



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

October 26, 2010 Government Records Council Meeting

John Pusterhofer
Complainant

Complaint No. 2007-270

v.

Shrewsbury Borough Board of Education (Monmouth)
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council ("Council") considered the October 19, 2010 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, accepts the Administrative Law Judge's Initial Decision dated July 26, 2010, 2010 in which the Judge ordered that the parties comply with the settlement terms and that these proceedings be concluded.

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 October, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: October 28, 2010



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**John Pusterhofer¹
Complainant**

GRC Complaint No. 2007-270

v.

**Shrewsbury Borough Board of
Education (Monmouth)²
Custodian of Records**

Records Relevant to Complaint:

1. Any and all records relating to a vote brought about by an issue presented to the Board at the May 22, June 26 and September 18, 2007 public meetings and how each Board member voted thereon (member's name required).
2. Records proving the Shrewsbury Board of Education/School Officials had an authorized public interest purpose in connection with the Board's accusation that the Complainant violated federal trademark law and did not seek to retaliate against, and/or cause harm to, the Complainant's family. The Complainant requests that if no records responsive exist, the Custodian should clearly acknowledge this fact in writing.
3. All attorney billing records originating from the Board of Education Counsel's law firm(s) and accounting records originating from the school district that show those bills were paid with public funds. The requested period is from June 1, 2002 through the end of 2007.

Request Made: September 20, 2007

Response Made: October 1, 2007

Custodian: Debora Avento

GRC Complaint Filed: November 2, 2007

Background

April 29, 2009

Government Records Council's ("Council") Interim Order. At its April 29, 2009 public meeting, the Council considered the April 22, 2009 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 No legal representation listed on record.

² Represented by Marc H. Zitomer, Esq., of Schwartz, Simon, Edelstein, Celso & Kessler, LLC (Morristown, NJ).

1. The Custodian responded on the sixth (6th) business day after receipt of Complainant's September 20, 2007 request stating that no records responsive to request Item No. 1 existed and subsequently certified in the Statement of Information that no records exist which are responsive to request Item No. 1 and there is no credible evidence in the record to refute the Custodian's certifications. Therefore, there was no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days as to when the determination of the special service charge would be available, the Custodian's October 1, 2007 written response to the Complainant requesting an extension of time is insufficient under N.J.S.A. 47:1A-5.i. See Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
3. Item No. 2 of the Complainant's September 20, 2007 OPRA requests sought records demonstrating the Board of Education had an authorized interest purpose and did not seek to retaliate against the Complainant in connection with the Board of Education's accusation that the Complainant violated federal trademark law. This is not a request for specific identifiable government records. Because the Custodian would have had to research all files and evaluate all records contained therein to determine whether any records existed which related to the subject matter set forth in the Complainant's OPRA request, the Complainant's request Item No. 2 is invalid because it is overly broad pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (March 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005). Further, the Custodian has borne her burden of proving that the denial of access to Item No. 2 of the Complainant's OPRA requests was authorized by law pursuant to N.J.S.A. 47:1A-6.
4. In order to fully develop the record with regard to the reasonableness of the Custodian's asserted special service charge, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

May 1, 2009

Council's Interim Order distributed to the parties.

July 7, 2009

Complaint transmitted to the Office of Administrative Law ("OAL").

July 26, 2010

Initial decision of Administrative Law Judge (“ALJ”) Elia A. Pelios ratifying the parties’ settlement agreement as follows:

1. “The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives’ signatures.”
2. “The settlement fully disposes of all issues in controversy and is consistent with the law.”

“I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.”

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council accept the Administrative Law Judge’s Initial Decision dated July 26, 2010, 2010 in which the Judge ordered that the parties comply with the settlement terms and that these proceedings be concluded.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 19, 2010



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

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

INTERIM ORDER

April 29, 2009 Government Records Council Meeting

John Pusterhofer
Complainant

Complaint No. 2007-270

v.

Shrewsbury Borough School District (Monmouth)
Custodian of Record

At the April 29, 2009 public meeting, the Government Records Council (“Council”) considered the April 22, 2009 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 responded on the sixth (6th) business day after receipt of Complainant’s September 20, 2007 request stating that no records responsive to request Item No. 1 existed and subsequently certified in the Statement of Information that no records exist which are responsive to request Item No. 1 and there is no credible evidence in the record to refute the Custodian’s certifications. Therefore, there was no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days as to when the determination of the special service charge would be available, the Custodian’s October 1, 2007 written response to the Complainant requesting an extension of time is insufficient under N.J.S.A. 47:1A-5.i. See Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
3. Item No. 2 of the Complainant’s September 20, 2007 OPRA requests sought records demonstrating the Board of Education had an authorized interest purpose and did not seek to retaliate against the Complainant in connection with the Board of Education’s accusation that the Complainant violated federal trademark law. This is not a request for specific identifiable



government records. Because the Custodian would have had to research all files and evaluate all records contained therein to determine whether any records existed which related to the subject matter set forth in the Complainant's OPRA request, the Complainant's request Item No. 2 is invalid because it is overly broad pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (March 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005). Further, the Custodian has borne her burden of proving that the denial of access to Item No. 2 of the Complainant's OPRA requests was authorized by law pursuant to N.J.S.A. 47:1A-6.

4. In order to fully develop the record with regard to the reasonableness of the Custodian's asserted special service charge, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 29th Day of April, 2009

Robin Berg Tabakin, Chairwoman
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: May 1, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2009 Council Meeting**

**John Pusterhofer¹
Complainant**

GRC Complaint No. 2007-270

v.

**Shrewsbury Borough School District (Monmouth)²
Custodian of Records**

Records Relevant to Complaint:

1. Any and all records relating to a vote brought about by an issue presented to the Board at the May 22, June 26 and September 18, 2007 public meetings and how each Board member voted thereon (member's name required).
2. Records proving the Shrewsbury Board of Education/School Officials had an authorized public interest purpose in connection with the Board's accusation that the Complainant violated federal trademark law and did not seek to retaliate against, and/or cause harm to, the Complainant's family. The Complainant requests that if no records responsive exist, the Custodian should clearly acknowledge this fact in writing.
3. All attorney billing records originating from the Board of Education Counsel's law firm(s) and accounting records originating from the school district that show those bills were paid with public funds. The requested period is from June 1, 2002 through the end of 2007.

Request Made: September 20, 2007

Response Made: October 1, 2007

Custodian: Debora Avento

GRC Complaint Filed: November 2, 2007

Background

September 20, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on three (3) separate official OPRA request forms on the same date.

October 1, 2007

Custodian's response to the OPRA requests. The Custodian responds in writing to the Complainant's OPRA requests on the sixth (6th) business day following receipt of

¹ No legal representation listed on record.

² Represented by John E. Horan, Esq., of Schwartz, Simon, Edelstein, Celso & Kessler, LLC (Morristown, NJ).

such request. The Custodian states the Complainant's September 20, 2007 OPRA requests were received by the Custodian on September 21, 2007.

The Custodian states that no vote was taken on May 22, June 26 or September 18, 2007 or on any other date on which the Complainant brought an issue against the Board of Education ("BOE"), therefore, no records responsive to request Item No. 1 exist.

The Custodian states that the Complainant's request Item No. 2 is vague and ambiguous and therefore is unclear as to which records are being requested. The Custodian further states that any communication between the BOE and its attorneys relating to the violation of federal trademark law by the Complainant is protected by attorney/client privilege and is exempt from disclosure under OPRA.

The Custodian states that with regard to request Item No. 3, the Complainant previously requested to review attorney billing records for 2001 through 2003 on December 9, 2003 and failed to respond to two (2) attempts by the Custodian to contact the Complainant. The Custodian further states that the Complainant renewed his December 9, 2003 OPRA request in May of 2004 and reviewed the requested attorney billing records. The Custodian states that the Complainant requested attorney billing records for 2004 in July 2004 but never inspected the records. The Custodian states that the 2004 attorney billing records will be produced with redactions where applicable. The Custodian further states that due to the period of time given in the request, the records cannot be produced in seven (7) business days and that the Complainant will be assessed a special service charge based on the extraordinary amount of time and effort needed to produce the requested records pursuant to N.J.S.A. 47:1A-5.c. The Custodian finally states that the special service charge will be based upon her rate of pay and that the Custodian will contact the Complainant to notify him of the amount due at which time the Complainant will have the choice to proceed with this request.

October 23, 2007

Letter from the Custodian to the Complainant. The Custodian states that the estimated special service charge for processing the attorney billing records responsive to the request Item No. 3 is as follows:

Estimated Hours	26 hours		
Estimated Copying/ Record Retrieval	10 hours	\$18.02 per hour	\$180.20
Estimated Redactions	16 hours	\$62.02 per hour	\$992.32
Total			\$1,172.52

The Custodian requests that the Complainant contact the Custodian advising whether or not to proceed with request Item No. 3 by close of business on November 2, 2007.

November 2, 2007

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

- Complainant’s three (3) OPRA requests dated September 20, 2007.
- Letter from the Custodian to the Complainant dated October 1, 2007.
- Letter from the Complainant to the Custodian dated October 23, 2007.

The Complainant states that he submitted three (3) OPRA requests on September 20, 2007. The Complainant further states that he received a written response addressing all three (3) OPRA requests from the Custodian on October 1, 2007.

The Complainant contends that the Custodian’s assertion that request Item No. 2 represents a vague and ambiguous request is incorrect. The Complainant asserts that the Custodian is intentionally refusing to either state that there are no records responsive or to provide an invitation to inspect records responsive to request Item No. 2.

The Complainant also asserts that the Custodian is denying access to request Item No. 3. The Complainant contends that the Custodian admits in paragraph 3 of her October 1, 2007 response that the Custodian has already undertaken the work and is in possession of redacted attorney billing records for 2001 to 2004. The Complainant further contends that the Custodian has repeatedly lied in her assertions that the Complainant failed to respond to previous OPRA requests for attorney billing records. The Complainant alleges that the Custodian has gone to great lengths to intentionally deny the Complainant access to redacted attorney billing records. The Complainant asserts that unless the Custodian has destroyed the previously redacted attorney billing records, the Custodian is charging \$1,172.52 in order to merely pull out the four (4) file folders containing the requested attorney billing records for 2001 to 2004. The Complainant contends that, based on the size of the Shrewsbury district (one building), the Custodian would unlikely spend “an extraordinary amount of time and effort” to provide access to attorney billing records for the remaining years of 2005, 2006 and 2007.

The Complainant declined mediation of this complaint.

November 14, 2007

Request for the Statement of Information sent to the Custodian.

November 19, 2007

E-mail from the Custodian to the GRC. The Custodian requests an extension of the deadline to submit the Statement of Information.

November 20, 2007

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension until November 30, 2007 to file the Statement of Information.

November 30, 2007

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

- Complainant's three (3) OPRA requests dated September 20, 2007.
- Letter from the Custodian to the Complainant dated October 1, 2007.
- Letter from the Complainant to the Custodian dated October 23, 2007.³

The Custodian states that she received the Complainant's OPRA requests on September 21, 2007. The Custodian states that she responded in writing to the Complainant on October 1, 2007.

The Custodian certifies that the BOE never voted on any issue which appears related to the Complainant's request Item No. 1; therefore, no records responsive exist.

The Custodian further states that request Item No. 2 is too vague to identify the records sought by the Complainant. The Custodian further asserts that to the extent that any records responsive to request Item No. 2 do exist, such records are attorney-client communications which are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian also states that two (2) letters dated January 31, 2003 and December 12, 2003 were found to be relevant to request Item No. 2 and have already been provided to the Complainant.⁴

The Custodian states that the Complainant has a history of requesting attorney billing records. The Custodian states that the Complainant made two (2) previous requests for attorney billing records for 2001 through 2003 in December 2003 and May 2004. The Custodian further states that the Complainant did not respond to the Custodian's notice of disclosure for the December 2003 request, but did inspect the requested records in June 2004. The Custodian further states that the Complainant requested attorney billing records for 2004 in July 2004, but the Complainant did not respond to the Custodian's notice of disclosure.

The Custodian certifies that her search for the requested records in request Item No. 3 consisted of locating the attorney billing records and accounting records in the basement of Shrewsbury's school.

The Custodian states that she informed the Complainant that the records requested in request Item No. 3 will be provided once the Complainant pays a special service charge of \$1,172.52 as a result of the labor and effort required to produce approximately 600 pages of requested records, including copying and redactions pursuant to N.J.S.A. 47:1A-5.c. The Custodian states the Complainant has not paid the special service charge and has not indicated that the payment will be submitted, so the records responsive have not been prepared.

³ The Custodian also attaches correspondence from December 9, 2003 to July 21, 2004 relevant to the Complainant's previous requests for attorney billing records.

⁴ The Custodian provided these two (2) letters pursuant to request Item No. 2 of the Complainant's September 20, 2007 OPRA request.

The Custodian finally asserts that an effort has been made to provide the Complainant with the requested records whenever possible. The Custodian asserts that the BOE has compiled and provided the Complainant with voluminous amounts of information, causing a substantial disruption of operations in the small district at times. The Custodian requests that this complaint be dismissed.

November 30, 2007

E-mail from the Complainant to the GRC. The Complainant contends that the evidence of record shows that a reasonable number of attorney billing records were available and that they were deliberately and intentionally withheld. The Complainant requests that he be able to respond to the Custodian's SOI if necessary.

November 30, 2007

E-mail from the GRC to the Complainant. The GRC grants the Complainant's request to submit a response to the Custodian's SOI.

December 4, 2007

E-mail from the Complainant to the GRC. The Complainant requests until December 30, 2007 to prepare a response to the Custodian's SOI.

December 14, 2007

E-mail from the Complainant to the GRC. The Complainant contends that the Custodian's SOI and supporting documents shows inconsistencies in the Custodian's certified statements.

December 18, 2007

E-mail from the Complainant to the GRC. The Complainant requests that the GRC respond to his December 14, 2007 e-mail regarding the Custodian's SOI.

December 18, 2007

E-mail from the GRC to the Complainant. The GRC states that all evidence of record will be thoroughly inspected, as is the normal procedure with all complaints filed with the GRC. The GRC grants an extension until January 5, 2007 for the Complainant to submit a response to the Custodian's SOI.

January 6, 2008

The Complainant's response to the Custodian's SOI, attaching a letter from the Complainant to Shrewsbury Borough Board of Education dated May 24, 2007 (with attachments).

The Complainant asserts that in the Custodian's SOI, the Custodian failed to address why no attorney billing records would be released until the special service charge is paid. The Complainant asserts that since the Custodian certifies that she did not destroy the previously prepared records, the Custodian has willfully denied access to attorney billing records for 2003 and misrepresented to the GRC that the availability of these records would require sixteen (16) hours of the Custodian's time in addition to ten (10) hours of additional staff time for copying the records. The Complainant contends

that the Custodian's charge of over \$1,100 is unreasonable given that the Custodian only needs to open a file drawer to access redacted attorney billing records for 2003.

Additionally, the Complainant alleges that the Custodian's SOI certification that two (2) letters dated January 31, 2003 and December 12, 2003 were responsive to request Item No. 2 is clearly and willfully false because the two (2) letters do not show that there was a public interest purpose for the use of public funds to falsely accuse the Complainant of any violation of federal trademark law.

The Complainant further asserts that the Custodian, as the BOE Business Administrator, is responsible for approving the release of funds paid to the BOE attorney. The Complainant asserts that it is improbable that the Custodian denied any payments to the BOE attorney for the letters composed; however, that determination of whether the BOE used public funds to compose other letters regarding the Complainant's alleged violation of federal trademark law cannot be made without inspecting the records responsive to request Item No. 3.

Finally, the Complainant asserts that the Custodian's refusal to provide the records responsive to request Item No. 3 is a direct result of the BOE's inability to provide a lawful explanation for what appears to be the use of public funds to retaliate against the Complainant. The Complainant further asserts that he does not believe that the Custodian and the BOE attorney actually think that the Complainant is filing requests to harass the Custodian. The Complainant further argues that more public funds are being used to deny access to the requested attorney billing records by charging a special service charge for the records, some of which have already been prepared for inspection in response to the Complainant's previous OPRA requests.

May 5, 2008

E-mail from the GRC to the Custodian. The GRC requests that the Custodian complete a 14-point analysis in order to determine whether the Custodian's assertion of a \$1,172.52 special service charge is warranted.

May 13, 2008

E-mail from the GRC to the Custodian. The GRC states that the Custodian's 14-point analysis was due on May 9, 2008 and has not yet been received. The GRC requests that the Custodian advise the GRC as to the status of the 14-point analysis.

May 13, 2008

E-mail from the Custodian to the GRC. The Custodian states that she was out at a conference the previous week. The Custodian states that she will prepare the 14-point analysis and submit it as soon as possible.

May 23, 2008

E-mail from the Custodian to the GRC. The Custodian states that she is working on the 14-point analysis but will need until May 30, 2008 because the BOE office is closed from May 23, 2008 until May 27, 2008.

May 29, 2008

E-mail from the Custodian to the GRC attaching the Custodian's 14-point analysis. The Custodian apologizes for the delay and cites extenuating circumstances within the school district for the delay.⁵

The Custodian reiterates that the Complainant requested attorney billing records for the year 2001, 2002 and 2003 in December of 2003, renewed his December request in May of 2004 and requested attorney billing records for 2004 in July of 2004. The Custodian states that all attorney billing records from July 2004 to the date of the request will be released to the Custodian with the appropriate redactions once the special service charge assessed in accordance with the GRC's 14-point analysis is paid by the Complainant. The Custodian finally states that the Complainant was notified of the special service charge on October 23, 2007, at which time the Complainant subsequently informed the Custodian that a Denial of Access Complaint was being filed.

October 6, 2008

E-mail from the GRC to the Custodian. The GRC requests that the Custodian certify to the following:

1. Whether the attorney billing records previously prepared for the Complainant still exist within your office?
2. Specifically describe why the Accounts Payable Clerk will need ten (10) hours to retrieve the requested records.
3. Specifically identify why the Custodian is the only staff member capable of making any redactions to the attorney billing records.

The GRC requests that the Custodian provide this certification by October 10, 2008.

October 10, 2008

E-mail from the Custodian to the GRC. The Custodian requests additional time to provide the requested certification to the GRC.

October 14, 2008

E-mail from the GRC to the Custodian. The GRC grants an extension until October 20, 2008 to submit the requested certification. The GRC states that if the Custodian's certification is not received by October 20, 2008, the GRC will proceed with adjudication based on the evidence of record.

October 23, 2008

E-mail from the Custodian to the GRC. The Custodian advises that she has been out of work and will complete the requested certification soon.

⁵ The certification does not include the language "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." N.J. Court Rules, 1969 R. 1:4-4 (2005) which makes a certification legally binding. John Pusterhofer v. Shrewsbury Borough Board of Education, 2007-270 – Findings and Recommendations of the Executive Director

October 24, 2008

Custodian's certification to the GRC.⁶ The Custodian asserts that the records prepared for the Complainant's previous OPRA requests remained in the office for several months after the Complainant was notified that the requested records were available. The Custodian asserts that following the lack of response from the Complainant, the original records were re-filed and the prepared records were destroyed because of limited space and the Complainant's failure to obtain the records.

The Custodian further asserts that the accounts Payable Clerk will have to go down into the archives located in the basement of the school, retrieve the requested attorney billing records and copy each record with the supporting documents. The Custodian asserts that the proposed ten (10) hours was based on the amount of time it previously took to prepare the records from the Complainant's previous requests.

The Custodian finally contends that the support staff is not aware of all of the sensitive and/or privileged information that may appear on an attorney billing record that must be redacted. The Custodian asserts that the attorneys are capable of redacting the records; however, the Custodian's hourly rate is much more cost effective.

October 29, 2008

E-mail from the Complainant to the Custodian. The Complainant disputes the Custodian's assertions regarding the previous requests and asks the Custodian to be more detailed as to who destroyed the prepared records. The Complainant also requests that the Custodian provide a valid certification.

October 31, 2008

E-mail from the Complainant to the GRC attaching two (2) photographs. The Complainant states that the two (2) attached photographs of attorney billing records prepared by the Custodian were taken on June 8, 2004 in the presence of the Custodian. The Complainant contends that he believes these photographs are proof that the Custodian provided false information in her certifications. The Complainant further argues that the Custodian's assertion of the amount of time needed to redact the requested records is equally false.

November 3, 2008

E-mail from the GRC to the Custodian. The GRC requests that the Custodian recertify her 14-point analysis and October 24, 2008 certifications and include the following language:

"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." N.J. Court Rules, 1969 R. 1:4-4 (2005)

⁶ The certification does not include the language "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." N.J. Court Rules, 1969 R. 1:4-4 (2005) which makes a certification legally binding. John Pusterhofer v. Shrewsbury Borough Board of Education, 2007-270 – Findings and Recommendations of the Executive Director

The GRC states that inclusion of this language is a requirement in preparing and submitting a valid legal certification and that the Custodian had failed to provide this language in both the 14-point analysis and October 24, 2008 certifications. The GRC requests that the Custodian provide the two (2) amended certifications by November 7, 2008.

November 3, 2008

E-mail from the Custodian to the GRC. The Custodian states that she is out of the district until November 12, 2008 and will respond appropriately upon return.

November 25, 2008

E-mail from the GRC to the Custodian. The GRC states that a request for two (2) amended certifications was sent to the Custodian on November 3, 2008. The GRC states that the Custodian responded stating that she will be out of the district until November 12, 2008 and would respond appropriately upon return. The GRC states that there has been no response from the Custodian to date.

The GRC requests that the two (2) amended certifications be provided by no later than November 28, 2008 or the GRC will proceed with adjudication based on the evidence of record.

Analysis

Whether the Custodian responded to request Items No. 1 and No. 3 of the Complainant's September 20, 2007 requests in a timely manner?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA also states that:

“*[i]mmediate* access ordinarily shall be granted to budgets, *bills*, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA further provides that:

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

OPRA also states that:

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

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

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

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

The Custodian responded to the Complainant’s September 20, 2007 OPRA requests on October 1, 2007, the sixth (6th) business day after receipt of the Complainant’s OPRA requests, stating that no vote was taken on May 22, June 26 or September 18, 2007 or on any other date on which the Complainant brought an issue against the Board of Education (“BOE”); therefore, no records responsive to request Item No. 1 exist. Additionally, the Custodian certified in the SOI that no records responsive to request Item No. 1 existed at the time of the Complainant’s OPRA request.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant’s request existed. The GRC determined that although the Custodian failed

to respond to the OPRA request in a timely manner, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

In this complaint, the Custodian responded on the sixth (6th) business day after receipt of Complainant's September 20, 2007 request stating that no records responsive to request Item No. 1 existed and subsequently certified in the SOI that no records exist which are responsive to request Item No. 1 and there is no credible evidence in the record to refute the Custodian's certifications. Therefore, there was no unlawful denial of access pursuant to Pusterhofer, *supra*.

Moreover, in Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian responded in writing to the Complainant on the seventh (7th) business day requesting an extension of time to respond to the Complainant's request. The Custodian initially failed to provide a specific date on which the requested records would be made available. The GRC held that the Custodian's request for an extension of time to respond to the Complainant's OPRA request was inadequate and resulted in a deemed denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, *supra*, because the Custodian failed to provide a date on which the records would be made available for the Complainant as required in N.J.S.A. 47:1A-5.i.

Hardwick, *supra*, concerns a custodian's duty to provide a specific date on which records can be made available to a requestor pursuant to N.J.S.A. 47:1A-5.i. However, a custodian also has a duty under OPRA to provide the requestor with a chance to review and object to the estimated special service charge pursuant to N.J.S.A. 47:1A-5.c. Allowing a custodian to make an open-ended request for an extension of time to determine a special service charge does not comply with the spirit of OPRA given the requirements of N.J.S.A. 47:1A-5.i. Therefore, when a custodian requests an extension of time to provide an estimate of special service charges and fails to specify a date certain on which he or she will do so, that custodian has violated N.J.S.A. 47:1A-5.i.

In the complaint now before the Council, the Custodian sought an extension of time in writing to provide a special service charge estimate for request Item No. 3 on the sixth (6th) business day following receipt of the Complainant's OPRA requests, but failed to provide a date upon which she would notify the Complainant of the special service charge. Therefore, because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days as to when the determination of the special service charge would be available, the Custodian's October 1, 2007 written response to the Complainant requesting an extension of time is insufficient under N.J.S.A. 47:1A-5.i. See Hardwick, *supra*.

Whether the Complainant's request Item No. 2 is a valid OPRA request?

The Custodian responded to request Item No. 2 on the sixth (6th) business day after receipt of the Complainant's OPRA request, stating that request Item No. 2 is vague and ambiguous and is therefore unclear as to what is being requested. The Custodian further states that any records containing communication between the BOE attorney and

the BOE relating to a violation of federal trademark law by the Complainant are protected by attorney/client privilege and are exempt from disclosure under OPRA.

Additionally, the Complainant alleges that the Custodian's SOI certification that two (2) letters dated January 31, 2003 and December 12, 2003 were responsive to request Item No. 2 is clearly and willfully false because the two (2) letters do not cite to any laws that the Complainant violated in regards to federal trademark law.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁷ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁸

Additionally, in New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..." *Id.*

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008), the Council held that "[b]ecause the Complainant's OPRA requests No. 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super.

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁸ As stated in Bent, *supra*.

534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005).”

In the complaint now before the Council, Item No. 2 of the Complainant’s September 20, 2007 OPRA requests sought records demonstrating that the BOE had an authorized public interest purpose and did not seek to retaliate against the Complainant in connection with the BOE’s accusation that the Complainant violated federal trademark law. This is not a request for specific identifiable government records. Because the Custodian would have to research all files and evaluate all records contained therein to determine whether any records existed which related to the subject matter set forth in the Complainant’s OPRA requests, the Complainant’s request Item No. 2 is invalid as overly broad pursuant to MAG, *supra* and Bent, *supra*. Further, the Custodian has borne her burden of proving that the denial of access to Item No. 2 of the Complainant’s OPRA requests was authorized by law pursuant to N.J.S.A. 47:1A-6.

Further, because request Item No. 2 of the Complainant’s OPRA requests is overly broad, the issue of whether any records responsive to the request are exempt from disclosure as attorney-client privileged is irrelevant.

Whether the special service charge proposed by the Custodian in reference to request Item No. 3 is warranted and reasonable pursuant to OPRA?

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 ...*” (Emphasis added.) 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 a variety of factors. These factors were discussed in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. *Id.* at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. *Id.*

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5.c. *Id.* at

202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA:

- The volume of government records involved;
- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying;
- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination;⁹ and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

The court determined that in the context of OPRA, the term “extraordinary” will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. *Id.* at 202. “[W]hat may appear to be extraordinary to one school district might be routine to another.” *Id.*

Recognizing that many different variables may affect a determination of whether a special service charge is reasonable and warranted, the GRC established an analytical framework for situations which may warrant an assessment of a special service charge. This framework incorporates the factors identified in the Courier Post case, as well as additional relevant factors. For the GRC to determine when and whether a special service charge is reasonable and warranted, a Custodian must provide a response to the following questions:

1. What records are requested?
2. Give a general nature description and number of the government records requested.
3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?

⁹ With regard to this factor, the court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?
13. What is the availability of information technology and copying capabilities?
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

In the complaint now before the Council, the Custodian responded to the above questions as follows:

1. What records are requested?	Attorney billing records from June 1, 2002 to September 30, 2007, the date of the Complainant's OPRA request, including records demonstrating that the bills were paid with public funds.
2. Give a general nature description and number of the government records requested.	Approximately 600 pages of attorney's invoices and corresponding purchase orders.
3. What is the period of time over which the records extend?	June 1, 2002 to September 30, 2007.
4. Are some or all of the records sought archived or in storage?	Due to space constraints, all but the current school year of records are archived.
5. What is the size of the agency (total number of employees)?	The school district is Kindergarten through Eighth (8 th) grade with three (3) employees in the Business Office: Payroll/Benefits Coordinator, Accounts Payable Clerk and the Custodian. ¹⁰

¹⁰ The Custodian of Record in this complaint is the Business Administrator for the BOE.
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6. What is the number of employees available to accommodate the records request?	Two (2): The Custodian and Accounts Payable Clerk.
7. To what extent do the requested records have to be redacted?	Each attorney invoice from June 1, 2002 to the present is several pages in length and will require redaction. The majority of the request will have to be redacted.
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?	<p>The Accounts Payable Clerk will need to spend an estimated ten (10) hours at a rate of \$18.02 per hour to retrieve and copy the requested records.</p> <p>The Custodian will need to spend an estimated sixteen (16) hours at a rate of \$62.02 per hour to redact the requested records.</p>
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?	N/A
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee or 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?	The personnel allocated to this request are current employees in the school district.
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?	Accounts Payable Clerk at \$18.02 an hour. Custodian at \$62.02 an hour.

13. What is the availability of information technology and copying capabilities?	There is sufficient copying capability available and no information technology for archiving the requested records is available.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	The Accounts Payable Clerk will need to spend an estimated ten (10) hours at a rate of \$18.02 per hour to retrieve and copy the requested records. The Custodian will need to spend an estimated sixteen (16) hours at a rate of \$62.02 per hour to redact the requested records.

The Custodian in this complaint has proposed a charge of \$1,172.52 to respond to request Item No. 3. This request item seeks five (5) years and three (3) months of attorney billing records. The Custodian asserts that approximately six hundred (600) pages of attorney billing records from June 1, 2002 to September 30, 2007 are responsive and that all but the current 2007 year attorney billing records are archived. The Custodian further asserts that the requested records will need to be retrieved and copied by the Accounts Payable Clerk at a cost of \$18.02 per hour for ten (10) hours. Additionally, the Custodian asserts that she will need to review and redact the requested attorney billing records at a cost of \$62.02 per hour for sixteen (16) hours.

However, the Custodian asserts in her response to the special service charge that only the attorney billing records from July of 2004 to 2007 would be released to the Complainant because the Complainant had previously inspected the requested June 1, 2002 through July of 2004 records. Further, the Custodian failed to provide a valid certification regarding the 14-point analysis, therefore hindering the GRC's decision process regarding this special service charge on the basis of certified facts. The Custodian additionally failed to provide an amended certification by the requested deadline and subsequently failed to respond to a second request for the amended certification.

Therefore, in order to fully develop the record with regard to the reasonableness of the Custodian's asserted special service charge, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian responded on the sixth (6th) business day after receipt of Complainant's September 20, 2007 request stating that no records responsive to request Item No. 1 existed and subsequently certified in the Statement of Information that no records exist which are responsive to request Item No. 1 and there is no credible evidence in the record to refute the Custodian's certifications. Therefore, there was no unlawful denial of access pursuant to

Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

2. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days as to when the determination of the special service charge would be available, the Custodian's October 1, 2007 written response to the Complainant requesting an extension of time is insufficient under N.J.S.A. 47:1A-5.i. See Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
3. Item No. 2 of the Complainant's September 20, 2007 OPRA requests sought records demonstrating the Board of Education had an authorized interest purpose and did not seek to retaliate against the Complainant in connection with the Board of Education's accusation that the Complainant violated federal trademark law. This is not a request for specific identifiable government records. Because the Custodian would have had to research all files and evaluate all records contained therein to determine whether any records existed which related to the subject matter set forth in the Complainant's OPRA request, the Complainant's request Item No. 2 is invalid because it is overly broad pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (March 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005). Further, the Custodian has borne her burden of proving that the denial of access to Item No. 2 of the Complainant's OPRA requests was authorized by law pursuant to N.J.S.A. 47:1A-6.
4. In order to fully develop the record with regard to the reasonableness of the Custodian's asserted special service charge, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

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Executive Director

April 22, 2009