman
Government Records Council

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

Virginia Hook, Secretary
Government Records Council

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Supplemental Findings and Recommendations of the Executive Director

Janon Fisher,
Complainant
v.
GRC Complaint No. 2004-55

Department of Law and Public Safety, Division of Law,
Custodian of Records

Records Requested:

"Under the New Jersey Open Public Records Act I request: All emails, correspondence, memoranda and other records concerning the assignment of Deputy State Attorney Generals as GRC staff, temporary or permanent, and their involvement in OPRA cases where the Department of Law and Public Safety or any of its entities is a party. Additionally, I request, all emails, correspondence, memoranda and other records addressing GRC complaint response times and backlogs. And I request all outgoing and incoming emails, correspondence, memoranda and other communication between GRC staff members and the Department of Law and Public Safety concerning GRC backlogs and staffing matters. I also request all internal meeting minutes of non-public meetings of GRC staff and the staff of the Department of Law and Public Safety. I also request any and all correspondence between the Department of Law and Public Safety and the governor's office regarding staffing of the GRC, the processing of OPRA requests and any OPRA exemptions. Please note I want the records in the possession of the Division of Law, not those in the possession of the GRC. If any material responsive to these requests is exempt from release, I ask that the division make every effort to redact that portion and release the rest of the document."

Custodian: Robert Sanquinetti

Request Made: March 10, 2004

Response Made: March 19, 2004 (request for extension to respond) and April 2, 2004

GRC Complaint filed: May 3, 2004

Background

At its January 13, 2005 public meeting, the Government Records Council (Council) considered the January 5, 2005 Supplemental Findings and Recommendations of the Executive Director Regarding the Division of Law's (DOL) Request for Reconsideration and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations and, therefore, found that:

1. The DOL's request for a Stay to assemble the requested documents and to apply the special service charges is denied.
2. The Council's December 9, 2004 Interim Decision is reaffirmed; however, a Stay of the Council's decision will be granted should the DOL file an appeal to the Appellate Division of the Superior Court of New Jersey on or before January 28, 2005 and provide evidence of same to the Executive Director.
3. The Stay shall be automatically dissolved should the DOL not take action to file an appeal in the time frame provided and, in which case, the Council's December 9, 2004 Interim Decision will remain in effect.

The Council confirmed its decision in a January 21, 2005 Interim Decision on Request for Stay that was circulated to all parties.

On January 27, 2005, Custodian's counsel provided the Council with a copy of the DOL's Notice of Appeal filed in this case with the Superior Court of New Jersey – Appellate Division. Therefore, the DOL has complied with the Council's January 21, 2005 Interim Decision.

Analysis

WHETHER the Council now has any jurisdiction over this Complaint

The Open Public Records Act (OPRA) states that the Council does not have jurisdiction over the Judicial branch of State Government or any of its agencies, officers or employees. N.J.S.A. 47:1A-7(g).

The DOL's Notice of Appeal to the Superior Court of New Jersey – Appellate Division (Court), clearly establishes that the court now has jurisdiction of this Open Public Records Act (OPRA) complaint.

The Council now does not have any jurisdiction of this complaint and should forego any further action pending the outcome of the appeal.

Document Reviewed

27, 2005 Notice of Appeal to the Court

Conclusions and Recommendations of the Executive Director

For the reasons stated in the Analysis above, the Executive Director respectfully recommends that the Council find that:

1. The DOL has fully complied with the Council's January 21, 2005 Interim Decision on Request for Stay by filing the January 27, 2005 Notice of Appeal with the Court,
2. The Council now does not have any jurisdiction of this complaint and should forego any further action pending the outcome of the appeal.

Paul F. Dice
Executive Director
Government Records Council

February 3, 2005

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Interim Decision on Request for Stay

**Janon Fisher,
Complainant**

Complaint No. 2004-55

v.

**Law and Public Safety – Division of Law,
Custodian of Record**

At the January 13, 2005 public meeting, the Government Records Council ("Council") considered the January 6, 2005 Executive Director's Findings and Recommendations and all related documents submitted by the parties, including the January 12, 2005 supplemental submission from the Division of Law. The Council voted unanimously to adopt the entirety of said findings and recommendations with an amendment to grant a Stay of the Council's decision on the basis that an appeal is filed to the Appellate Division of the Superior Court of New Jersey on or before January 28, 2005 and provide evidence of same to the Executive Director. Therefore, the Council hereby finds that:

1. The Division of Law's request for a Stay to assemble the requested documents and to apply the special service charges is denied.
2. The Council's December 9, 2004 Interim Decision is reaffirmed; however, a Stay of the Council's decision will be granted should the Division of Law file an appeal to the Appellate Division of the Superior Court of New Jersey on or before January 28, 2005 and provide evidence of same to the Executive Director.
3. The Stay shall be automatically dissolved should the Division of Law not take action to file an appeal in the time frame provided and, in which case, the Council's December 9, 2004 Interim Decision will remain in effect.

Interim Decision Rendered by the
Government Records Council
On The 13th Day of January, 2005

Vincent P. Maltese, Chairman
Government Records Council

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

Virginia Hook, Secretary
Government Records Council

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Supplemental Findings and Recommendations of the Executive Director

Janon Fisher,

GRC Complaint No. 2004-55

Complainant

v.

**Department of Law and Public Safety, Division of Law,
Custodian of Records**

Records Requested:

"Under the New Jersey Open Public Records Act I request: All emails, correspondence, memoranda and other records concerning the assignment of Deputy State Attorney Generals as GRC staff, temporary or permanent, and their involvement in OPRA cases where the Department of Law and Public Safety or any of its entities is a party. Additionally, I request, all emails, correspondence, memoranda and other records addressing GRC complaint response times and backlogs. And I request all outgoing and incoming emails, correspondence, memoranda and other communication between GRC staff members and the Department of Law and Public Safety concerning GRC backlogs and staffing matters. I also request all internal meeting minutes of non-public meetings of GRC staff and the staff of the Department of Law and Public Safety. I also request any and all correspondence between the Department of Law and Public Safety and the governor's office regarding staffing of the GRC, the processing of OPRA requests and any OPRA exemptions. Please note I want the records in the possession of the Division of Law, not those in the possession of the GRC. If any material responsive to these requests is exempt from release, I ask that the division make every effort to redact that portion and release the rest of the document."

Custodian: Robert Sanquinetti

Request Made: March 10, 2004

Response Made: March 19, 2004 (request for extension to respond) and April 2, 2004

GRC Complaint filed: May 3, 2004

Background

At its December 9, 2004 public meeting, the Government Records Council ("Council") considered the December 7, 2004 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 and, therefore, found that:

1. The Division of Law has met the burden of justifying that the Open Public Records Act ("OPRA") request was "extraordinary" pursuant to N.J.S.A. 47:1A-5(c).
2. The Division of Law has not met the burden of justifying the use of attorneys for document compilation that comprises the assessed special service charge of \$1877.93.
3. The Division of Law shall fulfill the subject OPRA request and charge Complainant Fisher in accordance with OPRA's routine copy charges outlined in N.J.S.A. 47:1A-5(b).

The Custodian was given ten (10) business days from receipt of this Final Decision to comply with same and to provide Executive Director Paul Dice with written confirmation of compliance. The Custodian did not comply as directed.

On December 22, 2004, the Custodian's counsel filed a request for reconsideration of the Council's decision finding that the Division did not meet the burden of justifying the use of attorneys for document compilation and limiting the special service charge for the production of documents responsive to the Fisher request to the amount of the routine copy charges outlined in N.J.S.A. 47:1A-5(b).

Analysis

The Division of Law (Division) cites to the seven (7) certifications it submitted to support the special service charge claimed in the amount of 1,877.93. However, on November 9, 2004, the Executive Director of the Council recommended that the Council demand a more detailed outline of the charges within five (5) days. Specifically, it was recommended that the Division provide a certification outlining the following:

- a. What was requested.
- b. The level(s) of skill necessary to accommodate the request.
- c. The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill in #2 above.
- d. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.
- e. Who in the agency will perform the work associated with each request.

However, the Division never submitted a supplemental certification or any other documentation providing the above information. Therefore, because the information requested was not contained in any of the other certifications submitted by the Division, the Council denied the special service charge, allowing only the statutory copy charges.

The Division contends in its motion that the Council is abrogating the Division's right to collect a special service charge for an "extraordinary" OPRA request. In fact, this is not the case at all. Rather, the Council has determined that any agency seeking a special service charge must supply additional information as outlined above. As applied to the Division, despite the fact that the OPRA request was deemed by the Council to be "extraordinary", the special service charge cannot issue due to the Division's failure to provide a more specific certification in support of the claimed amount.

The Division did not provide sufficient documentation or certifications explaining the specific reasons why the agency employed the particular level of skill to accommodate the request, or a categorization of the hours needed to identify, copy or prepare for inspection, production and return of the requested documents. The Division merely stated who would provide the documents and the hourly rate, without further justification. Therefore, the Division's Motion for Reconsideration should be denied.

Document Reviewed

- December 21, 2004 letter brief in support of the Division of Law's motion for reconsideration
- December 22, 2004 Notice of Motion for Reconsideration provided to Complainant

Conclusions and Recommendations of the Executive Director

For the reasons stated in the Analysis above, the Executive Director respectfully recommends that the Council deny the Division of Law's request for reconsideration.

Paul F. Dice
Executive Director
Government Records Council

January 6, 2005

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Final Decision on Special Service Charge of \$1877.93

Janon Fisher,
Complainant
v.
Department of Law and Public Safety,
Division of Law
Custodian of Record

Complaint No. 2004-55

At its December 9, 2004 public meeting, the Government Records Council ("Council") considered the December 7, 2004 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 and, therefore, found that:

1. The Division of Law has met the burden of justifying that the Open Public Records Act ("OPRA") request was "extraordinary" pursuant to N.J.S.A. 47:1A-5(c).
2. The Division of Law has not met the burden of justifying the use of attorneys for document compilation that comprises the assessed special service charge of \$1877.93.
3. The Division of Law shall fulfill the subject OPRA request and charge Complainant Fisher in accordance with OPRA's routine copy charges outlined in N.J.S.A. 47:1A-5(b).

The Custodian has ten (10) business days from receipt of this Final Decision to comply with same and to provide Executive Director Paul Dice with written confirmation of compliance.

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.

Final Decision Rendered by the
Government Records Council
On The 9th Day of December, 2004

Vincent P. Maltese, Chairman
Government Records Council

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

Virginia Hook, Secretary
Government Records Council

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Supplemental Findings and Recommendations of the Executive Director

Janon Fisher,
Complainant
v.
Department of Law and Public Safety,
Division of Law,
Custodian of Records

GRC Complaint No. 2004-55

Records Requested:

"Under the New Jersey Open Public Records Act I request: All emails, correspondence, memoranda and other records concerning the assignment of Deputy State Attorney Generals as GRC staff, temporary or permanent, and their involvement in OPRA cases where the Department of Law and Public Safety or any of its entities is a party. Additionally, I request, all emails, correspondence, memoranda and other records addressing GRC complaint response times and backlogs. And I request all outgoing and incoming emails, correspondence, memoranda and other communication between GRC staff members and the Department of Law and Public Safety concerning GRC backlogs and staffing matters. I also request all internal meeting minutes of non-public meetings of GRC staff and the staff of the Department of Law and Public Safety. I also request any and all correspondence between the Department of Law and Public Safety and the governor's office regarding staffing of the GRC, the processing of OPRA requests and any OPRA exemptions. Please note I want the records in the possession of the Division of Law, not those in the possession of the GRC. If any material responsive to these requests is exempt from release, I ask that the division make every effort to redact that portion and release the rest of the document."

Custodian: Robert Sanquinetti

Request Made: March 10, 2004

Response Made: March 19, 2004 (request for extension to respond) and April 2, 2004

GRC Complaint filed: May 3, 2004

Background

At the November 9, 2004 public meeting, the Government Records Council ("Council") considered the November 3, 2004 Executive Director's Findings and Recommendations and all related documents submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations with amendments and find that:

1. The Department of Law and Public Safety (DOL) is to use the following ten factors in determining whether this case involves an "extraordinary" situation and whether the DOL's actions needed to satisfy this OPRA request should be classified as an "extraordinary effort." For the Council to consider the DOL's submissions, the custodian must provide a certification that outlines the answers to each of the following:
 - a. The volume, nature, size, number, of government records involved,
 - b. The period of time over which the records were received,
 - c. Whether some or all of the records sought are archived,
 - d. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying,
 - e. The amount of time, level, rate and number, if any, required to be expended by government employees to monitor the inspection or examination, and,
 - f. The amount of time required to return documents to their original storage place.
 - g. The size of the agency,
 - h. The number of employees available to accommodate documents requests,
 - i. The availability of information technology, copying capabilities, and,
2. The DOL shall provide a certification outlining the following:
 - a. What was requested,
 - b. The level(s) of skill necessary to accommodate the request,
 - c. The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill in #2 above
 - d. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents,
 - e. Identify who in the agency will perform the work associated with each request.
3. The DOL shall provide the certifications referenced in #1 and #2 directly above to Executive Director, Paul Dice, within fifteen (15) calendar days from receipt of the Council's order.

The Council memorialized the above in an Interim Decision distributed to all parties on November 16, 2004.

Analysis

The DOL responded to the Council's November 16, 2004 Interim Decision on November 23, 2004. Counsel for the DOL submitted certifications from the DOL personnel involved in responding to Complainant's request that, in part, state the following:

NOTE: Each of the following seven exhibits represents the certification of one representative of the DOL.

Exhibit A – Records responsive to the request would have been received from approximately July 2002 through March 10, 2004. The individual expended 10.5 hours reviewing 4,690 documents and e-mails located in her computers to determine what was responsive to the request.

Exhibit B – Records responsive to the request would have been received from approximately July 2003 through March 10, 2004. The individual expended nine hours reviewing at least 5,000 e-mails located in her computer and estimates that it would take an additional eight to ten hours to complete the project. In addition, she expects that it would take less than one hour for her secretary to copy the documents.

Exhibit C – Records were received from approximately December 2003 through March 10, 2004. The individual expended two hours and reviewed 350 e-mails located in her computer.

Exhibit D – Records were received from approximately July 2003 through March 10, 2004. The individual reviewed at least 3,500 e-mails located in his computer. He expended three hours and estimates that it would take an addition two to three hours to review and prepare the documents. In addition, he expects that it would take less than one hour for his secretary to copy the documents.

Exhibit E – Records were received from approximately April 2003 through March 10, 2004. The individual expended 10 hours reviewing between 1,600 and 1,800 e-mails located in her computer. She estimates that it would take another eight hours to retrieve documentation and an additional five to 10 hours to prepare the documents. In addition, she expects that it would take less than one hour for her secretary to copy the documents.

Exhibit F – Records responsive to the request may have been generated from June 2002 through March 10, 2004. The individual compiled 100 pages of e-mails and estimates that the time spent and the time to be incurred to complete the project would total four hours. In addition, he expects that it would take less than one hour for his secretary to copy the documents.

Exhibit G – Records responsive to the request may have been generated from June 2002 through March 10, 2004. The individual compiled 100 e-mails from his computer and estimates that the time spent and the time to be incurred to complete the project would total four hours. In addition, he expects that it would take less than one hour for his secretary to copy the documents.

Considering all of the certifications combined, the DOL's personnel must review approximately 15,540 documents received over as much as 21 months, expend between 52.5 and 88.5 personnel hours (attorney and secretarial time included) to satisfy this request. The Open Public Records Act (OPRA) permits public agencies to charge Special Service Charges in OPRA requests if an extraordinary expenditure of time and effort would be needed to accommodate the request. N.J.S.A. 47:1A-5(c). Though OPRA does not define the word

"extraordinary," the volume of documents and the personnel hours needed to review same in the instant matter clearly places this OPRA request in the "extraordinary" category. As such, the Council should find that the DOL is entitled to charge a special service charge.

Having established that a Special Service Charge is warranted, the Council must consider the amount of said charge. OPRA states that it "shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies." N.J.S.A. 47:1A-5(c).

The DOL asserts that the hourly rate being charged against all personnel hours represents that of the "lowest salaried attorney working on the project" – \$35.77/hour. The DOL further asserts that the judge in Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 202 (Law Div. 2002) [Lenape] "suggested that it would be appropriate to calculate the hourly wage rates of the clerical and professional employees involved in all tasks related to accommodating the request, and to multiply those figures by the total hours spent by the employee." This argument is only relevant if the DOL can prove that attorney expertise was needed to satisfy this OPRA request.

The DOL's argument that attorneys were and still are needed to compile the records to satisfy this OPRA request is not persuasive for two reasons.

1. The DOL has overlooked a significant fact in the Lenape case: the judge directed that clerical staff should perform routine tasks of retrieval and assembling. In short, a public agency must certify as to the reason for a particular level of document scrutiny or otherwise justify the use of professional or supervisory personnel. Id. at 202, 203. The DOL's certifications simply state that each attorney "was the best qualified person" because the records were in their possession. In addition, counsel for the DOL states "the request in this case required the attorneys involved to review their own files and records, a task only they could perform."^[1] These statements do not explain why a clerk could not have managed the routine task of compiling documentation for review.
2. With regard to legal expertise, counsel for the DOL asserts "this case is distinguishable from Courier Post, supra, with regard to attorney time and effort to determine whether information should be redacted."^[2] This would be a valid argument if the DOL's efforts had included such activities. However, and according to the DOL's submissions, the attorneys were not involved with redactions. To date, the attorneys have simply compiled documentation for further analysis. Again according to the DOL's counsel, "The DOL sought to impose a special service charge only for the estimated hours the attorneys required to gather the information requested – 52.5 hrs."^[3]

OPRA states "The 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 DOL denied Complainant Fisher access to the requested records based on his refusal to pay the DOL's \$1,877.93 Special Service Charge. Had the DOL borne its burden of proving that the charge was lawfully imposed, i.e., reasonable, the denial of access would be justified. However, and for the reasons stated above, the DOL has not proven that the charge is justified. The Council should order the DOL to disclose the documents at OPRA's routine copy charge outlined in N.J.S.A. 47:1A-5(b).

Document Reviewed

The November 23, 2004 response from Custodian's counsel to the Council's November 16, 2004 Interim Decision.

Conclusions and Recommendations of the Executive Director

The Executive Director respectfully recommends that the Council find:

1. The Division of Law has met the burden of justifying the OPRA request was "extraordinary" pursuant to N.J.S.A. 47:1A-5(c).
2. For the reasons set forth above, the Division of Law has not met the burden of justifying the use of attorneys for document compilation that comprises the assessed special service charge of \$1877.93.
3. The Division of Law should fulfill the subject OPRA request and charge Complainant Fisher in accordance with OPRA's routine copy charges outlined in N.J.S.A. 47:1A-5(b).

Paul F. Dice
Executive Director
Government Records Council
December 7, 2004

^[1] November 23 letter from DOL counsel, Deputy Attorney General Mary Beth Wood, to Executive Director Paul Dice. Page 8.

^[2] Ibid., 8.

^[3] Ibid., 9.

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Interim Decision on Access

Janon Fisher,
Complainant
v.
Department of Law and Public Safety,
Custodian of Record

Complaint No. 2004-55

At the November 9, 2004 public meeting, the Government Records Council ("Council") considered the November 3, 2004 Executive Director's Findings and Recommendations and all related documents submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations with the following amendments to the "Conclusions and Recommendations of the Executive Director:" in number "1" items "a" and "j" are combined, add "level, rate and number" to item "e" and change number "2" to read, "Provide the Government Records Council with a certification outlining the following." Therefore, the Council hereby finds that:

1. The Department of Law and Public Safety ("DOL") is to use the following ten factors in determining whether this case involves an "extraordinary" situation and whether the DOL's actions needed to satisfy this OPRA request should be classified as an "extraordinary effort." For the Council to consider the DOL's submissions, the custodian must provide a certification that outlines the answers to each of the following:
 - a. The volume, nature, size, number, of government records involved,
 - b. The period of time over which the records were received,
 - c. Whether some or all of the records sought are archived,
 - d. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying,
 - e. The amount of time, level, rate and number, if any, required to be expended by government employees to monitor the inspection or examination, and,
 - f. The amount of time required to return documents to their original storage place.
 - g. The size of the agency,
 - h. The number of employees available to accommodate documents requests,
 - i. The availability of information technology, copying capabilities, and,
2. The DOL shall provide a certification outlining the following:
 - a. What was requested,
 - b. The level(s) of skill necessary to accommodate the request,
 - c. The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill in #2 above
 - d. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents,
 - e. Identify who in the agency will perform the work associated with each request.
3. The DOL shall provide the certifications referenced in #1 and #2 directly above to Executive Director, Paul Dice, within fifteen (15) calendar days from receipt of the Council's order.

Interim Decision Rendered by the
Government Records Council
On The 9th Day of November, 2004

Vincent P. Maltese, Chairman
Government Records Council

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

Virginia Hook, Secretary
Government Records Council

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Findings and Recommendations of the Executive Director

Janon Fisher,
Complainant

GRC Complaint No. 2004-55

v.
Department of Law and Public Safety,
Division of Law,
Custodian of Records

Records Requested:

"Under the New Jersey Open Public Records Act I request: All emails, correspondence, memoranda and other records concerning the assignment of Deputy State Attorney Generals as GRC staff, temporary or permanent, and their involvement in OPRA cases where the Department of Law and Public Safety or any of its entities is a party. Additionally, I request, all emails, correspondence, memoranda and other records addressing GRC complaint response times and backlogs. And I request all outgoing and incoming emails, correspondence, memoranda and other communication between GRC staff members and the Department of Law and Public Safety concerning GRC backlogs and staffing matters. I also request all internal meeting minutes of non-public meetings of GRC staff and the staff of the Department of Law and Public Safety. I also request any and all correspondence between the Department of Law and Public Safety and the governor's office regarding staffing of the GRC, the processing of OPRA requests and any OPRA exemptions. Please note I want the records in the possession of the Division of Law, not those in the possession of the GRC. If any material responsive to these requests is exempt from release, I ask that the division make every effort to redact that portion and release the rest of the document."

Custodian: Robert Sanquinetti

Request Made: March 10, 2004

Response Made: March 19, 2004 (request for extension to respond) and April 2, 2004

GRC Complaint filed: May 3, 2004

Background

The Complainant asserts he filed the subject Open Public Records Act request on March 10, 2004. The Custodian requested a two-week extension of time to respond on March 19, 2004. The Complainant granted same.

On April 2, 2004, the Custodian advised the Complainant "because the Division of Law made an extraordinary expenditure of time and effort to accommodate this request, there will be a special service charge of \$1,877.93. Several Division of Law attorneys had to search through thousands of e-mails as well as numerous files to locate documents responsive to your request. The total time spent by these attorneys was 52.5 hours and the hourly rate is based on the salaries of the Deputy Attorneys General involved."

In response to the special service charge assessment, the Complainant asked the Custodian on April 2, 2004 how many pages were involved. The Complainant restated that request on April 7, 2004.

By e-mail dated April 7, 2004, the Custodian stated, "the special service charge is for our attorneys time to search e-mails." The Custodian then explained that his earlier communication stating that the total hours had already been expended was a mistake "due to an internal miscommunication." He explained that once it was determined that a special service charge would be assessed, the Division of Law (DOL) advised the Complainant of same before applying the charge.

Complainant asserts that he has been misled by the DOL and the method used to calculate the \$1,877.93 special service charge remains unclear. Further, he asserts that per Courier Post v. Lenape Regional High School District, "requestors may not be charged for attorney time in reviewing and redacting material."

Custodian's counsel asserts that the Complainant has only been charged "for the estimated time to identify documents responsive to his request." Further the Custodian acted in accordance with N.J.S.A. 47:1A-5(c) by advising the Complainant what the special service charge would be prior to incurring same.

The Complainant has not agreed to the special service charge. Rather, he filed a second OPRA request for documentation regarding the need for the special service charge. This second OPRA request will be addressed in Fisher v. Office of Attorney General, Division of Law, GRC Complaint No. 2004-82.

Analysis

The issue at hand is whether the DOL's imposition of a \$1,877.93 special service charge is warranted pursuant to N.J.S.A. 47:1A-5(c), which reads as follows:

Whenever 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** [emphasis added], the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ; provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance. The requestor shall have the opportunity to review and object to the charge prior to it being incurred.

The Custodian stated to the Complainant that the DOL estimates that it will take 52.5 hours to process the request and that the total cost would be \$1,877.93. The rate, \$35.77, represents an attorney's hourly wage.

Custodian's counsel confirms in a September 8, 2004 Statement of Information submitted in the Fisher v. Office of Attorney General, Division of Law, GRC Complaint No. 2004-82 case that the \$1,877.93 represents incurred and projected time for the DOL's attorneys to identify documents responsive to his request. It does not include estimated costs for reviewing said documents for any pertinent exemptions and privileges.

OPRA does not define "extraordinary" in the context of special service charges. In making a determination whether this case involves an "extraordinary" situation, the Council should adopt the following six (6) factors outlined in Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 199 (Law Div. 2002) as a framework for analysis:

1. The volume of government records involved,
2. The period of time over which the records were received,
3. Whether some or all of the records sought are archived,
4. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying,
5. The amount of time, if any, required to be expended by government employees to monitor the inspection or examination, and,
6. The amount of time required to return documents to their original storage place.

In addition to the factors above, the Council should also adopt the following factors for use in making a determination whether this case supports the DOL's assertion that satisfaction of this OPRA request will require an "extraordinary effort:"

1. The size of the agency,
2. The number of employees available to accommodate documents requests,
3. The availability of information technology, copying capabilities, and,
4. The nature, size, and number of documents sought.

Lenape 360 N.J. Super. at 203.

The Council should advise the DOL that it intends to employ the above ten (10) factors in making a determination of whether this case involves an "extraordinary" situation and whether the DOL's actions needed to satisfy this OPRA request should be classified as an "extraordinary effort."

If the Council concludes that a Special Service Charge is warranted, it also needs to address the issue of whether the DOL is justified in utilizing attorneys to compile the information at \$35.77 per hour. Here, the Council should adopt the standard that public agencies should use the appropriate level of skill commensurate with the request. Further, public agencies should provide certifications to support their positions. The DOL's submissions lack sufficient information to address this matter. Therefore, the Council should order the DOL to provide a certification outlining the following:

1. What was requested,
2. The level(s) of skill necessary to accommodate the request,
3. The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill in #2 above

4. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents,
5. Who in the agency will perform the work associated with each request.

Documents Reviewed

1. May 3, 2004 – Denial of Access Complaint
 - i. April 2, 2004 – Records Request Receipt #8252
 - ii. April 8, 2004 – Custodian response to request
2. May 4, 2004 – Complainant's email refusal of Mediation
3. June 2, 2004 – Statement of Information
 - i. June 2, 2004 – Letter response to the Statement of Information request
 - ii. March 10, 2004– OPRA Request
 - iii. March 19, 2004 – Custodian response to OPRA Request
 - iv. March 22, 2004 – Complainant's acceptance of extension requested by Custodian
 - v. April 7, 2004 – Complainant's request for the number of documents involved
 - vi. April 8, 2004 – Custodian response to request
 - vii. April 12, 2004 – Complainant's response to OPRA request clarification
 - viii. April 12, 2004 – Complainant's request for further documents for clarification of fees
 - ix. April 20, 2004 – Records Request Receipt #8741
 - x. April 20, 2004 – Documents responsive to the request
 - xi. April 1, 2004 – Custodian email "OPRA Request"
 - xii. May 3, 2004 – Records Request Receipt #8741
4. June 16, 2004 – Complainant's letter to the Government Records Council

Conclusions and Recommendations of the Executive Director

The Executive Director respectfully recommends that the Council:

1. Advise the DOL that it will use the following ten factors in determining whether this case involves an "extraordinary" situation and whether the DOL's actions needed to satisfy this OPRA request should be classified as an "extraordinary effort:" For the Council to consider the DOL's submissions, the custodian must provide a certification that outlines the answers to each of the following:
 - a. The volume of government records involved,
 - b. The period of time over which the records were received,
 - c. Whether some or all of the records sought are archived,
 - d. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying,
 - e. The amount of time, if any, required to be expended by government employees to monitor the inspection or examination, and,
 - f. The amount of time required to return documents to their original storage place.
 - g. The size of the agency,
 - h. The number of employees available to accommodate documents requests,
 - i. The availability of information technology, copying capabilities, and,
 - j. The nature, size, and number of documents sought.
2. Order the DOL to provide a certification outlining the following:
 - a. What was requested,
 - b. The level(s) of skill necessary to accommodate the request,
 - c. The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill in #2 above
 - d. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents,
 - e. Who in the agency will perform the work associated with each request.
3. Provide the certifications referenced in #1 and #2 directly above to Executive Director Paul Dice within five (5) business days from receipt of the Council's order.

Paul F. Dice
Executive Director
Government Records Council

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EXHIBIT 2

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

STEVEN WRONKO,

Plaintiff,

v.

BOROUGH OF NORTH
ARLINGTON AND KATIE MOORE,
in her official capacity as Records
Custodian for the Borough of North
Arlington,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BERGEN COUNTY

DOCKET NO. BER-L-2744-19

CIVIL ACTION

OPINION

Argued: June 17, 2019

Decided: June 28, 2019

Honorable Bonnie J. Mizdol, A.J.S.C.

CJ Griffin, Esq. & Michael J. Zoller, on behalf of the plaintiff, Steven Wronko, (Pashman, Stein, Walder, and Hayden, P.C.)

Randy T. Pearce, Esq., on behalf of defendants, Borough of North Arlington and Katie Moore, in her official capacity as Records Custodian for the Borough of North Arlington, (Pearce Law, L.L.C.)

Introduction

On April 10, 2019, Steven Wronko (“Plaintiff” or “Wronko”) filed a Verified Complaint and Order to Show Cause against the Borough of North Arlington (“the Borough”) and Katie Moore, in her official capacity as Records Custodian for the Borough (“the Custodian,” collectively, “the Defendants”), alleging violations of the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 (“OPRA”). Plaintiff seeks to compel production of government records from the Borough’s official Facebook pages. The issue presented is whether Defendants may impose a special service charge for the production of such records.

Facts

Plaintiff, Steven Wronko, resides in Spotswood, New Jersey. Defendant, Borough of North Arlington, is a municipal entity in Bergen County, New Jersey. Defendant Katie Moore is the Borough Clerk and the statutory Records Custodian for the Borough.

Plaintiff is an activist who routinely monitors government action. His activism includes investigating government censorship of citizens on social media accounts owned and operated by public agencies and their officials. A major part of these investigations is the filing of OPRA requests to determine whether municipalities or their officials have censored their social media pages.

On March 11, 2019, Plaintiff, under the pseudonym “Mike Roland,” filed the following OPRA request with North Arlington:

I would like a copy of the administrative page for the towns Facebook page that is most current as of March 11, 2019.

I would like a copy of the censored words page for the towns Facebook page that is most current as of March 11, 2019.

I would like a copy of the banned profiles page for the towns police department's Facebook page that is most current as of March 11, 2019.

I would like a copy of the administrative page for the towns police department's Facebook page that is most current as of March 11, 2019.

I would like a copy of the censored words page for the towns police department's Facebook page that is most current as of March 11, 2019.

I would like a copy of the banned profiles page for the towns Facebook page that is most current as of March 11, 2019.

[Exhibit A to Verified Complaint.]

The Borough responded to Plaintiff's OPRA request on March 20, 2019, stating that following a review of the request, they would be charging a special service charge of \$200. Exhibit B to Verified Complaint. The \$200 charge was based upon a quote from INSYNC Municipal Systems, ("Insync"), the Borough's information technology consultant, who determined that it would take two hours to produce the requested documents.

Plaintiff, via e-mail, voiced his objection to the fee that same day, challenging the need for substantial effort and time to produce "a few pieces of paper." Exhibit C to Verified Complaint.

The Borough defended the charge, stating:

Please be advised that N.J.S.A. 47:1A-5(d) allows the Borough to charge fees when the request requires "a substantial amount of manipulation or programming of information technology." The Borough "may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical and supervisory assistance required, or both."

As the proposed cost is supported by a documented price quote and is reasonable based on the labor necessary, it is permitted under N.J.S.A. 47:1A-5(d). As such, please provide payment based on the

quote provided. Upon receipt of such payment, the Borough will be happy to provide the requested records.

[Exhibit D to Verified Complaint.]

To date, the Borough has not released any of the requested documents.

Plaintiff filed this Verified Complaint and Order to Show Cause on April 10, 2019.

Testimony and oral argument were entertained on June 17, 2019. Defendant presented two information technology experts. The first was Keith Guirao (“Guirao”), owner and operator of Maven Media. The second was Michael Licameli (“Licameli”), president of Insync. Plaintiff presented Gavin Rozzi (“Rozzi”), an independent journalist, web developer, and technology professional. Rozzi currently operates Rozzi Media Group, a company that develops and operates a variety of technology platforms and offers consulting services on web development and other technology issues. Additionally, the following documents were admitted into evidence: NA-1Ev., NA-2Ev., NA-3Ev., NA-4Ev., and NA-5Ev.

Law

A. OPRA

a. Generally

The purpose of OPRA, N.J.S.A. 47:1A-1 to -13, is plainly set forth in the statute: “to insure that government records, unless exempted, are readily accessible to citizens of New Jersey for the protection of the public interest.” Mason v. City of Hoboken, 196 N.J. 51, 57 (2008) (citing N.J.S.A. 47:1A-1). The Act replaced the former Right to Know Law, N.J.S.A. 47:1A-1 to -4 (repealed 2002), and perpetuates “the State’s long-standing public policy favoring ready access to most public records.” Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 36 (App. Div. 2005) (quoting Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003)). To accomplish that objective, OPRA establishes a comprehensive framework for access to public

records. Mason, supra, 196 N.J. at 57. Specifically, the statute requires, among other things, prompt disclosure of records and provides different procedures to challenge a custodian's decision denying access. Ibid.

OPRA mandates "all government records shall be subject to public access unless exempt." N.J.S.A. 47:1A-1. Therefore, records must be covered by a specific exclusion to prevent disclosure. Ibid. The Act defines "government record" as follows:

[A]ny 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. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[N.J.S.A. 47:1A-1.1.]

The OPRA framework contemplates a swift timeline for disclosure of government records. Mason, supra, 196 N.J. at 57. Unless a shorter time period is prescribed by statute, regulation or executive order, a records custodian must grant or deny access to a government record "as soon as possible, but not later than seven business days after receiving the request." N.J.S.A. 47:1A-5(i). Failure to respond within seven business days "shall be deemed a denial of the request." Ibid. If the record is in storage or archived, the custodian must report that information within seven business days and advise when the record will be made available. Ibid. Courts have repeatedly found providing redacted documents is also a denial and each redaction must have an exemption. See e.g., Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 148

(App. Div. 2011) (holding the redacted portions of the records must be disclosed as they did not meet the trade secret exemption).

If access to a government record is denied by the custodian, the requestor may challenge that decision by filing an action in Superior Court or a complaint with the Government Records Council (“GRC”). N.J.S.A. 47:1A-6. The right to institute any proceeding under this section, however, belongs solely to the requestor. Ibid. If the requestor elects to file an action in Superior Court, the application must be brought within forty-five days of the denial. See Mason, supra, 196 N.J. at 70 (holding, explicitly, a 45-day statute of limitations applies to OPRA actions). The Act, however, specifically provides “a decision of the [GRC] shall not have value as precedent for any case initiated in Superior Court,” N.J.S.A. 47:1A-7, though such decisions are normally considered unless “arbitrary, capricious or unreasonable, or [violative of] legislative policies expressed or implied in the act governing the agency.” Serrano, supra, 358 N.J. Super. at 362 (citing Campbell v. Dep’t of Civil Service, 39 N.J. 556, 562 (1963)).

In OPRA actions, the public agency bears the burden of proving the denial of access is authorized by law. N.J.S.A. 47:1A-6. As such, an agency “seeking to restrict the public’s right of access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality.” Courier News v. Hunterdon Cnty. Prosecutor’s Office, 358 N.J. Super. 373, 382–83 (App. Div. 2003). Absent the necessary proofs, “a citizen’s right of access is unfettered.” Ibid. In assessing the sufficiency of the proofs submitted by the agency in support of its claim for nondisclosure, “a court must be guided by the overarching public policy in favor of a citizen’s right of access.” Ibid. If it is determined access has been improperly denied, such access shall be granted, and a prevailing party shall be entitled to a reasonable attorney’s fee. N.J.S.A. 47:1A-6.

b. OPRA Special Service Charge

OPRA provides for a reasonable service charge when production of requested records requires unusual expenditures. N.J.S.A. 47:1A-5(d) provides that:

If a request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.

[N.J.S.A. 47:1A-5(d)].

Where production of records requires a substantial amount of manipulation or programming of information technology (“IT”), a reasonable fee is permitted. Otherwise, access to “electronic records and non-printed materials shall be provided free of charge.” N.J.S.A. 47:1A-b(1).

Analysis

A. OPRA

To trigger OPRA’s disclosure requirements, the records requested must be “government records.” N.J.S.A. 57:1A-1.1 defines a government record as any document or recording made or received by any government entity, or any officer, authority or political subdivision thereof, in the course of his or its official business. There is no dispute that the records being sought meet the statutory definition of government records under OPRA and are subject to production.

I. Special Service Charge

OPRA instructs that a special service charge is appropriate in situations where production of records would require substantial manipulation of information technology. N.J.S.A. 47:1A-5(d).

The Borough bears the burden of proving that the imposition of any such charge is justified. This court finds that the Borough has failed to carry that burden.

To impose a special service charge, the Borough must prove that a substantial amount of manipulation or programming of information technology is required. It argues that production of the requested screenshots requires the employment of technical expertise and considerable time, qualifying it for a fee. According to the Custodian, she did not possess the “requisite technical experience and expertise to obtain the requested records, and that, in order to produce the requested records, it was necessary to employ the services of the Borough’s information technology professionals.” Moore Certification at ¶ 4. Defendants enlisted Licameli, who certifies that “in light of the substance of the request...and the Borough’s procedures with regard to access to and maintenance of its Facebook pages, a substantial amount of manipulation of information technology was necessary to completely fulfill the request.” Licameli Certification at ¶ 5. To assist in the production of the requested documents, Insync contracted with Maven Media, LLC (“Maven”), experts in social media. Licameli claims that production of the screenshots requires time and effort to navigate, review and organize. His Certification details the tasks needed to provide the requested screenshots and concludes that “[b]ased on my knowledge and experience of doing this type of research properly and to a professional standard, the quoted price of \$200.00 was actually underestimated in relation to industry standards for the services required.” *Id.* at ¶ 6 & 7.

Plaintiff argues that production of the requested documents does not require a substantial manipulation of information technology and produced a certification from Rozzi, an expert with an extensive background in social media, OPRA and information technology services. See Rozzi Certification. Rozzi challenges Licameli’s claims that significant effort and time are needed to

produce these documents, stating that the information is “readily accessible.” Id. at ¶ 8. The Facebook pages at issue can be viewed, copied and printed within a “matter of minutes.” Ibid. Rozzi certifies that users of his website, OPRAMachine, “frequently request these same type of Facebook records from other public agencies and they are routinely produced without any charge.” Rozzi Certification at ¶ 20. Based upon the conflicting certifications, the court ordered the expert witnesses to provide testimony on the return date of the Order to Show Cause.

The testifying witnesses all presented credibly. All witnesses were qualified, without objection, in the field of digital media and information technology. While testifying, each witness maintained direct eye contact, provided specificity of detail, and demonstrated the requisite level of competency in their fields.

Defendants’ first witness, Guirao, testified as to the time and effort required to locate and disclose the requested records. In support of his testimony, Guirao presented a video reenactment of the steps required to produce one such record. The video demonstrated how one would identify and secure a screenshot of a Facebook page. The video demonstration lasted approximately twenty-three (23) minutes. Defendants then offered Licamelli’s testimony that because neither he nor the Custodian were capable of responding to the OPRA request, he decided to hire a social media expert. Licamelli testified that the quoted price of \$200 was a reasonable price considering the time expended.

Plaintiff’s witness, Rozzi, challenged the Defendant’s video reenactment, stating that a majority of the tasks demonstrated were outside the scope of the OPRA request. Rozzi testified to the ease of responding to this type of request. Stating that no expertise is needed, Rozzi further testified that if one can administer a Facebook page, one can readily locate and screenshot the pages requested.

The court finds from the certifications and the testimony presented that production of the requested documents does not require a substantial amount of manipulation of information technology, as testified to by Rozzi. It finds the video demonstration an over-exaggeration of the tasks required to respond to this request. Guirao needlessly introduced levels of complexity to the process of taking screenshots of Facebook pages. For example, Photoshop is a graphics editing program available for purchase and used by Guirao to capture the requested screenshots. This program is not required. Guirao mentions that other methods of screenshotting exist. Those methods are free and can be easily used to provide these records to Plaintiff. A simple Google search for “how to take a screenshot” provides the instructions for capturing a screenshot without the need to purchase any programs. In six (6) sentences, Rozzi lays out how one can secure screenshots. Rozzi Certification at ¶ 17. These tasks may be repetitive, but they are simplistic and do not require any expertise in the field of information technology. It is clear to this court that no manipulation of data or technology is required to secure screenshots; ordinary use of a computer can accomplish the task.

Additionally, navigating Facebook and organizing screenshots into folders are not intricate tasks. If an administrator is capable of navigating Facebook, they are capable of locating the requested pages. Facebook is a prominent social media website. Its use is so widespread that the operation and administration of the platform requires minimal technological skill. Further, Facebook publishes easy-to-use “Help Pages” to assist users in navigating the website. Exhibit 3-4 to Rozzi Certification. Municipalities and their officials have adopted the platform for purposes of official government business. North Arlington is one such municipality. See Rozzi Certification at ¶ 15-16 (Borough Facebook pages are frequently updated, sometimes several times per week).

The Custodian argues that “she” does not possess the requisite technical knowledge to obtain records requested under OPRA and, thus, needed to secure professional assistance. See Moore Certification at ¶ 4. Even if the Custodian does not possess the basic level of computer skills necessitated by this request, another Borough employee likely does. The employee who routinely updates Facebook on behalf of the Borough could have attempted to secure the screenshots. No such attempt was made. Rather, the Borough immediately hired IT consultants. They have every right to do so, however, only in limited circumstances does OPRA permit them to shift costs associated with production to Plaintiff. Navigating Facebook and using everyday computer skills is not one of those situations.

In opposition, the Borough details “phases” of work required to produce the documents and defines this work as “a substantial manipulation of information technology.” See Licameli Certification at ¶ 6. The actions taken in the video and listed in Licameli’s certification describe basic Internet navigation and administrative duties, nothing more. See Licameli Certification at ¶ 6. “Navigating Facebook”, “labeling images”, “organizing folders” and “documenting pages” are ordinary tasks that do not require substantial effort. Contra Signature Info. Sols., LLC, supra, (App. Div. Mar. 18, 2016). To hold otherwise would permit the special service charge to be levied in nearly every OPRA request that is submitted.

To comply with Plaintiff’s request, the Borough did not need to compile complicated data or produce documents that they don’t routinely use. Contra Signature Info. Sols., LLC v. Jersey City Mun. Utils. Auth., No. A-1503-14T2, 2016 N.J. Super. Unpub. LEXIS 594, at *13 (App. Div. Mar. 18, 2016) (holding a special service charge was justified because the OPRA request required defendants to compile data not readily available and provide it in a specific electronic format Defendant did not routinely use, develop or maintain). Rather, production of the requested

documents required the use of ordinary computer skills. See Rozzi Certification at ¶ 15-16. Rozzi notes that production of the screenshots would take no more than a few minutes. Rozzi Certification at ¶ 8. The Supreme Court has held that where it would take no more than two to three minutes of time to produce documents, a substantial amount of manipulation has not occurred. See Paff v. Galloway Tp., 229 N.J. 340, 354 (2017). Here, the production of the screenshots from Facebook aligns with this precedent. Production only requires a few minutes of basic computer skills. Thus, a substantial manipulation of information technology has not occurred.

Even if the court were to accept that production of the requested documents required two hours of time, it is still not the kind of substantial time envisioned by OPRA. OPRA permits a special service charge where a request “involves an extraordinary expenditure of time and effort.” N.J.S.A. § 47:1A-5(c). The Government Records Council has held that a request that only takes a few hours to fulfill is not “extraordinary.” See, e.g., Diamond v. Twp. Of Old Bridge, GRC Complaint No. 2003-15 (Feb. 18, 2004) (holding four (4) hours of time to respond to OPRA request was not “extraordinary”); Carter v. Franklin Fire District No. 1, GRC Complaint No. 2013-281/2013-282/2013-283 (Oct. 28, 2014) (holding eight (8) hours of time to search for emails did not justify a special service charge); Verry v. Borough of South Bound Brook, GRC Complaint No. 2010-105/2010-106 (Dec. 20, 2011) (holding three (3) hours of time to review records was not “extraordinary”).

Lastly, OPRA requests increasingly involve information technology in this digital age. Those hired to serve as an OPRA Records Custodian, thus, must have the requisite skills to reply to requests for government records located on such digital platforms. If a custodian does not have such skills, the municipality has the ability to rely on information technology experts or hire third

party help. However, shifting costs related to same requires the presence of a substantial amount of manipulation on information technology.

Conclusion

For the foregoing reasons, Plaintiff's requests for disclosure under OPRA are granted without the requirement of a special service charge pursuant to N.J.S.A. § 47:1A-5(d). The Court finds (1) producing the responsive records does not require a "substantial amount of manipulation or programming of information technology" and (2) the imposition of a service charge is unlawful.

As Plaintiff is the prevailing party under OPRA and is entitled to an award of reasonable attorneys' fees and costs under N.J.S.A. 47:1A-6, counsel shall attempt to agree upon a reasonable quantum of fees. Failing to accomplish same, counsel for Plaintiff shall submit a certification of services to the Court within fourteen (14) days of the date hereof and Defendants, a response, within twenty-one (21) days.

The appropriate Order has been executed.



Bonnie J. Mizdol, A.J.S.C.

EXHIBIT 3



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08615-0819

Toll Free: 866-850-0511
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E-mail: grc@do.state.nj.us
Web Address:
www.nj.gov/grc

2003-15

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- [Findings and Recommendations of Executive Director](#)

Final Decision

Mike Diamond,
Complainant
v.
Township of Old Bridge,
Custodian of Record

Complaint No. 2003-15

Decision Issued: February 18, 2004
Decision Effective: February 28, 2004

At its February 10, 2004 public meeting, the Government Records Council ("Council") considered the February 4, 2004 Findings and Recommendations of Executive Director and all related documentation submitted by the parties. The Council voted to adopt the entirety of said Findings and Recommendations. The Council dismissed the complaint finding that:

1. The custodian has not met its burden in explaining the "Special service charge" of \$247.20 was warranted and access should be permitted.
2. Since the requestor no longer seeks the records, the issue of providing access is moot.

Vincent P. Maltese, Chairman
Government Records Council

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

Virginia Hook, Secretary
Government Records Council

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Findings and Recommendations of Executive Director

GRC No. 2003-15

Mike Diamond
Complainant
v.
Township of Old Bridge
Custodian of Records

Relevant Records Requested: Information Concerning the Sale or Trade-In of Weapons within Police Department since 1985

Request made: January 22, 2003

Response made: January 29, 2003

Custodian: Stella Ward, Deputy Clerk

GRC Complaint Filed: February 3, 2003

Executive Director's Recommendation

Denial of access is still an issue in this case even though the requestor no longer wants copies of the requested documents because the requestor maintains there is a timeliness issue for adjudication. The denial of access issue presented is whether the Township's accommodation of the request would involve an extraordinary expenditure of time and effort that would warrant a special service charge of approximately \$247.20, pursuant to N.J.S.A. 47:1A-5c. If the service charge was not warranted, then the custodian denied access. In order to secure the requested documents, the Township explained that a police officer would be needed for approximately four hours to research and prepare the requested information. The requestor asserted that the charge was excessive and questioned the need for using a police officer instead of a clerk to secure the requested information.

The Acting Executive Director respectfully recommends the Council dismiss the case for the following reasons:

1. The custodian has not met its burden in explaining the "Special service charge" of \$247.20 was warranted and access should be permitted.
2. Since the requestor no longer seeks the records, the issue of providing access is moot.

Statement of Facts

January 22, 2003 - Records Request

The requestor made a records request with the Old Bridge Clerk's Office requesting information concerning the sale or trade-in of weapons within the police department. Specifically, Mr. Diamond was looking for the serial number, caliber, manufacturer and model number of each weapon traded-in or sold. In his request, he mentioned that more than 40 law enforcement agencies had submitted this information, including the state police, who were advised by the attorney general that this information was a public record.

January 23, 2003 - Internal Memo from Clerk to Police Chief

The memo indicates that it would take the Police Sergeant Lynch approximately four hours of overtime to research and prepare the information for the requestor and the total cost of labor would be \$247.20.

January 29, 2003 - Response Sent to Requestor

The custodian stated in written response to the requestor that the police department charges a \$247.20 fee for the research involved in the request. She also requested that the fee be paid in advance of any work. If the research should take more than four hours, the requestor would be notified of any additional costs and if it should take less time, the custodian will reimburse the requestor.

January 31, 2003 - Internal Letter from Custodian to Police Chief

This letter notified the Police Chief of a correspondence received from the requestor regarding the Township's response. The requestor inquired whether a clerk, who doesn't make as much per hour, could perform the research instead of the police officer.

The memo had a written response from the Chief stating that the response stays the same.

February 3, 2003 - Denial of Access Filed

The requestor filed a complaint to the GRC. In this complaint, they argued that there was no need to put a highly paid officer on overtime to find these records. No other departments had levied this type of fee on the requestor.

March 18, 2003 - Mediation Declined by Requestor

May 9, 2003 - Statement of Information and Supplemental Requested by GRC

May 12, 2003 - Supplement to Complaint Submitted

This information highlighted the cost involved for performing the request. The requestor criticized the Township of Old Bridge for providing no explanation as to why it would take four hours of overtime to acquire the information. "As in the Krisberg v. Paterson police case," Mr. Diamond claimed that this information should not involve a substantial amount of effort pursuant to NJSA.

May 13, 2003 - Statement of Information Submitted

The Clerk explained that the information would have been provided to Mr. Diamond however, the Township needed to receive a deposit for this work beforehand. She also wrote that the requestor asked for a clerk to be assigned, to perform the research, who doesn't make as much per hour.

October 20, 2003 - Custodian's Letter to Requestor

The custodian wrote a letter to the requestor indicating that records for years 1995, 1997 and 1998 was located and would be forwarded to the requestor after they received \$2.25; the rest of the information would be researched in the Township's archives and would take them time to attain.

October 22, 2003 - Requestor's Response

The requestor responded by saying that the information was submitted in such an untimely manner that the information was no longer needed.

October 22, 2003 - Custodian's Letter to the Department of Law and Public Safety

The custodian wrote a letter to the Department of Law and Public Safety stating that she had received a letter from the requestor indicating his decision to discontinue the request. The custodian asked if she was to understand that the complaint was no longer in effect and that we are required to do nothing more.

October 31, 2003 - Requestor's verbal notification to GRC to continue case

Requestor informed the Acting Executive Director by phone that he wanted the case to be continued for the Council to address the timeliness issue.

January 6, 2004 - Custodian's Explanation Regarding Timeliness Issue

The custodian explained that the request was dated 11/15/02 and received by fax on January 23, 2003. The custodian indicated that the request was forwarded to their police department and a response was given to the requestor on January 29, 2003. The custodian indicated that a number of attempts were made to contact the requestor concerning the request and associated fees. The custodian explained that in October 2003, the police chief "arranged to have a part of Mr. Diamond's request available for him" and informed the requestor of the documents that were available. The custodian indicated that the documentation covered a period of 18 years and contended that the requestor was advised the request would require "a lot of time to compile."

January 23, 2004 - GRC request for detailed explanation of extraordinary service fees

The GRC requested from the custodian a detailed explanation of the \$247.20 fees charged for services in providing the requested documents for the Council to properly assess your claim of "an extraordinary expenditure of time and effort..." pursuant to N.J.S.A. 47:1A-5c that included the number of hours, number of days, the number of documents pertaining to the request, a detailed explanation concerning any research or special services required and associated costs.

January 23, 2004 - Custodian's response to GRC 1/23/04 letter request

Legal Issues and Considerations

The issue of denial of access is before the Council even though the requestor no longer wants copies of the requested documents, because the requestor maintains that there is a timeliness issue for Council adjudication. The denial of access issue before the Council is whether, pursuant to N.J.S.A. 47:1A-5c(1), the Township's accommodation of the request would involve an extraordinary expenditure of time and effort that would warrant a special service charge of approximately \$247.20. If the Council finds that the special service charge was warranted, then the Complaint should be dismissed as there was no denial of access, as the Township had a right to require payment before producing the documents. See N.J.S.A. 47:1A-5b. If the Council determines that the special service charge was not warranted, then the Township denied access, because it did not provide access to the requested documents within seven business days at a charge pursuant to the rates set forth in N.J.S.A. 47:1A-5b. In that event, the Council can then determine whether the matter warrants a hearing on the imposition of a possible penalty pursuant to N.J.S.A. 47:1A-11.

The Division of Law issued advice to the Government Records Council on March 14, 2003, which, in part, discussed the meaning of the word "extraordinary" as used in N.J.S.A. 47:1A-5(c). The relevant portions of that advice are restated here as it applies to the Council's determination of whether the Township's accommodation of the request would involve an extraordinary expenditure of time and effort that would warrant a special service charge:

OPRA does not contain a definition of what is 'extraordinary' for purposes of N.J.S.A. 47:1A-5c. In the absence of a specific legislative definition or clear legislative intent to the contrary, statutory words are to be given their 'generally accepted meaning.' N.J.S.A. 1:1-1. See Stryker Corp. v. Director, Div. of Taxation, 168 N.J. 138, 156 (2001). Thus, the word 'extraordinary' in N.J.S.A. 47:1A-5c is to be given its usual meaning of 'beyond what is common or usual.' Webster's II New Riverside University Dictionary. The meaning of 'extraordinary' under OPRA is fact-specific and is not amenable to a general definition which is applicable to all cases. Instead of establishing a bright line definition, the question of what constitutes an extraordinary amount of time must be assessed on a case-by-case basis. See Atty. Gen. Op. 11-2000 (Florida), *supra* (appropriateness of special service charge must be decided on a case-by-case basis). See also The Courier Post v. Lenape Regional High School District, *supra* ('extraordinary' requirement of N.J.S.A. 47:1A-5c fulfilled where staff expended 100 hours over 10 to 15 days, to retrieve and assemble thousands of documents). Cf. Krisburg v. Paterson, No. 2002-55 (Government Records Council 2002) (in absence of contrary factual information, one hour is not 'substantial' and 'extensive' for purposes of N.J.S.A. 47:1A-5d).

With regard to the calculation of the amount of the special service charge, the statute simply states that the charge shall be 'reasonable' and based on 'the actual direct cost' incurred. N.J.S.A. 47:1A-5c. In The Courier Post, *supra*, Judge Sweeney did not make a determination as to the amount the school district could charge. He suggested, in *dicta*, that it would be appropriate to calculate the hourly wage rates of the clerical and professional employees involved in all tasks related to accommodating the document inspection request, and to multiply those figures by the total hours spent by these employees. *Id.* at 13.

This formula is consistent with the underlying intent of the statute, which, as discussed above, is to permit recoupment of actual costs where an extraordinary effort is necessary. In view of this purpose, it is reasonable to include costs attributable to both clerical and supervisory work, where participation by supervisory employees was required. See N.J.S.A. 47:1A-5d (where record is converted into another medium, charge may include cost of both clerical and supervisory personnel). Significantly, the Florida statute upon which N.J.S.A. 47:1A-5c is based permits supervisory costs to be captured in the special service charge. Section 119.07(1)(b). A Florida court has construed this statute as permitting a charge for the 'supervisory personnel necessary to properly review the materials for possible application of exemptions.' Herskovitz v. Leon County, No. 98-22 (Fla. 2d Cir. 1998) (unreported, cited in Florida's Government in the Sunshine Manual (2003)). Thus, where a special service charge is permitted, whether for copies of documents or for inspection, it may be appropriate, depending on the circumstances, to include within the charge the time spent by higher-level employees in reviewing which documents could be disclosed.

Therefore, the Council should apply the above law and advice to the facts of this case to determine whether the Township's accommodation of the request would involve an extraordinary expenditure of time and effort that would warrant a special service charge.

Conclusion

The Acting Executive Director respectfully recommends that the Council dismiss the case because:

1. The custodian has not met its burden in explaining the "Special service charge" of \$247.20 was warranted and access should be permitted.
2. Since the requestor no longer seeks the records, the issue of access is moot.

Paul F. Dice, Acting Executive Director

Government Records Council

Dated: February 4, 2004

[1] N.J.S.A. 47:1A-5c provides: "Whenever 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. The requestor shall have the opportunity to review and object to the charge prior to it being incurred."

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EXHIBIT 4



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

January 31, 2017 Government Records Council Meeting

Jeff Carter
 Complainant

Complaint Nos. 2013-281, 2013-282 and
 2013-283

v.

Franklin Fire District No. 1 (Somerset)
 Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council should find that the supplemental time expended for the request for reconsideration was not reasonable. The Council should thus adjust the total fee to \$1,080.00, representing 3.6 hours of service at \$300.00 per hour, or a decrease of 1.1 hours totaling \$330.00.
2. Having found the additional fee awarded for Complainant Counsel’s partially successful request for reconsideration, the Council should include the supplemental time in its total fee award. **Accordingly, the Council should amend its total fee award to \$11,580.00, representing the adjusted figure of 38.6 hours of service at \$300 per hour, or an increase of 3.6 hours for a total of \$1,080.00.**
3. As was the case with the Council’s initial adjudication on fees, no enhancement should be awarded because same was not requested.

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 31st Day of January, 2017

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 3, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Supplementary Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
January 31, 2017 Council Meeting**

**Jeff Carter¹
Complainant**

**GRC Complaint Nos. 2013-281,
2013-282 and 2013-283²**

v.

**Franklin Fire District No. 1 (Somerset)³
Custodial Agency**

Records Relevant to Complaint:

July 1, 2013 OPRA request: Electronic copies via e-mail of correspondence (including but not limited to e-mails, text messages, letters, memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 ("FFD") and/or its agents (including all commissioners, legal counsel, and Ms. Dawn Cuddi) from April 12, 2013, to July 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board's "Resolution of Violation" issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01.

August 1, 2013 OPRA requests:

1. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian's Counsel, Bruce Padula, and Joseph Danielsen from May 1, 2013, to August 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board's "Resolution of Violation" issued on April 12, 2013, in Wickman.
2. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian's Counsel, and Bruce Padula from May 1, 2013, to August 1, 2013, regarding The Palace at Somerset, Somerset, NJ.

Custodian of Record: Tim Szymborski

Request Received by Custodian: July 2, 2013, and August 2, 2013

Response Made by Custodian: July 8, 2013, and August 11, 2013

GRC Complaint Received: September 23, 2013

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Background

December 13, 2016 Council Meeting:

At its December 13, 2016 public meeting, the Council considered the December 6, 2016 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, found that:

1. Regarding Complainant Counsel's first prevailing party point, he failed to establish that the complaint should be reconsidered based on illegality or a mistake. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Counsel did not provide any evidence to support that the Council erroneously disallowed charges for acknowledgement notifications. Further, Counsel failed to support that the Council was required to accept and consider his November 16, 2015 "new evidence" brief. Thus, these portions of the request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Regarding Complainant's Counsel second point about the fee application charge, he has established that the complaint should be reconsidered based on a mistake (as opposed to illegality). Counsel showed, although partially, that the Council acted arbitrarily, capriciously, or unreasonably in not allowing for the fee application charge in accordance with precedential case law. See Courier News v. Hunterdon Cnty. Prosecutor's Office, 378 N.J. Super. 539, 547 (App. Div. 2005). Thus, this portion of the request for reconsideration should be accepted. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
3. The Council should amend its conclusion No. 2 to restore 1.3 hours at a rate of \$300.00 to the award. **Accordingly, the Council should temporarily amend its fee award to Complainant's Counsel to \$10,500.00, representing the adjusted figure of 35 hours of service at \$300 per hour, or an increase of \$390.00.**
4. Because the Complainant's Counsel prevailed on a portion of his May 25, 2016 request for reconsideration, the Complainant and/or Counsel is entitled to an award of minimally additional fees. **Thus, the Complainant and/or Counsel shall submit an updated fee application, based on the limited scope of prevailing fees associated with the original fee application, within five (5) business days following receipt of**

this Order. The Custodian shall have five (5) business days from the date of service of the updated fee application to object to the attorney's fees requested.

Procedural History:

On December 14, 2016, the Council distributed its Interim Order to all parties. On December 20, 2016, the Complainant's Counsel filed a Supplemental Fee Application Brief ("Brief") in support of his application for additional fees. Therein, Complainant's Counsel sought an additional \$1,980.00 representing 6.6 hours of work at \$300.00 per hour. The Complainant's Counsel also asked that the GRC consider the Brief in light of his previously filed Certification of Services on June 29, 2015.

On December 21, 2016, Custodian's Counsel filed an opposition to the Brief ("Opposition"). Therein, the Custodian's Counsel disputed six (6) entries totaling 2.6 hours wherein Complainant's Counsel sought reimbursement for reviewing the GRC's scheduling notices for this complaint (April 21, and December 6, 2016) and reviewing the Council's decisions and discussing with the Complainant (May 2, and December 14, 2016). The Custodian's Counsel argued that the Complainant's Counsel would have reviewed and discussed these documents regardless of the outcome. The Custodian's Counsel also disputed two (2) entries totaling 0.2 wherein the Complainant's Counsel sought reimbursement for seeking an extension of time to submit a request for reconsideration (May 13, 2016). The Custodian's Counsel contended that the FFD should not be required to pay fees for extension requests based on the Complainant's and/or Counsel's own circumstances. The Custodian's Counsel noted that, although extensions are granted routinely, any fees associated with them should not be considered as part of the prevailing party analysis. The Custodian's Counsel thus asserted that Complainant Counsel's requested fees should be reduced \$840.00, or from \$1,980.00 to \$1,410.00.

Analysis

Compliance

At its December 13, 2016 meeting, the Council ordered the Complainant and/or Counsel to submit an updated fee application. The Council also provided the Custodian an opportunity to submit opposition to the updated fee application. On December 14, 2016, the Council distributed its Interim Order to all parties, providing the Complainant five (5) business days to comply with the terms of said Order and the Custodian five (5) days beyond receipt of the updated fee application to submit opposition. Thus, the Complainant's response was due by close of business on December 21, 2016.

On December 20, 2016, the fourth (4th) business day after receipt of the Council's Order, the Complainant's Counsel submitted his Brief. On December 21, 2016, the first (1st) business day after receipt of the Brief, the Custodian's Counsel submitted his opposition. Thus, the parties both timely filed their respective submissions.

Prevailing Party Attorney's Fees

A. Evaluation of Supplemental Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter, Counsel is seeking an additional fee award of \$1,980, representing 6.6 hours of work at \$300 per hour. This fee is in addition to the current awarded amount of \$10,500, representing the adjusted figure of 35 hours of service at \$300 per hour.

The GRC notes that Complainant Counsel's time sheet actually reflects 4.7 hours, and not 6.6 as he stated in the Brief. Thus, the total requested fees based on the actual time calculation present in the timesheet submitted total \$1,410.00 (at \$300.00 per hour).

The GRC notes that the Council has already determined that \$300 is a reasonable fee for attorneys of Complainant Counsel's experience representing clients before the GRC. *See Carter v. Franklin Fire Dist. No. 1 (Somerset)*, GRC Complaint No. 2013-281, *et seq.* (Final Decision dated April 26, 2016). Accordingly, the GRC finds that Counsel's hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.

b. Time Expended

To be compensable, hours expended must not be excessive, redundant, or otherwise unnecessary. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The New Jersey District Court, in *PIRG v. Powell Duffryn Terminals*, 1991 U.S. Dist. LEXIS 21199 (D.N.J. 1991), reduced plaintiff's trial preparation fee request by 50%. The *PIRG* court, noting that plaintiff's counsel had tried numerous similar cases, found the work performed to be both redundant and unnecessary.

In accordance with N.J.A.C. 105-2.13(b), Counsel's time sheet provides descriptions of the work performed. N.J.A.C. 105-2.13(b)(5); *See* Brief. Most of Counsel's entries are broken into time increments of one tenth of an hour, with an accompanying description of the work performed. *Id.* The time entries memorialize communications, both oral and written, and identify the entity or individual with whom Counsel communicated. Similarly, the notations for reviewing and drafting of pleadings identify the specific document examined or drafted and the time spent on the task.

The GRC awarded fees to the Complainant based upon the Council's ruling of prevailing party status. By necessity, the GRC must conduct a review of a fee application on a case-by-case basis. The GRC conducted a review of the Brief and considered each time entry. The time expended by Counsel was evaluated in light of the work performed and the benefit to the Complainant, if any, and to determine whether it was reasonable when considered by the standards set forth in R.P.C. 1.5(a). While the Council does not comment on the strategy of an

attorney's representation of his client, the Council indeed recognizes that that any fees awarded will be paid from public funds. See, HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 167 (January 26, 1996).

The Brief supplements Complainant Counsel's previously filed Certification of Services to the requirements of N.J.A.C. 1:105-2.13(b). The Custodian's Counsel submitted objections to several of the entries. In reviewing the Brief and Opposition, the GRC finds the total supplemental hours excessive and the fee not reasonable, as set forth in the following table:

Date of time entry	Description of Service	Time Expended (in tenths of an hour)/ and Amount Billed at \$300/hour in dollars		Findings from Fee Application Review	Adjusted Entry: Time allowed and total Amount at \$300.00/hour	
4/21/2016	Receive and review GRC's e-mail scheduling consolidated matters for GRC's April 26, 2016 meeting.	0.1	\$30.00		0.1	\$30.00
5/02/2016	Receive and review GRC's April 26, 2016 Final Decision.	1.0	\$300.00		1.0	\$300.00
5/02/2016	Discuss Final Decision with Complainant.	0.2	\$60.00		0.2	\$60.00
5/13/2016	File a request for an extension of time to submit a request for reconsideration.	0.1	\$30.00	The GRC previously disallowed for this charge in <u>Carter v. Franklin Fire Dist. No. 1 (Somerset)</u> , GRC Complaint No. 2011-228 (March 2014) at 11, "the time expended requesting an extension is not chargeable to the Custodian." However, the Complainant needed an extension because he did not receive a copy of the table attached to the Council April 26, 2016 Final Decision. Thus, the Complainant's Counsel reasonably should be allowed to recoup cost for this extension request.	0.1	\$30.00
5/13/2016	Receive and review GRC's e-mail granting extension of time to submit a request for reconsideration.	0.1	\$30.00	See above.	0.1	\$30.00
5/20/2016	Legal research (limited to portion of reconsideration addressing attorney's fees): <u>New Jerseyans for Death Penalty Moratorium v. NJ Dep't of Corr.</u> , 185 N.J. 137 (2005) <u>R.M. v. Supreme Court of NJ</u> ,	N/C	\$0.00	Complainant's Counsel noted that he included a charge for this research as part of his supplemental fee brief in <u>Carter v. Franklin Fire Dist. No. 1 (Somerset)</u> , GRC Complaint No. 2013-328, <i>et seq.</i>	N/C	\$0.00

	190 N.J. 1 (2007) <u>Sitar Co. v. 222 Realty, Inc.</u> , 2005 N.J. Super. Unpub LEXIS 646 (App. Div. 2005)(<i>cert.</i> <i>denied</i> 186 N.J. 257 (2006))					
5/21/2016	Draft request for reconsideration brief – 3 pages (12-14).	0.6	\$180.00	Of the four (4) paragraphs addressing fees, just over half of was also present in the reconsideration submitted relevant to <u>Carter</u> , GRC 2013-328, <i>et seq.</i> for which Counsel is receiving the full 0.6 hours of time. Based on this duplication of work, the Complainant’s Counsel should only receive fees for half of the proposed time, or 0.3.	0.3	\$90.00
5/23/2016	Draft GRC’s request for reconsideration form.	0.2	\$60.00		0.2	\$60.00
5/25/2016	File request for reconsideration.	0.1	\$30.00	Charging an attorney’s hourly rate to perform basic administrative functions is unreasonable. Thus, this action is not chargeable. The Council previously denied similar charges in <u>Carter</u> , GRC 2013-328, <i>et seq.</i> (Interim Order dated April 26, 2016) at 7 (“[The Complainant’s Counsel] also billed for . . . transmission of filings via e-mail. Those services are administrative and should be performed, if at all, by a para-professional charging far less than \$300.00 an hour.”).	0.0	\$0.00
12/6/2016	Receive and review GRC’s e-mail scheduling consolidated matters for GRC’s December 13, 2016 meeting.	0.1	\$30.00		0.1	\$30.00
12/14/2016	Receive and review GRC’s December 13, 2016 Interim Order.	1.0	\$300.00		1.0	\$300.00
12/14/2016	Discuss Interim Order with Complainant, including reply, reconsideration, and interlocutory options thereto.	0.2	\$60.00		0.2	\$60.00
12/17/2016	Draft six (6) page Brief, but only charging for 2 of 6 pages related to the fee award, consistent with the Council’s December 13, 2016 Interim	0.4	\$120.00	Of the six (6) pages, only one (1) page addresses fees. The rest rehash old arguments addressed on multiple occasions by the Council.	0.2	\$60.00

	Order.			For this reason, the Complainant's Counsel should only receive fees for that one (1) page, or half of 0.4.		
12/19/2016	Draft detailed time sheet.	0.5	\$150.00	The total charge is unreasonable because the Complainant's Counsel made few modifications to the time sheet he submitted in <u>Carter</u> , GRC 2013-328. A comparison of the time sheet from that complaint and here offers sufficient evidence, if not highlighted by the fact that the total hours and amount from <u>Carter</u> , GRC 2013-328 are mistakenly present at the end of the time sheet. Thus, only the minimum chargeable time is reasonable.	0.1	\$30.00
12/20/2016	File Brief and timesheet.	0.1	\$30.00	See 5/25/2016 entry.	0.0	\$0.00
Total:		6.6	\$1,980.00		--	--
Actual Total:		4.7	\$1,410.00		3.6	\$1,080.00

In sum, the GRC conducted a review of the Brief and found that the additional time spent on the file exceeds the allowable time in accordance with its prior decision in this matter. Initially, the Complainant's Counsel appeared to carry over the total hours and fee amount requested from Carter, GRC 2013-328, which led to an inflation of \$570.00 representing 1.9 hours at a rate of \$300.00. Moreover, some of Complainant Counsel's charges reflect administrative actions not reasonably performed at a rate of \$300.00 an hour. Further, the Complainant's Counsel included additional arguments in the Brief not relevant to the fee issue, which the Council has previously addressed multiple times. The Complainant's Counsel also misrepresented the page amount in the Brief addressing additional fees. Finally, the time allotted to prepare the timesheet was reduced due to the amount of work necessary to make minimal changes from the timesheet submitted in Carter, GRC 2013-328.

With respect to Custodian Counsel's opposition, the GRC does not agree. The GRC elaborated above on its position that charges for communications regarding an extension of time were reasonable in this instance. However, awarding all other additional charges is consistent with the GRC's past evaluation of this consolidated complaint.

For the reasons set forth above, the Council should find that the supplemental time expended for the request for reconsideration was not reasonable. The Council should thus adjust the total fee to \$1,080.00, representing 3.6 hours of service at \$300.00 per hour, or a decrease of 1.1 hours totaling \$330.00.

Having found the additional fee awarded for Complainant Counsel's partially successful request for reconsideration, the Council should include the supplemental time in its total fee award. **Accordingly, the Council should amend its total fee award to \$11,580.00, representing the adjusted figure of 38.6 hours of service at \$300 per hour, or an increase of 3.6 hours for a total of \$1,080.00.**

2. Enhancement Analysis

As was the case with the Council's initial adjudication on fees, no enhancement should be awarded because same was not requested.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Council should find that the supplemental time expended for the request for reconsideration was not reasonable. The Council should thus adjust the total fee to \$1,080.00, representing 3.6 hours of service at \$300.00 per hour, or a decrease of 1.1 hours totaling \$330.00.
2. Having found the additional fee awarded for Complainant Counsel's partially successful request for reconsideration, the Council should include the supplemental time in its total fee award. **Accordingly, the Council should amend its total fee award to \$11,580.00, representing the adjusted figure of 38.6 hours of service at \$300 per hour, or an increase of 3.6 hours for a total of \$1,080.00.**
3. As was the case with the Council's initial adjudication on fees, no enhancement should be awarded because same was not requested.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

January 24, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

December 13, 2016 Government Records Council Meeting

Jeff Carter
 Complainant

Complaint No. 2013-281, 2013-282
 and 2013-283

v.

Franklin Fire District No. 1 (Somerset)
 Custodian of Record

At the December 13, 2016 public meeting, the Government Records Council (“Council”) considered the December 6, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Regarding Complainant Counsel’s first prevailing party point, he failed to establish that the complaint should be reconsidered based on illegality or a mistake. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. See D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Counsel did not provide any evidence to support that the Council erroneously disallowed charges for acknowledgement notifications. Further, Counsel failed to support that the Council was required to accept and consider his November 16, 2015 “new evidence” brief. Thus, these portions of the request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); See D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Regarding Complainant’s Counsel second point about the fee application charge, he has established that the complaint should be reconsidered based on a mistake (as opposed to illegality). Counsel showed, although partially, that the Council acted arbitrarily, capriciously, or unreasonably in not allowing for the fee application charge in accordance with precedential case law. See Courier News v. Hunterdon Cnty. Prosecutor’s Office, 378 N.J. Super. 539, 547 (App. Div. 2005). Thus, this portion of the request for reconsideration should be accepted. D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).



3. The Council should amend its conclusion No. 2 to restore 1.3 hours at a rate of \$300.00 to the award. **Accordingly, the Council should temporarily amend its fee award to Complainant's Counsel to \$10,500.00, representing the adjusted figure of 35 hours of service at \$300 per hour, or an increase of \$390.00.**
4. Because the Complainant's Counsel prevailed on a portion of his May 25, 2016 request for reconsideration, the Complainant and/or Counsel is entitled to an award of minimally additional fees. **Thus, the Complainant and/or Counsel shall submit an updated fee application, based on the limited scope of prevailing fees associated with the original fee application, within five (5) business days following receipt of this Order. The Custodian shall have five (5) business days from the date of service of the updated fee application to object to the attorney's fees requested.**

Interim Order Rendered by the
Government Records Council
On The 13th Day of December, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: December 14, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

*Reconsideration
Prevailing Party Attorney's Fees*
**Supplemental Findings and Recommendations of the Executive Director
December 13, 2016 Council Meeting**

**Jeff Carter¹
Complainant**

**GRC Complaint Nos. 2013-281,
2013-282 and 2013-283²**

v.

**Franklin Fire District No. 1 (Somerset)³
Custodial Agency**

Records Relevant to Complaint:

July 1, 2013 OPRA request: Electronic copies via e-mail of correspondence (including but not limited to e-mails, text messages, letters, memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 ("FFD") and/or its agents (including all commissioners, legal counsel, and Ms. Dawn Cuddi) from April 12, 2013, to July 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board's "Resolution of Violation" issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01.

August 1, 2013 OPRA requests:

1. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian's Counsel, Bruce Padula, and Joseph Danielsen from May 1, 2013, to August 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board's "Resolution of Violation" issued on April 12, 2013, in Wickman.
2. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian's Counsel, and Bruce Padula from May 1, 2013, to August 1, 2013, regarding The Palace at Somerset, Somerset, NJ.

Custodian of Record: Tim Szymborski

Request Received by Custodian: July 2, 2013, and August 2, 2013.

Response Made by Custodian: July 8, 2013, and August 11, 2013.

GRC Complaint Received: September 23, 2013.

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Background

April 26, 2016 Council Meeting:

At its April 26, 2016 public meeting, the Council considered the April 19, 2016 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 Council finds that \$300 is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-153 (2013). Accordingly, the Council finds that Counsel's hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.
2. The Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth above and within the chart attached, the Council finds that the time expended was not reasonable. The Council finds that 31.8 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. Carter v. Franklin Fire Dist. #1 (Somerset), GRC 2011-228 (March 2014). Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Council awards fees to Mr. Bermingham, Counsel to the Complainant, in the amount of \$10,110.00 representing 33.7 hours of service at \$300 per hour.**
3. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded

Procedural History:

On May 2, 2016, the Council distributed its Final Decision to all parties. On May 3, 2016, the Complainant sought a copy of "Exhibit A" from the Final Decision, which comprised a copy of the GRC's fee application table, because he did not receive same as part of the Final Decision. On May 13, 2016, the Complainant reiterated his request to obtain a copy of "Exhibit A," and requested additional time to weigh his options, either to seek reconsideration or appeal the decision. On the same day, the GRC provided the Complainant with a copy of "Exhibit A" and granted his request for an extension until May 27, 2016.

On May 25, 2016, the Complainant's Counsel filed a request for reconsideration of the Council's April 26, 2016 Final Decision based on illegality and a mistake.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council

Jeff Carter v. Franklin Fire District #1 (Somerset), 2013-281, 282, and 283 Reconsideration Prevailing Party Attorney's Supplemental Findings and Recommendations of the Executive Director

decision. Requests must be in writing, delivered to the Council, and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's April 26, 2016 Final Decision on May 25, 2016, two (2) business days prior to the expiration of the extended deadline. Therefore, the request to reconsider the April 26, 2016 Final Decision was timely received.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D’Atria, 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

The Complainant's Counsel submitted a sixteen (16) page brief as part of his request for reconsideration. However, he only addressed the Council's April 26, 2016 Final Decision awarding prevailing party attorney's fees over three (3) of the sixteen (16) pages. The remainder of Complainant Counsel's brief either rehashes previously submitted arguments or posits additional arguments from pending complaints currently before the Office of Administrative Law (“OAL”).⁴

Non-Prevailing Party Fee Issues

The Complainant's Counsel took issue with the fact that the GRC did not initially acknowledge his November 16, 2015 “new evidence” letter brief or address the arguments therein in its Final Decision. However, as noted in its Final Decision, the GRC's regulations simply did not provide for briefs contesting prior decisions beyond the time afforded either to

⁴ The Complainant's Counsel submitted as part of his brief an Initial Decision in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288, *et seq.* However, OAL has not returned that complaint to the GRC in order to determine whether it would accept, reject, or modify said decision.

request reconsideration or file an appeal. N.J.A.C. 5:105-2.10; N.J.A.C. 5:105-2.11. Here, the Council ordered the Custodian to disclose certain records on October 28, 2014; Complainant's Counsel received that Order on October 29, 2014. In its subsequent May 26, 2015 Interim Order, the Council found that the Custodian did not knowingly or willfully violate OPRA; Complainant's Counsel received that Order on May 28, 2015. Had the Complainant's Counsel wanted the Council to reconsider either of those decisions, the applicable regulations required him to file same within ten (10) business days of his receipt of the Orders. N.J.A.C. 5:105-2.10(a) - (e). Also, the Complainant's Counsel did not consider the fact that the Council has the discretion not to consider any attempted new arguments or briefs that are filed out of time and several months following a decision.

The Complainant's Counsel cited to NJ Court Rules R. 4:49-2 as legal basis to accept his November 16, 2015 brief. The Rule permits a motion for rehearing or reconsideration to those seeking to alter or amend a judgment or order. According to the Rule, assuming *arguendo* that it is applicable to OPRA and agency adjudications, a moving party is required to make such a motion within twenty (20) days after judgment or service on the parties. In Gilleran v. Rutherford Downtown Partnership Inc., 2014 N.J. Super. Unpub. Lexis 2188 (Law Div. 2014), the Appellate Division held that "in the interest of justice and in the exercise of sound discretion," the courts may consider new or additional information that the moving party "could not have provided on first application." Id. at 10 (*citing* R. 4:49-2). However, the Gilleran Court also denied defendants' motion for reconsideration.

Prevailing Party Fee Issues

The Complainant's Counsel raised only three instances where the Council denied a portion of his fee. First, the Complainant's Counsel provided a copy of a January 11, 2014 letter brief and the GRC's acknowledgement e-mail as proof that the GRC received the brief and that the awarded fee should be amended accordingly. The Complainant's Counsel also disputed the Council's decision denying fees generated from his various requests that the GRC acknowledge receipt of his initial filings. Second, Counsel disputed the denial of 1 hour for preparation of his fee application, noted on his May 17, 2015 entry in his statement of services

The GRC rejects the first point regarding the January 11, 2014 letter brief. First, the GRC was unable to locate the letter brief during review of Complainant Counsel's fee application because it was sent in regard to seventeen (17) complaints filed by the Complainant. However, the GRC did eventually locate the brief, based only on exhibits that Complainant Counsel had attached to the request for reconsideration.⁵ However, the letter brief did not factor into any one of those specific complaints but rather asked the GRC produce procedural guidelines for conflicts of interest; however, the Council already previously declined to do so here. Carter, GRC 2013-281, *et seq.* (Interim Order dated April 28, 2015) at 2. Thus, notwithstanding that the GRC's original reason for not awarding fees for this brief was in error, the decision was correct: the letter brief was not a contributing factor to the Complainant's status as a prevailing party here (or any other to which Counsel's brief referred). For this reason, the letter brief does not factor

⁵ In the letter brief, the Complainant's Counsel discussed his opinion that the FFD's actions in the complaints were similar to alleged OPRA disclosure issues raised by media outlets in connection with the "Bridgegate" matter. Jeff Carter v. Franklin Fire District #1 (Somerset), 2013-281, 282, and 283 Reconsideration Prevailing Party Attorney's Supplemental Findings and Recommendations of the Executive Director

into the casual nexus between these complaints and the relief ultimately achieved. Mason, 196 N.J. 51.

The GRC also rejects the second point of Complainant Counsel's request for reconsideration. The standard for determining reasonableness of fees is the New Jersey Rules of Professional Conduct, which require an adjudicator to address, among other factors, "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." R.P.C. 1.5(a). In its Final Decision, the Council denied fees associated with the acknowledgement e-mails because they appeared to constitute unnecessary "make-work." Instead, the Complainant's Counsel requested that the GRC send an acknowledgement of receipt for each of the subject Denial of Access Complaints. The Complainant's Counsel billed 0.2 hours of time to review each e-mail. However, the Complainant's Counsel submitted no proof to support that the "time and labor required" to review and address receipt notifications was necessary. As an example of the unnecessary nature of this task and contrary to his letter brief arguments, Counsel could have utilized an e-mail program (such as Microsoft Outlook®) that generated an automated "received" notification. This would have negated his need to request and subsequently review acknowledgement correspondence.

The Complainant's Counsel also disputed the Council's denial of fees for the June 2, and June 9, 2015 entries noted in his statement of services. The June 2, 2015 entry was for "Attention to files, reconcile work in all three cases and consolidate billing where appropriate or courtesy." First, Complainant's Counsel did not properly seek payment by billing three times for the same work. Therefore, consolidating and reconciling his billing was a necessary correction of his own record keeping. Neither his client nor the FFD are responsible for internal record-keeping processes. As for the "attention to files" portion of the entry, such work is obviously too vague to compensate.

However, the GRC accepts the second point of Complainant Counsel's request for reconsideration. The Appellate Division determined in Courier News v. Hunterdon Cnty. Prosecutor's Office, 378 N.J. Super. 539, 547 (App. Div. 2005), that prevailing party attorneys may be compensated for their time spent preparing fee applications so long as the amount charged is reasonable. *See also* Tanksley v. Cook, 360 N.J. Super. 63, 67 (App. Div. 2003); H.I.P. (Heightened Independence & Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 163 (Law Div. 1996); Robb v. Ridgewood Bd. of Educ., 269 N.J. Super. 394, 411 (Ch. Div. 1993); Council Enterps., Inc. v. Atlantic City, 200 N.J. Super. 431, 443 (Law Div. 1984)). Here, Complainant's Counsel's charge of 1.3 hours to prepare the prevailing party fee application is reasonable and therefore eligible for reimbursement. Accordingly, the Council shall revise its prior counsel fee award to include an additional \$390 as payment for 1.3 work hours in preparing the fee application.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See* Cummings, 295 N.J. Super. at 384.

Regarding Complainant Counsel's first prevailing party point and remaining issues, he failed to establish that the complaint should be reconsidered based on illegality or a mistake. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. See D'Atria, 242 N.J. Super. at 401. Counsel did not provide any evidence to support that the Council erroneously disallowed charges for acknowledgement notifications. Further, Counsel failed to support that the Council was required to accept and consider his November 16, 2015 "new evidence" brief. Thus, these portions of the request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

However, regarding Complainant's Counsel second point about the fee application charge, he has established that the complaint should be reconsidered based on a mistake (as opposed to illegality). Counsel showed, although partially, that the Council acted arbitrarily, capriciously, or unreasonably in not allowing for the fee application charge in accordance with precedential case law. See Courier News, 378 N.J. Super. at 547. Thus, this portion of the request for reconsideration should be accepted. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Accordingly, the Council should amend its conclusion No. 2 to restore 1.3 hours at a rate of \$300.00 to the award. **Accordingly, the Council should amend its fee award, pending Complainant's Counsel's new submission as discussed below, to \$10,500.00, representing the adjusted figure of 35 hours of service at \$300 per hour, or an increase of \$390.00.**

Additionally, because the Complainant's Counsel prevailed on a portion of his May 25, 2016 request for reconsideration, the Complainant and/or Counsel is entitled to an award of minimally additional fees. **Thus, the Complainant and/or Counsel shall submit an updated fee application, based on the limited scope of prevailing fees associated with the original fee application, within five (5) business days following receipt of this Order. The Custodian shall have five (5) business days from the date of service of the updated fee application to object to the attorney's fees requested.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Regarding Complainant Counsel's first prevailing party point, he failed to establish that the complaint should be reconsidered based on illegality or a mistake. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Counsel did not provide any evidence to support that the Council erroneously disallowed charges for acknowledgement notifications. Further, Counsel failed to support that the Council was required to accept and consider his November 16, 2015 "new evidence" brief. Thus, these portions of the request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of

Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. Regarding Complainant's Counsel second point about the fee application charge, he has established that the complaint should be reconsidered based on a mistake (as opposed to illegality). Counsel showed, although partially, that the Council acted arbitrarily, capriciously, or unreasonably in not allowing for the fee application charge in accordance with precedential case law. See Courier News v. Hunterdon Cnty. Prosecutor's Office, 378 N.J. Super. 539, 547 (App. Div. 2005). Thus, this portion of the request for reconsideration should be accepted. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
3. The Council should amend its conclusion No. 2 to restore 1.3 hours at a rate of \$300.00 to the award. **Accordingly, the Council should temporarily amend its fee award to Complainant's Counsel to \$10,500.00, representing the adjusted figure of 35 hours of service at \$300 per hour, or an increase of \$390.00.**
4. Because the Complainant's Counsel prevailed on a portion of his May 25, 2016 request for reconsideration, the Complainant and/or Counsel is entitled to an award of minimally additional fees. **Thus, the Complainant and/or Counsel shall submit an updated fee application, based on the limited scope of prevailing fees associated with the original fee application, within five (5) business days following receipt of this Order. The Custodian shall have five (5) business days from the date of service of the updated fee application to object to the attorney's fees requested.**

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

December 6, 2016



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

April 26, 2016 Government Records Council Meeting

Jeff Carter
 Complainant

Complaint Nos. 2013-281, 2013-282 and
 2013-283

v.

Franklin Fire District No. 1 (Somerset)
 Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council ("Council") considered the March 22, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council finds that \$300 is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-153 (2013). Accordingly, the Council finds that Counsel's hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.
2. The Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth above and within the chart attached, the Council finds that the time expended was not reasonable. The Council finds that 31.8 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. Carter v. Franklin Fire Dist. #1 (Somerset), GRC 2011-228 (March 2014). Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Council awards fees to Mr. Bermingham, Counsel to the Complainant, in the amount of \$10,110.00 representing 33.7 hours of service at \$300 per hour.**
3. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

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 26th Day of April, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 2, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting**

**Jeff Carter¹
Complainant**

**GRC Complaint Nos. 2013-281,
2013-282 and 2013-283²**

v.

**Franklin Fire District No. 1 (Somerset)³
Custodial Agency**

Records Relevant to Complaint:

July 1, 2013 OPRA request: Electronic copies via e-mail of correspondence (including but not limited to e-mails, text messages, letters, memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 ("FFD") and/or its agents (including all commissioners, legal counsel, and Ms. Dawn Cuddi) from April 12, 2013, to July 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board's "Resolution of Violation" issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01.

August 1, 2013 OPRA requests:

1. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian's Counsel, Bruce Padula, and Joseph Danielsen from May 1, 2013, to August 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board's "Resolution of Violation" issued on April 12, 2013, in Wickman.
2. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian's Counsel, and Bruce Padula from May 1, 2013, to August 1, 2013, regarding The Palace at Somerset, Somerset, NJ.

Custodian of Record: Tim Szymborski

Request Received by Custodian: July 2, 2013, and August 2, 2013.

Response Made by Custodian: July 8, 2013, and August 11, 2013.

GRC Complaint Received: September 23, 2013.

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Background

May 26, 2015 Council Meeting:

At its May 26, 2015 public meeting, the Council considered the May 19, 2015 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, found that:

1. The Custodian complied with the Council's April 28, 2015 Interim Order because he responded in the extended time frame, providing the responsive e-mails with redactions in accordance with the Council's *in camera* examination and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian failed to bear his burden of proof that the proposed special service charge was reasonable and warranted. Further, he unlawfully denied access to portions of the eight (8) withheld e-mails. However, the Custodian timely complied with the Council's October 28, 2014, January 30, 2015, and April 28, 2015 Interim Orders. Also, the Custodian lawfully denied access to content within the eight (8) e-mails. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's October 28, 2014, and April 28, 2015 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council required disclosure of records, in whole or part, through both Interim Orders. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Procedural History:

On May 27, 2015, the Council distributed its Interim Order to all parties. On June 12, 2015, the Complainant's Counsel John A. Birmingham Jr., Esq. ("Counsel") filed a Certification of Services in support of his application for fees.

On June 29, 2015, Counsel for the Custodian Dominic P. DiYanni, Esq. ("Mr. DiYanni") filed an opposition to the Application ("Opposition"), combining his arguments with those he made in opposition to Counsel's fees in another case, Carter v. Franklin Fire Dist. #2 (Somerset), GRC Complaint Nos. 2013-328, 329, 330, and 331 (May 2015) ("Carter 328-331").

Analysis**Compliance**

At its May 26, 2015 meeting, the Council permitted the "Complainant, or his attorney . . . to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)." The Council further added that "[t]he Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the fees requested. N.J.A.C. 5:15-2.13(d)." On May 27, 2015, the Council distributed its Interim Order to all parties. Accordingly, the Complainant's application for fees was due by June 24, 2015. Counsel timely filed and served his application for fees on June 12, 2015.⁴

On June 29, 2015, the tenth (10th) business day following receipt of the Counsel's application for fees, Mr. DiYanni timely filed his opposition to the application for attorney's fees. Mr. DiYanni argued that the only issue in the consolidated case and Carter 328-331 was whether the Custodian was entitled to charge a special service charge. He argued that Counsel could have filed a single Complaint, as all matters concerned the same respondent, all claimed denial of access because of the Custodian's demand for a special service charge, and all involved similar or identical subject matter in several of the cases. Further, Mr. DiYanni argued that, owing to what he called Counsel's "lining up" seven separate complaints that could have been filed as one, Counsel was seeking to maximize his return on prevailing party attorney's fees, which Mr. DiYanni finds unreasonable. Mr. DiYanni also argued that, in addition to some of Counsel's arguments and briefs being duplicative, some work was connected to unnecessary ancillary issues, such as conflict of interest. Finally, he argued that none of Counsel's work for preparing his application for Counsel fees should be compensated.

Prevailing Party Attorney's Fees

Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't. of Corrections, ("NJDPM") 185 N.J. 137, 152 (2005)

⁴ Counsel sent his e-mail after normal business hours on Friday, June 12. Therefore, the GRC will assume that all parties received the e-mail on Monday, June 15, 2015.

(quoting Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted)). However, this principle is not without exception. NJDPM, 185 N.J. at 152. Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.’” NJDPM, 185 N.J. at 153 (quoting, Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989)).

New Jersey public policy, as codified in OPRA, is that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” NJDPM, 185 N.J. at 153 (citing N.J.S.A. 47:1A-1). OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6. *See generally* NJDPM, 185 N.J. 137. “By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” *Id.* at 153. (quoting Courier News v. Hunterdon Cty. Prosecutor’s Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found that the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006). Further, the Council found that a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Accordingly, the Council ruled that the Complainant was a prevailing party entitled to an award of a reasonable attorney’s fees and directed the Complainant to file an application for attorney’s fees.

A. Standards for Fee Award

The starting point “. . . for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate,” a calculation known as the lodestar. NJDPM, 185 N.J. at 153. (quoting Rendine v. Pantzer, 141 N.J. 292, 324 (1995) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983))). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. *See* Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting, Rendine, 141 N.J. at 337). The fee-shifting statutes do not contemplate that the losing party has to pay for the learning experience of attorneys for the prevailing party. *See*, HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at

Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing, Council Enter., Inc. v. Atl. City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Once the reasonable number of hours has been ascertained, the court should adjust the lodestar in light of the success of the prevailing party in relation to the relief sought. See Walker, 415 N.J. Super. at 606 (citing Furst v. v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004)). The loadstar amount may be adjusted, either upward or downward, depending on the degree of success achieved. See NJDPM, 185 N.J. at 153-55. OPRA neither mandates nor prohibits enhancements. Rivera v. Office of the Cnty. Prosecutor, 2012 N.J. Super. Unpub. LEXIS 2752 *1, * 10 (Law Div. Dec. 2012) (citing NJDPM, 185 N.J. at 157 (applying Rendine, 141 N.J. 292 (1995) to OPRA)). However, “[b]ecause enhancements are not preordained . . . enhancements should not be made as a matter of course.” NJDPM, 185 N.J. at 157.

“[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting, Hensley, 461 U.S. at 435). Notwithstanding that position, the NJDPM court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar” but cautioned that “[o]rdinarily the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157.

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at *10-11 (citing Furst, 182 N.J. 1, 21-22 (2004) (applying R.P.C. § 1.5(a))).

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

Rivera, at 11 (citing R.P.C. 1.5(a)).

In addition, N.J.A.C. 5:105-2.13(b) sets forth the information that counsel must provide in an application seeking fees in an OPRA matter. Providing the requisite information required

by that Code section permits the reviewing tribunal to analyze the reasonableness of the requested fee.

Finally, the Appellate Division has aptly noted that “[i]n fixing fees against a governmental entity, the judge must appreciate the fact that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded [must] serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting Furey v. Cnty. of Ocean, 287 N.J. Super. 42, 46 (1996)).

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter, Counsel is seeking a fee award of \$22,050, representing 73.5 hours of work at \$300 per hour. Counsel supports the hourly rate through a recitation of his experience and years in practice. Certification of John A. Bermingham, Esq., dated June 12, 2015 at ¶ 7 (Exhibit B).

The Council finds that \$300 is a reasonable fee for attorneys of Counsel’s experience representing clients before the GRC. Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-153 (2013) (The rate of \$300 is reasonable for a[n] [OPRA] practitioner . . . in this geographical area.) Accordingly, the Council finds that Counsel’s hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.

b. Time Expended

In support of his request for fees, Counsel submitted a log of his time. For the period from “September 2, 2013, through June 12, 2015” Counsel billed a total of 73.5 hours for work on the file.⁵ This time included reviewing the file, conducting legal research, drafting the complaint and accompanying briefs, reviewing e-mail correspondence to and/or from the GRC and/or the client, communicating with the client regarding the action, drafting a letter brief and request for reconsideration, drafting a separate brief alleging “new evidence,” and drafting a certification for the fee application.

In accordance with N.J.A.C. 105-2.13(b), Counsel’s time-sheets provide descriptions of the work performed. N.J.A.C. 105-2.13(b)(5); Certification of John Bermingham dated June 12, 2015. Most of Counsel’s entries are broken into time increments of one tenth of an hour, with an accompanying description of the work performed. Id. The time entries memorialize communications, both oral and written, and identify the entity or individual with whom Counsel

⁵ The GRC notes that Complainant’s Counsel made a computation error in his favor. The total hours billed on GRC 2013-283 add to 11.1 hours, not the 11.3 hours listed by Complainant’s Counsel. The total amount therefore totals 73.3 hours, not 73.5.

communicated. Similarly, the notations for reviewing and drafting the pleadings identify the specific document examined or drafted and the time spent on the task.

The GRC awarded fees to the Complainant based upon the Council's ruling of prevailing party status. By necessity, a review of a fee application must be conducted on a case-by-case basis. The GRC conducted a review of the fee application submitted. Each time entry was reviewed and considered. The time expended by Counsel was evaluated in light of the work performed and the benefit to the Complainant, if any, and to determine whether it was reasonable when considered by the standards set forth in R.P.C. 1.5(a). While the Council does not comment on the strategy of an attorney's representation of his client, the Council indeed recognizes that any fees awarded will be paid from public funds. See, HIP, 291 N.J. Super. at 167. The recommendations of the Executive Director following review of the application are set forth in the attached chart. Although the fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b), the GRC finds the total hours excessive and the total fee not reasonable, as discussed below.

For example, Counsel billed 22.2 hours for a fee of \$6,660.00. That billing represents approximately 30% of the total fee, which is applied to drafting the three Complaints and respective briefs, which were filed simultaneously on September 23, 2013. As set forth in the attached table, the GRC finds that the brief filed with Carter, GRC 2013-281, was largely copied and transplanted into the briefs filed with Carter, GRC 2013-282, and Carter, GRC 2013-283 (cited respectively as "2013-281," "2013-282," and "2013-283"). For example, the brief for 2013-281, from the middle of the page 18 through page 40, contains language that is strikingly similar to the brief for 2013-282, pages 11 through page 33. More than one half of the brief for 2013-282 is copied with the same language and sequence from the brief for 2013-281. Further, and as noted in the attached table, the briefs for 2013-282 and 2013-283 are virtual copies of each other. Accordingly, the fees for drafting the three Complaints and three briefs were unreasonable. Therefore, the fee for those services for 2013-282 is reduced from 7.0 hours to 3.0 hours, and the fee for those services for 2013-283, virtually identical to 2013-282, is reduced from 6.8 hours to 0.4 hours. Thus the total fee for drafting the three Complaints and the respective briefs is reduced from the 22.2 hours and \$6,660 down to 11.8 hours and \$3,540.

Counsel also chose to bill for legal research for which he billed in previous cases where counsel fees had been awarded. He also billed for reviewing standard forms, such as acknowledgements of receipts and for transmission of filings via e-mail. Those services are administrative and should be performed, if at all, by a para-professional charging far less than \$300.00 an hour. Counsel also billed for services which appear to serve no legitimate purpose, such as three separate discussions with his client concerning a standard form letter sent by the GRC to the Custodian – the letter in question merely asks the Custodian to fill out the SOI. Council's billing in that instance was also unreasonable, given that the substance of the GRC's letter did not change. Moreover, Counsel's client has filed approximately 70 prior Complaints and would therefore be reasonably familiar with both the procedure and the standard form letter. The GRC therefore disallows those charges.

In addition, between February 15, 2015, and March 19, 2015, Counsel billed 11.1 hours of services, totaling \$3,330.00 in fees that were connected to a request for reconsideration, filed with a 27 page brief, and a request to submit “new evidence,” supported with a 24 page brief. Counsel fees must be awarded for services that resulted in a prevailing party ruling – to wit, actions that brought about a change in the Custodian’s behavior. Thus, fees for services rendered in conjunction with a denied motion for reconsideration are not valid and are not chargeable to the Custodian. Carter v. Franklin Fire Dist. #1 (Somerset), GRC 2011-228 (March 2014). Here the Council’s relief, granted to the Complainant after its initial finding on October 28, 2014, was entirely based on the *in-camera* review, and the Council granted no additional relief owing to the Reconsideration, which was denied contemporaneously with the relief granted after the *in-camera* review. There is no factual nexus between the results ultimately achieved, the motion for reconsideration, or the request to consider new evidence. Carter, 2013-228. Teeters, 387 N.J. Super. 432; Mason, 196 N.J. 51. Thus, while the Reconsideration motion was filed prior to the GRC’s ruling of prevailing party status, it was ultimately denied, therefore providing no further benefit to the Complainant and causing no change in the Custodian’s behavior.

Further, the GRC did not render any new findings or rulings after the “new evidence” was submitted but rather only considered compliance issues. Moreover, the submission by Counsel did not result in any change in the GRC’s decision or in the consequent behavior of the Custodian. Thus, fees billed in conjunction for same are also not chargeable to the Custodian. See Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006).

Finally, Counsel billed for the cost of preparing the fee application. Although federal bankruptcy law might permit such charges, the GRC finds that charging for time spent preparing a fee application does not advance the purpose of OPRA. Applications for fees are submitted after the Council has ruled on the merits of a case and have no impact on the GRC’s ruling. The GRC is not persuaded that time spent preparing a fee application correlates to any action that brought about a change in the Custodian’s behavior. Additionally, the GRC notes that Counsel has previously prepared and filed a boilerplate certification of services that he uses in other cases pending before the GRC and that awarding a fee for preparing the application in every such case would clearly be unreasonable. The GRC therefore disallows those charges.

Accordingly the Council finds that Counsel’s fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth above and within the attached chart, the Council finds that the time expended was not reasonable. The Council finds that 33.7 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. Carter, GRC 2011-228. Teeters, 387 N.J. Super. 432; Mason, 196 N.J. 51. **Accordingly, the Council award fees to Mr. Bermingham, Counsel to the Complainant, in the amount of \$10,110.00 representing 33.7 hours of service at \$300 per hour.**

2. Enhancement Analysis

Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Council finds that \$300 is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-153 (2013). Accordingly, the Council finds that Counsel's hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.
2. The Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth above and within the chart attached, the Council finds that the time expended was not reasonable. The Council finds that 31.8 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. Carter v. Franklin Fire Dist. #1 (Somerset), GRC 2011-228 (March 2014). Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Council awards fees to Mr. Bermingham, Counsel to the Complainant, in the amount of \$10,110.00 representing 33.7 hours of service at \$300 per hour.**
3. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Prepared By: Ernest Bongiovanni
Staff Attorney

April 19, 2016⁶

⁶ This complaint was prepared for adjudication at the Council's March 29, 2016 meeting; however, the complaint could not be adjudicated due to lack of a quorum.



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

May 26, 2015 Government Records Council Meeting

Jeff Carter
 Complainant

Complaint Nos. 2013-281, 2013-282
 and 2013-283

v.

Franklin Fire District No. 1 (Somerset)
 Custodian of Record

At the May 26, 2015 public meeting, the Government Records Council (“Council”) considered the May 19, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s April 28, 2015, Interim Order because he responded in the extended time frame providing the responsive e-mails with redactions in accordance with the Council’s *in camera* examination and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian failed to bear his burden of proof that the proposed special service charge was reasonable and warranted. Further, he unlawfully denied access to portions of the eight (8) withheld e-mails. However, the Custodian timely complied with the Council’s October 28, 2014, January 30, 2015, and April 28, 2015, Interim Orders. Also, the Custodian lawfully denied access to content within the eight (8) e-mails. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s October 28, 2014, and April 28, 2015, Interim Orders, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council required disclosure of records, in whole or part, through both Interim Orders. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a



reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Interim Order Rendered by the
Government Records Council
On The 26th Day of May, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 28, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 26, 2015 Council Meeting**

**Jeff Carter¹
Complainant**

**GRC Complaint Nos. 2013-281,
2013-282 and 2013-283²**

v.

**Franklin Fire District No. 1 (Somerset)³
Custodial Agency**

Records Relevant to Complaint:

July 1, 2013 OPRA request: Electronic copies via e-mail of correspondence (including but not limited to e-mails, text messages, letters, memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 (“FFD”) and/or its agents (including all commissioners, legal counsel, and Ms. Dawn Cuddi) from April 12, 2013, to July 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01.

August 1, 2013 OPRA requests:

1. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel, Bruce Padula, and Joseph Danielsen from May 1, 2013, to August 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013, in Wickman.
2. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel, and Bruce Padula from May 1, 2013, to August 1, 2013, regarding The Palace at Somerset, Somerset, NJ.

Custodian of Record: Tim Szymborski

Request Received by Custodian: July 2, 2013, and August 2, 2013.

Response Made by Custodian: July 8, 2013, and August 11, 2013.

GRC Complaint Received: September 23, 2013.

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Background

April 28, 2015, Council Meeting:

At its April 28, 2015, public meeting, the Council considered the April 21, 2015, *In Camera* and Reconsideration 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 Custodian complied with the Council's January 30, 2015, Interim Order because he responded in the extended time frame, providing the GRC all eight (8) e-mails for an *in camera* review and a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *in camera* examination set forth in the above table reveals the Custodian has lawfully denied access to the bodies of the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian must disclose all other portions of the eight (8) requested e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
5. The Complainant's Counsel has failed to establish in his request for reconsideration of the Council's January 30, 2015, Interim Order that either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant's Counsel failed to establish that the complaint should be reconsidered based on mistake, new evidence, or illegality. The Complainant's Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, the Complainant's Counsel failed to submit any compelling arguments to refute the Council's analysis on the issues presented. Thus, the Complainant's Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

6. 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On April 29, 2015, the Council distributed its Interim Order to all parties. On May 4, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that he was providing eight (8) e-mails with redactions in accordance with the Council's *in camera* examination to all parties.

On May 5, 2015, the GRC advised the Custodian that he had not fully complied with the Council's Order because the redactions made to the e-mails were not visually obvious. Wolosky v. Vernon Twp. Bd. of Educ. (Sussex), GRC Complaint No. 2009-57 (Interim Order dated December 22, 2009); Wolosky v. Twp. of Randolph (Morris), GRC Complaint No. 2010-308 (Interim Order dated August 28, 2012). The GRC requested that the Custodian rectify his redactions prior to close of business on May 6, 2015, the last day to comply with the Council's Order. On the same day, the Custodian's Counsel sought an extension until May 8, 2015, to resubmit compliance, which the GRC granted.

On May 7, 2015, the Custodian resubmitted his compliance with the appropriate redactions and certified confirmation of compliance to the Executive Director.

Analysis

Compliance

At its April 28, 2015, meeting, the Council ordered the Custodian to provide to the Complainant eight (8) responsive e-mails in accordance with the Council's *in camera* examination and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On April 29, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 6, 2015.

On May 4, 2015, the third (3rd) business day after receipt of the Council's Order, the Custodian provided those records to all parties and simultaneously submitted certified confirmation of compliance to the Executive Director. However, the Custodian redacted by whiting out the exempt portions of the e-mails, which is not in accordance with OPRA and prior GRC case law. On May 5, 2015, the GRC advised the Custodian of this fact and required him to resubmit the e-mails with visually obvious redactions. On the same day, the Custodian's Counsel requested an extension until May 8, 2015, to respond, which the GRC granted. On May 7, 2015, the Custodian rectified the issue by resubmitting compliance with the appropriate redactions.

Therefore, the Custodian complied with the Council's April 28, 2015, Interim Order because he responded in the extended time frame providing the responsive e-mails with redactions in accordance with the Council's *in camera* examination and simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, the Custodian failed to bear his burden of proof that the proposed special service charge was reasonable and warranted. Further, he unlawfully denied access to portions of the eight (8) withheld e-mails. However, the Custodian timely complied with the Council's October 28, 2014, January 30, 2015, and April 28, 2015, Interim Orders. Also, the Custodian lawfully denied access to content within the eight (8) e-mails. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties, Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.”

However, the Court noted in Mason that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former [Right to Know Law (“RTKL”)] did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring

access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.' Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

In the matter currently before the Council, the Complainant disputed the proposed special service charge and requested that the Council require disclosure of the responsive records. In its October 28, 2014, Interim Order, the Council determined that the proposed charge was unreasonable and required disclosure of all responsive records, as requested by the Complainant. The Custodian complied with this Order on December 2, 2014. However, the Custodian withheld access to eight (8) e-mails, to which the Complainant's Counsel objected. The Council conducted an *in camera* review of said records and determined that the Custodian unlawfully denied access to portions of same. In its April 28, 2015, Interim Order, the Council ordered disclosure of the e-mails with redactions. The Custodian complied with this Order on May 7, 2015. Based on the forgoing, the Complainant is a prevailing party entitled to an award of attorney's fees.

Therefore, pursuant to the Council's October 28, 2014, and April 28, 2015, Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council required disclosure of records, in whole or part, through both Interim Orders. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's April 28, 2015, Interim Order because he responded in the extended time frame providing the responsive e-mails with redactions in accordance with the Council's *in camera* examination and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian failed to bear his burden of proof that the proposed special service charge was reasonable and warranted. Further, he unlawfully denied access to portions of the eight (8) withheld e-mails. However, the Custodian timely complied with the Council's October 28, 2014, January 30, 2015, and April 28, 2015, Interim Orders. Also, the Custodian lawfully denied access to content within the eight (8) e-mails. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's October 28, 2014, and April 28, 2015, Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council required disclosure of records, in whole or part, through both Interim Orders. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Dawn R. SanFilippo
Deputy Executive Director

May 19, 2015



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

April 28, 2015 Government Records Council Meeting

Jeff Carter
 Complainant

Complaint Nos. 2013-281, 2013-282,
 and 2013-283

v.

Franklin Fire District No. 1 (Somerset)
 Custodian of Record

At the April 28, 2015 public meeting, the Government Records Council (“Council”) considered the April 21, 2015 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. The Custodian complied with the Council’s January 30, 2015, Interim Order because he responded in the extended time frame, providing the GRC all eight (8) e-mails for an *in camera* review and a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *in camera* examination set forth in the above table reveals the Custodian has lawfully denied access to the bodies of the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian must disclose all other portions of the eight (8) requested e-mails to the Complainant (*i.e.* sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
5. The Complainant’s Counsel has failed to establish in his request for reconsideration of the Council’s January 30, 2015, Interim Order that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant’s Counsel failed to establish that the complaint should be reconsidered based on mistake, new evidence, or illegality. The Complainant’s Counsel has also



failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, the Complainant's Counsel failed to submit any compelling arguments to refute the Council's analysis on the issues presented. Thus, the Complainant's Counsel request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

6. 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of April, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 29, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera and Reconsideration*
Findings and Recommendations of the Executive Director
April 28, 2015 Council Meeting**

**Jeff Carter¹
Complainant**

**GRC Complaint Nos. 2013-281,
2013-282 and 2013-283²**

v.

**Franklin Fire District No. 1 (Somerset)³
Custodial Agency**

Records Relevant to Complaint:

July 1, 2013 OPRA request: Electronic copies via e-mail of correspondence (including but not limited to e-mails, text messages, letters, memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 (“FFD”) and/or its agents (including all commissioners, legal counsel, and Ms. Dawn Cuddi) from April 12, 2013 to July 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01.

August 1, 2013 OPRA requests:

1. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel, Bruce Padula, and Joseph Danielsen from May 1, 2013, to August 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013 in Wickman.
2. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel and Bruce Padula from May 1, 2013 to August 1, 2013, regarding The Palace at Somerset, Somerset, NJ.

Custodian of Record: Tim Szymborski

Request Received by Custodian: July 2, 2013 and August 2, 2013

Response Made by Custodian: July 8, 2013 and August 11, 2013

GRC Complaint Received: September 23, 2013

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Records Submitted for *In Camera* Examination:

- E-mail from Mr. Goldberg to Custodian's Counsel dated May 4, 2013.
- E-mail from the Custodian's Counsel to Mr. Goldberg dated May 4, 2013.
- E-mail from Mr. Goldberg to Custodian's Counsel and Mr. Danielsen dated May 5, 2013.
- E-mail from Mr. Wickman to Custodian's Counsel dated May 16, 2013.
- E-mail from Custodian's Counsel to Mr. Wickman dated May 16, 2013.
- E-mail from Custodian's Counsel to Mr. Padula dated May 22, 2013.
- E-mail from Mr. Padula to Custodian's Counsel dated May 22, 2013.
- E-mail from Custodian's Counsel to Mr. Padula dated May 22, 2013.

Background**January 30, 2015 Council Meeting:**

At its January 30, 2015, public meeting, the Council considered the January 20, 2015, 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, found that:

1. The Custodian complied with the Council's October 28, 2014 Interim Order because he responded in the extended time frame, providing responsive records to the Complainant via his preferred method of delivery (e-mail), submitting a document index of the e-mails for which the Custodian asserted exemptions applied, and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The GRC must conduct an *in camera* review of the eight (8) responsive e-mails to determine the validity of the Custodian's assertion that the same are attorney-client privileged and exempt from disclosure under OPRA. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁶ "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."

4. 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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On February 3, 2015, the Council distributed its Interim Order to all parties.

On February 9, 2015, the Custodian's Counsel stated that the document index attached to the FFD's compliance package was actually sent to the Complainant on June 12, 2013 as part of a June 3, 2013 OPRA request not relevant to these complaints concerning a similar subject matter. The Custodian's Counsel offered to provide the eight (8) e-mails for an *in camera* review but requested an extension of ten (10) business days to do so.

On the same day, the Complainant's Counsel e-mailed the GRC, arguing that the eight (8) e-mails are absolutely related to the complaints and should be disclosed for an *in camera* review. Further, the Complainant's Counsel asserted that the FFD's request for an extension is unreasonable because they identified, redacted, and disclosed the e-mails on December 4, 2014.

On February 13, 2015, the Complainant's Counsel sought an update on whether the GRC intended to allow for an extension of time. On the same day, the GRC granted Custodian's Counsel an extension until February 25, 2015. On February 15, 2015, the Complainant's Counsel requested a ten (10) business day extension to submit a request for reconsideration, which the GRC granted on February 18, 2015.

On February 24, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that he provided nine (9) copies of the responsive e-mails to the GRC for an *in camera* review in accordance with the Council's Order.

On February 26, 2015, the Custodian filed a request for reconsideration of the Council's January 30, 2015, Interim Order based on a mistake, new evidence, and illegality. The Complainant's Counsel stated that he is seeking reconsideration of the Council's Order based on the following:⁷

1. The Council's failure to consider conflicts of interest denied the Complainant his due process rights during the adjudication process;
2. The Council's decision that it would have been impossible to submit a document index without incurring the disputed special service charge has no basis in law and is inapposite to Appellate precedent; and

⁷ The Complainant's Counsel cites to numerous alleged violations of the Open Public Meetings Act ("OPMA") as incriminating evidence against the Custodian. However, the GRC has no authority over OPMA and will not address these allegations. N.J.S.A. 47:1A-7(b); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.* (Interim Order dated March 25, 2014) at 6.

3. The Council's decision to allow the Custodian to provide all responsive records together unfairly hampered the Complainant's right to unfettered access consistent with how same were originally requested (in three separate OPRA requests).

The Complainant's Counsel argued that, if left uncorrected, these issues will have a severely negative impact on the public's right to access under OPRA. Further, the Complainant's Counsel argued that these complaints should be referred to the Office of Administrative Law for a fact-finding hearing consistent with the Council's prior decision in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-284 *et seq.* (Interim Order dated March 25, 2014) and Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.* (Interim Order dated March 25, 2014).

Analysis

Compliance

At its January 30, 2015, meeting, the Council ordered the Custodian to submit nine (9) copies of the responsive e-mails and a document index for an *in camera* review. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On February 3, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on February 10, 2015.

On February 9, 2015, the Custodian's Counsel sought an extension of ten (10) business days, which the GRC granted. On February 25, 2015, the last business day of the extension, the GRC received the Custodian's compliance package, which included all eight (8) e-mails along with a document index and certified confirmation of compliance.

Therefore, the Custodian complied with the Council's January 30, 2015, Interim Order because he responded in the extended time frame providing the GRC all eight (8) e-mails for an *in camera* review, a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

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. N.J.S.A. 47:1A-6.

OPRA provides that a "government record" shall not include "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1 (emphasis added). To assert attorney-client privilege, a party must show that there was a confidential communication between lawyer and client in the course of that relationship and in professional confidence. N.J.R.E. 504(1). Such

communications are only those “which the client either expressly made confidential or which [one] could reasonably assume under the circumstances would be understood by the attorney to be so intended.” State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989). However, merely showing that “the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear.” Id. at 220-21.

In the context of public entities, the attorney-client privilege extends to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. See Tractenberg v. Twp. Of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

The GRC first notes that these eight (8) e-mails fall within the parameters of the Complainant's July 1, and August 1, 2013 OPRA requests. The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record No.	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ⁸
1.	E-mail from Mr. Goldberg to Custodian's Counsel, dated May 4, 2013. *Note: Record No. 2 and 3 included in chain.	Mr. Goldberg seeks legal advice from Counsel on a recent decision.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.

⁸ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted, a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

2.	E-mail from the Custodian's Counsel to Mr. Goldberg, dated May 4, 2013. *Note: Record No. 1 and 3 included in chain.	Counsel provides legal advice and direction about a recent decision.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
3.	E-mail from Mr. Goldberg to Custodian's Counsel and Mr. Danielsen, dated May 5, 2013. *Note: Record No. 1 and 2 included in chain.	Mr. Goldberg seeks additional legal advice from Counsel on a recent decision.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
4.	E-mail from Mr. Wickman to Custodian's Counsel, dated May 16, 2013. *Note: Record No. 5 included in chain.	Mr. Wickman seeks legal advice from Counsel on a recent decision.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
5.	E-mail from Custodian's Counsel to Mr. Wickman, dated May 16, 2013. *Note: Record No. 4 included in chain.	Counsel provides legal advice in response to Mr. Wickman's request.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
6.	E-mail from Custodian's	Counsel discusses litigation and	Attorney-client privileged	The body of the e-mail is exempt because it

	Counsel to Mr. Padula, dated May 22, 2013. *Note: Record No. 7 and 8 included in chain.	appeal strategy with Mr. Padula, special counsel to the FFD.	material. <u>N.J.S.A.</u> 47:1A-1.1.	contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
7.	E-mail from Mr. Padula to Custodian's Counsel, dated May 22, 2013. *Note: Record No. 6 and 8 included in chain.	Mr. Padula discusses litigation and appeal strategy with Counsel.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
8.	E-mail from Custodian's Counsel to Mr. Padula, dated May 22, 2013. *Note: Record No. 6 and 7 included in chain.	Counsel provides directive and legal advice to Mr. Padula.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.

Additionally, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record.

Thus, the Custodian must disclose all other portions of the eight (8) responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Acad. Charter Sch. (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council, and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant's Counsel filed the request for reconsideration of the Council's Order dated January 30, 2015, on February 26, 2015, two (2) business days prior to the expiration of the extended time frame to submit same.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

As the moving party, the Complainant's Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. The Complainant's Counsel failed to establish that the complaint should be reconsidered based on a mistake, new evidence, or illegality. The Complainant's Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. Specifically, the Complainant's Counsel failed to submit any compelling arguments to refute the Council's analysis on the issues presented. Thus, the Complainant's Counsel request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Knowing & Willful

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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's January 30, 2015, Interim Order because he responded in the extended time frame, providing the GRC all eight (8) e-mails for an *in camera* review and a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *in camera* examination set forth in the above table reveals the Custodian has lawfully denied access to the bodies of the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian must disclose all other portions of the eight (8) requested e-mails to the Complainant (*i.e.* sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
5. The Complainant's Counsel has failed to establish in his request for reconsideration of the Council's January 30, 2015, Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant's Counsel failed to establish that the complaint should be reconsidered based on mistake, new evidence, or illegality. The Complainant's Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, the Complainant's Counsel failed to submit any compelling arguments to refute the Council's analysis on the issues presented. Thus, the Complainant's Counsel request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990);

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

6. 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

April 21, 2015



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

January 30, 2015 Government Records Council Meeting

Jeff Carter
 Complainant
 v.

Complaint Nos. 2013-281, 2013-282
 and 2013-283

Franklin Fire District No. 1 (Somerset)
 Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council ("Council") considered the January 20, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council's October 28, 2014 Interim Order because he responded in the extended time frame providing responsive records to the Complainant via his preferred method of delivery (e-mail), submitted a document index of the e-mails for which the Custodian asserted exemptions applied, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The GRC must conduct an *in camera* review of the eight (8) responsive e-mails to determine the validity of the Custodian's assertion that the same are attorney-client privileged and exempt from disclosure under OPRA. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. 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.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of January, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 3, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

**Jeff Carter¹
Complainant**

**GRC Complaint Nos. 2013-281,
2013-282 and 2013-283²**

v.

**Franklin Fire District No. 1 (Somerset)³
Custodial Agency**

Records Relevant to Complaint:

July 1, 2013 OPRA request: Electronic copies via e-mail of correspondence (including but not limited to e-mails, text messages, letters memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 (“FFD”) and/or its agents (including all commissioners, legal counsel and Ms. Dawn Cuddi) from April 12, 2013 to July 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013 in the matter of James Wickman, Docket No. 11-01.

August 1, 2013 OPRA requests:

1. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel, Bruce Padula and Joseph Danielsen from May 1, 2013 to August 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013 in Wickman.
2. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel and Bruce Padula from May 1, 2013 to August 1, 2013, regarding The Palace at Somerset, Somerset, NJ.

Custodian of Record: Tim Szymborski

Request Received by Custodian: July 2, 2013 and August 2, 2013

Response Made by Custodian: July 8, 2013 and August 11, 2013

GRC Complaint Received: September 23, 2013

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Background

October 28, 2014 Council Meeting:

At its October 28, 2014 public meeting, the Council considered the October 21, 2014 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 Custodian has not borne his burden of proof that the payment of a special service charge was reasonable and warranted. Specifically, the evidence does not support that Network Blade was solely capable and required to respond to the OPRA requests, and that an extraordinary amount of time and effort was required. *See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch.*, 360 N.J. Super. 191, 199 (Law Div. 2002); *Carter v. Franklin Fire Dist. No. 1 (Somerset)*, GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame and must identify any records that are redacted and state the basis for redacting same. *See Blau v. Union Cnty.*, GRC Complaint No. 2003-75 (January 2005).
2. **The Custodian shall comply with item No. 1 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 1:4-4,⁴ to the Executive Director.⁵**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On October 29, 2014, the Council distributed its Interim Order to all parties. On November 3, 2014, the Custodian's Counsel sought a thirty (30) day extension due to the voluminous nature of the request and the time it would take the FFD to coordinate retrieval. On November 6, 2014, the GRC granted an extension until December 4, 2014.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

On December 2, 2014, the Custodian responded to the Council's Interim Order. The Custodian certified that attached to his response are the records responsive to the Complainant's three (3) OPRA requests. The Custodian certified that eight (8) e-mails were withheld as attorney-client privileged material. N.J.S.A. 47:1A-1.1.

The Custodian further noted that he believed some type of charge should have been passed to the Complainant because it took two (2) hours to retrieve and review the responsive e-mails. Additionally, the Custodian reiterated from the Statement of Information ("SOI") that he did not knowingly and willfully violate OPRA; rather, the FFD took a legal stance based on OPRA and prior GRC decisions.

On December 4, 2014, the Complainant's Counsel stated that he received responsive records in hard copy, which was contrary to the Complainant's preferred method of delivery (via e-mail). The Complainant's Counsel thus objected to the FFD's deliberate and intentional failure to disclose records electronically and argued that the Custodian failed to comply with the Council's Interim Order. On the same day, the Custodian's Counsel responded via e-mail advising that the FFD would provide the responsive records via e-mail. The Custodian's Counsel noted that he was concerned that the file would be too large to e-mail, but he would attempt to send the records, whether in whole or in multiple files. Subsequent to this e-mail, the Custodian's Counsel forwarded to the Complainant and Complainant's Counsel all records via e-mail (and copied the GRC).

On December 10, 2014, the Complainant's Counsel again objected to the Custodian's compliance. First, Counsel stated that the Complainant filed three (3) separate OPRA requests; however, the Custodian disclosed all records in one file. Thus, it prevented the Complainant from conducting a meaningful review because he had no idea which records corresponded to each of the three (3) OPRA requests. Counsel asserted that the matters were complicated because responsive records relevant to GRC 2013-281 and 2013-282 were disclosed under one (1) divider page. Counsel argued that disclosing the records in this manner is further evidence of a knowing and willful violation. Counsel requested that the GRC require immediate disclosure of the records separately as requested. Counsel asserted that ordering such an action is consistent with the Council's decision in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008)(holding that custodian must respond to each request item individually), which the Custodian and Custodian's Counsel were aware of because Paff, was cited in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-73 (Interim Order dated September 25, 2012). Counsel further requested that, as a matter of public policy, the GRC should, in similarly consolidated matters, order disclosure of records separately to ensure that the complainant can identify those records responsive to the corresponding OPRA requests.

Second, the Complainant's Counsel objected to the eight (8) e-mails for which access was denied because the Custodian failed to provide an adequate document index in the SOI per Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). Counsel noted that he previously argued this point in briefs filed for each complaint. Counsel argued that any asserted privilege at this point is grossly inappropriate because it further delays the disclosure of

responsive records, even with redactions due to a lawful denial.⁶ Counsel contended that the GRC's longstanding precedent requiring an *in camera* review under particular circumstances to determine the validity of the asserted exemptions exacerbates the Custodian's deliberate and intentional efforts to delay disclosure of records that may be unfavorable to the FFD.

Analysis

Compliance

At its October 28, 2014 meeting, the Council ordered the Custodian to disclose all records responsive to the Complainant's three (3) OPRA requests, identify those records with redactions and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On October 29, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 5, 2014.

On November 3, 2014, the third (3rd) business day after receipt of the Council's Order, the Custodian's Counsel sought an extension of thirty (30) days to respond, which the GRC granted until December 4, 2014. On December 2, 2014, the Custodian sent hardcopies of the responsive records to the Complainant and provided certified confirmation of compliance to the GRC. On December 4, 2014, following Complainant Counsel's objection to paper copies of the records (the Complainant's preferred method of delivery was electronic via e-mail) the Custodian submitted electronic copies of same to the Complainant and GRC.

Thereafter, the Complainant's Counsel argued that the Custodian did not comply because he produced all records without providing sufficient clarity as to which records corresponded with each OPRA request at issue. He further argued that the Custodian inappropriately exempted access to eight (8) e-mails unlawfully by failing to submit a document index in the SOI.

The GRC rejects the Complainant Counsel's first assertion. The GRC reviewed the compliance packet and found that it was easily able to identify the manner in which the records were provided. Specifically, the Complainant filed three (3) complaints with each corresponding to one (1) of the three (3) OPRA requests at issue, at which point the GRC consolidated same based on the commonalty of parties and issues. In complying with the Council's Order, the Custodian grouped the records for the first two (2) OPRA requests under the divider page "Responsive Records for GRC 2013-281 & 2013-282." The GRC notes that both of these OPRA requests sought correspondence between similar individuals regarding the same subject for an overlapping time frame of April 12, 2013 to August 1, 2013.⁷ The responsive e-mails are

⁶ The Complainant's Counsel also objected to the Council's declination of conflict of interest issues based on N.J.S.A. 47:1A-7(b). He further requested that the Council reverse its opinion and adjudicate such issues. However, Complainant Counsel's request to reconsider this issue is deficient because same was not submitted as a request for reconsideration per the GRC's regulations. N.J.A.C. 5:105-2.10. Further, the Council has already declined to this address based on a plain reading of OPRA.

⁷ The GRC notes that in instances where OPRA requests for the same records overlapped in time, the GRC has not required a custodian to produce duplicate copies of the same records for each request. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013) at 6.

provided in reverse chronological order from August 1, 2013 to May 4, 2013. The Custodian attached the records responsive to the third (3rd) OPRA request under the divider page “Responsive Records for GRC 2013-283.” Thus, the GRC is satisfied that the Custodian provided the Complainant with the responsive records in an appropriate manner.

Notably, the Complainant’s Counsel argued that requiring the Custodian to separate responsive records by request in an identifiable way was consistent with the Council’s holding in Paff, 2007-272. The Council’s decision in Paff, however, considered a custodian’s failure to address all items in their written response. Further, the GRC has not applied Paff to the disclosure of records in response to an OPRA request containing multiple items. Nor is the GRC inclined to do so here because it is satisfied that the records were provided in an appropriate manner.

Additionally, the GRC rejects the Complainant Counsel’s second assertion. The evidence of record is clear that the Custodian did not perform a search for responsive records because the Complainant objected to the special service charge; thus, it would have been impossible to submit a document index without incurring the costs that the FFD was attempting to charge. That the Custodian did not submit a document index in the SOI did not prohibit him from asserting that certain records are exempt once he located same. In fact, the Council’s Order specifically allowed for the possibility that the Custodian may assert that certain redactions apply to the records by requiring him to “identify any records that are redacted and state the basis for redacting same.”

Therefore, the Custodian complied with the Council’s October 28, 2014 Interim Order because he responded in the extended time frame providing responsive records to the Complainant via his preferred method of delivery (e-mail), submitted a document index of the e-mails for which the Custodian asserted exemptions applied, and simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁸ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

⁸ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Custodian submitted compliance to include a document index identifying eight (8) e-mails that he argued were exempt under the attorney-client privilege exemption. The Complainant's Counsel only contended that the denial of access was inappropriate because the Custodian did not assert such exemptions in the SOI. Further, Counsel argued that the denial was meant to intentionally delay access to the e-mails because the GRC would be required to conduct an *in camera* review. To this end, it is necessary for the GRC to conduct an *in camera* examination of the eight (8) e-mails.

Therefore, the GRC must conduct an *in camera* review of the eight (8) responsive e-mails to determine the validity of the Custodian's assertion that the same are attorney-client privileged and exempt from disclosure under OPRA. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

Knowing & Willful

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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's October 28, 2014 Interim Order because he responded in the extended time frame providing responsive records to the Complainant via his preferred method of delivery (e-mail), submitted a document index of the e-mails for which the Custodian asserted exemptions applied, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The GRC must conduct an *in camera* review of the eight (8) responsive e-mails to determine the validity of the Custodian's assertion that the same are attorney-client privileged and exempt from disclosure under OPRA. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index¹⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹¹ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. 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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Deputy Executive Director

January 20, 2015

⁹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹⁰ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹¹ "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."

Jeff Carter v. Franklin Fire District No. 1 (Somerset), 2013-281, 2013-282 & 2013-283 – Supplemental Findings and Recommendations of the Executive Director 7



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

October 28, 2014 Government Records Council Meeting

Jeff Carter Complainant v. Franklin Fire District No. 1 (Somerset) Custodian of Record	Complaint Nos. 2013-281, 2013-282, and 2013-283
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At the October 28, 2014 public meeting, the Government Records Council ("Council") considered the October 21, 2014 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. The Custodian has not borne his burden of proof that the payment of a special service charge was reasonable and warranted. Specifically, the evidence does not support that Network Blade was solely capable and required to respond to the OPRA requests, and that an extraordinary amount of time and effort was required. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame and must identify any records that are redacted and state the basis for redacting same. See Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005).
2. **The Custodian shall comply with item No. 1 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 1:4-4,¹ to the Executive Director.²**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of October, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: October 29, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 28, 2014 Council Meeting**

**Jeff Carter¹
Complainant**

**GRC Complaint No. 2013-281, 2013-282
and 2013-283²**

v.

**Franklin Fire District No 1 (Somerset)³
Custodial Agency**

Records Relevant to Complaint:

July 1, 2013 OPRA request: Electronic copies via e-mail of correspondence (including but not limited to e-mails, text messages, letters memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 (“FFD”) and/or its agents (including all commissioners, legal counsel and Ms. Dawn Cuddi) from April 12, 2013 to July 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013 in the matter of James Wickman, Docket No. 11-01.

August 1, 2013 OPRA requests:

1. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel, Bruce Padula and Joseph Danielsen from May 1, 2013 to August 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013 in Wickman.
2. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel and Bruce Padula from May 1, 2013 to August 1, 2013, regarding The Palace at Somerset, Somerset, NJ.

Custodian of Record: Tim Szymborski

Request Received by Custodian: July 2, 2013 and August 2, 2013

Response Made by Custodian: July 8, 2013 and August 11, 2013

GRC Complaint Received: September 23, 2013

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

Jeff Carter v. Franklin Fire District No. 1 (Somerset), 2013-281, 2013-282 & 2013-283 – Findings and Recommendations of the Executive Director

Background⁴

Request and Response:

July 1, 2013 OPRA request

On July 1, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 8, 2013, the Custodian responded in writing seeking an extension of time until July 19, 2013 to gather information. On July 9, 2013, the Complainant granted the extension provided that the Custodian include e-mails coming into existence through July 19, 2013. On July 17, 2013, the Custodian’s Counsel sought a second extension of time until July 29, 2013 to allow the FFD’s IT contractor to retrieve possibly responsive records and perform redactions, if necessary. On July 18, 2013, the Complainant granted the extension provided that the Custodian includes e-mails coming into existence through July 29, 2013. Further, the Complainant noted that his agreement to the extension includes the following conditions due to obvious conflicts of interest:

1. Identify the name(s) of the IT vendor(s) performing the actual search.
2. Advise if the search is being conducted under Counsel’s supervision.

On July 28, 2013, the Custodian’s Counsel responded advising the Complainant that the FFD has determined that utilizing its IT vendor, Network Blade, LLC, warrants the imposition of a special service charge. N.J.S.A. 47:1A-5. Counsel stated that Network Blade would spend approximately three (3) hours at the FFD rate of \$120.00 per hour and that Counsel’s supervision would similarly cost \$120.00 per hour. Counsel further noted that he would impose a charge for one (1) additional hour to review and perform redactions where necessary. Counsel stated that the FFD could alternatively provide its employee to supervise the search for \$20.00 an hour; however, Counsel’s one (1) hour charge for review and redaction would still apply. Counsel requested that the Complainant advise whether he objected to the proposed charge.

On July 29, 2013, the Complainant objected to the proposed fee, arguing that the special service charge is an attempt to delay disclosure of the responsive records. Further, the Complainant stated that he never insisted that Custodian’s Counsel supervise the search; however, the Complainant maintained that he certainly would not pay a charge for Counsel’s time. The Complainant stated that he had been more than accommodating with extensions and was well aware of the FFD’s frustration for having to comply with OPRA without being able to charge requestors for access in a majority of cases. The Complainant stated that he had no desire to pursue the matter unless the FFD failed to comply with OPRA.

On the same day, the Custodian’s Counsel requested a third extension of ten (10) days to meet with the FFD to work out a compromise. Counsel further requested that the Complainant provide some options that he may be considering in coming to said compromise. The Complainant responded rejecting an extension for non-email records (*e.g.* legal appeals, letters,

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Jeff Carter v. Franklin Fire District No. 1 (Somerset), 2013-281, 2013-282 & 2013-283 – Findings and Recommendations of the Executive Director

memos, fax transmittals, *etc.*) and requested a legitimate reason for another extension to search for e-mails. Subsequently, the Custodian's Counsel responded providing all responsive non-email records and further noted that the special service charge for Network Blade's three (3) hours of time at \$120.00 still applied to for e-mail records. Counsel noted that he would not be supervising the search or charging for review and redaction; thus, the special service charge will only apply to Network Blade's time. Counsel requested that the Complainant advise whether he would pay the amended charge.

On July 30, 2013, the Complainant again objected to the amended charge, noting that the FFD did not charge for non-email records and has not previously charged for similar e-mail requests. The Complainant noted that the FFD uses Microsoft Outlook®, which facilitates a simple process for searching, identifying and providing responsive e-mails. On the same day, the Custodian's Counsel stated that the FFD instituted a policy of having Network Blade retrieve e-mails. Counsel acknowledged that OPRA and GRC case law requires special service charges to be levied on a case-by-case basis. Counsel stated that although the FFD has not imposed a special service charge on past OPRA requests for e-mails, the FFD determined that same was warranted here.

On August 3, 2013, the Complainant sought the criteria the FFD used to impose the special service charge. The Custodian's Counsel responded stating that the FFD relied on the GRC's criteria.⁵ On August 5, 2013, the Complainant again objected to the charge, arguing that the FFD could not pass the cost of utilizing Network Blade to search for responsive e-mails onto a requestor. The Complainant stated that prior to August 2012, searches for responsive e-mails were conducted by individuals named in the request, and that the convenience of having Network Blade conduct such a search does allow the FFD to impose a charge for same. On August 10, 2013, the Custodian's Counsel reiterated that special services charges are imposed on a case by case basis. Counsel noted that one of the factors is the size of an agency and the number of employees, and that an agency cannot be any smaller than the FFD, which employs one (1) person.

August 1, 2013 OPRA requests

On August 1, 2013, the Complainant submitted two (2) OPRA requests to the Custodian seeking the above-mentioned records. On August 11, 2013, the Custodian responded in writing advising that the FFD has determined that utilizing its IT vendor, Network Blade, LLC, to retrieve e-mails responsive to both requests warrants the imposition of a special service charge. N.J.S.A. 47:1A-5. Counsel stated that Network Blade would spend approximately three (3) hours at the FFD rate of \$120.00 per hour. Further, the Custodian advised that if the Complainant require supervision for the retrieval process, an hourly rate of \$20.00 would apply. The Custodian requested that the Complainant advise whether he objected to the proposed charge.

On August 12, 2013, the Complainant objected to the proposed fee as unreasonable. The Complainant further argued that despite his attempts to compromise on past requests, he believed the proposed charge was retaliation for previous objections to proposed fees. The Complainant

⁵ A copy of the 14-point analysis for determining special service charges is posted to the GRC's website. <http://www.state.nj.us/grc/pdf/OPRASpecialServiceCharge.pdf>.

Jeff Carter v. Franklin Fire District No. 1 (Somerset), 2013-281, 2013-282 & 2013-283 – Findings and Recommendations of the Executive Director

also alleged that the proposed fee was little more than an attempt to deliberately withhold government records. The Complainant stated that if he did not receive the responsive records by close of business, he would pursue the denial of access with the appropriate venue.

On August 20, 2013, the Custodian sought an extension of fourteen (14) business days to respond due to a recent personal issue and the fact that FFD has one (1) employee assisting with all FFD business, which has received a consistent amount of daily OPRA requests. On August 21, 2013, the Complainant objected to the extension arguing that the Custodian already had fourteen (14) business days to respond providing records. The Complainant also alleged that the Custodian previously sought extensions in bad faith by waiting until the last day to deny access to records by way of special service charge.

Denial of Access Complaint:

On September 23, 2013, the Complainant filed three (3) Denial of Access Complaints with the Government Records Council (“GRC”). The Complainant first noted that at no point prior to this complaint did the Custodian either indicate if a search was conducted or provide a 14-point analysis proving that the proposed fees were warranted. The Complainant noted that this fact is evidenced by the Custodian’s response that there would be a proposed charge for labor involved in searching for responsive records and advising that records would be provided “if they exist.”

The Complainant stated that in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-114 *et seq.* (Interim Order dated May 29, 2012), the Council confirmed a custodian’s obligation to search for and disclose responsive e-mails based on the criteria required to be included in a request for e-mails. *Id.* at 11. Further, the Complainant stated that the time frame in Verry was a five (5) period, which yielded only 309 e-mails without any contemplation of a special service charge. The Complainant noted that his requests sought e-mails over a period of three (3) months or less, which would in no way be burdensome to the FFD. The Complainant asserted that his requests here were more closely related to the request in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-234 (Interim Order dated January 29, 2013), where the Council ordered disclosure of e-mails for a 63 day period. Also, the Complainant contended the FFD’s choice to utilize its IT vendor to perform the search out of convenience does not allow the FFD to pass said cost onto the Complainant. See Rivera v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-154 (June 2008)(holding that a special service charge including a fee for staff IT training was unreasonable and unwarranted).

The Complainant alleged that the proposed special service charge is nothing more than retaliation against him for previous OPRA requests seeking e-mails; several of which were the subject of complaints filed with the GRC. The Complainant argued that because his requests contained the requisite criteria, and because he explicitly noted the Custodian’s obligation to search for responsive e-mails in correspondence prior to the filing of these complaints, the imposition of a special service charge here is unreasonable and unwarranted. The Complainant also noted that the Council’s decision in Verry was cited on multiple occasions in decisions the Council rendered against FFD prior to the submission of these requests; thus, the Custodian and Counsel cannot claim that they were unaware of the Council’s established precedent.

Further, the Complainant argued that prevailing case law supports that the proposed charge is unreasonable, unwarranted and was imposed to deliberately stonewall access to the responsive records. For example, the Council previously held that a custodian cannot charge for records already in electronic format. Wolosky v. Twp. of Randolph (Morris), GRC Complaint No. 2010-186 (September 2012). Further, in Wolosky v. Sparta Bd. of Educ. (Sussex), GRC Complaint No. 2009-56 (April 2010), the Council held that a custodian could charge actual cost “. . . which ordinarily should not include a charge for labor.” Id. at 7.

Additionally, the Complainant requested that the GRC take judicial notice of all filings in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated August 28, 2012)⁶ to show that the Complainant has used e-mails to provide competent, credible evidence to refute certifications of FFD custodians.⁷ The Complainant alleged that Carter, GRC 2011-76, is one of a long history of attempts by the FFD to impede him access to the very records that he has successfully used to advance the “bedrock principles” of OPRA as stated in Burnett v. Cnty. of Bergen, 198 N.J. 408, 414 (2009). Finally, the Complainant requested that the Council: 1) determine that the Custodian violated OPRA by failing to provide the responsive records within seven (7) business days; 2) order disclosure of all responsive records; 3) determine that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the responsive record under the totality of the circumstances; and 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

Statement of Information:

On October 23, 2013, the Custodian filed Statements of Information (“SOI”) for each complaint.

July 21, 2013 OPRA request

The Custodian certified that he received the Complainant’s OPRA request on July 2, 2013 and responded on July 8, 2013 (seeking an extension) and on July 28, 2013 (advising of a proposed special service charge).

The Custodian certified that in August 2012, the FFD decided that it would utilize its IT vendor to handle the retrieval of e-mail from FFD accounts. The Custodian affirmed that this policy was meant to curtail scrutiny over allegations of withholding e-mails and because the FFD is run by elected officials employing one (1) full time position. Thus, the FFD would provide OPRA requests to the vendor, who would estimate the amount of time necessary to search for and retrieve all response e-mails. The Custodian affirmed that once the IT vendor advised of the

⁶ The GRC notes that the issue in Carter, GRC 2011-76 was the existence of financial disclosure statements and not a special service charge or disclosability of e-mails.

⁷ The Complainant also requested that, in light of the FFD’s “ethical shortcomings,” the GRC develop reasonable guidelines/procedures on how custodians must deal with searching for records when compelling conflicts of interest exist. The GRC notes that in its decision in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-228 *et seq.* (Interim Order dated March 25, 2014), adjudicated during the pendency of this complaint, it declined to adjudicate any possible conflict of interest issues as OPRA does not expressly afford the GRC the opportunity to do so. N.J.S.A. 47:1A-7(b).

Jeff Carter v. Franklin Fire District No. 1 (Somerset), 2013-281, 2013-282 & 2013-283 – Findings and Recommendations of the Executive Director

amount of time necessary to perform a search, he would utilize the 14-point analysis to determine whether a special service charge was warranted. The Custodian certified that, in this case, he followed FFD's protocol and determined a special service charge was warranted based on the following:

1. What records are requested?

E-mail communications and correspondence between eight (8) individuals.

2. Give a general nature description and number of the government records requested.

See above. The subjects of the e-mails and correspondence regard an appeal of the Franklin Township Municipal Ethics Board's "Resolution of Violation" issued on April 12, 2013 in the matter of James Wickman, Docket No. 11-01. The Custodian stated that after Network Blade began their search, it was determined that there was potential for voluminous records. Further, because of the variations present in the request, all records would need to be reviewed individually to determine responsiveness.

3. What is the period of time over which the records extend?

From April 12, 2013 through July 1, 2013.

4. Are some or all of the records sought archived or in storage?

All records would be electronically maintained on the FFD's server or located in the FFD offices.

5. What is the size of the agency (total number of employees)?

One (1) employee for the entire agency.

6. What is the number of employees available to accommodate the records request?

One (1), which is the only employee. However, this employee is also responsible for performing all other administrative duties of the FFD.

7. To what extent do the requested records have to be redacted?

Not sure, all potentially responsive records would have to be reviewed. The Custodian noted that he could foresee certain records needing redactions for attorney-client privileged information.

- 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?**

FFD's only employee makes \$20.00 an hour. Network Blade, whom is definitely qualified to perform the search charges \$120.00 an hour and has estimated it will take three (3) hours to locate, retrieve, group and convert the records. These three (3) hours are not inclusive of review for redactions or preparation of/and disclosure, which FFD would not include in the charge.

- 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?**

FFD's only employee could monitor inspection at \$20.00 an hour, but any examination would need to be conducted by Counsel.⁸ This cost would have been passed to the Complainant.

- 10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?**

N/A.

- 11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?**

FFD felt it best to utilize Network Blade to respond to OPRA requests seeking e-mails for several reasons. As noted, the Custodian is an elected official with a full-time job and limited time for requests. Further, all officials are elected to three (3) year terms and job duties could change almost annually. Further, given the recent history of OPRA requests and the fact that FFD employs one (1) full time person, FFD felt it best to utilize the IT vendor as it was most qualified for these requests.

- 12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?**

Network Blade, LLC at an hourly rate of \$120.00.

- 13. What is the availability of information technology and copying capabilities?**

Full availability.

⁸ The GRC notes that the Custodian included arguments for charging a monitoring fee by Counsel. The evidence of record indicates that a monitoring fee was not included.

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14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

The IT vendor, whom is definitely qualified to perform the search charges \$120.00 an hour and has estimated it will take three (3) hours to locate, retrieve, group and convert the records.

The Custodian certified that the Complainant rejected the proposed special service charge multiple times, but did not attempt to reach a compromise on the fee. Further, the Custodian asserted that because the Complainant failed to agree to the proposed special service charge, he had no choice but to deny the Complainant access to the responsive records.

August 1, 2013 OPRA requests

The Custodian certified that he received the Complainant's OPRA requests on August 2, 2013 and responded on August 11, 2013 advising the Complainant of a proposing special service charge. The Custodian certified that, in this case, he followed FFD's protocol and determined a special service charge was warranted based on the following:

1. What records are requested?

OPRA Request No. 1: E-mail communications between nine (9) individuals.

OPRA Request No. 2: E-mail communications between eight (8) individuals.

2. Give a general nature description and number of the government records requested.

OPRA Request No. 1: The subjects of the e-mails and correspondence are about an appeal of appeal of the Franklin Township Municipal Ethics Board's "Resolution of Violation" issued on April 12, 2013 in the matter of James Wickman, Docket No. 11-01.

OPRA Request No. 2: The subjects of the e-mails and correspondence are about The Palace at Somerset, Somerset, NJ.

The Custodian stated that after Network Blade began their search, it was determined that there was potential for voluminous records. Further, because of the variations present in the request, all records would need to be reviewed individually to determine responsiveness.

3. What is the period of time over which the records extend?

From May 1, 2013 through August 1, 2013.

4. Are some or all of the records sought archived or in storage?

All records would be electronically maintained on the FFD's server or located in the FFD offices.

5. What is the size of the agency (total number of employees)?

One (1) employee for the entire agency.

6. What is the number of employees available to accommodate the records request?

One (1), which is the only employee. However, this employee is also responsible for performing all other administrative duties of the FFD.

7. To what extent do the requested records have to be redacted?

Not sure, all potentially responsive records would have to be reviewed. The Custodian noted that he could foresee certain records needing redactions for attorney-client privileged information.

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?

OPRA request No. 1: Network Blade has estimated it will take three (3) hours to locate, retrieve, group and convert the records. These three (3) hours are not inclusive of review for redactions or preparation of/and disclosure, which FFD would not include in the charge.

OPRA request No. 2: Network Blade has estimated it will similarly take three (3) hours to locate, retrieve, group and convert the records. These three (3) hours are not inclusive of review for redactions or preparation of/and disclosure, which FFD would not include in the charge.

FFD's only employee makes \$20.00 an hour. Network Blade, whom is definitely qualified to perform the search charges \$120.00 an hour.

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?

FFD's only employee could monitor inspection at \$20.00 an hour, but any examination would need to be conducted by Counsel.⁹ This cost would have been passed to the Complainant.

10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?

N/A.

⁹ The GRC notes that the Custodian included arguments for charging a monitoring fee by Counsel. The evidence of record indicates that a monitoring fee was not included.

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11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?

FFD felt it best to utilize Network Blade to respond to OPRA requests seeking e-mails for several reasons. As noted, the Custodian is an elected official with a full-time job and limited time for requests. Further, all officials are elected to three (3) year terms and job duties could change almost annually. Further, given the recent history of OPRA requests and the fact that FFD employs one (1) full time person, FFD felt it best to utilize the IT vendor as it was most qualified for these requests.

12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?

Network Blade, LLC at an hourly rate of \$120.00.

13. What is the availability of information technology and copying capabilities?

Full availability.

14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

The IT vendor, whom is definitely qualified to perform the search charges \$120.00 an hour and has estimated it will take three (3) hours per OPRA request to locate, retrieve, group and convert the records.

The Custodian certified that the Complainant rejected the proposed special service charge, but did not attempt to reach a compromise on the fee. Further, the Custodian asserted that because the Complainant failed to agree to the proposed special service charge, he had no choice but to deny the Complainant access to the responsive records.

Regarding the request for an extension, the Custodian certified that due to the number of requests received around the time of the subject OPRA requests, he accidentally sent the Complainant a request for an extension on August 20, 2013. This was because the Custodian was making an effort to avoid past situations where the FFD failed to respond to OPRA request within seven (7) business days.

Additional Submissions:

On November 11, 2013, the Complainant's Counsel, via letter, first noted that the Custodian failed to submit a document index to the GRC in accordance with Paff v. NJ Dep't of Labor, 392 N.J. Super. 334 (App. Div. 2007). Counsel further argued that although the Custodian attempted to paint FFD as an overburdened agency, it does not fall within the limits provided for in OPRA allowing for limited OPRA hours. N.J.S.A. 47:1A-5(a).

Counsel contended that the Custodian, who chose to run for office, is paid a \$5,000 stipend and is by no means “virtually volunteer.” Counsel also asserted that any inability for FFD to appropriately staff their agency should not affect the Complainant’s ability to request and receive records as provided for in OPRA.

Finally, Counsel contended that the Custodian’s 14-point analysis was flawed and the subject OPRA requests do not warrant a special service charge. Further, Counsel asserted that there should be no need to “convert” any e-mails because they are, by their very nature, already in the Complainant’s preferred medium of electronic format.

On December 28, 2013, the Custodian’s Counsel requested, via letter, that the GRC expedite this complaint based on the Appellate Division’s denial of FFD’s motion for leave to appeal in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-284 *et seq.* (Interim Order dated October 29, 2013) and Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.* (Interim Order dated October 29, 2013). Counsel asserted that the GRC should immediately order disclosure of all records because the Custodian has not disclosed same. Counsel further argued that it is now undeniable that the Custodian knowingly and willfully violated OPRA by knowingly denying access to this request in spite of being aware of the Council’s holdings in Carter.

Analysis

Special Service Charge

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.

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:

Whenever 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

N.J.S.A. 47:1A-5(c).

The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of the variety of factors discussed in The Courier Post v. Lenape Reg’l High Sch., 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: (1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) 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.

Here, the Custodian has provided a response to questions posed by the GRC that reflect the analytical framework outlined in the Courier Post regarding the proper assessment of a special service charge. The Custodian argued the necessity of Network Blade’s hourly cost of \$120.00 being passed onto the Complainant in order to perform:

1. Two (2) hours of work to disclose records responsive to the Complainant’s July 1, 2013 OPRA request.
2. Three (3) hours of work to disclose records responsive to the Complainant’s August 1, 2013 OPRA request No. 1.
3. Three (3) hours of work to disclose records responsive to the Complainant’s August 1, 2013 OPRA request No. 2.

The current issue is similar in principle to one issue contemplated by Court in Courier Post. There, the Court held that “[a]ttorneys’ fees will not be allowed to be charged to the Post or to any other requestor of documents for review and redaction of exempt material.” Id. at 207. In reaching this decision, the Court reasoned that “[t]he Legislature could have enacted an attorney review clause, but it did not. Neither did it create a special subclass for attorney bills and accord to them any kind of special treatment. It appears rather conclusively that the custodian is responsible for asserting the privilege and making [redactions].” Id. at 203-204. *But see Fisher v.*

Div. of Law, 400 N.J. Super. 61 (App. Div. 2008)(affirming the Council's decision that the custodian could charge for deputy attorney general time spent retrieving and redacting records based on special circumstances).

The Council later applied the Court's decision in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). There, the custodian sought to charge the attorney's hourly rate of \$150.00 for 2.5 to 3 hours for reviewing 78 pages of invoices. The Council, citing to Courier Post, and noting that OPRA does not prohibit a public agency's use of an attorney to advise, supervise or even to perform such redactions, determined that:

[A]lthough the original Custodian sought Mr. Cooper's aid in redacting the responsive vendor list, the Custodian cannot attempt to pass the cost of Mr. Cooper's services onto the Complainant because OPRA clearly requires "... that the *custodian* is responsible for asserting the privilege and making the redaction." Courier Post . . . at 203-204. Moreover, the current Custodian failed to prove that Counsel's expertise is required to review the vendor list and redact personal information. Thus, the proposed special service charge of \$375.00 to \$450.00 is not reasonable or warranted pursuant to N.J.S.A. 47:1A-5(c). Therefore, the current Custodian must redact and provide the responsive list to the Complainant at no charge.

Id. at 13. *See also* Nummermacker v. City of Hackensack, 2014 N.J. Super. Unpub. LEXIS 1287 (May 27, 2014).

In the matter currently before the Council, the GRC first notes that the Complainant's three (3) OPRA requests, submitted a month apart, seek e-mails over a limited time frame of approximately three (3) months. The Custodian has proposed passing the cost of utilizing Network Blade to search for and retrieve a relatively unknown number of responsive records between as many as nine (9) people that would take roughly eight (8) hours total if the time for all three (3) requests is added together.

In part, this action is not any different from passing the cost of utilizing an attorney to retrieve and redact invoices. A custodian's duties under OPRA include complying with "a request to inspect, examine, copy, or provide a copy of a government record." N.J.S.A. 47:1A-5(g). As in Carter, although OPRA does not prohibit assistance from other employees, officials, vendors, *etc.*, this does not necessarily mean that a custodian may charge for the assistance any time it is utilized. *See also* Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated July 29, 2014).

The evidence here indicates that a search for records responsive to the Complainant's OPRA request could be adequately performed by the employee and/or persons identified in the request. As in both Courier Post, and Carter, and notwithstanding both parties' arguments on the number of persons able to accommodate OPRA requests, the GRC is not satisfied that utilizing Network Blade falls within an extraordinary amount of time or effort, or that no other person is capable of searching for the responsive records. Further, although utilizing Network Blade might

be the most succinct way to search for all responsive e-mails, the evidence of record does not support that doing so is such a necessity that the Custodian had no other option. Also, given current programs such as Microsoft Outlook®, searching for e-mails/electronic correspondence does not take an IT professional level of expertise. Thus, the proposed fee is unwarranted here and the Custodian should disclose the responsive records.

The GRC notes that, for the July 1, 2013 OPRA request, the Complainant conditioned his granting of extensions on the Custodian providing access to records beyond the date of the OPRA request. However, such a condition resulted in an on-going request for records. The GRC has previously decided that on-going requests are not valid under OPRA. See Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005) and Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012). Accordingly, the Custodian will not be required to disclose records created either beyond the time frame specified in each of the subject OPRA requests or beyond the date on which the Complainant submitted each OPRA request.

Therefore, the Custodian has not borne his burden of proof that the payment of a special service charge was reasonable and warranted. Specifically, the evidence does not support that Network Blade was solely capable and required to respond to the OPRA requests, and that an extraordinary amount of time and effort was required. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199; Carter, GRC 2011-71. Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame and must identify any records that are redacted and state the basis for redacting same. See Blau, GRC 2003-75.

Knowing & Willful

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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not borne his burden of proof that the payment of a special service charge was reasonable and warranted. Specifically, the evidence does not support that Network Blade was solely capable and required to respond to the OPRA requests, and that an extraordinary amount of time and effort was required. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC

Complaint No. 2011-71 (Interim Order dated June 26, 2012). Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame and must identify any records that are redacted and state the basis for redacting same. See Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005).

2. **The Custodian shall comply with item No. 1 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 1:4-4,¹⁰ to the Executive Director.¹¹**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

October 21, 2014

¹⁰ "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."

¹¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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STEVEN WRONKO,

Plaintiff,

v.

BOROUGH OF CARTERET and CARMELA
POGORZELSKI, in her official capacity as
records custodian for the Borough of Carteret,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO.:

Civil Action**ORDER**

THIS MATTER having been opened by Pashman Stein Walder Hayden (Michael J. Zoller, appearing) on behalf of Plaintiff, Steven Wronko, alleging violations of the Open Public Records Act (“OPRA”) against Defendants Borough of Carteret (“Carteret”) and Carmela Pogorzelski, in her official capacity as Records Custodian for Carteret, and the Court having heard oral argument on _____ and having considered the submissions by parties; and for the reasons stated on the record; and for good cause shown;

It is on this ____ day of _____, 2019, hereby **ORDERED** that:

1. Defendants have violated OPRA by asserting an unlawful special service charge before releasing non-exempt records; and

2. Defendants shall release to Plaintiff the records requested in his October 4, 2019 OPRA request without charging a special service charge within seven (7) days from the date of this Order; and

3. Plaintiff is a prevailing party entitled to an award of reasonable attorney's fees and costs of suit pursuant to N.J.S.A. 47:1A-6. If the Parties cannot resolve the amount of attorney's fees and costs, Plaintiff may submit a fee application to the Court.

Hon. Alberto Rivas, A.J.S.C.

☐ Opposed

☐ Unopposed