



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**

**March 31, 2015 Government Records Council Meeting**

Janine and Glen Latz  
Complainant

Complaint Nos. 2012-241 and 2012-242

v.

Township of Barnegat (Ocean)  
Custodian of Record

At the March 31, 2015 public meeting, the Government Records Council (“Council”) considered the March 24, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council accepts the Honorable Patricia M. Kerin’s Initial Decision dated March 10, 2015, which concludes that “. . . [the Complainant] has failed to prosecute this appeal” by failing to appear for a March 9, 2015 hearing without explanation or extension and that these complaints be “. . . hereby **DISMISSED WITH PREJUDICE.**” No further adjudication is required.

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 31<sup>st</sup> Day of March, 2015

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: April 2, 2015**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
March 31, 2015 Council Meeting**

**Janine and Glen Latz<sup>1</sup>  
Complainant**

**GRC Complaint Nos. 2012-241 and 2012-242<sup>2</sup>**

**v.**

**Township of Barnegat (Ocean)<sup>3</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic or hard copies of:<sup>4</sup>

1. All overtime paid to salaried employees for 2009, 2010, 2011, and 2012, by pay period, base salary, overtime paid, and double time paid per pay week.
2. All time cards or time sheets used to calculate overtime in 2009, 2010, 2011, and 2012, for salaried employees.
3. Hours per week the Tax Assessor spent working as 1) Tax Assessor; 2) Low Income Tax Assessor; and 3) Geographical Information System (“GIS”) Coordinator for 2009, 2010, and 2011.
4. Any and all correspondence between the Administrator and any public official asking for permission to make payments in excess of local ordinances.

**Custodian of Record:** Sharon L. Auer

**Request Received by Custodian:** June 13, 2012

**Response Made by Custodian:** July 30, 2012

**GRC Complaints Received:** August 14, 2012

**Background**

January 28, 2014 Council Meeting:

At its January 28, 2014 public meeting, the Council considered the January 21, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

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<sup>1</sup> No legal representation listed on record.

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

<sup>3</sup> Represented by Christopher Dasti, Esq., of Dasti, Murphy, McGuckin, Ulaky, Cherkos & Connors, P.C. (Forked River, NJ).

<sup>4</sup> Complainants requested additional records that are not at issue.

1. The Custodian did not fully comply with the Council's November 19, 2013 Interim Order because she failed to provide the second certification within the ten (10) business days required. However, the Custodian did initially provide the amended special service charge, availability of electronic records certification, and simultaneous certification of compliance in a timely manner.
2. The Council should refer this matter to the Office of Administrative Law for a hearing to resolve the facts of this complaint regarding the electronic availability of the responsive overtime paid to salaried employees from 2009 through 2012 and the availability's impact on the proposed special service charge. Additionally, this complaint should be referred to the Office of Administrative Law to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Procedural History:

On January 29, 2014, the Council distributed its Interim Order to all parties. On April 25, 2014, these complaints were transmitted to the Office of Administrative Law ("OAL"). On March 10, 2015, the Honorable Patricia M. Kerins, Administrative Law Judge ("ALJ"), issued an Initial Decision as follows:

This matter was transmitted to the [OAL] on April 28, 2014, for hearing as a contested case by the [GRC]. After a series of motions and prehearing conferences, the matter was scheduled for a hearing on March 9, 2015 at 9 a.m. at the offices of the OAL in Mercerville, New Jersey. Although [the Township] and its witnesses appeared for the hearing, [the Complainant] did not. No request for adjournment was received from [the Complainant] nor did [she] contact the OAL with an explanation for her nonappearance.

Pursuant to N.J.A.C. 1:1-14.4(a), the judge shall return the matter to the transmitting agency for appropriate disposition if, after appropriate notice, a party fails to appear at any proceeding and no explanation for the nonappearance is received within one day. Further, absent exigent circumstances, failure to prosecute a matter should generally result in its dismissal. In re Thompson, City of Newark, CSV 05511-06, Final Decision (October 24, 2007), <<http://njlaw.rutgers.edu/collections/oal/>>.

Here, there is no explanation whatsoever demonstrating just cause to excuse [the Complainant's] failure to appear.

Therefore, the ALJ “. . . **CONCLUDE[D]** that [the Complainant] has failed to prosecute this appeal. [The ALJ] **ORDER[ED]** that [these complaints] be and [are] hereby **DISMISSED WITH PREJUDICE.**”

## Analysis

### Administrative Law Judge's Initial Decision

Here, after multiple motions and prehearing conferences, the Complainant failed to appear before the OAL as scheduled on March 9, 2015. Further, as noted by the ALJ, the Complainant failed to request adjournment or provide an explanation regarding her absence. Thus, in accordance with N.J.A.C. 1:1-14.4, the ALJ dismissed these complaints with prejudice and returned same to the GRC for action.

Therefore, the GRC recommends that the Council accept the ALJ's Initial Decision dated March 10, 2015, which concludes that “. . . [the Complainant] has failed to prosecute this appeal” by failing to appear for a March 9, 2015 hearing without explanation or extension and that these complaints be “. . . hereby **DISMISSED WITH PREJUDICE.**” No further adjudication is required.

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Honorable Patricia M. Kerin's Initial Decision dated March 10, 2015, which concludes that “. . . [the Complainant] has failed to prosecute this appeal” by failing to appear for a March 9, 2015 hearing without explanation or extension and that these complaints be “. . . hereby **DISMISSED WITH PREJUDICE.**” No further adjudication is required.

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

Approved By: Dawn R. SanFilippo  
Deputy Executive Director

March 24, 2015



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**INTERIM ORDER**

**January 28, 2014 Government Records Council Meeting**

Janine and Glen Latz  
Complainant

Complaint Nos. 2012-241 and 2012-242

v.

Township of Barnegat (Ocean)  
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 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 did not fully comply with the Council’s November 19, 2013 Interim Order because she failed to provide the second certification within the ten (10) business days required. However, the Custodian did initially provide the amended special service charge, availability of electronic records certification and simultaneous certification of compliance in a timely manner.
2. The Council should refer this matter to the Office of Administrative Law for a hearing to resolve the facts of this complaint regarding the electronic availability of the responsive overtime paid to salaried employees from 2009 through 2012 and the availability’s impact on the proposed special service charge. Additionally, this complaint should be referred to the Office of Administrative Law to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of January, 2014

Robin Berg Tabakin, Esq., Chair  
Government Records Council



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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: January 29, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Janine and Glen Latz<sup>1</sup>  
Complainant**

**GRC Complaint Nos. 2012-241 and 2012-242<sup>2</sup>**

v.

**Township of Barnegat (Ocean)<sup>3</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic or hard copies of:<sup>4</sup>

1. All overtime paid to salaried employees for 2009, 2010, 2011 and 2012, by pay period, base salary, overtime paid and double time paid per pay week.
2. All time cards or time sheets used to calculate overtime in 2009, 2010, 2011 and 2012, for salaried employees.
3. Hours per week the Tax Assessor spent working as 1) Tax Assessor; 2) Low Income Tax Assessor; and 3) Geographical Information System (“GIS”) Coordinator for 2009, 2010 and 2011.
4. Any and all correspondence between the Administrator and any public official asking for permission to make payments in excess of local ordinances.

**Custodian of Record:** Sharon L. Auer

**Request Received by Custodian:** June 13, 2012

**Response Made by Custodian:** July 30, 2012

**GRC Complaints Received:** August 14, 2012

**Background**

November 19, 2013 Council Meeting:

At its November 19, 2013 public meeting, the Council considered the November 12, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

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<sup>1</sup> No legal representation listed on record.

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

<sup>3</sup> Represented by Christopher Dasti, Esq., of Dasti, Murphy, McGuckin, Ulaky, Cherkos & Connors, P.C. (Forked River, NJ).

<sup>4</sup> Complainants requested additional records that are not at issue.

1. The Custodian complied with the Council's August 27, 2013 Interim Order because she advised Mrs. Latz of the proposed special service charge within the prescribed time frame, certified that no records responsive to OPRA request item No. 3 exist and timely submitted both certified confirmations of compliance to the Executive Director thereafter.
2. The evidence before the GRC supports the conclusion that a special service charge of \$43.95 per hour times 21 hours equaling \$922.95 is reasonable and warranted based on the Payroll Coordinator's extraordinary effort to retrieve the records from storage, copy the records and return same to storage. N.J.S.A. 47:1A-5(c). However, the Custodian has failed to bear her burden of proving that the charge for the CFO's supervision of the process is warranted given that no redactions will be necessary and the Payroll Coordinator is familiar with the records. N.J.S.A. 47:1A-6. Thus, the Custodian shall recalculate the special service charge and provide same to Mrs. Latz. The Custodian shall also include a certification as to whether (1) the records exist electronically and can easily be provided to Mrs. Latz as she asserted; and/or (2) whether the records can be produced electronically to eliminate the copy cost.
3. **The Custodian shall comply with item No. 2 above by making the amended special service charge available to Mrs. Latz within three (3) business days from receipt of the Council's Interim Order and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup> The Custodian shall disclose to Mrs. Latz the requested records upon payment of the special service charge, if any, within ten (10) 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, to the Executive Director. If Mrs. Latz fails to pay the special service charge for the requested records or does not respond by the tenth (10<sup>th</sup>) business day from receipt of the Council's Interim Order, the Custodian shall simultaneously provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On November 20, 2013, the Council distributed its Interim Order to all parties.

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<sup>5</sup> "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."

<sup>6</sup> 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.



On November 22, 2013, the Custodian responded to the Council's Interim Order copying Mrs. Latz. The Custodian certifies that, in accordance with the Council's Order, the applicable special service charge is \$1,068.55 (\$922.95 for labor and \$145.60 for copies) and that a \$500.00 deposit is necessary to begin retrieving the records. The Custodian further certifies that the requested information does not exist in electronic format nor can the records be provided electronically to avoid copy costs. The Custodian certifies that the electronic version of the records contain personal information that cannot be electronically redacted. The Custodian certifies that the hard copies were previously redacted.

On December 4, 2013, Mrs. Latz contended that she did not receive any response to the Council's Interim Order. Mrs. Latz further contended that the effort to produce the records is not extraordinary and that the records are kept electronically because the Custodian has provided same electronically in the past. Mrs. Latz requested that the GRC (1) require the CFO to submit a certification that no electronic records are kept; (2) require the Payroll Coordinator to certify to same; and (3) require the Custodian to certify that the records are only kept in hard copy.

On December 10, 2013, Mrs. Latz stated that she received the Custodian's compliance, but did not receive a revised special service charge. Mrs. Latz reiterated that the GRC should obtain certifications from the CFO and Payroll Coordinator as to whether the responsive records exist electronically. Mrs. Latz further disputed the Custodian's certification that records exist electronically but cannot be redacted and thus cannot be provided electronically. Mrs. Latz contended that the Custodian has provided no evidence to support her certification that the electronic or hardcopy records contain personal information.

On December 11, 2013, the Custodian's Counsel stated that Mrs. Latz was copied on the Custodian's response by both regular and certified mail, return receipt requested. Counsel noted that the Township copied Mrs. Latz in this matter on all prior correspondence and that on at least two occasions, the certified mail was returned "unclaimed." Counsel further notes that the regular mail copies were never returned. Counsel stated that under Court Rules, when a party is copied in this manner and no regular mail is returned, good service is effectuated. Counsel noted that he has not received returned certified mail of the Custodian's compliance, but believes that Mrs. Latz is refusing to accept same. Counsel asserted that because the regular mail was not returned, it is presumed that Mrs. Latz received the Custodian's compliance.

### Analysis

#### Compliance

At its November 19, 2013 meeting, the Council ordered the Custodian to amend the special service charge and provide same to Mrs. Latz, provide a certification as to the availability of the responsive records electronically, and simultaneously provide certified confirmation of compliance to the Executive Director. The Interim Order further required a certification as to whether Mrs. Latz accepted the amended special service charge, rejected same or failed to respond. On November 20, 2013, the Council distributed its Interim Order to all parties, providing the Custodian three (3) business days to provide Mrs. Latz with the amended special service charge and provide a certification as to the availability of records electronically. The

Order further provided the Custodian ten (10) business days to advise of Mrs. Latz's response to the amended special service charge. Thus, the Custodian's first (1<sup>st</sup>) response was due by close of business on November 25, 2013 and the second response was due by close of business on December 6, 2013.

On November 22, 2013, the second (2<sup>nd</sup>) business day after receipt of the Council's Order, the Custodian provided Mrs. Latz with the amended special service charge, submitted a certification to the availability of the records electronically and simultaneously submitted certified confirmation of compliance. Thereafter, Mrs. Latz expressed to the GRC that she never received the amended special service charge, notwithstanding the fact the Custodian's November 22, 2013 certification containing the amended charge is attached to Mrs. Latz's December 10, 2013 letter to the GRC. Although it was clear from Mrs. Latz's correspondence to the GRC that she rejected the special service charge, the Custodian was still required to submit a certification on this fact by the tenth (10<sup>th</sup>) business day advising as such and failed to do so.

Therefore, the Custodian did not fully comply with the Council's November 19, 2013 Interim Order because she failed to provide the second certification within the ten (10) business days required. However, the Custodian did initially provide the amended special service charge, availability of electronic records certification and simultaneous certification of compliance in a timely manner.

### **Contested Facts**

A determination of whether the records at issue here can be provided electronically is integral to whether a special service charge is warranted and reasonable. Electronic availability could drastically reduce the time necessary to provide the records thus reducing or negating the charge all together. At the very least, providing the records electronically would negate the copy cost of \$145.60.

Based on the evidence of record, there are contested facts regarding the existence and availability of the responsive records electronically. Specifically, the GRC, noting that it was unclear whether the records were maintained or could be available electronically, required the Custodian to submit a certification addressing this issue. Latz v. Township of Barnegat (Ocean), GRC Complaint No. 2012-241 *et seq.* (Interim Order dated November 19, 2013) at 8. The Custodian certified in her November 22, 2013 compliance that the requested records do not exist in electronic format; however, she then affirmed that the electronic records could not be electronically redacted. The Custodian's certification is contradicting and adds weight to Mrs. Latz's repeated arguments throughout the pendency of this complaint that she previously received similar information electronically. Thus, the GRC is not satisfied that the evidence supports that electronic records either do not exist or cannot be provided. Based on the forgoing, a fact-finding hearing will be necessary to develop the record.

Therefore, the Council should refer this matter to the Office of Administrative Law ("OAL") for a hearing to resolve the facts of this complaint regarding the electronic availability of the responsive overtime paid to salaried employees from 2009 through 2012 and the availability's impact on the proposed special service charge. Additionally, this complaint should

be referred to the OAL to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council's November 19, 2013 Interim Order because she failed to provide the second certification within the ten (10) business days required. However, the Custodian did initially provide the amended special service charge, availability of electronic records certification and simultaneous certification of compliance in a timely manner.
2. The Council should refer this matter to the Office of Administrative Law for a hearing to resolve the facts of this complaint regarding the electronic availability of the responsive overtime paid to salaried employees from 2009 through 2012 and the availability's impact on the proposed special service charge. Additionally, this complaint should be referred to the Office of Administrative Law to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

January 21, 2014



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

November 19, 2013 Government Records Council Meeting

Janine and Glen Latz  
Complainant

Complaint Nos. 2012-241 & 2012-242

v.

Township of Barnegat (Ocean)  
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council ("Council") considered the November 12, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council's August 27, 2013 Interim Order because she advised Mrs. Latz of the proposed special service charge within the prescribed time frame, certified that no records responsive to OPRA request item No. 3 exist and timely submitted both certified confirmations of compliance to the Executive Director thereafter.
2. The evidence before the GRC supports the conclusion that a special service charge of \$43.95 per hour times 21 hours equaling \$922.95 is reasonable and warranted based on the Payroll Coordinator's extraordinary effort to retrieve the records from storage, copy the records and return same to storage. N.J.S.A. 47:1A-5(c). However, the Custodian has failed to bear her burden of proving that the charge for the CFO's supervision of the process is warranted given that no redactions will be necessary and the Payroll Coordinator is familiar with the records. N.J.S.A. 47:1A-6. Thus, the Custodian shall recalculate the special service charge and provide same to Mrs. Latz. The Custodian shall also include a certification as to whether (1) the records exist electronically and can easily be provided to Mrs. Latz as she asserted; and/or (2) whether the records can be produced electronically to eliminate the copy cost.
3. **The Custodian shall comply with item No. 2 above by making the amended special service charge available to Mrs. Latz within three (3) business days from receipt of the Council's Interim Order and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the**

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<sup>1</sup> "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."

**Executive Director.<sup>2</sup> The Custodian shall disclose to Mrs. Latz the requested records upon payment of the special service charge, if any, within ten (10) 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, to the Executive Director. If Mrs. Latz fails to pay the special service charge for the requested records or does not respond by the tenth (10<sup>th</sup>) business day from receipt of the Council's Interim Order, the Custodian shall simultaneously provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director.**

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 19<sup>th</sup> Day of November, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: November 20, 2013**

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<sup>2</sup> 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.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
November 19, 2013 Council Meeting**

**Janine and Glen Latz<sup>1</sup>  
Complainant**

**GRC Complaint Nos. 2012-241 and 2012-242<sup>2</sup>**

v.

**Township of Barnegat (Ocean)<sup>3</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic or hard copies of:<sup>4</sup>

1. All overtime paid to salaried employees for 2009, 2010, 2011 and 2012, by pay period, base salary, overtime paid and double time paid per pay week.
2. All time cards or time sheets used to calculate overtime in 2009, 2010, 2011 and 2012, for salaried employees.
3. Hours per week the Tax Assessor spent working as 1) Tax Assessor; 2) Low Income Tax Assessor; and 3) Geographical Information System (“GIS”) Coordinator for 2009, 2010 and 2011.
4. Any and all correspondence between the Administrator and any public official asking for permission to make payments in excess of local ordinances.

**Custodian of Record:** Sharon L. Auer

**Request Received by Custodian:** June 13, 2012

**Response Made by Custodian:** July 30, 2012

**GRC Complaints Received:** August 14, 2012

**Background**

August 27, 2013 Council Meeting:

At its August 27, 2013 public meeting, the Council considered the August 20, 2013 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:

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<sup>1</sup> No legal representation listed on record.

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

<sup>3</sup> Represented by Christopher Dasti, Esq., of Dasti, Murphy, McGuckin, Ulaky, Cherkos & Connors, P.C. (Forked River, NJ).

<sup>4</sup> Complainants requested additional records that are not at issue.

1. GRC Complaint No. 2012-242 should be dismissed because Mr. Latz filed a complaint based on an OPRA request submitted by a different party and thus this complaint is improperly before the GRC. N.J.S.A. 47:1A-6.
2. The Custodian unlawfully denied access to the records responsive to OPRA request item Nos. 1 and 2. N.J.S.A. 47:1A-6. The Custodian must: (1) disclose to Mrs. Latz the records responsive to OPRA request item Nos. 1 and 2 pending payment of appropriate copying costs; or (2) if the Custodian believes a special service charge is warranted, complete a 14-point analysis and provide Mrs. Latz with the estimated cost to provide the responsive records.
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, 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,<sup>5</sup> to the Executive Director.<sup>6</sup> If applicable, the Custodian shall make the amount of the charge available to Mrs. Latz within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to Mrs. Latz the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon Mrs. Latz's payment of the special service charge, if any, within ten (10) 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, to the Executive Director. If a special service charge is applicable and Mrs. Latz fails to pay the special service charge for the requested records by the tenth (10<sup>th</sup>) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director.**
4. The Custodian may have unlawfully denied access to records responsive to OPRA request item No. 3. Thus, the Custodian must either disclose a breakdown of hours worked responsive to OPRA request item No. 3 or certify that no record reflecting this breakdown exists.
5. **The Custodian shall comply with item No. 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup>**

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<sup>5</sup> "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."

<sup>6</sup> 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.

<sup>7</sup> See F.N. No. 8.

<sup>8</sup> See F.N. No. 9.

6. The Complainant's request item No. 4 is invalid under OPRA because it fails to identify specific dates or ranges of dates for the responsive e-mails and because the request item requires research beyond the scope of a custodian's duties. Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010); Armenti v. Robbinsville Board of Education (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (Interim Order dated July 31, 2012). Thus, the Custodian did not unlawfully deny access to this request item. N.J.S.A. 47:1A-6.
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On August 28, 2013, the Council distributed its Interim Order to all parties. On September 3, 2013, the Custodian sent a letter to Mrs. Latz advising that the proposed special service charge is approximately \$2,000 and that a \$1,000 deposit would be necessary to begin compiling the responsive records. On the same day, the Custodian responded to the Council's Interim Order.

#### OPRA request item Nos. 1 and 2

The Custodian certifies that she is charging a special service charge of approximately \$2,000 and is requiring a deposit of \$1,000 based on the 14-point analysis as follows:

##### **1. What records are requested?**

**Response:** Overtime paid to salaried employees from 2009 through 2012, listing every pay period, overtime paid and double time paid per pay period and all time sheets used to calculate overtime for salaried employees.

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

**Response:** 2,912 salary documents for 28 employees from 2009 through 2012

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

**Response:** 2009 through 2012.

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

**Response:** All records are in storage in the basement of the Township of Barnegat ("Township") Administration Building.



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

**Response:** 28 employees.

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

**Response:** 2 employees – Payroll Coordinator and Chief Financial Engineer (“CFO”).

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

**Response:** No redactions necessary.

**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?**

**Response:** The Payroll Coordinator will need one (1) business day to retrieve the responsive records, or seven (7) business hours.

**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?**

**Response:** The CFO will monitor the entire process over the three (3) business days, or 21 business hours.

**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?**

**Response:** The Payroll Coordinator (\$43.95 an hour) will need one (1) business days to retrieve the responsive records, or seven (7) business hours.

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

**Response:** The Payroll Coordinator is the ideal employee to perform this job because she is familiar with the location of the records.

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

**Response:** Teri Kitchner, Payroll Coordinator - \$43.95.  
Kathy Janeski, CFO - \$55.64.

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

**Response:** The Township has a copy machine on the premises. The copy cost will amount to \$145.60.

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

**Response:** It will take seven (7) business hours to retrieve the records, seven (7) business hours to copy the records, and seven (7) business hours to return the records.

OPRA request item No. 3

The Custodian certifies that the Township does not keep a record of the Tax Assessor's hours worked by job title; thus, no responsive record exists.

On September 12, 2013, Mrs. Latz disputes the special service charge,<sup>9</sup> arguing that it is an attempt to conceal records that are readily available electronically and can easily be produced by the CFO. Mrs. Latz further disputes that the responsive records are voluminous and kept in the basement. Mrs. Latz asserts that, pursuant to a previous OPRA request, the Township provided her similar records electronically for a previous time period. Mrs. Latz asserts that she believes the CFO annually audits overtime records electronically with accounting software. Mrs. Latz further contends that there is no reason for the CFO to supervise the Payroll Coordinator. Mrs. Latz notes that she is willing to provide a backup device and reasonable cost for the CFO to disclose records.

Mrs. Latz finally contends that on September 9, 2013, the Township advised her that the Custodian Counsel's law firm has not represented the Township since January 1, 2013. Mrs. Latz questions Custodian Counsel's representation in this case if he is no longer representing the Township.

On September 18, 2013, the Custodian responded to the Interim Order certifying that she notified Mrs. Latz of the special service charge on September 3, 2013 and received no response within the ten (10) business days afforded for in the Order.

On September 24, 2013, Mrs. Latz indicated she disputes the Township's response to the Council's Order and has already notified the Custodian's Counsel that no copies are necessary. Mrs. Latz notes that if disclosure of the records was unduly burdensome, she would accept the records on a memory device that she will provide. Mrs. Latz reiterates that the Custodian's Counsel is no longer representing the firm. Finally, Mrs. Latz contends she responded to the Township's notification of a special service charge.

On October 18, 2013, the Custodian's Counsel acknowledges that his firm was not reappointed to represent the Township; however, the firm did retain several files that it was

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<sup>9</sup> The Complainant did not copy the Custodian or Custodian's Counsel on this letter.

working on prior to January 1, 2013. Counsel states that for this reason, he is authorized to represent the Township and Mrs. Latz's argument is erroneous. Counsel further reiterates that Mrs. Latz never responded to his September 3, 2013 letter in accordance with the GRC's Order.

### Analysis

#### Compliance

At its August 27, 2013 meeting, the Council ordered the Custodian to (1) disclose to Mrs. Latz the records responsive to OPRA request item Nos. 1 and 2 pending payment of appropriate copying costs; or (2) if the Custodian believes a special service charge is warranted, complete a 14-point analysis and provide Mrs. Latz with the estimated cost to provide the responsive records. The Council's Order further required the Custodian to certify whether any records responsive to the Complainant's item No. 3 existed. The Order further required the Custodian to provide simultaneous certified confirmation of compliance to the Executive Director on the fifth (5<sup>th</sup>) and after the tenth (10<sup>th</sup>) business day of receipt of the Order.

On August 28, 2013, the Council distributed its Interim Order to all parties. Thus, the Custodian's response was due by close of business on September 5, and after September 12, 2013. On September 3, 2013, the third (3<sup>rd</sup>) business day after receipt of the Council's Order, the Custodian submitted certified confirmation of compliance that she advised Mrs. Latz of a proposed special service charge and further certified that no records responsive to item No. 3 existed. On September 18, 2013, the Custodian certified that she received no response from Mrs. Latz.

Therefore, the Custodian complied with the Council's August 27, 2013 Interim Order because she advised Mrs. Latz of the proposed special service charge within the prescribed time frame, certified that no records responsive to OPRA request item No. 3 exist and timely submitted both certified confirmations of compliance to the Executive Director thereafter.

#### Special Service Charge

OPRA provides that:

A copy or copies of a government record may be purchased ... upon payment of the fee prescribed by law or regulation. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be \$ 0.05 per letter size page or smaller, and \$ 0.07 per legal size page or larger ... The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. *Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies* such as computer discs.

N.J.S.A. 47:1A-5(b)(emphasis added).

OPRA further provides that:

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 ... The requestor shall have the opportunity to review and object to the charge prior to it being incurred.

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

Whenever a 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). 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. The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002). The GRC established criteria for the assessment of whether a special service charge is warranted and reasonable in Fisher v. Division of Law and Public Safety, GRC Complaint No. 2004-55 (December 2004). The same questions asked in Fisher, GRC 2004-55, provide the basis for the analysis in this complaint.

Here, the Custodian responded to the Council’s Order and sent a letter to Mrs. Latz on September 3, 2013 stating the proposed special service charge is \$2,000. N.J.S.A. 47:1A-5(c). As part of her certified confirmation of compliance, the Custodian included a 14-point analysis in which she certified that the total number of responsive records is 2,912 salary documents from 2009 through 2012. The Custodian also certified that all records were in storage in the Administration Building’s basement and that it would take the Payroll Coordinator three (3) working days to retrieve the records from storage, make copies (no redactions necessary) and return the records to storage. The Custodian certified that the Payroll Coordinator is the ideal employee to perform the work because she is familiar with the location of the records; however, the Custodian calculated the cost of the CFO’s supervision throughout the process. Thus, the Custodian multiplied both hourly costs of \$43.95 (Payroll Coordinator) and \$55.64 (CFO) by 21 hours (7 hours a day for 3 days) and added \$145.60 for copying costs.<sup>10</sup>

Mrs. Latz contended that the special service charge was unlawful because the responsive information could be taken from the CFO’s accounting software. Mrs. Latz asserted that she previously requested similar information and was provided with same electronically, although she submitted no evidence to support this claim. Mrs. Latz further argued that she would accept

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<sup>10</sup> The actual cost as quoted by the Custodian is \$2,236.99.

the records electronically to negate the copy cost. Mrs. Latz finally argued that there is no reason for the CFO to supervise the Payroll Coordinator in producing the records.

The number of records at issue here (2,912) and the amount of time needed to retrieve, copy and return the records (3 business days) certainly amounts to a substantial amount of time. However, the GRC agrees with Mrs. Latz that it is unreasonable for the Township to charge for supervision of the process. As noted in Courier Post, 360 N.J. Super. at 199, "... the burden should be placed squarely on the governmental entity to prove that some sort of monitoring is necessary." Id. The Custodian failed to provide any evidence indicating that the CFO's supervision was necessary, especially considering that the Custodian certified that the Payroll Coordinator is the person familiar with the records and no redactions will be necessary. Thus, the process needs no specialized supervision to fulfill.

Additionally, it is unclear whether, (1) the records are maintained electronically, thus likely negating the need for retrieval of the paper records; and (2) the records could be converted and provided electronically thus negating the copy cost. Although Mrs. Latz argued that similar records were previously produced to her electronically by way of the CFO's accounting software, the GRC cannot determine whether similar disclosure is possible here given the lack of evidence.<sup>11</sup>

Therefore, the evidence before the GRC supports the conclusion that a special service charge of \$43.95 per hour times 21 hours equaling \$922.95 is reasonable and warranted based on the Payroll Coordinator's extraordinary effort to retrieve the records from storage, copy the records and return same to storage. N.J.S.A. 47:1A-5(c). However, the Custodian has failed to bear her burden of proving that the charge for the CFO's supervision of the process is warranted given that no redactions will be necessary and the Payroll Coordinator is familiar with the records. N.J.S.A. 47:1A-6. Thus, the Custodian shall recalculate the special service charge and provide same to Mrs. Latz. The Custodian shall also include a certification as to whether (1) the records exist electronically and can easily be provided to Mrs. Latz as she asserted; and/or (2) whether the records can be produced electronically to eliminate the copy cost.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's August 27, 2013 Interim Order because she advised Mrs. Latz of the proposed special service charge within the prescribed time frame, certified that no records responsive to OPRA request item No. 3 exist and

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<sup>11</sup> The GRC notes that the Complainant requested the records either electronically or in hard copy. Thus, offering paper copies of the records complies with the Complainant's requested method of delivery.  
Janine and Glen Latz v. Township of Barnegat (Ocean), 2012-241 and 2012-242 – Supplemental Findings and Recommendations of the Executive Director 8

timely submitted both certified confirmations of compliance to the Executive Director thereafter.

2. The evidence before the GRC supports the conclusion that a special service charge of \$43.95 per hour times 21 hours equaling \$922.95 is reasonable and warranted based on the Payroll Coordinator's extraordinary effort to retrieve the records from storage, copy the records and return same to storage. N.J.S.A. 47:1A-5(c). However, the Custodian has failed to bear her burden of proving that the charge for the CFO's supervision of the process is warranted given that no redactions will be necessary and the Payroll Coordinator is familiar with the records. N.J.S.A. 47:1A-6. Thus, the Custodian shall recalculate the special service charge and provide same to Mrs. Latz. The Custodian shall also include a certification as to whether (1) the records exist electronically and can easily be provided to Mrs. Latz as she asserted; and/or (2) whether the records can be produced electronically to eliminate the copy cost.
3. **The Custodian shall comply with item No. 2 above by making the amended special service charge available to Mrs. Latz within three (3) business days from receipt of the Council's Interim Order and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>12</sup> to the Executive Director.<sup>13</sup> The Custodian shall disclose to Mrs. Latz the requested records upon payment of the special service charge, if any, within ten (10) 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, to the Executive Director. If Mrs. Latz fails to pay the special service charge for the requested records or does not respond by the tenth (10<sup>th</sup>) business day from receipt of the Council's Interim Order, the Custodian shall simultaneously provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Brandon D. Minde, Esq.  
Executive Director

November 12, 2013

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<sup>12</sup> "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."

<sup>13</sup> 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.



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

August 27, 2013 Government Records Council Meeting

Janine and Glen Latz  
Complainant

Complaint Nos. 2012-241 and 2012-242

v.

Township of Barnegat (Ocean)  
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council ("Council") considered the August 20, 2013 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. GRC Complaint No. 2012-242 should be dismissed because Mr. Latz filed a complaint based on an OPRA request submitted by a different party and thus this complaint is improperly before the GRC. N.J.S.A. 47:1A-6.
2. The Custodian unlawfully denied access to the records responsive to OPRA request item Nos. 1 and 2. N.J.S.A. 47:1A-6. The Custodian must: (1) disclose to Mrs. Latz the records responsive to OPRA request item Nos. 1 and 2 pending payment of appropriate copying costs; or (2) if the Custodian believes a special service charge is warranted, complete a 14-point analysis and provide Mrs. Latz with the estimated cost to provide the responsive records.
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, 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,<sup>1</sup> to the Executive Director.<sup>2</sup> If applicable, the Custodian shall make the amount of the charge available to Mrs. Latz within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to Mrs. Latz the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon Mrs. Latz's payment of the special service**

<sup>1</sup> "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."

<sup>2</sup> 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.



**charge, if any, within ten (10) 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, to the Executive Director. If a special service charge is applicable and Mrs. Latz fails to pay the special service charge for the requested records by the tenth (10<sup>th</sup>) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director.**

4. The Custodian may have unlawfully denied access to records responsive to OPRA request item No. 3. Thus, the Custodian must either disclose a breakdown of hours worked responsive to OPRA request item No. 3 or certify that no record reflecting this breakdown exists.
5. **The Custodian shall comply with item No. 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> to the Executive Director.<sup>4</sup>**
6. The Complainant's request item No. 4 is invalid under OPRA because it fails to identify specific dates or ranges of dates for the responsive e-mails and because the request item requires research beyond the scope of a custodian's duties. Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010); Armenti v. Robbinsville Board of Education (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (Interim Order dated July 31, 2012). Thus, the Custodian did not unlawfully deny access to this request item. N.J.S.A. 47:1A-6.
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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<sup>3</sup> See F.N. No. 8.

<sup>4</sup> See F.N. No. 9.



Interim Order Rendered by the  
Government Records Council  
On The 27th Day of August, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: August 28, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 27, 2013 Council Meeting**

**Janine and Glen Latz<sup>1</sup>  
Complainant**

**GRC Complaint Nos. 2012-241 and 2012-242<sup>2</sup>**

v.

**Township of Barnegat (Ocean)<sup>3</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic or hard copies of:<sup>4</sup>

1. All overtime paid to salaried employees for 2009, 2010, 2011 and 2012, by pay period, base salary, overtime paid and double time paid per pay week.
2. All time cards or time sheets used to calculate overtime in 2009, 2010, 2011 and 2012, for salaried employees.
3. Hours per week the Tax Assessor spent working as 1) Tax Assessor; 2) Low Income Tax Assessor; and 3) Geographical Information System (“GIS”) Coordinator for 2009, 2010 and 2011.
4. Any and all correspondence between the Administrator and any public official asking for permission to make payments in excess of local ordinances.

**Custodian of Record:** Sharon L. Auer

**Request Received by Custodian:** June 13, 2012

**Response Made by Custodian:** July 30, 2012

**GRC Complaints Received:** August 14, 2012

**Background<sup>5</sup>**

**Request and Response:**

On June 13, 2012, Mrs. Latz submitted an Open Public Records Act (“OPRA”) request to the Custodian. On July 30, 2012, the Custodian’s Counsel responded in writing on behalf of the Custodian as follows:

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<sup>1</sup> No legal representation listed on record.

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

<sup>3</sup> Represented by Christopher Dasti, Esq., of Dasti, Murphy, McGuckin, Ulaky, Cherkos & Connors, P.C. (Forked River, NJ).

<sup>4</sup> Complainants requested additional records that are not at issue.

<sup>5</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

1. This request item seeks information and no government records and will be extremely time-consuming because the Custodian will need to prepare records to compile the information sought. Thus, Mrs. Latz must submit a deposit for the cost to provide the responsive information.
2. See response to item No. 1 (except that the Police Department and Department of Heads do not have time cards/sheets).
3. This information does not exist.
4. The Township of Barnegat (“Township”) is not aware of any correspondence between the Assessor and Administrator concerning permission to make payments in excess of local ordinance.

#### Denial of Access Complaint:

On August 14, 2012, the Complainants filed Denial of Access Complaints with the Government Records Council (“GRC”) disputing the Township’s denial of access but providing no additional arguments.

#### Statement of Information:

On September 28, 2012, the Custodian filed a Statement of Information (“SOI”) for both complaints.

#### GRC Complaint No. 2012-241:

The Custodian certifies that she received Mrs. Latz’s OPRA request on June 13, 2012 and responded via Counsel on July 30, 2012.<sup>6</sup>

#### GRC Complaint No. 2012-242:

The Custodian certifies that although the Township received an OPRA request from Mr. Latz on another date, Mr. Latz identifies Mrs. Latz’s OPRA request as the request at issue in his complaint. The Custodian certifies that Counsel’s July 30, 2012 response to Mrs. Latz applies to Mr. Latz’s complaint as well.

#### Additional Submissions:

On September 28, 2012, Mr. Latz argues that the Custodian knowingly and willfully violated OPRA. Mr. Latz further argues that the Custodian’s Counsel deliberately withheld access to government records in an attempt to hide the Custodian’s actions.

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<sup>6</sup> The Custodian certifies that Counsel also responded on September 4, 2012; however, a review of this response indicates that it addressed an OPRA request that is not at issue herein. The GRC further notes that the Latzs’ complaints do not identify W-2 forms as at issue; therefore, the Council will not address whether these records are subject to disclosure. No additional arguments regarding the records at issue herein were provided.

## Analysis<sup>7</sup>

### Validity of Denial of Access Complaint No. 2012-242

OPRA provides that:

*A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may ... in lieu of filing an action in Superior Court, file a complaint with the Government Records Council ... [t]he right to institute any proceeding under this section shall be solely that of the requestor.*

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

Here, Mr. Latz filed GRC Complaint No. 2012-242 indicating that Mrs. Latz's request was at issue in his complaint. Although the Custodian noted that Mr. Latz filed a separate OPRA request at some point prior to filing his Denial of Access Complaint, Mr. Latz failed to identify that request as at issue here. Instead, his complaint is not properly before the Council because Mrs. Latz is the only person with the right to file a denial of access based on her June 13, 2012 OPRA request. Mr. Latz does not have standing here to bring a complaint based on his wife's OPRA request.

Therefore, GRC Complaint No. 2012-242 should be dismissed because Mr. Latz filed a complaint based on an OPRA request submitted by a different party and thus this complaint is improperly before the GRC. N.J.S.A. 47:1A-6.

### Unlawful Denial of Access

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

OPRA request item Nos. 1, 2 and 3:

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

Moreover, OPRA provides that:

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<sup>7</sup> There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

[T]he personnel or pension records of any individual in the possession of a public agency ... shall not be considered a government record and shall not be made available for public access, *except that*: an individual's name, title, position, salary, *payroll record*, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record ...

N.J.S.A. 47:1A-10 (emphasis added).

The Council previously determined that that time or attendance sheets are payroll records subject to disclosure under OPRA. See Burdick v. Franklin Township BOE (Hunterdon), GRC Complaint No. 2007-74 (Interim Order dated October 31, 2007)(*citing* Weimer v. Township of Middletown, GRC Complaint No. 2004-22 (August 2005)); Havlusch, Jr. v. Borough of Allenhurst (Monmouth), GRC Complaint No. 2011-243 (December 2012)(*citing* Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004)).

Here, OPRA request item Nos. 1, 2 and 3 sought “overtime” information, time sheets for 2009 through 2012 and hours worked in different positions by the Tax Assessor for 2009 through 2011. Counsel responded on behalf of the Custodian stating that OPRA request item Nos. 1 and 2 would be time consuming to compile and that a deposit would be necessary to begin the process. However, Counsel never provided Mrs. Latz with either an estimated number of records or an estimated cost or addressed this issue in the SOI. Thus, it is unclear whether this presumed special service charge is even warranted. Further, Counsel responded to OPRA request item No. 3 advising that no responsive records exist. However, the SOI is also devoid of any certified statements addressing whether a breakdown of hours the Tax Assessor worked in certain positions exists within the Township’s records. Thus, according to OPRA and precedential case law, these records are subject to disclosure upon request, if they exist, with overtime information specifically identified as “immediate access” information. N.J.S.A. 47:1A-5(e).

Therefore, the Custodian unlawfully denied access to the records responsive to OPRA request item Nos. 1 and 2. N.J.S.A. 47:1A-6. The Custodian must: (1) disclose to Mrs. Latz the records responsive to OPRA request item Nos. 1 and 2 pending payment of appropriate copying costs; or (2) if the Custodian believes a special service charge is warranted, complete a 14-point analysis and provide Mrs. Latz with the estimated cost to provide the responsive records.

Further, the Custodian may have unlawfully denied access to records responsive to OPRA request item No. 3. Thus, the Custodian must either disclose a breakdown of hours worked responsive to OPRA request item No. 3 or certify that no record reflecting this breakdown exists.

#### OPRA request item No. 4:

In Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010), the Council examined what constitutes a valid request for e-mails under OPRA. The Council determined that:

In accord with [MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005)], and its progeny, in order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof.

Id. at 5 (emphasis in original).

The Council also applied the criteria set forth in Elcavage, to other forms of correspondence, such as letters. *See* Armenti v. Robbinsville Board of Education (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (Interim Order dated July 31, 2012).

Here, notwithstanding Counsel's response that no records exist, Mrs. Latz's request item No. 4 failed to identify a specific date or range of dates within which the Custodian could focus her search. Thus, although the request item contained a type of record (e-mail), a sender/recipient (Administrator) and a subject (permission to make payments in excess of local ordinances), the Custodian would be forced to research every e-mail in her possession beginning with the Administrator's first e-mail in order to determine whether same is responsive. OPRA does not require custodians to perform such research.

The Complainant's request item No. 4 is invalid under OPRA because it fails to identify specific dates or ranges of dates for the responsive e-mails and because the request item requires research beyond the scope of a custodian's duties. Elcavage, *supra*; Armenti, *supra*; Verry, *supra*. Thus, the Custodian did not unlawfully deny access to this request item. N.J.S.A. 47:1A-6.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. GRC Complaint No. 2012-242 should be dismissed because Mr. Latz filed a complaint based on an OPRA request submitted by a different party and thus this complaint is improperly before the GRC. N.J.S.A. 47:1A-6.
2. The Custodian unlawfully denied access to the records responsive to OPRA request item Nos. 1 and 2. N.J.S.A. 47:1A-6. The Custodian must: (1) disclose to Mrs. Latz the records responsive to OPRA request item Nos. 1 and 2 pending payment of appropriate copying costs; or (2) if the Custodian believes a special service charge is

warranted, complete a 14-point analysis and provide Mrs. Latz with the estimated cost to provide the responsive records.

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, 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,<sup>8</sup> to the Executive Director.<sup>9</sup> If applicable, the Custodian shall make the amount of the charge available to Mrs. Latz within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to Mrs. Latz the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon Mrs. Latz's payment of the special service charge, if any, within ten (10) 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, to the Executive Director. If a special service charge is applicable and Mrs. Latz fails to pay the special service charge for the requested records by the tenth (10<sup>th</sup>) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director.**
4. The Custodian may have unlawfully denied access to records responsive to OPRA request item No. 3. Thus, the Custodian must either disclose a breakdown of hours worked responsive to OPRA request item No. 3 or certify that no record reflecting this breakdown exists.
5. **The Custodian shall comply with item No. 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>10</sup> to the Executive Director.<sup>11</sup>**
6. The Complainant's request item No. 4 is invalid under OPRA because it fails to identify specific dates or ranges of dates for the responsive e-mails and because the request item requires research beyond the scope of a custodian's duties. Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010); Armenti v. Robbinsville Board of Education (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011); Verry v. Borough of South Bound Brook

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<sup>8</sup> "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."

<sup>9</sup> 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.

<sup>10</sup> See F.N. No. 8.

<sup>11</sup> See F.N. No. 9.

(Somerset), GRC Complaint No. 2011-119 (Interim Order dated July 31, 2012). Thus, the Custodian did not unlawfully deny access to this request item. N.J.S.A. 47:1A-6.

7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Brandon D. Minde, Esq.  
Executive Director

August 20, 2013