



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

FINAL DECISION

June 26, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2009-311

v.

Rutgers, The State University of New Jersey
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council (“Council”) considered the June 19, 2012 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. Although the evidence of record indicates that the Custodian, via Ms. Pastva, provided access to the computer-aided dispatching reports in a timely manner and complied in totality with Item No. 5 of the Council’s Order, the Custodian did not fully comply with the Council’s May 29, 2012 Interim Order by failing to provide certified confirmation of compliance regarding Item No. 3 of the Council’s Order within five (5) business days from receipt of said Order as was required.
2. The original Custodian’s failure to respond in writing in a timely manner resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the original Custodian violated OPRA by charging \$25.00 per CD. N.J.S.A. 47:1A-5.b. However, the original Custodian withdrew the proposed fee prior to the Council’s January 31, 2012 Interim Order, the Council determined that the records responsive to the Complainant’s OPRA request Item No. 3 were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and the Council further determined that request Items No. 4 through No. 7 were invalid under OPRA because they failed to identify specific records. Moreover, the current Custodian failed to prove that Ms. Visokay’s portion of the special service charge was reasonable and warranted pursuant to N.J.S.A. 47:1A-5.c. and further failed to fully comply with the Council’s May 29, 2012 Interim Order. However, the current Custodian complied with the Council’s January 31, 2012 Interim Order and further proved that the special service charge of \$139.35 reflecting three (3) hours is reasonable and warranted under N.J.S.A. 47:1A-5.c. based on the extraordinary efforts of Lt. Johnson to locate, retrieve, preserve, review and copy the responsive Mobile Video Recorder footage. Additionally, the evidence of record does not indicate that the original and current Custodians’ violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original and current Custodians’ 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.

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 June, 2012

Steven F. Ritardi, Esq., Acting Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: June 28, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 26, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2009-311

v.

**Rutgers, The State University of New Jersey²
Custodian of Records**

Records Relevant to Complaint:

1. Copies of computer-aided dispatching (“CAD”) summary report or similar police report for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m.
2. Copies of CAD abstract reports or similar police report for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m.
3. Copies of police daily duty log for October 19, 2009 from 5:30 p.m. to 11:59 p.m. that includes all police officers, supervisors and civilians working normal duty and overtime details during that time and what their assignments were.
4. Copies of mobile data terminal transmissions to and from every police terminal for October 19, 2009 from 5:30 p.m. to 11:59 p.m.
5. Copies of all police radio recordings for October 19, 2009 from 5:30 p.m. to 11:59 p.m.
6. Copies of all police telephone recordings for October 19, 2009 from 5:30 p.m. to 11:59 p.m.
7. Copies of all police 911 telephone recordings for October 19, 2009 from 5:30 p.m. to 11:59 p.m.
8. Copies of officer vehicle logs for marked police vehicles in service on October 19, 2009 from 5:30 p.m. to 11:59 p.m.
9. Copies of Mobile Video Recorder (“MVR”) footage from all police vehicles in service on October 19, 2009 from 5:30 p.m. to 7:30 p.m.
10. On-site inspection of Commercial Avenue parking lot and building video footage for October 19, 2009 from 5:30 p.m. to 7:30 p.m.

Request Made: November 5, 2009

Response Made: November 17, 2009

Custodian: Leslie Fehrenbach³

GRC Complaint Filed: November 19, 2009⁴

¹ No legal representation listed on record.

² Represented by Elizabeth Minott, Esq. (New Brunswick, NJ).

³ The original Custodian of Record was Kate Cahill.

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

Background

May 29, 2012

Government Records Council's ("Council") Interim Order. At its May 29, 2012 public meeting, the Council considered the May 22, 2012 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 timely complied with the Council's January 31, 2012 Interim Order by providing the Complainant with an amended estimated cost and the Custodian submitted certified confirmation of compliance to the Executive Director within the prescribed deadline to comply with said Order. The Custodian further timely complied with the Council's Order by submitted a second certification in which she certified that the Complainant failed to respond to Ms. Pastva within the five (5) business day deadline to respond per the Council's Order.
2. Ms. Visokay's portion of the special service charge, \$37.24, is unwarranted and unreasonable pursuant to N.J.S.A. 47:1A-5.c. because Ms. Visokay expended only 1.5 hours to retrieve, copy and return eleven (11) pages of records to a non-archived location. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.c. regarding this portion of the special service charge and must disclose the responsive records to the Complainant without cost.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if necessary, 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 1:4-4,⁵ to the Executive Director.⁶**
4. The evidence of record supports a conclusion that a special service charge of \$139.35 reflecting three (3) hours is reasonable and warranted based on the extraordinary efforts of Lt. Johnson to locate, retrieve, preserve, review and copy the responsive record. Thus the Custodian is only obligated to provide access to said record once the Complainant has remitted payment for same. *See Paff v. City of Plainfield*, GRC Complaint No. 2006-54 (July 2006).
5. **The Complainant shall, within five (5) business days from receipt of the Council's Interim Order, deliver to the Custodian (a) a payment in the**

⁵ "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."

⁶ Satisfactory compliance requires that the Custodian deliver the records 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.

amount of \$139.35, or (b) a statement declining to purchase the records. Should the Complainant accept and pay the appropriate special service charge, the Custodian shall disclose the responsive records within three (3) business days from receipt of same. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within eight (8) business days from receipt of the Council's Interim Order the Custodian shall provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4,⁷ to the Executive Director with respect to the Complainant's willingness or refusal to purchase the requested records.

6. The Council defers analysis of whether the original and current Custodians 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.

May 30, 2012

Council's Interim Order distributed to the parties.

May 30, 2012

E-mail from the Complainant to Ms. Kimberlee Pastva ("Ms. Pastva"), Compliance Associate. The Complainant states that he is interested in obtaining a copy of the MVR responsive to his OPRA request Item No. 9. The Complainant requests that Ms. Pastva provide a physical address so that he may remit payment of \$139.35.

May 30, 2012

Letter from Ms. Pastva to the Complainant (with attachments). Ms. Pastva states that she is in receipt of the Council's May 29, 2012 Interim Order. Ms. Pastva states that in accordance with said Order, attached are the following records:

- 860 CAD summary reports.
- 860 CAD abstract reports.

Ms. Pastva further states that the CD containing the MVR footage responsive to the Complainant's OPRA request Item No. 9 is available upon payment of the special service charge of \$139.35. Ms. Pastva provides the physical address to the Complainant and states that if the Complainant wishes to pay and receive the record in person, her office hours are 8:30 a.m. to 4:30 p.m.

May 30, 2012

E-mail from Ms. Pastva to the Complainant (with attachments). Ms. Pastva states that attached is her letter to the Complainant as well as the records responsive to the

⁷ "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."
Richard Rivera v. Rutgers, The State University of New Jersey, 2009-311 – Supplemental Findings and Recommendations of the Executive Director 3

Complainant's request Item No. 1 and No. 2. Ms. Pastva notes that the Complainant may mail the special service charge to her attention.

June 11, 2012

Custodian's response to the Council's Interim Order with the following attachments:

- Letter from Ms. Pastva to the Complainant dated May 30, 2012.
- E-mail from Ms. Pastva to the Complainant dated May 30, 2012 (with attachments).
- E-mail from the Complainant to Ms. Pastva, Compliance Associate, dated May 30, 2012.

The Custodian certifies that she received the Council's Interim Order on May 30, 2012. The Custodian certifies that the Order required her to disclose to the Complainant the records responsive to his OPRA request Items No. 1 and No. 2 free of charge within five (5) business days. The Custodian certifies that the Order further required that within five (5) business days, the Complainant deliver \$139.35 to Rutgers (at which point the Complainant had three (3) days to provide the responsive MVR) or a statement declining payment of the special service charge. The Custodian finally certifies that the Order required her to submit certified confirmation of compliance within eight (8) business days.

The Custodian certifies that on May 30, 2012, the Complainant advised Ms. Pastva via e-mail that he wished to purchase the MVR and asked for a physical address to mail his payment. The Custodian further certifies that on May 30, 2012, Ms. Pastva provided to the Complainant the records responsive to request Item No. 1 and No. 2 under cover of letter and further advised that the responsive MVR was available upon receipt of payment either by mail or hand delivery. The Custodian certifies that Ms. Pastva forwarded this letter to the Complainant via e-mail on the same day.

The Custodian certifies that the Complainant hand-delivered his payment on May 31, 2012 and was immediately provided with a copy of the responsive MVR on a CD.

Analysis

Whether the Custodian complied with the Council's May 29, 2012 Interim Order?

The Council's May 29, 2012 Interim Order required the Custodian to provide the Complainant with the CAD reports responsive to request Item No. 1 and No. 2 "... **within five (5) business days from receipt of the Council's Interim Order ... and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁸ to the Executive Director.**"

⁸ "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."
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Additionally, the Council's Order required the Complainant to advise the Custodian whether he wished to obtain a copy of the MVR responsive to his request Item No. 9 for a special service charge of \$139.35 within five (5) business days after receipt of the Order. The Order further required the Custodian to provide the MVR to the Complainant within three (3) days of receipt of payment and further required that "... **the Custodian shall provide certified confirmation of compliance ... to the Executive Director with respect to the Complainant's willingness or refusal to purchase the requested records**" within eight (8) business days following receipt of the Council's Order.

The Custodian received the Council's Interim Order on May 30, 2012 and tasked Ms. Pastva with compliance. Therefore, Ms. Pastva sent to the Complainant the CAD reports as required by the Council's Order and further provided the Complainant with options regarding remission of payment for the MVR. The evidence of record indicates that the Complainant went to Rutgers on May 31, 2012 and remitted payment for the MVR and received same at that time.

The Custodian submitted certified confirmation of compliance on the eighth (8th) business day after receiving the Council's Order. However, the Council's Order was in two parts: (1) the Custodian was required to submit a certification regarding provision of the CAD reports within five (5) business days after receipt of the Council's Order; and (2) the Custodian was required to submit a certification regarding the MVR within eight (8) business days after receipt of the Council's Order. The GRC highlighted this dual requirement by separating these two parts into separate enumerated conclusions. Here, Ms. Pastva provided the CAD reports in a timely manner, but the Custodian did not provide certified confirmation of compliance regarding Item No. 3 of the Council's Order until the eighth (8) business day after receipt of the Council's Order, or three (3) business days beyond the time period prescribed in the Council's Order.

Therefore, although the evidence of record indicates that the Custodian, via Ms. Pastva, provided access to the CAD reports in a timely manner and complied in totality with Item No. 5 of the Council's Order, the Custodian did not fully comply with the Council's May 29, 2012 Interim Order by failing to provide certified confirmation of compliance regarding Item No. 3 of the Council's Order within five (5) business days from receipt of said Order as was required.

Whether the original and current Custodians' actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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 (Berg); 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).

In the instant complaint, the original Custodian’s failure to respond in writing in a timely manner resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the original Custodian violated OPRA by charging \$25.00 per CD. N.J.S.A. 47:1A-5.b. However, the original Custodian withdrew the proposed fee prior to the Council’s January 31, 2012 Interim Order, the Council determined that the records responsive to the Complainant’s OPRA request Item No. 3 were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and the Council further determined that request Items No. 4 through No. 7 were invalid under OPRA because they failed to identify specific records. Moreover, the current Custodian failed to prove that Ms. Visokay’s portion of the special service charge was reasonable and warranted pursuant to N.J.S.A. 47:1A-5.c. and further failed to fully comply with the Council’s May 29, 2012 Interim Order. However, the current Custodian complied with the Council’s January 31, 2012 Interim Order and further proved that the special service charge of \$139.35 reflecting three (3) hours was reasonable and warranted under N.J.S.A. 47:1A-5.c. based on the extraordinary efforts of Lt. Johnson to locate, retrieve, preserve, review and copy the responsive MVR. Additionally, the evidence of record does not indicate that the original and current Custodians’ violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original and current Custodians’ 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the evidence of record indicates that the Custodian, via Ms. Pastva, provided access to the computer-aided dispatching reports in a timely manner and complied in totality with Item No. 5 of the Council's Order, the Custodian did not fully comply with the Council's May 29, 2012 Interim Order by failing to provide certified confirmation of compliance regarding Item No. 3 of the Council's Order within five (5) business days from receipt of said Order as was required.

2. The original Custodian's failure to respond in writing in a timely manner resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the original Custodian violated OPRA by charging \$25.00 per CD. N.J.S.A. 47:1A-5.b. However, the original Custodian withdrew the proposed fee prior to the Council's January 31, 2012 Interim Order, the Council determined that the records responsive to the Complainant's OPRA request Item No. 3 were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and the Council further determined that request Items No. 4 through No. 7 were invalid under OPRA because they failed to identify specific records. Moreover, the current Custodian failed to prove that Ms. Visokay's portion of the special service charge was reasonable and warranted pursuant to N.J.S.A. 47:1A-5.c. and further failed to fully comply with the Council's May 29, 2012 Interim Order. However, the current Custodian complied with the Council's January 31, 2012 Interim Order and further proved that the special service charge of \$139.35 reflecting three (3) hours is reasonable and warranted under N.J.S.A. 47:1A-5.c. based on the extraordinary efforts of Lt. Johnson to locate, retrieve, preserve, review and copy the responsive Mobile Video Recorder footage. Additionally, the evidence of record does not indicate that the original and current Custodians' violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original and current Custodians' 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.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

June 19, 2012



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
Acting Commissioner

INTERIM ORDER

May 29, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2009-311

v.

Rutgers, The State University of New Jersey
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council ("Council") considered the May 22, 2012 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 timely complied with the Council's January 31, 2012 Interim Order by providing the Complainant with an amended estimated cost and the Custodian submitted certified confirmation of compliance to the Executive Director within the prescribed deadline to comply with said Order. The Custodian further timely complied with the Council's Order by submitted a second certification in which she certified that the Complainant failed to respond to Ms. Pastva within the five (5) business day deadline to respond per the Council's Order.
2. Ms. Visokay's portion of the special service charge, \$37.24, is unwarranted and unreasonable pursuant to N.J.S.A. 47:1A-5.c. because Ms. Visokay expended only 1.5 hours to retrieve, copy and return eleven (11) pages of records to a non-archived location. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.c. regarding this portion of the special service charge and must disclose the responsive records to the Complainant without cost.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if necessary, 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**

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 records 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 evidence of record supports a conclusion that a special service charge of \$139.35 reflecting three (3) hours is reasonable and warranted based on the extraordinary efforts of Lt. Johnson to locate, retrieve, preserve, review and copy the responsive record. Thus the Custodian is only obligated to provide access to said record once the Complainant has remitted payment for same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
5. **The Complainant shall, within five (5) business days from receipt of the Council's Interim Order, deliver to the Custodian (a) a payment in the amount of \$139.35, or (b) a statement declining to purchase the records. Should the Complainant accept and pay the appropriate special service charge, the Custodian shall disclose the responsive records within three (3) business days from receipt of same. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within eight (8) business days from receipt of the Council's Interim Order the Custodian shall provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director with respect to the Complainant's willingness or refusal to purchase the requested records.**
6. The Council defers analysis of whether the original and current Custodians 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.

Interim Order Rendered by the
Government Records Council
On The 29th Day of May, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: May 30, 2012

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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 29, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2009-311

v.

**Rutgers, The State University of New Jersey²
Custodian of Records**

Records Relevant to Complaint:

1. Copies of computer-aided dispatching (“CAD”) summary report or similar police report for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m.
2. Copies of CAD abstract reports or similar police report for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m.
3. Copies of police daily duty log for October 19, 2009 from 5:30 p.m. to 11:59 p.m. that includes all police officers, supervisors and civilians working normal duty and overtime details during that time and what their assignments were.
4. Copies of mobile data terminal transmissions to and from every police terminal for October 19, 2009 from 5:30 p.m. to 11:59 p.m.
5. Copies of all police radio recordings for October 19, 2009 from 5:30 p.m. to 11:59 p.m.
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10. On-site inspection of Commercial Avenue parking lot and building video footage for October 19, 2009 from 5:30 p.m. to 7:30 p.m.

Request Made: November 5, 2009

Response Made: November 17, 2009

Custodian: Leslie Fehrenbach³

GRC Complaint Filed: November 19, 2009⁴

¹ No legal representation listed on record.

² Represented by Elizabeth Minott, Esq. (New Brunswick, NJ).

³ The original Custodian of Record was Kate Cahill.

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

Background

January 31, 2012

Government Records Council's ("Council") Interim Order. At its January 31, 2012 public meeting, the Council considered the January 24, 2012 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's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because request Item No. 3 sought police daily duty logs, which records necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel, such records are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.
3. The Complainant's request Items No. 4 through No. 7 are invalid under OPRA because they are overly broad and fail to identify specific government records sought. Moreover, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005), Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005); and New Jersey Builder's Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).
4. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006) and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the original Custodian's proposed charge of \$25.00 per CD is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. However, because the original Custodian withdrew the proposed fee of \$25.00 per CD, the GRC declines to order the Custodian to submit a legal certification providing the actual cost incurred by Rutgers to produce CDs to the Complainant and provide the requested CDs to the Complainant at the "actual cost." See O'Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008).
5. Because request Item No. 3 is exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1., and because request Items No. 4 through No. 7 are invalid under OPRA because they are overly broad and fail

to specify identifiable government records, the Custodian must recalculate the actual cost of providing the records responsive to request Items No. 1, No. 2, and No. 9 and provide such estimate to the Complainant.

6. **The Custodian shall comply with Item No. 5 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.⁶ If the Complainant fails to respond to the amended estimate of the costs of providing the records responsive to request Items No. 1, No. 2, and No. 9, the Custodian shall so certify to the Council. Additionally, if the Complainant has already been provided with the responsive records, the Custodian shall so certify to the Council.**
7. The Council defers analysis of whether the original 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.

February 2, 2012

Council's Interim Order distributed to the parties.

February 8, 2012

Letter from Ms. Kimberlee Pastva ("Ms. Pastva"), Compliance Associate, to the Complainant. Ms. Pastva states that Rutgers, the State University of New Jersey, ("Rutgers") is in receipt of the Council's January 31, 2012 Interim Order. Ms. Pastva states that said Order requires Rutgers to recalculate the cost of providing records responsive to request Items No. 1, No. 2 and No. 9 to the Complainant.

OPRA request Items No. 1 and No. 2:

Ms. Pastva states that Rutgers University Police Department ("RUPD") has advised that Ms. Kathryn Visokay ("Ms. Visokay"), Discovery Clerk, spent 1.5 hours to retrieve, review and copy responsive records. Ms. Pastva states that Ms. Visokay is the only RUPD employee who files and retrieves written records. Ms. Pastva states that Ms. Visokay's hourly pay rate is \$24.28. Ms. Pastva states that pursuant to N.J.S.A. 47:1A-5.c., an agency is authorized to impose a special service charge where an agency must make an extraordinary expenditure of time and effort to accommodate an OPRA request. Ms. Pastva states that accordingly, Rutgers is charging the Complainant a special service charge of \$37.24.

⁵ "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."

⁶ Satisfactory compliance requires that the Custodian deliver the records 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.

Ms. Pastva states that the responsive records are available for delivery electronically via e-mail upon payment of the appropriate fees. Ms. Pastva states that there is no charge for delivery.

OPRA request Item No. 9:

Ms. Pastva states that RUPD has advised that one (1) CD responsive to request Item No. 9 exists. Ms. Pastva states that Lieutenant Rowland Johnson (“Lt. Johnson”), RUPD Officer, spent three (3) hours locating, retrieving, preserving, reviewing and copying the responsive records. Ms. Pastva states that Lt. Johnson is one of three (3) employees who have the security clearance necessary to review and copy MVRs. Ms. Pastva states that Lt. Johnson’s hourly pay rate is \$46.45.

Ms. Pastva states that pursuant to N.J.S.A. 47:1A-5.c., an agency is authorized to impose a special service charge where an agency must make an extraordinary expenditure of time and effort to accommodate an OPRA request. Ms. Pastva states that accordingly, Rutgers is charging the Complainant a special service charge of \$139.35.

Ms. Pastva states that the MVRs require a special program to view, which will be included on the CD. Ms. Pastva states that Rutgers has previously agreed to waive any fee for provision of the CD. Ms. Pastva states that the CD is available for disclosure upon payment of the appropriate fees.

Ms. Pastva states that the total charge for the responsive records is \$176.59. Ms. Pastva states that the records will be provided to the Complainant in his preferred method of delivery following receipt of payment of the appropriate fees. Ms. Pastva requests that the Complainant respond within five (5) business days so that Rutgers may satisfy its obligation to comply with the Council’s Order.

February 8, 2012

Custodian’s response to the Council’s Interim Order attaching the following:

- Letter from Ms. Pastva to the Complainant dated February 8, 2012.
- E-mail from Ms. Pastva to the Complainant dated February 8, 2012.

The Custodian certifies that Ms. Pastva e-mailed a letter to the Complainant on February 8, 2012 that contained an amended estimated cost for producing records responsive to the Complainant’s OPRA request Items No. 1, No. 2 and No. 9. The Custodian certifies that in said letter, Ms. Pastva requested that the Complainant respond within five (5) business days so that Rutgers may comply with the Council’s Order.

February 20, 2012

Custodian’s supplemental response to the Council’s Interim Order. The Custodian certifies that the Complainant has not responded to Ms. Pastva’s letter regarding the amended estimated cost for providing records responsive to the Complainant’s OPRA request Items No. 1, No. 2 and No. 9.

February 26, 2012

E-mail from the Complainant to Ms. Pastva. The Complainant states that he is in receipt of Ms. Pastva's February 20, 2012 letter. The Complainant notes that he received the Custodian's February 8, 2012 legal certification via e-mail and has not had time to respond.

The Complainant states that Ms. Pastva did not delineate the number of records responsive to request Items No. 1, No. 2 and No. 9; thus, the Complainant cannot make an informed decision as to whether he will purchase the requested records. The Complainant requests that Ms. Pastva provide him with the number of records for each item and to include the number and length of MVRs that Rutgers will provide. The Complainant states that this information will also allow him to determine whether the special service charge is reasonable, especially regarding the CAD records that are typically easily accessible. The Complainant states that he is still interested in purchasing the responsive records but needs more information.

February 28, 2012

Letter from Ms. Pastva to the Complainant. Ms. Pastva states that the responsive records are as follows:

OPRA request Items No. 1 and No. 2:

Ms. Pastva states that the Complainant's request Item No. 1 sought CAD summary reports or similar police reports for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m. Ms. Pastva states that the Complainant's request Item No. 2 sought CAD abstract reports or similar police reports for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m.

Ms. Pastva states that the responsive records total seven (7) pages and four (4) pages, respectively, for each request item.

OPRA request Item No. 9:

Ms. Pastva states that the Complainant's request Item No. 9 sought MVR footage from all police vehicles in service and assigned to the area around Commercial Avenue in New Brunswick and Route 18 on October 19, 2009 from 6:25 p.m. to 9:30 p.m.

Ms. Pastva states that the CD contains MVR footage from one (1) vehicle totaling 14 minutes and 44 seconds. Ms. Pastva states that the CD also includes the program required to view the MVR.

Ms. Pastva reiterates from her February 8, 2012 letter that the total assessed special service charge for all records responsive is \$176.59. Ms. Pastva further reiterates that Rutgers will provide the responsive records to the Complainant upon remittance of payment.

March 8, 2012

Letter from the Complainant to Ms. Pastva. The Complainant states that he does not agree with the estimated fee and the amount of time for retrieval. The Complainant states that he has filed hundreds of OPRA requests with law enforcement agencies and cannot recall one time that an agency charged him for 1.5 hours of time to retrieve eleven (11) pages of computerized records. The Complainant further states that he has never been charged for MVRs. The Complainant notes that had he not asked Ms. Pastva to delineate the responsive records, he nor the GRC would have been capable of determining whether the estimated cost was reasonable.

April 20, 2012

Letter from the GRC to the Custodian. The GRC states that its regulations provide that “[t]he Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint.” *N.J.A.C. 5:105-2.4(1)*. The GRC states that it has reviewed the parties’ submissions and has determined that additional information is required.

The GRC states that it is in receipt of Ms. Pastva’s February 28, 2012 e-mail providing additional information regarding the amended cost for providing the responsive CAD abstract reports and MVR to the Complainant. The GRC has additional questions regarding the work that Lt. Johnson performed in order to produce one (1) MVR totaling 14 minutes and 44 seconds.

The GRC thus requests a legal certification, pursuant to N.J. Court Rule 1:4-4, in response to the following:

1. Please provide an in-depth and specific account of Lt. Johnson’s work performed during the three (3) hours Ms. Pastva stated in her February 28, 2012 e-mail were needed to produce the responsive MVR.

The GRC states that the requested certification may be best coming from Lt. Johnson as he was the person who did the work. The GRC requests that the Custodian provide the requested legal certification by April 25, 2012. The GRC notes that submissions received after this deadline date may not be considered by the Council for adjudication.

April 25, 2012

Lt. Johnson’s legal certification attaching the following:

- Complainant’s OPRA request dated November 5, 2009.
- Complainant’s amended OPRA request dated December 24, 2009.

Lt. Johnson certifies that he submits this certification in support of Rutgers’ assessment of a special service charge pursuant to N.J.S.A. 47:1A-5.c. Lt. Johnson certifies that the Complainant’s original OPRA request sought, in relevant part, “[MVR] footage from all police vehicles in service on October 19, 2009 from 5:30 p.m. to 7:30 p.m.” Lt. Johnson certifies that upon receipt of said request, he was assigned to supervise

Ms. Visokay; Ms. Eileen McElhaney, RUPD Communications Dispatch Supervisor; Officer Douglas Rager and Officer Alex Yang.

Lt. Johnson certifies that he was also assigned to preserve and write to CD the MVRs responsive to request Item No. 9. Lt. Johnson certifies that he is one (1) of three (3) RUPD employees with the authorization to access, view and copy MVRs. Lt. Johnson certifies that MVR footage is captured when a police officer engages his overhead lights, which an officer can do from inside or outside the police car. Lt. Johnson further certifies that in any given shift, an officer may have multiple MVR videos, with each lasting anywhere from 2 minutes to much longer depending on the incident. Lt. Johnson certifies that because the MVR system overwrites saved footage as storage space is needed, the MVRs needed to be immediately preserved to ensure it was not erased.

Lt. Johnson certifies that RUPD utilizes CMS Client's recording program for MVRs. Lt. Johnson certifies that when he needs to review and/or copy an MVR, he uses "Insight Video Net CMS Client Software." Lt. Johnson certifies that in order to identify specific footage, he must locate same by date, location, officer and patrol car and then review the entire video. Lt. Johnson certifies that the amount of time spent reviewing an MVR depends on the length of the footage. Lt. Johnson certifies that in order to preserve MVRs, CMS Client first verifies the integrity of the file, which takes approximately 2 minutes or longer depending on the MVR's length. Lt. Johnson certifies that he must then export the file to his computer, at which time the file is converted into a digital format. Lt. Johnson certifies that this process can again take 2 minutes or more depending on the MVR's length. Lt. Johnson certifies that he then writes the file to a CD, which takes twice as long as the length of the MVR being copied. Lt. Johnson certifies that an MVR cannot be reviewed without compatible software: it takes additional time to copy an MVR to a CD with the compatible video player. Lt. Johnson certifies that he cannot view any other MVRs or complete other work on his computer when making the CDs, effectively stopping him from performing his regular duties and assignments. Lt. Johnson certifies that he then reviews the CD to make sure it works properly. Lt. Johnson again reiterates that the time frame for review depends on the length of the MVR.

Lt. Johnson certifies that for the relevant request item, he had to locate, view, save and copy all MVR footage within the responsive time frame. Lt. Johnson certifies that he located and viewed approximately 30 to 40 videos and copied them to 10 CDs. Lt. Johnson certifies that he expended 10 hours viewing, preserving and copying the requested records.

Lt. Johnson certifies that included was one (1) MVR from Officer Wayne's patrol car totaling 14 minutes and 44 seconds. Lt. Johnson certifies that he expended 15 minutes to open and view the video, 2 minutes for the CMS Client to verify the files integrity, 2 minutes exporting the file to his computer, 30 minutes to write the MVR to a CD and another 15 minutes to review the file. Lt. Johnson certifies that accordingly and in responding to the relevant request item, he expended 1 hour and 4 minutes reviewing, preserving and copying this MVR.

Lt. Johnson certifies that on December 24, 2009, the Complainant amended the relevant OPRA request item to seek MVRs for "those vehicles assigned to or present in

the area of Commercial [Avenue] in New Brunswick and those vehicles assigned to or present in the area of Route 18 in New Brunswick between 6:25 p.m. and 9:30 p.m.” Lt. Johnson certifies that upon receipt of the amended OPRA request item, he had to review all the records he previously compiled to determine whether any of the MVRs were responsive to the amended OPRA request. Lt. Johnson certifies that he expended 20 minutes obtaining and reviewing the Daily Operational Plan for October 19, 2009 to determine which officers were assigned to the locations specified in the amended OPRA request item. Lt. Johnson certifies that he expended 20 minutes obtaining the CAD logs for October 19, 2009 and reviewing them in conjunction with the MVRs to verify if any officers would have responsive records. Lt. Johnson certifies that he confirmed that Officer Wayne was the only officer that might have MVR footage responsive to the amended OPRA request item. Lt. Johnson certifies that he thus expended an additional 40 minutes identifying which MVRs were responsive.

Lt. Johnson certifies that he expended an additional 5 minutes searching Officer Wayne’s MVR footage to locate records that matched the criterion in the amended OPRA request. Lt. Johnson certifies that he located one (1) responsive MVR video that was 14 minutes and 44 seconds in length. Lt. Johnson certifies that he expended 45 minutes to isolate the MVR and 45 minutes to review and copy the MVR to CD along with the necessary software. Lt. Johnson certifies that he then expended 15 minutes to test the CD and review the MVR. Lt. Johnson certifies that he thus expended an additional 1 hour and 5 minutes to respond to the amended OPRA request item.

Lt. Johnson certifies that in total, he expended 2 hours and 49 minutes locating, viewing, preserving and copying the responsive MVR. Lt. Johnson certifies that in addition, he spent several minutes at the outset planning the tasks he would need to undertake in order to properly identify and provide all responsive records and confirming that the results of his work were accurate and complete.

Analysis

Whether the Custodian complied with the Council’s January 31, 2012 Interim Order?

At its January 31, 2012 public meeting, the Council ordered the Custodian to “... recalculate the actual cost of providing the records responsive to request Items No. 1, No. 2, and No. 9 and provide such estimate to the Complainant.” *Id.* The Council therefore ordered the Custodian to provide the amended estimate to the Complainant within five (5) business days of receipt of the Council’s Interim Order or by February 9, 2012. Moreover, the Council ordered the Custodian to certify to whether “... the Complainant fails to respond to the amended estimate of the costs of providing the records responsive to request Items No. 1, No. 2, and No. 9 ...” *Id.*

On February 8, 2012, the Custodian certified to the GRC that on the same date, Ms. Pastva sent the Complainant a letter advising him of the amended special service charge for providing access to the records responsive to the Complainant’s OPRA request Items No. 1, No. 2 and No. 9. The Custodian further certified that Ms. Pastva requested that the Complainant respond to her letter within five (5) business days in order for

Rutgers to properly fulfill its obligation to comply with the Council's Order. The Custodian submitted a second (2nd) certification on February 20, 2012 certifying that the Complainant failed to respond to Ms. Pastva within the five (5) business day deadline to respond per the Council's Order.

Therefore, the evidence of record indicates that the Custodian timely complied with the Council's January 31, 2012 Interim Order by providing the Complainant with an amended estimated cost and the Custodian submitted certified confirmation of compliance to the Executive Director within the prescribed deadline to comply with said Order. The Custodian further timely complied with the Council's Order by submitted a second certification in which she certified that the Complainant failed to respond to Ms. Pastva within the five (5) business day deadline to respond per the Council's Order.

Whether the special service charge assessed by the Custodian 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;⁷ 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 that 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?
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?

⁷ 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.
 Richard Rivera v. Rutgers, The State University of New Jersey, 2009-311– Supplemental Findings and Recommendations of the Executive Director 10

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.

Because the Complainant disputes the proposed amended special service charge, the GRC must address whether same is warranted and reasonable.

The GRC previously requested and received from Rutgers a 14-point analysis on February 28, 2011, portions of which are still relevant to the Complainant's minimized OPRA request. Rivera v. Rutgers, The State University of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012) at pg. 11-14. In said submission, the Custodian certified that "the actual special service charge should be reduced to \$340.28." This charge was based upon the amount of time Rutgers needed to compile the records responsive to all of the Complainant's eight (8) request items.⁸ However, the GRC determined that request Items No. 4 through No. 7 were invalid and that the records responsive to request Item No. 3 were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Thus, the GRC ordered the Custodian to estimate the cost for providing records responsive to request Items No. 1, No. 2 and No. 9. The Custodian complied with the Council's January 31, 2012 Interim Order on February 8, 2012 when Ms. Pastva provided the amended estimate to the Complainant totaling \$176.59. This cost contained Ms. Visokay's fee of \$37.24 for 1.5 hours of work on request Items No. 1 and No. 2 and Lt. Johnson's fee of \$139.35 for three (3) hours of work on request Item No. 9.

The Complainant responded on February 26, 2012, requesting that Ms. Pastva provide more detail regarding the records Rutgers was providing so he could make a determination as to whether he would accept the amended estimate. Ms. Pastva responded on February 28, 2012 stating that eleven (11) pages of records were responsive to the Complainant's OPRA request Items No. 1 and No. 2 and that one (1) vehicle's MVR totaling 14 minutes and 44 seconds was contained on a CD. The Complainant responded on March 8, 2012 stating that he disputed the amended special service charge.

In the 14-point analysis, the Custodian certified that RUPD had 75 employees at the time of the Complainant's OPRA request. The Custodian further certified that Ms. Visokay and Lt. Johnson were the lowest paid employees who had the knowledge and security clearance to fulfill the Complainant's OPRA request.

Regarding the estimated charge for Ms. Visokay, the Custodian certified in the 14-point analysis that no responsive records were in storage or archived. Further, the Custodian certified that Ms. Visokay is the only employee at RUPD who files and retrieves written records. Moreover, the Custodian certified that Ms. Visokay expended 1.5 hours to retrieve, review and copy eleven (11) pages of records. There is no indication in the record that Ms. Visokay performed any redactions to the requested records.

⁸ The Complainant withdrew request Items No. 8 and No. 10 in a letter to the Custodian prior to the GRC request for the 14-point analysis.

In Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (Interim Order dated December 17, 2007), the complainant sought meeting minutes from November 2005 to October 23, 2006. The custodian responded assessing a special service charge of \$84.40. The complainant filed a complaint arguing that she believed the special service charge was unwarranted. The custodian submitted a 14-point analysis that revealed that 224 pages of minutes were responsive to the complainant's OPRA request. The custodian further noted that the responsive 2005 minutes were archived while the 2006 minutes were contained within a binder in the office. The custodian asserted that it took 8 hours and 40 minutes to prepare the records. The custodian further asserted that she supervised the part time clerk typist in preparing a response.

The Council determined that the proposed special service charge was excessive and unwarranted based on a number of factors. Specifically, the Council noted that all but two (2) months of the responsive minutes were easily accessible. Moreover, the Council noted that the custodian was attempting to charge for tasks that were part of her duties as a custodian of record and did not appropriately utilize the part time clerk typist in preparing the City's response. The Council thus held that:

“... it is reasonable for the Custodian to assess a special service charge for retrieval of the two (2) months of archived meeting minutes, which the Custodian certifies took her thirty ... minutes, and the thirty... minutes that it took ... to return the records back to storage.” *Id.* at pg. 11.

The facts of Janney provide guidance here. Specifically, the Custodian certified in the 14-point analysis that the responsive CAD reports were not archived. Additionally, Ms. Visokay's duties include retrieving and filing written records. Further, Ms. Pastva stated in her letter to the Complainant dated February 8, 2012 that Ms. Visokay expended only 1.5 hours to obtain and provide eleven (11) pages of records. Thus, the evidence of record does not support that the estimated special service charge of \$37.24 reflecting Ms. Visokay's time was warranted or reasonable. Specifically, the evidence of record does not indicate that Ms. Visokay needed an extraordinary amount of time to perform her job duties, which entail filing and retrieving the types of records sought by the Complainant.

Therefore, the evidence of record indicates that Ms. Visokay's portion of the special service charge, \$37.24, is unwarranted and unreasonable pursuant to N.J.S.A. 47:1A-5.c. because Ms. Visokay expended only 1.5 hours to retrieve, copy and return eleven (11) pages of records to a non-archived location. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.c. regarding this portion of the special service charge and must disclose the responsive records to the Complainant without cost.

Regarding the estimated charge for Lt. Johnson, the Custodian certified in the 14-point analysis that some records needed to be preserved because they were subject to a fifteen (15) to thirty (30) day retention period and could have been overwritten if not preserved. Thus, Lt. Johnson was tasked with ensuring that any responsive MVRs for a 2 hour time period (from 5:30 p.m. to 7:30 p.m.) were preserved. Ms. Pastva further stated in her February 8, 2012 letter to the Complainant that Lt. Johnson expended three (3) hours to locate, retrieve, preserve, review and copy the responsive MVR. Ms. Pastva

subsequently stated in her letter dated February 28, 2012 that Lt. Johnson made available for disclosure one (1) MVR that is 14 minutes and 44 seconds long.

Pursuant to the GRC's request for more information, Ms. Pastva submitted Lt. Johnson's legal certification on April 25, 2012 in which he provided an in depth account of his effort to ultimately provide the responsive MVR. Lt. Johnson certified that in response to the Complainant's initial OPRA request Item No. 9, he located, preserved, reviewed and copied 30 to 40 videos onto 10 CDs. Lt Johnson certified that he expended 10 hours, 1 hour and 4 minutes of which came from reviewing, preserving and copying the record at issue herein. Lt. Johnson further certifies that in order to respond to the Complainant's amended OPRA request Item No. 9, he spent 40 minutes identifying which MVRs were responsive to said request and 1 hour and 5 minutes to reproduce a copy of the responsive record. Lt. Johnson thus certified that he expended 2 hours and 49 minutes to provide the responsive record in addition to several minutes at the outset of his search and after the completion of his work.

More importantly, Lt. Johnson certified that while he copied the CDs, he was unable to do any other work on his computer. Thus, Lt. Johnson likely could not have worked on anything else during the downtime of copying the responsive CDs. Moreover, although Lt. Johnson clearly spent an additional 9 hours working on the Complainant's initial OPRA request, Rutgers is only charging for the three (3) hours Lt. Johnson spent to locate, retrieve, preserve, review and copy the MVR responsive to the Complainant's amended OPRA request Item No. 9. Thus, the factors provided by Rutgers indicate that the charge of \$139.35 is reasonable for the work Lt. Johnson put into responding to the Complainant's OPRA request Item No. 9 in totality.

Thus, the evidence of record supports a conclusion that a special service charge of \$139.35 reflecting three (3) hours is reasonable and warranted based on the extraordinary efforts of Lt. Johnson to locate, retrieve, preserve, review and copy the responsive record. Thus, the Custodian is only obligated to provide access to said record once the Complainant has remitted payment for same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

Additionally, the GRC notes that although Rutgers undertook the task of responding to the Complainant's initial OPRA request Item No. 9 for MVRs, same was actually an invalid OPRA request for same. See Rivera v. Wall Police Department (Monmouth), GRC Complaint No. 2008-142 & 2008-143 (April 2010)(holding that the "[t]he Complainant failed to designate the specific record he sought by providing one or more of the following identifiers: name or number of the recording, agency-assigned number or serial number of the MVR device used to make the recording, name or badge number of the creator of the recording, police vehicle or mobile unit in which the MVR device is/was mounted when the recording was made, incident number or description of the incident that was captured on the MVR or other information that would identify with reasonable clarity the record sought." *Id.*). The Custodian still responded providing access to responsive records pending payment of the special service charge. Thus, pursuant to Gannett v. County of Middlesex, 379 NJ Super. 205 (App. Div. 2005), Rutgers could not subsequently argue this that said request item was invalid because "[s]uch a voluntary disclosure of ..." the responsive MVRs "... constituted a waiver of

whatever right ... to deny [the] entire OPRA request on the ground that it was improper.”
Id. at. 212-213.

The GRC further notes the Complainant subsequently amended his OPRA request Item No. 9 on December 24, 2009 to seek MVRs for “... those vehicles assigned to or present in the area of Commercial Avenue and those vehicles assigned to or present in the area of Route 18 in New Brunswick on October 19, 2009 from 6:25 p.m. to 9:30 p.m.” The Complainant’s amended OPRA request item contains the type of information required for a request for MVRs to be valid in accordance with Rivera. Specifically, the Complainant identified a specific location to which officers were assigned thus limiting the potential number of MVR recordings Lt. Johnson had to review in order to locate the responsive records.

Whether the original and current Custodians’ actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the original and current Custodians 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian timely complied with the Council’s January 31, 2012 Interim Order by providing the Complainant with an amended estimated cost and the Custodian submitted certified confirmation of compliance to the Executive Director within the prescribed deadline to comply with said Order. The Custodian further timely complied with the Council’s Order by submitted a second certification in which she certified that the Complainant failed to respond to Ms. Pastva within the five (5) business day deadline to respond per the Council’s Order.
2. Ms. Visokay’s portion of the special service charge, \$37.24, is unwarranted and unreasonable pursuant to N.J.S.A. 47:1A-5.c. because Ms. Visokay expended only 1.5 hours to retrieve, copy and return eleven (11) pages of records to a non-archived location. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.c. regarding this portion of the special service charge and must disclose the responsive records to the Complainant without cost.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, if necessary, 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 1:4-4,⁹ to the Executive Director.¹⁰

4. The evidence of record supports a conclusion that a special service charge of \$139.35 reflecting three (3) hours is reasonable and warranted based on the extraordinary efforts of Lt. Johnson to locate, retrieve, preserve, review and copy the responsive record. Thus the Custodian is only obligated to provide access to said record once the Complainant has remitted payment for same. *See Paff v. City of Plainfield*, GRC Complaint No. 2006-54 (July 2006).
5. **The Complainant shall, within five (5) business days from receipt of the Council's Interim Order, deliver to the Custodian (a) a payment in the amount of \$139.35, or (b) a statement declining to purchase the records. Should the Complainant accept and pay the appropriate special service charge, the Custodian shall disclose the responsive records within three (3) business days from receipt of same. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within eight (8) business days from receipt of the Council's Interim Order the Custodian shall provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4,¹¹ to the Executive Director with respect to the Complainant's willingness or refusal to purchase the requested records.**
6. The Council defers analysis of whether the original and current Custodians 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.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 22, 2012

⁹ "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."

¹⁰ Satisfactory compliance requires that the Custodian deliver the records 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.

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."



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
Acting Commissioner

INTERIM ORDER

January 31, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2009-311

v.

Rutgers, The State University of New Jersey
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 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’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because request Item No. 3 sought police daily duty logs, which records necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel, such records are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.
3. The Complainant’s request Items No. 4 through No. 7 are invalid under OPRA because they are overly broad and fail to identify specific government records sought. Moreover, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005), Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005); and New Jersey Builder’s Ass’n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).
4. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006) and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the original Custodian’s proposed charge of \$25.00 per CD is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. However, because the original Custodian withdrew the proposed fee of \$25.00 per CD, the GRC declines to order the Custodian to submit a legal certification providing the actual



cost incurred by Rutgers to produce CDs to the Complainant and provide the requested CDs to the Complainant at the "actual cost." See O'Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008).

5. Because request Item No. 3 is exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1., and because request Items No. 4 through and No. 7 are invalid under OPRA because they are overly broad and fail to specify identifiable government records, the Custodian must recalculate the actual cost of providing the records responsive to request Items No. 1, No. 2, and No. 9 and provide such estimate to the Complainant.
6. **The Custodian shall comply with Item No. 5 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.² If the Complainant fails to respond to the amended estimate of the costs of providing the records responsive to request Items No. 1, No. 2, and No. 9, the Custodian shall so certify to the Council. Additionally, if the Complainant has already been provided with the responsive records, the Custodian shall so certify to the Council.**
7. The Council defers analysis of whether the original 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.

Interim Order Rendered by the
Government Records Council
On The 31st Day of January, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: February 2, 2012

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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2009-311

v.

**Rutgers, The State University of New Jersey²
Custodian of Records**

Records Relevant to Complaint:

1. Copies of computer-aided dispatching (“CAD”) summary report or similar police report for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m.
2. Copies of CAD abstract reports or similar police report for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m.
3. Copies of police daily duty log for October 19, 2009 from 5:30 p.m. to 11:59 p.m. that includes all police officers, supervisors and civilians working normal duty and overtime details during that time and what their assignments were.
4. Copies of mobile data terminal transmissions to and from every police terminal for October 19, 2009 from 5:30 p.m. to 11:59 p.m.
5. Copies of all police radio recordings for October 19, 2009 from 5:30 p.m. to 11:59 p.m.
6. Copies of all police telephone recordings for October 19, 2009 from 5:30 p.m. to 11:59 p.m.
7. Copies of all police 911 telephone recordings for October 19, 2009 from 5:30 p.m. to 11:59 p.m.
8. Copies of officer vehicle logs for marked police vehicles in service on October 19, 2009 from 5:30 p.m. to 11:59 p.m.
9. Copies of Mobile Video Recorder (“MVR”) footage from all police vehicles in service on October 19, 2009 from 5:30 p.m. to 11:59 p.m.
10. On-site inspection of Commercial Avenue parking lot and building video footage for October 19, 2009 from 5:30 p.m. to 11:59 p.m.

Request Made: November 5, 2009

Response Made: November 17, 2009

Custodian: Leslie Fehrenbach³

GRC Complaint Filed: November 19, 2009⁴

¹ No legal representation listed on record.

² Represented by Elizabeth Minott, Esq. (New Brunswick, NJ).

³ The original Custodian of Record was Kate Cahill.

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

Background

November 5, 2009

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

November 17, 2009

Original Custodian's response to the OPRA request. The Custodian responds verbally via telephone to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request.⁵ The Custodian states that the records requested are part of a case that is still an open investigation. The Custodian states that the Middlesex County Prosecutor's Office ("MCPO") requested that the Complainant's OPRA request be forwarded to them for review. The Custodian requests that the Complainant supply his e-mail address so that the Custodian can provide a written response.

November 18, 2009

E-mail from the original Custodian to the Complainant. The Custodian states that as discussed in the telephone conversation of November 17, 2009, the Custodian is waiting for a written response from the MCPO regarding the state of the case relevant to the records the Complainant is seeking. The Custodian states that she will send a formal response once the MCPO has contacted her. The Custodian notes that she will be away on vacation until November 23, 2009 but expects a response from the MCPO by November 24, 2009.

November 18, 2009

E-mail from the Complainant to the original Custodian. The Complainant states that all records requested with the exception of the stationary cameras on Commercial Avenue (request Item No. 10) are irrelevant to anything the MCPO may be investigating. The Complainant states that without a Rutgers official reviewing each record and determining its evidentiary value, a blanket denial is unlawful.

Further, the Complainant states that the Custodian is responsible for providing access to the requested records and not the MCPO. The Custodian states that if a complaint is filed, the Custodian and not the MCPO will have to respond to same.

The Complainant states that the Custodian contacted the Complainant on the seventh (7th) business day to deny access to the requested records. The Complainant states that because November 19, 2009 is the thirty-first (31st) day since creation of the requested records, telephone records responsive to the request may be lost by the time the Custodian returns from vacation. The Complainant requests that all records responsive to his request be preserved. Moreover, the Complainant asks that because some records may be purged from the system automatically, the Custodian confirm with a

⁵ The Custodian certifies in the Statement of Information that she received the Complainant's OPRA request on November 6, 2009.

knowledgeable employee as to the electronic retention schedule for each record requested and ensure that the records are not unintentionally destroyed.

November 19, 2009

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

- Complainant’s OPRA request dated November 5, 2009.
- E-mail from the original Custodian to the Complainant dated November 18, 2009.
- E-mail from the Complainant to the original Custodian dated November 18, 2009.

The Complainant states that he submitted an OPRA request to Rutgers on November 5, 2009. The Complainant states that the Custodian responded verbally on November 17, 2009 stating that access to the requested records was denied after consultation with the MCPO due to an ongoing investigation. The Complainant states that the Custodian did not specifically identify any request items to which access was denied nor did she provide a date certain on which any records would be provided.

The Complainant states that the Custodian e-mailed him on November 18, 2009 to follow up on the telephone conversation and inform the Complainant that the Custodian is waiting for a written response from MCPO regarding the request. The Complainant notes that the Custodian provided no further details.

The Complainant states that he replied to the Custodian on November 18, 2009 outlining some concerns about her response and requesting that the records responsive to the request at issue be preserved. The Complainant states that he contacted the Custodian’s office on November 19, 2009 to ensure preservation of the requested records as November 19, 2009 represented the thirty-first (31st) day for compliance with the Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).

The Complainant does not agree to mediate this complaint.

November 24, 2009

E-mail from the original Custodian to the Complainant dated November 24, 2009. The Custodian states that she will consult with a knowledgeable employee regarding the Complainant’s concerns about retention of the requested records.

The Custodian states that although the Custodian verbally informed the Complainant on November 17, 2009 that she would be denying access to the Complainant’s OPRA request because the case was still under investigation, the Custodian has not provided any written denial of access to the Complainant’s OPRA request. The Custodian reiterates that she informed the Complainant in writing on November 18, 2009 that she needed to pursue the matter with the MCPO and that she would contact the Complainant upon returning from vacation on November 24, 2009. The Custodian states that her e-mail dated November 18, 2009 was a courtesy to keep the Complainant abreast of the status of his OPRA request.

The Custodian states that she needs to confirm whether an investigation remains open before responding to the OPRA request in writing.

November 30, 2009

E-mail from the original Custodian to the Complainant. The Custodian states that she received a telephone call from Chief Rhonda Harris (“Chief Harris”), Chief of Police for Rutgers University Police Department (“RUPD”), regarding the Complainant’s OPRA request. The Custodian states that she has confirmed that one of the recordings requested in Item No. 10 of the Complainant’s OPRA request has been preserved. The Custodian states that she has also confirmed that the data and records requested in Items No. 1 through No. 9 are available and will need to be collected. The Custodian states that it is expected that the collection process will take approximately two (2) weeks. The Custodian notes that it is likely that a special service charge will be assessed but the Custodian will confirm this fact with RUPD.

The Custodian states that she has additional information regarding the Complainant’s OPRA request but will elaborate in more detail within twenty-four (24) hours.

November 30, 2009

E-mail from the Complainant to the original Custodian. The Complainant states that he is willing to narrow request Item No. 9 to vehicles in New Brunswick, New Jersey for a specified time if it helps the Custodian. The Complainant states that he may be willing to narrow this request item further if he knew more about the vehicles in the area. The Complainant states that he does not know whether RUPD uses GPS technology; however, the Complainant would be able to significantly narrow the scope of request Item No. 9 if RUPD does use GPS.

December 1, 2009

E-mail from the original Custodian to the Complainant. The Custodian states that she will forward his e-mail narrowing the scope of request Item No. 9 to Chief Harris.

December 15, 2009

E-mail from the original Custodian to the Complainant. The Custodian states that she has obtained an estimate from RUPD for the cost to gather the data and records sought by the Complainant. The Custodian states that the cost is significant so she would like to speak directly with the Complainant via telephone regarding the special service charge.⁶

December 17, 2009

Request for the Statement of Information (“SOI”) sent to the original Custodian.

December 18, 2009

Voicemail from the original Custodian to the Complainant. The Custodian advises that the special service charge would be in excess of \$1,000.00.

⁶ The Complainant acknowledged receipt of this e-mail on December 17, 2009 and advised that the Custodian may contact him via telephone to discuss the OPRA request at issue here.
Richard Rivera v. Rutgers, The State University of New Jersey, 2009-311 – Findings and Recommendations of the Executive Director 4

December 18, 2009

E-mail from the original Custodian to the Complainant attaching a cost summary memorandum. The Custodian states that attached is the estimated cost to the Complainant.

The Custodian states that OPRA provides that:

“[w]henever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter ... involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge ... 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 Custodian states that in order to fulfill the Complainant’s OPRA request, a special service charge will be assessed and must be paid prior to obtaining the records responsive. The Custodian states that the special service charge has been calculated based on the hourly rate of pay and the number of hours expended by staff members that coordinate and maintain the records responsive.

The Custodian states that the requested RUPD records will be made available to the Complainant for an estimated cost of \$1,819.00. The Custodian states that the amount due represents the cost of material (21 compact discs (“CD”) @ \$25.00 each = \$525.00) plus the estimated fee of \$1,294.00 for the time required by personnel to conduct the discovery process required to produce the requested records as follows:

Personnel	Estimated Hours	Hourly Rate	Total
Discovery Clerk	3 hours	\$38.00	\$114.00
Communications	6 hours	\$41.61	\$250.00
Officer	2.75 hours	\$60.00	\$165.00
Officer	2.75 hours	\$60.00	\$165.00
Officer	10 hours	\$60.00	\$600.00

The Custodian further advises that Chief Harris has informed her that special software is required to view the CDs.

December 24, 2009

Complainant’s amended OPRA request. The Complainant states that pursuant to a telephone conversation with the original Custodian and Chief Harris, the Complainant amends his November 5, 2009 OPRA request as follows:

1. Copies of Computer-aided dispatching (“CAD”) summary report or similar police report for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m.
2. Copies of CAD abstract reports or similar police report for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m.

3. Copies of police daily duty log for October 19, 2009 from 5:30 p.m. to 11:59 p.m. that includes all police officers, supervisors and civilians working normal duty and overtime details during that time and what their assignments were.
4. Mobile data terminal transmissions to and from every police terminal for October 19, 2009 from 6:25 p.m. to 9:30 p.m. (changed from 5:30 p.m. to 11:59 p.m.).
5. Copies of all police radio recordings for October 19, 2009 from 6:25 p.m. to 9:30 p.m. (altered from 5:30 p.m. to 11:59 p.m.).
6. Copies of all police telephone recordings for October 19, 2009 from 6:25 p.m. to 9:30 p.m. (altered from 5:30 p.m. to 11:59 p.m.).
7. Copies of all police 911 telephone recordings for October 19, 2009 from 6:25 p.m. to 9:30 p.m. (altered from 5:30 p.m. to 11:59 p.m.).
8. Withdrawn.
9. Copies of Mobile Video Recorder (“MVR”) footage from those vehicles assigned to or present in the area of Commercial Avenue and those vehicles assigned to or present in the area of Route 18 in New Brunswick on October 19, 2009 from 6:25 p.m. to 9:30 p.m. (altered from for all police vehicles in service from 5:30 p.m. to 11:59 p.m.).
10. Withdrawn.

The Complainant requests that the estimated special service charge for production of the amended request be provided and that the Custodian reconsider charging \$25.00 per CD, which appears to be an unreasonable charge. Moreover, the Complainant requests that, based on the amount of time that has already passed, the Custodian supply the telephone and radio recordings first once the special service charge is provided and agreed upon.

December 24, 2009

E-mail from the original Custodian to the GRC. The Custodian requests an extension to submit the requested SOI.⁷

December 24, 2009

E-mail from the GRC to the original Custodian. The GRC states that it routinely grants one (1) extension of five (5) business days; however, given the circumstances regarding this complaint, the GRC will grant an extension until January 8, 2010.

January 8, 2010⁸

Original Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated November 5, 2009.
- Custodian’s note dated November 17, 2009.
- E-mail from the Custodian to the Complainant dated November 18, 2009.

⁷ The Custodian notes that the Complainant has informed her that he may be withdrawing the complaint pending a response to an amended OPRA request filed on December 24, 2009. The Custodian states that the Complainant has given support for an extension pending the Custodian’s response in early January.

⁸ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant’s OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

- E-mail from the Complainant to the Custodian dated November 24, 2009.
- E-mail from the Custodian to the Complainant dated November 24, 2009.
- E-mail from the Custodian to the Complainant dated November 30, 2009.
- E-mail from the Complainant to the Custodian dated November 30, 2009.
- E-mail from the Custodian to the Complainant dated December 1, 2009.
- E-mail from the Custodian to the Complainant dated December 15, 2009.
- Custodian's note dated December 18, 2009.
- E-mail from the Custodian to the Complainant dated December 18, 2009 attaching a cost summary memorandum.

The Custodian certifies that she received the Complainant's OPRA request on November 6, 2009. The Custodian certifies that she initially responded to such request verbally on November 17, 2009 informing the Complainant that access to the requested records was being denied because the MCPO advised that the records were part of an on-going investigation. The Custodian certifies that she responded in writing on November 18, 2009 recapitulating her initial response and advising that she would provide the Complainant with a more formal response once the MCPO contacted her with their response on or about November 24, 2009.

The Custodian certifies that the Complainant replied on November 18, 2009 arguing that a blanket denial of access is unlawful under OPRA and asking that the requested records be preserved. The Custodian reiterates that per her November 18, 2009 e-mail, the matter was being pursued with the MCPO and that a formal response would be provided on November 24, 2009 upon the Custodian's return from vacation. The Custodian certifies that she replied in writing on November 24, 2009 confirming that the records would be preserved. Further, the Custodian certifies that she advised the Complainant that although she initially verbally responded stating that access to the requested records would be denied, the Custodian did not issue a blanket denial of access to any of the records requested.

The Custodian certifies that she e-mailed the Complainant on November 30, 2009 advising that records responsive were available and that a special service charge could be incurred based on approximately two (2) weeks of time to collect the records. The Custodian certifies that she again e-mailed the Complainant on December 15, 2009 confirming that RUPD has estimated a significant cost to produce the records responsive and that the Custodian would like to speak with the Complainant. The Custodian certifies that she left a voicemail for the Complainant on December 18, 2009 and subsequently supplied a cost summary memorandum to the Complainant via e-mail on the same day.

The Custodian argues that no denial of access has occurred in this complaint; rather, no records have been provided to this date. The Custodian states that she has had ongoing conversations with the Complainant regarding possible clarification of the request. The Custodian certifies that on December 24, 2009, she forwarded an amended request submitted by the Complainant to RUPD, who continues to gather the requested data.

January 12, 2010

E-mail from the Complainant to the original Custodian. The Complainant requests an update as to the status of his OPRA request.

January 12, 2010

E-mail from the original Custodian to the Complainant attaching a cost summary memorandum. The Custodian states that the Complainant submitted an amended OPRA request on December 24, 2009. The Custodian states that in response to said amended request, RUPD is assessing a special service charge of \$560.44. The Custodian states that the amount due represents the cost of material (4 CD's @ \$25.00 each = \$100.00) plus the estimated fee of \$460.44 for the time required by personnel to conduct the discovery process required to produce the requested records as follows:

Personnel	Estimated Hours	Hourly Rate	Total
Discovery Clerk	3 hours	\$38.00	\$114.00
Communications	4 hours (2 hours less than the original special service charge)	\$41.61	\$166.44
Officer	3 hours (12 hours and 2 staff members less than the original special service charge)	\$60.00	\$180.00

January 12, 2010

E-mail from the Complainant to the original Custodian. The Complainant states that he is in receipt of the Custodian's proposed special service charge. The Complainant notes that the New Brunswick Police Department ("NBPD"), which has a higher call for service rate than RUPD, produced seven (7) CDs and forty-seven (47) pages of records for the same event (for which it took the lead over ten (10) agencies) at a cost of \$116.50. The Complainant further notes that both this request and the one filed with NBPD were submitted at the same time, with NBPD request being more voluminous and NBPD was able to provide the records a month ago.

The Complainant states that because he has filed many requests for police records and is familiar with records retrieval and archiving, he understands that the proposed special service charge is merely an estimate. The Complainant states that he disagrees with the proposed fee, particularly since NBPD has set a benchmark fee based on already providing records for the same event.

The Complainant states that several of the records requested will take only minutes to produce. The Complainant states that as demonstrated in Rivera v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-154 (June 2008), telephone and radio transmissions typically last between a few seconds and a few minutes. The Complainant states that as another example, the request submitted to NBPD for the same event sought more than thirty-five (35) hours of real time recordings; however, the records provided

comprised of twenty (20) minutes of recordings with no redactions. The Complainant also states that the Custodian has not clearly stated whether the requested MVRs exist.

The Complainant states that regarding the \$25.00 charge for CDs, he believes that the fee is excessive and should reflect the actual cost for the CDs. The Complainant states that as an alternative, the records could be provided for just the special service charge and no charge for the CDs. The Complainant states that he wishes to come to a mutual agreement rather than to have the GRC adjudicate this complaint; however, the Complainant does not agree to the current special service charge. The Complainant requests that the Custodian consult with Chief Harris and respond in the near future.

January 12, 2010

E-mail from the original Custodian to the Complainant. The Custodian states that she will forward the Complainant's comments to Chief Harris and respond to the Complainant accordingly.

January 15, 2010

E-mail from the original Custodian to the Complainant. The Custodian states that she is still reviewing the Complainant's January 12, 2010 e-mail and will respond to said e-mail before the end of the week ending January 22, 2010.

February 8, 2010

Letter from the original Custodian to the Complainant attaching a cost summary memorandum. The Custodian states that this letter shall serve as her response to the Complainant's January 12, 2010 e-mail in which the Complainant requested that Rutgers reconsider the cost associated with fulfilling the Complainant's amended OPRA request. The Custodian states that Rutgers will waive the fee for CDs; however, Rutgers still assesses the proposed fee of \$460.44 for the compilation of the responsive records.

February 10, 2011

E-mail from the GRC to Ms. Kimberlee Pastva ("Ms. Pastva"), Compliance Associate. The GRC states that it is in need of additional information. The GRC states that Rutgers has asserted a special service charge for providing access to the records requested by the Complainant. The GRC requests that the Custodian prepare a 14-point analysis answering the following:

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

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

The GRC further states that Rutgers has asserted that CDs provided to the Complainant will cost \$25.00 per CD. The GRC states that Rutgers has also asserted that the Complainant will need special software to view the CDs. The GRC requests that the Custodian legally certify to the following:

1. The actual cost incurred to provide a single CD to a requestor. The actual cost is defined as "the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy." N.J.S.A. 47:1A-5.b.
2. The type of software needed to view the CDs and whether this software is easily obtainable by the Complainant.

The GRC requests that the Custodian provide the 14-point analysis and legal certification by February 18, 2011.

February 15, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that based on the amount of time that has passed since Rutgers has last dealt with the Complainant's OPRA request and the departure of the original Custodian, Counsel is requesting an extension of time until February 25, 2011 to submit the requested 14-point analysis and legal certification.

Counsel notes that the proposed fee of \$25.00 per CD is no longer at issue because Rutgers has since waived the fee, at least as it pertains to the OPRA request at issue here.

February 16, 2011

E-mail from the GRC to the Custodian’s Counsel. The GRC grants Counsel an extension of time until February 25, 2011 to submit the requested 14-point analysis and legal certification.

February 25, 2011

E-mail from the Custodian’s Counsel to the GRC. Counsel requests an extension of time until February 28, 2011 to submit the requested 14-point analysis and legal certification because the Custodian is unavailable to execute same at this time.

February 25, 2011

E-mail from the GRC to the Custodian’s Counsel. The GRC grants Counsel an extension of time until February 28, 2011 to submit the requested 14-point analysis and legal certification.

February 28, 2011

Custodian’s 14-point analysis and legal certification with the following attachments:

- Complainant’s OPRA request dated November 5, 2009.
- E-mail from the original Custodian to the Complainant dated December 18, 2009 attaching a cost summary memorandum.
- Complainant’s amended OPRA request dated December 24, 2009.
- E-mail from the Complainant to the Custodian dated January 12, 2010.
- E-mail from the Custodian to the Complainant dated January 12, 2010 attaching a cost summary memorandum.
- E-mail from the Complainant to the Custodian dated January 12, 2010.
- E-mail from the Custodian to the Complainant dated January 12, 2010.
- E-mail from the Custodian to the Complainant dated January 15, 2010.
- Letter from the Custodian to the Complainant dated February 8, 2010 attaching a cost summary memorandum.

Questions	Custodian’s Response
1. What records are requested?	<ol style="list-style-type: none"> 1. Copies of Computer-aided dispatching (“CAD”) summary report or similar police report for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m. 2. Copies of CAD abstract reports or similar police report for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m. 3. Copies of police daily duty log for October 19, 2009 from 5:30 p.m. to 11:59 p.m. that includes all police officers, supervisors and civilians working normal duty and overtime details during that time

	<p>and what their assignments were.</p> <ol style="list-style-type: none"> 4. Copies of mobile data terminal transmissions to and from every police terminal for October 19, 2009 from 5:30 p.m. to 11:59 p.m. 5. Copies of all police radio recordings for October 19, 2009 from 5:30 p.m. to 11:59 p.m. 6. Copies of all police telephone recordings for October 19, 2009 from 5:30 p.m. to 11:59 p.m. 7. Copies of all police 911 telephone recordings for October 19, 2009 from 5:30 p.m. to 11:59 p.m. 8. Copies of officer vehicle logs for marked police vehicles in service on October 19, 2009 from 5:30 p.m. to 11:59 p.m. 9. Copies of Mobile Video Recorder (“MVR”) footage from all police vehicles in service on October 19, 2009 from 5:30 p.m. to 11:59 p.m. 10. On-site inspection of Commercial Avenue parking lot and building video footage for October 19, 2009 from 5:30 p.m. to 11:59 p.m.
2. Give a general nature description and number of the government records requested.	No response.
3. What is the period of time over which the records extend?	See Complainant’s November 5, 2009 OPRA request.
4. Are some or all of the records sought archived or in storage?	The Custodian certifies that no records were archived or in storage. The Custodian certifies that many of the requested records were subject to a fifteen (15) to thirty (30) day retention policy and would have been automatically overwritten without expenditure of time to preserve said record. The Custodian certifies that upon receipt of the Complainant’s November 5, 2009 OPRA request, the RUPD expended an extraordinary amount of time to ensure these records were preserved.
5. What is the size of the agency (total number of employees)?	The Custodian certifies that at the time of the Complainant’s November 5, 2009 OPRA request, RUPD consisted of seventy-five (75) employees, each with assigned duties and various levels of security clearance.
6. What is the number of employees available to accommodate the records request?	The Custodian certifies that the Complainant’s November 5, 2009 OPRA request required the time of five (5) RUPD employees: Ms. Kathryn Visokay (“Ms. Visokay”), Discovery Clerk; Ms. Eileen McElhaney (Ms. McElhaney”), Communications Dispatch Supervisor; Lieutenant Rowland Johnson (“Lt. Johnson”), RUPD Officer; Officer Douglas Rager (“Officer Rager”), RUPD Officer; and Officer Alex Yang (“Officer Yang”), RUPD Officer. The Custodian certifies that these employees were chosen because they had the knowledge and the security clearance necessary to perform the tasks required to fulfill the Complainant’s OPRA request.
7. To what extent do the requested records have to be redacted?	N/A.
8. What is the level of personnel, hourly rate, and number of hours, if any,	The Custodian certifies that each of the five (5) employees identified was the lowest level employee (in terms of compensation) that could have responded to the Complainant’s OPRA request.

<p>required for a government employee to locate, retrieve and assemble the records for copying?</p>	<p>The Custodian certifies that Ms. Visokay expended 2 hours searching for and retrieving the records responsive to the Complainant’s OPRA request Items No. 1 through No. 3 and Item No. 8.</p> <p>The Custodian certifies that Ms. McElhaney is the lowest paid of two (2) employees at the RUPD with the security clearance necessary to review and copy data transmissions, police telephone recordings and 911 telephone recordings; thus, she was chosen to respond to request Items No. 4 through No. 7. The Custodian certifies that the Ms. McElhaney expended 1 hour locating the responsive 911 call and preserving approximately 250 responsive transmissions. The Custodian certifies that Ms. McElhaney estimated it would take 5 hours of time to review and copy the transmissions, which would be copied to an estimated six (6) CDs.</p> <p>The Custodian certifies that Lt. Johnson is the lowest paid of three (3) employees with the security clearance necessary to review MVR’s; thus, he was chosen to respond to request Item No. 9. The Custodian certifies that Lt. Johnson expended 10 hours reviewing and copying the requested MVR’s so that it could be preserved. The Custodian certifies that the records were placed on ten (10) CDs.</p> <p>The Custodian certifies that Officer’s Rager and Yang were junior officers at the time of the Complainant’s OPRA request. The Custodian certifies that each expended 2.75 hours reviewing and preserving video recordings responsive to Item No. 10, for a total of 5.5 hours. The Custodian certifies that the footage was placed on five (5) CDs.⁹</p> <p>The Custodian certifies that the total cost of \$1,294.00 was sent to the Complainant based on 18.5 total hours of extraordinary time already expended by the RUPD to fulfill the Complainant’s request and an estimated 6 hours the RUPD expected to expend.</p>
<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?</p>	<p>N/A.</p>
<p>10. What is the level of personnel, hourly rate and number of hours, if any, required for a government</p>	<p>The Custodian certifies that Ms. Visokay estimated 1 hour to separate, copy, reattach and re-file the records responsive to the Complainant’s OPRA request Items No. 1 through No. 3 and Item No. 8.</p>

⁹ The Custodian further certifies a higher-ranking RUPD officer had to train both officers to use the equipment necessary to preserve the recordings; however, the Complainant was not charged for that officer’s time.

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?	<p>The Custodian certifies that Ms. McElhaney and Lt. Johnson were the lowest paid employees with the necessary security clearance to review records responsive to request Items No. 4 through No. 7 and No. 9.</p> <p>The Custodian certifies that Ms. Visokay is the only employee responsible for filing and retrieving written records for the RUPD. The Custodian further certifies that Officers' Rager and Yang were junior officers at the time with a regular patrol assignment.</p>																				
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?	<table border="1"> <tr> <td>Ms. Visokay</td> <td>3 hours</td> <td>\$38.00</td> </tr> <tr> <td>Ms. McElhaney</td> <td>6 hours</td> <td>\$41.61</td> </tr> <tr> <td>Officer Rager</td> <td>2.75 hours</td> <td>\$60.00</td> </tr> <tr> <td>Officer Yang</td> <td>2.75 hours</td> <td>\$60.00</td> </tr> <tr> <td>Lt. Johnson</td> <td>10 hours</td> <td>\$60.00</td> </tr> </table>	Ms. Visokay	3 hours	\$38.00	Ms. McElhaney	6 hours	\$41.61	Officer Rager	2.75 hours	\$60.00	Officer Yang	2.75 hours	\$60.00	Lt. Johnson	10 hours	\$60.00					
Ms. Visokay	3 hours	\$38.00																			
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Officer Yang	2.75 hours	\$60.00																			
Lt. Johnson	10 hours	\$60.00																			
13. What is the availability of information technology and copying capabilities?	N/A.																				
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	<table border="1"> <tr> <td>Ms. Visokay</td> <td>3 hours</td> <td>\$38.00</td> <td>\$114.00</td> </tr> <tr> <td>Ms. McElhaney</td> <td>6 hours</td> <td>\$41.61</td> <td>\$250.00</td> </tr> <tr> <td>Lt. Johnson</td> <td>2.75 hours</td> <td>\$60.00</td> <td>\$165.00</td> </tr> <tr> <td>Officer Rager</td> <td>2.75 hours</td> <td>\$60.00</td> <td>\$165.00</td> </tr> <tr> <td>Officer Yang</td> <td>10 hours</td> <td>\$60.00</td> <td>\$600.00</td> </tr> </table> <p>The Custodian further certifies that added to the total of \$1,294.00 was a materials fee of \$524.00 for an estimated twenty-one (21) CDs at \$25.00 per CD. Thus, the total special service charge assessed to the Complainant's November 5, 2009 OPRA request was \$1,819.00.</p>	Ms. Visokay	3 hours	\$38.00	\$114.00	Ms. McElhaney	6 hours	\$41.61	\$250.00	Lt. Johnson	2.75 hours	\$60.00	\$165.00	Officer Rager	2.75 hours	\$60.00	\$165.00	Officer Yang	10 hours	\$60.00	\$600.00
Ms. Visokay	3 hours	\$38.00	\$114.00																		
Ms. McElhaney	6 hours	\$41.61	\$250.00																		
Lt. Johnson	2.75 hours	\$60.00	\$165.00																		
Officer Rager	2.75 hours	\$60.00	\$165.00																		
Officer Yang	10 hours	\$60.00	\$600.00																		

The Custodian certifies that the Complainant submitted an amended OPRA request on December 24, 2010. The Custodian certifies that said request withdrew Items No. 8 and No. 10 and amended Items No. 4 through No. 7 and Item No. 9. The Custodian certifies that based on the amended OPRA request, the original Custodian responded stating that the new assessed special service charge would be \$460.44. The Custodian certifies that this amount was derived from time already expended and still to be expended in fulfilling the Complainant's amended OPRA request. The Custodian certifies that the reduced special service charge included the following:

Personnel	Estimated Hours	Hourly Rate	Total
Discovery Clerk	3 hours	\$38.00	\$114.00
Communications	4 hours (2 hours less than the original special service charge)	\$41.61	\$166.44

Officer	3 hours (12 hours and 2 staff members less than the original special service charge)	\$60.00	\$180.00
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The Custodian certifies that the reduced cost accounts for only 10 hours, as opposed to the 24.5 hours originally charged. The Custodian further certifies that only four (4) CDs were needed, thus, the cost of materials amounted to an additional charge of \$100.00 or \$25.00 per CD.

The Custodian certifies that the Complainant e-mailed the original Custodian on January 12, 2010 requesting that Rutgers reconsider the proposed cost for fulfilling his amended OPRA request. The Custodian certifies that the original Custodian responded on February 8, 2010 stating that Rutgers was waiving the charge for the CDs, but would still impose a special service charge of \$460.44 as authorized pursuant to N.J.S.A. 47:1A-5.b. The Custodian certifies that this amount was equal to 10 hours of time expended or still to be expended by RUPD to fulfill the Complainant’s amended request although significantly more time was spent on both the Complainant’s original and amended OPRA requests.

The Custodian certifies that the type of software required to view the recordings that the Complainant has requested can be loaded directly onto one of the CDs at no additional cost.

The Custodian certifies that in preparing the 14-point analysis, it came to the Custodian’s attention that the hourly rate charged for each of the three (3) RUPD employees was an enhanced rate used by RUPD for tasks performed outside the course of the employee’s regular duties. The Custodian certifies that each actual rate is as follows:

Personnel	Estimated Hours	Hourly Rate
Discovery Clerk	3 hours	\$24.83
Communications	4 hours	\$31.61
Officer	3 hours	\$46.45

The Custodian certifies that based on the foregoing rates, the actual special service charge should be reduced to \$340.28.

Analysis

Whether the Custodian’s verbal response resulted in a violation of OPRA?

OPRA also 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 ... If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA further provides that:

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁰ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant complaint, the Custodian verbally responded to the Complainant on the seventh (7th) business day after receipt of the Complainant’s OPRA request stating that the requested record are still part of an ongoing investigation and that the MCPO is reviewing the Complainant’s OPRA request. The Custodian subsequently followed up her verbal response with a written response on the eighth (8th) business day after receipt of the Complainant’s request. The provisions of OPRA specifically provide that a custodian is required to respond in writing within the statutorily mandated seven (7) business day time frame. Here, though the Custodian responded within the statutorily mandated time frame, said verbal response is not in compliance with the provisions of OPRA. *See* Dittrich v. City of Hoboken, GRC Complaint No. 2008-04 (March 2009).

¹⁰ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

Whether the Custodian unlawfully denied access to the records requested?

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 ... A government record shall not include ... surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

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.

In the matter before the Council, the Complainant filed an OPRA request on November 5, 2009 seeking copies of the records relevant to this complaint listed above. The evidence indicates that the Custodian responded verbally via telephone to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request stating that the records requested are part of an open investigation. The evidence also indicates that in an e-mail to the Complainant dated November 30, 2009, the Custodian stated that she confirmed that one of the recordings requested in Item No. 10 of the Complainant's OPRA request had been preserved, and also confirmed that the data

and records requested in Items No. 1 through No. 9 are available would take approximately two (2) weeks to be collected.

The Complainant subsequently amended his OPRA request on December 24, 2009 as follows:

1. Copies of Computer-aided dispatching (“CAD”) summary report or similar police report for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m.
2. Copies of CAD abstract reports or similar police report for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m.
3. Copies of police daily duty log for October 19, 2009 from 5:30 p.m. to 11:59 p.m. that includes all police officers, supervisors and civilians working normal duty and overtime details during that time and what their assignments were.
4. Mobile data terminal transmissions to and from every police terminal for October 19, 2009 from 6:25 p.m. to 9:30 p.m. (altered from 5:30 p.m. to 11:59 p.m.).
5. Copies of all police radio recordings for October 19, 2009 from 6:25 p.m. to 9:30 p.m. (altered from 5:30 p.m. to 11:59 p.m.).
6. Copies of all police telephone recordings for October 19, 2009 from 6:25 p.m. to 9:30 p.m. (altered from 5:30 p.m. to 11:59 p.m.).
7. Copies of all police 911 telephone recordings for October 19, 2009 from 6:25 p.m. to 9:30 p.m. (altered from 5:30 p.m. to 11:59 p.m.).
8. Withdrawn.
9. Copies of Mobile Video Recorder (“MVR”) footage from those vehicles assigned to or present in the area of Commercial Avenue and those vehicles assigned to or present in the area of Route 18 in New Brunswick on October 19, 2009 from 6:25 p.m. to 9:30 p.m. (altered from for all police vehicles in service from 5:30 p.m. to 11:59 p.m.).
10. Withdrawn.

OPRA exempts from the definition of a government record security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software. N.J.S.A. 47:1A-1.1.

Item No. 3 of the Complainant’s OPRA request sought “[c]opies of police daily duty log for October 19, 2009 from 5:30 p.m. to 11:59 p.m. that includes all police officers, supervisors and civilians working normal duty and overtime details during that time and what their assignments were.”

Duty logs document the nature of a police officer’s daily activities and the amount of time that he devotes to patrol duties. *See, e.g., McElwee v. Borough of Fieldsboro*, 400 N.J. Super. 388, 391 (App. Div. 2008). The Complainant’s request for police duty logs sought details of the assignments of police personnel. Such records necessarily include details regarding surveillance techniques and staffing levels. If disclosed, such information could pose a risk to the safety of police personnel. The police duty logs sought by the Complainant at request Item No. 3 are therefore exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.¹¹

¹¹ The New Jersey Department of Law and Public Safety has specifically recognized the exemption to disclosure under OPRA of such records. *See, e.g., proposed N.J.A.C. 13:1E-3-2(a)3*, which provides that *Richard Rivera v. Rutgers, The State University of New Jersey*, 2009-311 – Findings and Recommendations of the Executive Director 18

Therefore, because request Item No. 3 sought police daily duty logs, which records necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel, such records are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.

Moreover, the Complainant's request Items No. 4, through No. 7 are invalid under OPRA because they are overly broad and fail to specify identifiable government records.

"[U]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt." MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005). A request that does not identify the particular records sought by name, date, type of record or some other specific identifying characteristic may be found to be invalid.

In MAG, the Division of Alcoholic Beverage Control sought to revoke MAG's liquor license for various violations. Trying to establish a defense of selective prosecution, MAG filed an OPRA request with the Division, seeking "**all documents or records ...** that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person [who], after leaving the licensed premises, was involved in a fatal auto accident," and "**all documents or records** evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity." *Id.* at 539-40 (Emphasis added). MAG's request did not identify any specific case by name, date, docket number or any other citation, but instead demanded that:

"the documents or records should set forth the persons and/or parties involved, the name and citation of each such case, including unreported cases, the dates of filing, hearing and decision, the tribunals or courts involved, the substance of the allegations made, the docket numbers, the outcome of each matter, the names and addresses of all persons involved, including all witnesses and counsel, and copies of all pleadings, interrogatory answers, case documents, expert reports, transcripts, findings, opinions, orders, case resolutions, published or unpublished case decisions, statutes, rules and regulations." *Id.* at 540.

The Court found that this was an invalid OPRA request with which the Custodian was not obligated to comply. *Id.* at 553. The Court found it very significant that MAG "failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past." *Id.* at 549. Because

"records which may reveal ... an agency's surveillance, security or investigative techniques or procedures or undercover personnel" are not considered government records subject to public access; *see also N.J.A.C. 13:1E-3.2(a)7* which provides that "[t]he duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment, including, but not limited to, overtime data pertaining to an individual law enforcement officer" is not considered a government record.

MAG failed to identify any particular documents by name, type of document, date range, or any other identifying characteristic, the custodian would have been required:

“to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense....Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.” *Id.*

The Court therefore found that “MAG's request was not a proper one for specific documents within OPRA's reach, but rather a broad-based demand for research and analysis, decidedly outside the statutory ambit.” *Id.* at 550. *See also* New Jersey Builder's Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007)(holding that a five-page document listing thirty-eight separate requests all of which included a request for “any and all data” failed to specifically identify the documents sought as required by N.J.S.A. 47:1A-5.f.); Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005)(finding that a five-part request for the “entire file” of his criminal investigation and “the factual basis underlying documented action and advice to third parties” is not a proper request for public records under OPRA and the information it seeks is beyond the statutory reach of OPRA); Reda v. Township of West Milford, GRC Complaint No. 2002-58 (January 17, 2003)(dismissing a request for annual costs of liability settlements by the Township for each of five years, including costs for “legal defense of said items[.]” because the requestor failed to identify any specific record in the custodian's possession and holding that OPRA does not require records custodians to conduct research among its records for a requestor and correlate data from various government records).

In the matter before the Council, the Complainant's request sought copies of the following:

1. Copies of Computer-aided dispatching (“CAD”) summary report or similar police report for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m.
2. Copies of CAD abstract reports or similar police report for activities on October 19, 2009 from 5:30 p.m. to 11:59 p.m.
3. Copies of police daily duty log for October 19, 2009 from 5:30 p.m. to 11:59 p.m. that includes all police officers, supervisors and civilians working normal duty and overtime details during that time and what their assignments were.
4. Copies of mobile data terminal transmissions to and from every police terminal for October 19, 2009 from 6:25 p.m. to 9:30 p.m.¹²
5. Copies of all police radio recordings for October 19, 2009 from 6:25 p.m. to 9:30 p.m.¹³

¹² The Complainant revised the applicable time period in his amended OPRA request dated December 24, 2009.

¹³ The Complainant revised the applicable time period in his amended OPRA request dated December 24, 2009.

6. Copies of all police telephone recordings for October 19, 2009 from 6:25 p.m. to 9:30 p.m.¹⁴
7. Copies of all police 911 telephone recordings for October 19, 2009 from 6:25 p.m. to 9:30 p.m.¹⁵
8. Copies of officer vehicle logs for marked police vehicles in service on October 19, 2009 from 5:30 p.m. to 11:59 p.m.¹⁶
9. Copies of Mobile Video Recorder (“MVR”) footage from all police vehicles in service on October 19, 2009 from 5:30 p.m. to 11:59 p.m.
10. On-site inspection of Commercial Avenue parking lot and building video footage for October 19, 2009 from 5:30 p.m. to 11:59 p.m.¹⁷

In Rivera v. Wall Police Department (Monmouth), GRC Complaint Number 2008-280 (June 2010), the Complainant’s OPRA request sought the following records:

- 1) DVD or VHS format copies of mobile video and audio recordings made by Wall Police Officer Eric Olsen on April 14, 2008 from 9:00 a.m. to 9:20 a.m.
- 2) Telephone and police radio transmission audio recordings for April 14, 2008 from 9:00 a.m. to 9:30 a.m.
- 3) Telephone and police radio transmission audio recordings for May 8, 2008 from 9:00 p.m. to 9:20 p.m.
- 4) Telephone and police radio transmission audio recordings for November 21, 2008 from 8:00 a.m. to 8:15 a.m.

The Council determined that the Complainant’s requests for Item No. 2 through Item No. 4¹⁸ of the Complainant’s request were overbroad and failed to specifically identify the records sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in MAG, supra, Bent, supra, New Jersey Builders, supra, and Schuler, supra.

Moreover, in Rivera v. Wall Police Department (Monmouth), GRC Complaint No. 2008-281 (July 2010), the Complainant’s OPRA request sought the following records:

- 1) Mobile to mobile data terminal (“MDT”) transmission for August 4, 2007 from 4:00 p.m. to 4:30 p.m.
- 2) All radio transmissions for August 4, 2007 from 4:00 p.m. to 4:30 p.m.

¹⁴ The Complainant revised the applicable time period in his amended OPRA request dated December 24, 2009.

¹⁵ The Complainant revised the applicable time period in his amended OPRA request dated December 24, 2009.

¹⁶ The Complainant subsequently withdrew this request Item in his amended OPRA request dated December 24, 2009.

¹⁷ The Complainant subsequently withdrew this request Item in his amended OPRA request dated December 24, 2009.

¹⁸ The Council ultimately determined that the evidence of record indicated that records responsive to request Item No. 1 did not exist.

- 3) All recorded telephone tapes for August 4, 2007 from 4:00 p.m. to 4:30 p.m.
- 4) Police radio transmission and Fire Department band tapes for September 12, 2007 from 3:15 p.m. to 3:35 p.m.
- 5) Police telephone tapes from all recorded phone lines for September 12, 2007 from 3:15 p.m. to 3:35 p.m.
- 6) Police MDT messages for September 12, 2007 from 3:15 p.m. to 4:15 p.m.

The Council determined that the Complainant's OPRA request was overly broad and failed to specifically identify the records sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG, supra, Bent, supra, and New Jersey Builders, supra.

In the matter before the Council, the Complainant's request Items No. 4, through 7 are extremely similar to the requests in Rivera v. Wall Police Department (Monmouth), GRC Complaint Number 2008-280 (June 2010) and Rivera v. Wall Police Department (Monmouth), GRC Complaint No. 2008-281 (July 2010); the Complainant's request for such items is invalid under OPRA because they are overly broad and fail to identify specific government records sought. Moreover, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG, supra, Bent, supra, and New Jersey Builders, supra.

Whether the fee assessed by the Custodian to fulfill the Complainant's OPRA request is warranted?

OPRA provides that:

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

OPRA also states that:

“[w]henver the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, *a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies*; provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual

cost of copying exceeds the foregoing rates shall be established in advance by ordinance. The requestor shall have the opportunity to review and object to the charge prior to it being incurred.” (Emphasis added). N.J.S.A. 47:1A-5.c.

Although the original Custodian on February 8, 2010 waived the fee to produce CDs to the Complainant, the GRC must address whether the assessed charge of \$25.00 per CD is appropriate under OPRA.

OPRA provides that government records may be purchased upon payment of the actual cost of duplicating the record. N.J.S.A. 47:1A-5.b. Said provision defines “actual cost” as “the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section...”

In Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Township of Edison charged \$55.00 for a computer diskette containing Township Council meeting minutes. The plaintiff asserted that the fee was excessive and not related to the actual cost of duplicating the record. The defendant argued that the plaintiff’s assertion is moot because the fee was never imposed and the requested records were available on the Township’s website free of charge. The Court held that “...the appeal is not moot, and the \$55 fee established by the Township of Edison for duplicating the minutes of the Township Council meeting onto a computer diskette is unreasonable and unsanctioned by explicit provisions of OPRA.” The court stated that:

“[i]n adopting OPRA, the Legislature made clear that ‘government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.’ N.J.S.A. 47:1A-1. The imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication. N.J.S.A. 47:1A-5.b.”

The Court also stated that “...although plaintiffs have obtained access to the actual records requested, the legal question remains viable, because it is clearly capable of repetition. *See New Jersey Div. of Youth & Family Servs. v. J.B.*, 120 N.J. 112, 118-19, 576 A.2d 261 (1990).” Further, the court stated that “...the fee imposed by the Township of Edison creates an unreasonable burden upon plaintiff’s right of access and is not rationally related to the actual cost of reproducing the records.”

The case law above was considered in several GRC complaints where a custodian asserted that the cost of providing a record on a medium other than on paper copies. *See Coulter v. Township of Bridgewater (Somerset)*, GRC Complaint No. 2008-220 (Interim Order dated November 18, 2008), *Paff v. Borough of Wildwood Crest (Cape May)*, GRC

Complaint No. 2009-54 (Interim Order dated June 29, 2010) and Wolosky v. Sparta Board of Education (Sussex), GRC Complaint No. 2009-56 (November 2009).

Additionally, in O’Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008), the custodian responded to the complainant’s OPRA request for an audio recording of the Council’s May 14, 2007 public and executive session in a timely manner stating that the cost for the recording would be \$35.00. The custodian also requested that the complainant indicate whether he would like the custodian to prepare the record. Subsequently, the complainant filed a Denial of Access Complaint arguing that the proposed fee did not represent the “actual cost,” and that copying fees prescribed in a Township ordinance, Chapter 250, Article II § 250.9(E), violate OPRA.

Based on the evidence in that complaint, the Council was tasked with deciding on whether the custodian violated OPRA by charging the fee enumerated in the Township’s ordinance rather than the actual cost of duplication of the requested record. The Council held that:

“... pursuant to N.J.S.A. 47:1A-5.b., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006) [and] Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) ... the Custodian must charge the actual cost of duplicating the requested records. As such, the Custodian’s charge of \$35.00 for an audio recording of the requested meeting minutes is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must provide the requested records to the Complainant and charge the actual cost of the audiotape and shall not include the cost of labor or other overhead expenses associated with making the copy.”

The facts of this complaint are similar to the facts of O’Shea, *supra*. Specifically, the original Custodian assessed a charge of \$25.00 per CD provided to the Complainant: the total cost of 21 CDs totals \$525.00

Subsequent to the filing of this complaint, the Complainant amended his OPRA request on December 24, 2009. The original Custodian responded on January 12, 2010 stating that the number of CDs had decreased to four (4) based on the Complainant’s amended request; however, the Custodian continued to impose a fee of \$25.00 for production of the CDs. On the same day, the Complainant took issue with the charge and requested that the original Custodian reconsider the charge. The original Custodian subsequently responded on February 8, 2010 stating that Rutgers would waive the fee for the CDs.

Regardless of whether the original Custodian later waived the proposed fee, the \$25.00 charge per CD initially proposed does not appear to be the actual cost incurred by Rutgers to provide each CD. Additionally, the original Custodian failed to provide any evidence showing that the proposed fee of \$25.00 represents Rutgers’ “actual cost” incurred to provide the requested CDs.

Therefore, pursuant to Spaulding, *supra*, and Libertarian Party of Central New Jersey, *supra*, the original Custodian's proposed charge of \$25.00 per CD is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. However, because the original Custodian withdrew the proposed fee of \$25.00 per CD, the GRC declines to order the Custodian to submit a legal certification providing the actual cost incurred by Rutgers to produce CD's to the Complainant and provide the requested CDs to the Complainant at the "actual cost." *See O'Shea, supra*.

However, because request Item No. 3 is exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1., and because request Items No. 4, through No. 7 are invalid under OPRA because they are overly broad and fail to specify identifiable government records, the Custodian must recalculate the actual cost of providing the records responsive to request Items No. 1, No. 2, and No. 9 and provide such estimate to the Complainant.

Whether the original Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the original 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because request Item No. 3 sought police daily duty logs, which records necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel, such records are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.
3. The Complainant's request Items No. 4 through No. 7 are invalid under OPRA because they are overly broad and fail to identify specific government records sought. Moreover, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534, 549

(App. Div. 2005), Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005); and New Jersey Builder's Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).

4. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006) and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the original Custodian's proposed charge of \$25.00 per CD is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. However, because the original Custodian withdrew the proposed fee of \$25.00 per CD, the GRC declines to order the Custodian to submit a legal certification providing the actual cost incurred by Rutgers to produce CDs to the Complainant and provide the requested CDs to the Complainant at the "actual cost." See O'Shea v. Township of Vernon (Sussex), GRC Complaint No. 2007-207 (April 2008).
5. Because request Item No. 3 is exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1., and because request Items No. 4 through and No. 7 are invalid under OPRA because they are overly broad and fail to specify identifiable government records, the Custodian must recalculate the actual cost of providing the records responsive to request Items No. 1, No. 2, and No. 9 and provide such estimate to the Complainant.
6. **The Custodian shall comply with Item No. 5 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹⁹, to the Executive Director.²⁰ If the Complainant fails to respond to the amended estimate of the costs of providing the records responsive to request Items No. 1, No. 2, and No. 9, the Custodian shall so certify to the Council. Additionally, if the Complainant has already been provided with the responsive records, the Custodian shall so certify to the Council.**
7. The Council defers analysis of whether the original 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.

Prepared By: Frank F. Caruso
Senior Case Manager

¹⁹ "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."

²⁰ 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.

Approved By: Catherine Starghill, Esq.
Executive Director

January 24, 2012