



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

November 15, 2016 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2013-287

v.

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

At the November 15, 2016 public meeting, the Government Records Council (“Council”) considered the November 9, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council finds that \$300 is a reasonable fee for attorneys of Counsel’s experience representing clients before the GRC. Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-153 (May 2013). Accordingly, the Council finds that Counsel’s hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.
2. Although the GRC finds that the fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b), the Council finds that the time expended was not reasonable. The Council finds instead that 15 hours at \$300.00 per hour is reasonable for the work performed in the instant matter. Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Council awards fees to Mr. Bermingham, Counsel to the Complainant, in the amount of \$4,500.00, representing 15 hours of service at \$300 per hour.**
3. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 15th Day of November, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 17, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
November 15, 2016 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2013-287

v.

**Franklin Fire District No 1 (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Any and all e-mails or correspondence between Don Bell and Joseph F. Danielsen, Todd Brown, the Custodian, Jim Wickman, Jason Goldberg and Dawn Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems from September 1, 2012, to December 31, 2012.
2. Any and all e-mails or correspondence between Mr. Brown and Mr. Danielsen, the Custodian, Mr. Wickman, Mr. Goldberg and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems from September 1, 2012, to December 31, 2012.
3. Any and all e-mails or correspondence between the Custodian and Mr. Danielsen, Mr. Wickman, Mr. Goldberg and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems from September 1, 2012, to December 31, 2012.
4. Any and all e-mails or correspondence between Mr. Wickman and Mr. Danielsen, Mr. Goldberg and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems from September 1, 2012, to December 31, 2012.
5. Any and all e-mails or correspondence between Mr. Goldberg and Mr. Danielsen and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems from September 1, 2012, to December 31, 2012.

Custodian of Record: Tim Szymborski

Request Received by Custodian: August 5, 2013

Response Made by Custodian: August 14, 2013

GRC Complaint Received: October 1, 2013

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

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC.

Background

July 28, 2015 Council Meeting

At its July 28, 2015 public meeting, the Council considered the July 21, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's June 30, 2015 Interim Order because he responded in the extended time frame by disclosing the eight (8) e-mails with appropriate redactions to the Complainant. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian initially failed to respond within the extended time frame, which resulted in a violation of OPRA. N.J.S.A. 47:1A-5(i). Further, the Custodian failed to bear his burden of proving that the proposed special service charge was reasonable and warranted, and he failed to comply fully with the Council's July 29, 2014 Interim Order. Also, the Custodian unlawfully denied access to e-mail attachments and portions of eight (8) e-mails. However, the Custodian timely complied with the Council's April 28, and June 30, 2015 Interim Orders. Further, the Custodian lawfully denied access to the bodies of the eight (8) e-mails reviewed *in camera*. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's July 29, September 30, 2014, and June 30, 2015 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council held that the proposed special service charge was unreasonable and unwarranted, the Custodian disclosed responsive records, the Complainant's Counsel was granted reconsideration of the Council's September 30, 2014 Interim Order, the Council required disclosure of e-mail attachments, and the Custodian disclosed the eight (8) e-mails with redactions per the *in camera* review. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the**

application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).

Procedural History:

On July 28, 2015, the Council distributed its Interim Order to all parties. On August 12, 2015, the Complainant's Counsel filed a Certification of services in support his application for fees.

Analysis

Compliance

At its July 28, 2015 meeting, the Council permitted Complainant "to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)." Further, the Council provided that the Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).

On August 12, 2015, the tenth (10th) business day after receipt of the Council's Order, the Complainant's Counsel filed an application for fees ("Application"). Neither the Custodian nor Custodian's Counsel filed opposition to the Application.

Prevailing Party Attorney's Fees

Under the American Rule, adhered to by the courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser. *See New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't. of Corrections*, 185 N.J. 137, 152 (2005) (*quoting Rendine v. Pantzer*, 141 N.J. 292, 322 (1995) (internal quotation marks omitted)). However, this principle is not without exception. NJDPM, 185 N.J. at 152. Some statutes, such as OPRA, incorporate a "fee-shifting measure: to ensure 'that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights . . . and to ensure justice for all citizens.'" NJDPM, 185 N.J. at 153 (*quoting Coleman v. Fiore Bros.*, 113 N.J. 594, 598 (1989)).

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

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

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

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

A. Standards for Fee Award

The starting point “for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate,” a calculation known as the lodestar. NJDPM, 185 N.J. at 153. (*quoting* Rendine v. Pantzer, 141 N.J. 292, 324 (1995)(*quoting* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. See Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010)(*quoting* Rendine, 141 N.J. at 337). The fee-shifting statutes do not contemplate that the losing party has to pay for the learning experience of attorneys for the prevailing party. See, HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (*citing* Council Enter., Inc. v. Atl. City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

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

“[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (*quoting* Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993)(*quoting* Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (*quoting* Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff

has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (*quoting* Hensley, 461 U.S. at 435). Notwithstanding that position, the NJDPM court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar” but further cautioned that “[o]rordinarily the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal [I]n a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157.

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

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

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

In addition, N.J.A.C. 5:105-2.13(b) sets forth the information that counsel must provide in an application seeking fees in an OPRA matter. Providing the requisite information required by that Code section permits the reviewing tribunal to analyze the reasonableness of the requested fee.

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

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter, Counsel is seeking a fee award of \$7,560, representing 25.2 hours of work at \$300 per hour. Counsel supports the hourly rate through a recitation of his experience

and years in practice. Certification of John A. Bermingham, Esq. (“Certification”), dated November 17, 2015 at ¶ 7 (Exhibit B).

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

b. Time Expended

To be compensable, hours expended must not be excessive, redundant, or otherwise unnecessary. *See Hensley*, 461 U.S. at 434. The New Jersey District Court, in PIRG v. Powell Duffryn Terminals, 1991 U.S. Dist. LEXIS 21199 (D.N.J. 1991), reduced plaintiff’s trial preparation fee request by 50%. The PIRG court, noting that plaintiff’s counsel had tried numerous similar cases, found the work performed to be both redundant and unnecessary.

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

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

In support of his request for fees, Counsel attached to his Certification of Services a four (4) page chart, itemizing his hours and expenses (“Time Log”). For the period from August 21, 2013, to August 11, 2015, Counsel billed a total of 25.2 hours for work on the file. The listed time included conducting legal research, drafting the complaint and accompanying briefs, reviewing e-mail correspondence to and/or from the GRC and/or the client, communicating with the client regarding the action, drafting various letter brief(s), drafting a brief in support of his application for a Reconsideration of the GRC’s decision, and drafting a certification for the fee application.

To begin, Counsel certifies that he has represented the Complainant in “many other matters before the GRC,” all of which “arose under OPRA and the common law right of access.” See Counsel’s Certification of Services, pg. 3 ¶ 6. Notwithstanding his experience, Counsel expended time on very basic research. For example, Counsel bills for researching the OPRA statute and administrative code sections, namely N.J.S.A. §§ 47:1A-5 et. seq., 47:1A-6 and 47:1A-11. See Time Log entries for September 20-29, 2013, and November 18-22, 2013. Those are some of the same statutory sections researched by Counsel in many prior matters. See Carter v. Franklin Fire Dist. No. 2, GRC Complaint No. 2011-228 (March 25, 2014) and Carter v. Franklin Fire Dist. No. 2, GRC Complaint No. 2011-262 (March 25, 2014). Likewise, Counsel has submitted billing for reviewing those same basic statutory provisions in several other fee applications pending before the GRC. See, e.g., Carter v. Franklin Fire District No. 1, GRC Complaint No. 2013-281, *et seq.* (Final Decision dated April 26, 2016). Similarly, Counsel bills for researching matters with which even a comparatively inexperienced attorney should already be familiar. Finally, Counsel billed to review several cases, some of which involve the same parties, often in almost identical circumstances. In some instances, Counsel reviewed the same cases in other matters presently pending before the GRC, with the research of same sometimes being within weeks or months of each other. Because of block billing, it is difficult to know how much time Counsel spent on reviewing which cases; however, the GRC will award attorney’s fees for some research in each of those matters. What is not contemplated by OPRA, however, is awarding attorney’s fees to Counsel for reviewing and re-reviewing the same cases over and over again, some of which are basic in nature and unaltered by practice. Therefore, those fees should not be awarded unless reasonably reduced.

Even if Counsel truly needed to re-review the same cases, including his own, and research seminal and elementary matters for OPRA practitioners, fee shifting statutes do not contemplate that the losing party be required to pay for the learning curve of the prevailing party’s counsel. Planned Parenthood of Central New Jersey, et. al. v. the Attorney General of the State of NJ. et. al., 297 F.3d 253, 271 (3rd Cir. 2001). HIP v. K. Hovnanian, 291 N.J. Super. at 160 (*citations omitted*). “A fee applicant cannot demand a high hourly rate – which is based on his experience, reputation, and a presumed familiarity with the applicable law – and then run up an inordinate amount of time researching that same.” Microsoft Corp. v. United Computer Res. of N.J., Inc., 216 F. Supp. 2d 383, 392 (D.N.J. May 23, 2002) (*citations omitted*). The higher the allowed hourly rate commanded based upon skill and experience, the shorter the time it should require an attorney to perform a particular task. HIP v. K. Hovnanian, 291 N.J. Super. at 160.

The GRC notes pages of identical arguments, including block quotes, in the numerous filings. Despite their length, the briefs do little to advance the Complainant’s case. The facts contained in the briefs are adequately set forth in the Complaint, and the legal analysis provides little more than well-settled law. The briefs filed with the Complaint and the SOI are detailed through block billed entries, including research over a number of days, making it difficult to ascribe proper credit for the work. The brief filed with the Complaint consists mostly of exhibits, and its analysis is a rehash of a standard, boilerplate analysis. Counsel also billed 2.5 hours for another rebuttal regarding a three-page argument, although the rebuttal was not considered as it was untimely. Counsel’s action in that regard could not have affected the outcome of the case or the prevailing party determination. Moreover, the record reveals numerous discussions between Counsel and his evidently well-informed client (who has filed over seventy other GRC

complaints), concerning such matters as informing the client that the GRC sent a request for a Statement of Information to the Custodian.

In one instance, Counsel billed 12 minutes for a one-sentence e-mail that asked for a status update. He then billed 24 minutes to review a two-sentence reply and another 24 minutes to discuss seemingly mundane, commonplace facts with his experienced client.

Finally, Counsel seeks reimbursement for the time spent compiling the justification for his fees. The Appellate Division has previously upheld a trial court's award of fees connected to time spent preparing the fee application. *See Courier News v. Hunterdon Cnty. Prosecutor's Office*, 378 N.J. Super. 539, 547 (App. Div., 2005)(plaintiff is also entitled to be compensated for the time spent by counsel in preparing a counsel fee petition so long as the amount charged is reasonable). *See also Tanksley v. Cook*, 360 N.J. Super. 63, 67 (App. Div. 2003); *HIP v. K. Hovnanian*, 291 N.J. Super. at 163; and *Robb v. Ridgewood Bd. of Educ.*, 269 N.J. Super. 394, 411, (Ch. Div. 1993); *Council Enterps., Inc. v. Atlantic City*, 200 N.J. Super. 431, 443 (Law Div.1984)). Therefore, the GRC allows 1.2 hours of time spent for preparing the fee application.

Although the GRC finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b), the Council finds that the time expended was not reasonable. The Council finds instead that 15 hours at \$300.00 per hour is reasonable for the work performed in the instant matter. *Teeters*, 387 N.J. Super. 432; *Mason*, 196 N.J. 51. **Accordingly, the Executive Director recommends that the Council awards fees to Mr. Bermingham, Counsel to the Complainant, for the amount of \$4,500.00, representing 15 hours of service at \$300.00 per hour.**

2. Enhancement Analysis

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Council finds that \$300 is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. *Paff v. Bordentown Fire Dist. No. 2 (Burlington)*, GRC Complaint No. 2012-153 (May 2013). Accordingly, the Council finds that Counsel's hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.
2. Although the GRC finds that the fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b), the Council finds that the time expended was not reasonable. The Council finds instead that 15 hours at \$300.00 per hour is reasonable for the work performed in the instant matter. *Teeters v. DYFS*, 387 N.J. Super. 432 (App. Div. 2006); *Mason v. City of Hoboken and City Clerk of the City of Hoboken*, 196 N.J. 51 (2008). **Accordingly, the Council awards fees to Mr. Bermingham, Counsel to the**

Complainant, in the amount of \$4,500.00, representing 15 hours of service at \$300 per hour.

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

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

November 9, 2016³

³ This complaint was prepared for adjudication at the Council's September 29, 2016 meeting; however, the complaint was tabled based on legal advice.

Date of Time Entry	Descriptions of Services	Findings from Fee Application Review	Time Expended and Amount Billed at \$300/hour for GRC Case No. 2013-287		Adjusted Entry: Time allowed and total amount at \$300.00/hour GRC Case No. 287	
8/21/2013	Discuss Fire District ("FD") response to client		0.4	\$120.00	0.4	\$120.00
8/22/2013	Discuss fire District ("FD") response (or lack thereof) to Client		0.4	\$120.00	0.4	\$120.00
9/20/2013	Discuss fire District ("FD") response (or lack thereof) to Client	There is insufficient detail in the bill to justify a third discussion of the same subject matter.	0.4	\$120.00	0	\$0.00
9/20/2013 - 9/29/2013	Draft 31 page DOA Complaint, Review Relevant Case law, Review Relevant Statutes; e.g. <u>Paff v. Franklin Fire District No. 1 (Somerset)</u> , GRC Complaint No. 2011-77 (Final Decision June 26, 2012); <u>Jeff Carter v. Franklin Fire District No. 1 (Somerset)</u> , GRC Complaint No.'s 2012-284; 2012-285; 2012-286; 2012-287 & 2012-[2951] sic ("2012-284 et. seq.") and <u>Jeff Carter v. Franklin Fire District No. 1 (Somerset)</u> , GRC Complaint No.'s 2012-288; 2012-289; 2012-290; 2012-293; 2012-294 ("2012-288 et. seq.") N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); <u>Kohn v. Township of Livingston Library (Essex)</u> , GRC Complaint No. 2007-124 (March 2008); <u>Verry v. Borough of South Bound Brook (Somerset)</u> , GRC Complaint No. 2008-253 (September 2009); <u>Robert A. Verry v. Borough of South Bound Brook (Somerset)</u> GRC Complaint No. 2008-253 (September 2009); <u>Robert A. Verry v. Borough of South Bound Brook (Somerset)</u> , Complaint No's 2011-114; 2011-115; 2011-116; 2011-117 & 2011-118 (Final Decision July 31, 2012); <u>N.J.S.A. 47:1A-6</u> ; and <u>N.J.S.A. 47:1A-11</u> .	Counsel bills for "[d]rafting [a] [thirty one] 31 page DOA Complaint." Of the 31 pages of the DOA Complaint, over half are exhibits, four are the GRC complaint and the balance eleven (11) pages are a letter brief. The brief consists of seven (7) block quotes, of which six (6) are exact copies of the email exchanges between the Complainant and the Custodian. Counsel's final block quote appears in Counsel's argument on timeliness. Counsel's argument, including the block quote, is virtually identical to the GRC's standard timeliness argument. Counsel's DOA Complaint is essentially a reiteration of the exchange between the Custodian and the Complaint and the GRC's timeliness argument. The brief adds little if anything to the GRC's form DOA complaint. Counsel bills for legal research, including the review of seven (7) cases. In the twelve (12) cases with fee applications pending plus the two (2) where fees were previously awarded, Counsel bills for reading 2007-124 and 2008-253 twice. In addition counsel bills for reading two (2) cases, 2012-284 and 2012-288 where he was attorney of record Counsel also bills for reading two sections of the OPRA statute, N.J.S.A 47-1A-6, at least seven (7) times and N.J.S.A. 47-1A-11 at least five (5) times. Experienced counsel should be familiar with the OPRA statute, and should not need to review it, and certainly not multiple times. Finally, the Council notes that Counsel block billed a total of seven (7) hours, over a nine (9) day period, for a fee of \$2,100, in connection with this time entry. The Council is unable to determine the time spent on any particular task, for example drafting the DOA Complaint or conducting research was reasonable. Rule of Professional Conduct 1.5(a) requires that all fees be reasonable. However from review of billing in other pending fee applications where Counsel has billed separately for briefs which accompany his DOA Complaints, Counsel bills 02. hours for every page, and by application of that amount 6.2 hours should be apportioned to the brief. The GRC determines that billing for the exhibits at the same rate as drafting the brief to be unreasonable and awards 2/3 of the hours for the brief/Complaint and nothing for the research.	7.0	\$2,100.00	4.2	\$1,260.00
9/30/2013	To GRC: File Complaint	Counsel files all of his documents and pleadings via email. For filing the complaint via email, Counsel bills a .2, for a fee of \$60.00. The Council finds that twelve (12) minutes is excessive for filing a document via email.	0.2	\$60.00	0.1	\$30.00
10/14/2013	To GRC: Request for Status of Complaint	This email from Counsel states in its entirety "Dear Government Records Council: Can you give me an update of the status of this case?" followed by Counsel's name. Twelve minutes to draft such an email is excessive.	0.2	\$60.00	0.1	\$30.00
10/15/2013	From/To GRC- Assignment of Complaint	The email reply to Counsel was "Mr. Bermingham: The complaint has been assigned to me and the Complaint Number is 2013-287. A Statement of Information request will be sent out to the Custodian this week", followed by the Case Manager's name. The GRC finds Twenty four (24) minutes to review such an email is excessive	0.4	\$120.00	0.1	\$30.00
10/15/2013	Consult with client	Counsel fails to give sufficient detail for the purpose of this consultation. If it were to discuss the "request for status and "assignment of complaint", as appears to be the case, then 24 minutes was excessive, and of dubious necessity	0.4	\$120.00	0.1	\$30.00

Date of Time Entry	Descriptions of Services	Findings from Fee Application Review	Time Expended and Amount Billed at \$300/hour for GRC Case No. 2013-287		Adjusted Entry: Time allowed and total amount at \$300.00/hour GRC Case No. 287	
10/18/2013	From GRC to FD - SOI request	Counsel bills a .2 or twelve minutes to review the GRC's form letter requesting the <i>Custodian</i> , not the Complaint, to file a Statement of Information (SOI letter). The SOI letter is a form letter which is mailed out in every GRC case. Thus, Counsel bills .2 for reviewing each SOI letter for a fee of \$60. In the other pending fee applications, Counsel billed an additional .2 or twelve (12) minutes to review the letter with his client for a total of \$120 (.4 hours x \$300/hour = \$120). Accordingly in the twelve (12) pending fee applications alone, Counsel billed a total of \$1,380 for review of a form letter (11 applications x \$120/ application + 1 application x \$60 = \$1,380.) In addition, the Council takes notice that Counsel has appeared before the GRC in numerous prior cases as has his client. Thus, Counsel finds that the amount of time to review SOI letter is excessive and unnecessary in light of RPC 1.5(a).	0.2	\$60.00	0	\$0.00
10/25/2013	From FD- SOI submission		0.2	\$60.00	0.2	\$60.00
11/18/2013 - 11/22/2013	Draft 28 page Rebuttal, Review of Relevant Case Law, Review Relevant Statutes; e.g. <i>John Paff v. NJ Department of Labor</i> , 392 N.J. Super. 334 (App. Div. 2007); Review of GRC's Handbook for Records Custodians; N.J.S.A. 47:1A-5a. http://www.ftdl.com/members, php ; <i>Jeff Carter v. Franklin Fire District No.1 (Somerset)</i> , GRC Complaint No. 2011-234; Fire District Logs; Fire District Resolution 12-20 and Dawn Cuddy's resume.	Drafting of Brief: Counsel bills for drafting of a twenty-eight (28) page brief, seventeen (17) pages of which are Exhibits. Counsel, as in the DOA complaints, makes a timeliness argument. The timeliness argument is exactly what is set forth in the DOA Complaint. Counsel may not charge for the same work--drafting the timeliness argument--twice. Counsel reviewed the GRC's Handbook for Records Custodians which appears on the agency's website. Experienced Counsel should be familiar with the information contained in the Handbook, which is intended to provide basic information to custodians, may of which are not attorneys. Alternatively, if Counsel was unfamiliar with such basic information, and needed to educate himself on same, the time spent doing should not be charged to the Custodial agency (or any client). See <i>HIP v. K. Hovnanian at Mahwah VI</i> , 291 N.J. Super. 144, 160 (Law Div. 1996). The Council declines to award a fee for experienced counsel to review basic information. Legal Research: The Council takes notice that the applicant was the attorney of record in <i>Jeff Carter v. Franklin Fire District No.1 (Somerset)</i> , GRC Complaint No. 2011-234. Counsel bills for "Review Relevant Statutes (plural) but only identifies the review of 47:1A-5a Experienced counsel should be familiar with the OPRA statute, and should not need to review it Factual Research: Counsel bills for reviewing a web page off of the Franklin Fire District No. 1's (FFD 1)website which he identifies with the URL: http://www.ftdl.com/members, php . The web page could not be located, possibly because it was a members only section, and could not be reviewed. Similarly Council cannot tell how much time was spent on reviewing the Fire logs or Ms. Cuddy's resume. Again Counsel block billed this time entry instead of separating the various tasks. See Comments to entry at 9/20 to 9/29/13. the time spent on this task. Based upon Counsel's standard of .02 pages for a brief, and considering the lack of justification for the substance of the rebuttal, the GRC will award 2/3 of the fee for the brief and nothing for the research.	5.5	\$1,650.00	3.6	\$1,080.00
11/22/2013	To GRC - Rebuttal	See explanation set forth above for the September 30, 2014 entry.	0.2	\$60.00	0.1	\$30.00
11/26/2013	From GRC Rebuttal Received	In his email filing the Rebuttal, Counsel requests a confirmation, from the case manager, of receipt of the filing.	N/A	N/A	0	\$0.00
7/22/2014	From GRC scheduled 7/29/2014	Here, counsel bills .2 or \$60 for receiving the standard email which is sent by the Case Manager when a case is scheduled for Council meeting. Counsel does not bill for calendaring the hearing date. Moreover, no appearance is required, and in fact counsel did not appear at the monthly meeting.	0.2	\$60.00	0	\$0.00
7/30/2014	From GRC Interim Order		0.2	\$60.00	0.2	\$60.00
7/30/2014	Consult with client		0.3	\$90.00	0.3	\$90.00
7/30/2014	From FD- Request an Extension	Experienced counsel should not need twelve minutes to read a short (four sentence) email requesting an extension of by Custodian time to comply, especially considering his familiarity with such requested extensions in a myriad of other GRC cases on which he has been counsel.	0.2	\$60.00	0.1	\$30.00

Date of Time Entry	Descriptions of Services	Findings from Fee Application Review	Time Expended and Amount Billed at \$300/hour for GRC Case No. 2013-287		Adjusted Entry: Time allowed and total amount at \$300.00/hour GRC Case No. 287	
8/1/2014	From GRC - Extension Granted	See previous comment to entry 7/30/14.	0.2	\$60.00	0.1	\$30.00
8/14/2014	From FD - Compliance		0.2	\$60.00	0.2	\$60.00
8/25/2014	From GRC - Receipt of Compliance	This appears to be duplicative of the above entry as the Fire District and not the Council would be sending proof of Compliance to Counsel.	0.2	\$60.00	0	\$0.00
9/22/2014	Draft three page Rebuttal and review <u>Nancy Lewen v. Robbinsville Public School District t (Mercer)</u> , GRC Complaint No. 2008-211 (Final Decision February 24, 2011) and Darm's Circular Letter 03-10-ST.	This Rebuttal was not accepted by GRC, as it was filed the same day that notices were sent scheduling the case for a meeting one week later. Thus, it did not contribute to prevailing party status.	1.5	\$450.00	0	\$0.00
9/23/2014	To GRC - Rebuttal	See comments to entry at 9/22/14. This filing did not contribute to prevailing party status.	0.2	\$60.00	0	\$0.00
9/23/2014	From GRC - Scheduled 9/30/2014	See explanation set forth above for the July 22, 2014 entry.	0.2	\$60.00	0	\$0.00
9/26/2014	From GRC - Denying Rebuttal		0.2	\$60.00		\$0.00
9/27/2014	To GRC - Defending Rebuttal	See comments to entry at 9/22/14. The filing did not contribute to prevailing party status/	0.2	\$60.00	0	\$0.00
9/30/2014	From GRC - Regarding Denial of Rebuttal	See comments to entry at 9/22/14. The filing did not contribute to prevailing party status.	0.2	\$60.00	0	\$0.00
10/1/2014	From GRC - Interim Order		0.2	\$60.00	0.2	\$60.00
10/1/2014	Consult with client		0.3	\$90.00	0.3	\$90.00
10/6/2014	To GRC - Stay Question for Request for Reconsideration		0.2	\$60.00	0.2	\$60.00
10/7/2014	From GRC - Stay Answer		0.2	\$60.00	0.2	\$60.00
10/9/2014	To GRC - Request for Reconsideration Filed		0.2	\$60.00	0.2	\$60.00
10/14/2014	Receipt of Reconsideration		N/A	\$0.00	0	\$0.00
10/14/2014	Thank you		N/A	\$0.00	0	\$0.00
4/21/2015	From GRC -Scheduled 4/28/2015	See time entry July 22, 2014.	0.2	\$60.00	0	\$0.00
4/29/2015	From GRC - Interim Order		0.2	\$60.00	0.2	\$60.00
4/29/2015	Consult with client		0.3	\$90.00	0.3	\$90.00
5/1/2015	From FD -Request Extension	Experienced counsel should not need twelve minutes to read a short email requesting an extension by Custodian time to comply. See comment to entries at 7/30/14 and 8/01/14.	0.2	\$60.00	0.1	\$30.00
5/2/2015	To GRC - Object to Extension	Experienced counsel should not need twelve minutes to draft a short email objecting to request of an extension by Custodian time to comply. See comments to entries at 7/30/14, 8/01/14 and 5/01/15	0.2	\$60.00	0.1	\$30.00
5/6/2015	From GRC - Extension Granted	Experienced counsel should not need twelve minutes to read a short (three sentence) email responding to the request for an extension of by Custodian time to comply.	0.2	\$60.00	0.1	\$30.00
5/15/2015	From FD- Compliance		0.2	\$60.00	0.2	\$60.00
6/23/2015	From GRC - Scheduled 6/30/2015	See comment set forth above for the July 22, 2014 entry.	0.2	\$60.00	0.1	\$30.00
7/1/2015	From GRC -Interim Order		0.2	\$60.00	0.2	\$60.00
7/1/2015	Consult with client		0.3	\$90.00	0.3	\$90.00
7/6/2015	From FD - Request Extension	Experienced counsel should not need twelve minutes to read a short email requesting an extension by Custodian time to comply. See comments to entries at 7/30/15, 8/02/14, 5/01/15, and 5/6/15.	0.2	\$60.00	0.1	\$30.00
7/6/2015	To GRC Object to Extension	Experienced counsel should not need twelve minutes to draft a short email objecting to request of an extension by Custodian time to comply.	0.2	\$60.00	0.1	\$30.00
7/6/2015	From GRC - Extension Granted	Experienced counsel should not need twelve minutes to read a short email responding to the request for an extension of by Custodian time to comply. See multiple previous comments above on same subject.	0.2	\$60.00	0.1	\$30.00
7/14/2015	From FD Compliance		0.2	\$60.00	0.2	\$60.00
7/21/2015	From GRC - Scheduled 7/28/2015		0.2	\$60.00	0.2	\$60.00
7/29/2015	From GRC - Interim Order		0.2	\$60.00	0.2	\$60.00



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

July 28, 2015 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2013-287

v.

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

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s June 30, 2015, Interim Order because he responded in the extended time frame by disclosing the eight (8) e-mails with appropriate redactions to the Complainant. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian initially failed to respond within the extended time frame, which resulted in a violation of OPRA. N.J.S.A. 47:1A-5(i). Further, the Custodian failed to bear his burden of proving that the proposed special service charge was reasonable and warranted, and he failed to comply fully with the Council’s July 29, 2014, Interim Order. Also, the Custodian unlawfully denied access to e-mail attachments and portions of eight (8) e-mails. However, the Custodian timely complied with the Council’s April 28, and June 30, 2015, Interim Orders. Further, the Custodian lawfully denied access to the bodies of the eight (8) e-mails reviewed *in camera*. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s July 29, September 30, 2014, and June 30, 2015, Interim Orders, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council held that the proposed special



service charge was unreasonable and unwarranted, the Custodian disclosed responsive records, the Complainant's Counsel was granted reconsideration of the Council's September 30, 2014, Interim Order, the Council required disclosure of e-mail attachments, and the Custodian disclosed the eight (8) e-mails with redactions per the *in camera* review. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Interim Order Rendered by the
Government Records Council
On The 28th Day of July, 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: July 29, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 28, 2015 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2013-287

v.

**Franklin Fire District No 1 (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Any and all e-mails or correspondence between Don Bell and Joseph F. Danielsen, Todd Brown, the Custodian, Jim Wickman, Jason Goldberg, and Dawn Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts, and computer systems from September 1, 2012, to December 31, 2012.
2. Any and all e-mails or correspondence between Mr. Brown and Mr. Danielsen, the Custodian, Mr. Wickman, Mr. Goldberg, and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts, and computer systems from September 1, 2012, to December 31, 2012.
3. Any and all e-mails or correspondence between the Custodian and Mr. Danielsen, Mr. Wickman, Mr. Goldberg, and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts, and computer systems from September 1, 2012, to December 31, 2012.
4. Any and all e-mails or correspondence between Mr. Wickman and Mr. Danielsen, Mr. Goldberg, and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts, and computer systems from September 1, 2012, to December 31, 2012.
5. Any and all e-mails or correspondence between Mr. Goldberg and Mr. Danielsen and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts, and computer systems from September 1, 2012, to December 31, 2012.

Custodian of Record: Tim Szymborski
Request Received by Custodian: August 5, 2013
Response Made by Custodian: August 14, 2013
GRC Complaint Received: October 1, 2013

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

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Background

June 30, 2015 Council Meeting:

At its June 30, 2015, public meeting, the Council considered the June 23, 2015, *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's April 28, 2015, Interim Order because he responded in the extended time frame by providing the Complainant all attachments ordered to be disclosed, sending to the GRC all eight (8) e-mails (and related attachments) for an *in camera* review along with a document index, and simultaneously providing certified confirmation of compliance to the Executive Director.
2. **The *in camera* examination set forth in the above table reveals the Custodian has lawfully denied access to the bodies of the records listed in the document index and related attachments pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian must disclose all other portions of the eight (8) requested e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Acad. Charter Sch. (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director.**
5. The 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On July 1, 2015, the Council distributed its Interim Order to all parties. On July 6, 2015, the Custodian's Counsel requested a ten (10) business day extension of time to comply with the Council's Order. On the same day, the Complainant's Counsel objected to any extension. The Complainant's Counsel alleged that the Franklin Fire District No. 1 ("FFD") is notorious for seeking extensions in bad faith to disclose records they have already identified. The Complainant's Counsel further contended that the extension requested is unreasonable. On July

9, 2015, the GRC responded to all parties advising that a ten (10) business day extension was unreasonable given the facts of this complaint. However, the GRC did allow for an extension until July 16, 2015.

On July 14, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that he was providing all parties with redacted copies of eight (8) e-mails per the Council's *in camera* examination.

Analysis

Compliance

At its June 30, 2015, meeting, the Council ordered the Custodian to disclose to the Complainant the eight (8) e-mails reviewed *in camera* with redactions of the bodies of each e-mail. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On July 1, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 9, 2015.

On July 6, 2015, the Custodian's Counsel sought a ten (10) business day extension of time to comply with the Council's Order, to which the Complainant's Counsel objected. On July 9, 2015, the GRC granted an extension until July 16, 2015, noting that any additional time would be unreasonable. On July 14, 2015, two (2) business days prior to the end of the extended deadline, the Custodian provided copies of the redacted e-mails to all parties and simultaneously provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's June 30, 2015, Interim Order because he responded in the extended time frame disclosing the eight (8) e-mails with appropriate redactions to the Complainant. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The

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

In the matter before the Council, the Custodian initially failed to respond within the extended time frame, which resulted in a violation of OPRA. N.J.S.A. 47:1A-5(i). Further, the Custodian failed to bear his burden of proving that the proposed special service charge was reasonable and warranted, and he failed to comply fully with the Council’s July 29, 2014, Interim Order. Also, the Custodian unlawfully denied access to e-mail attachments and portions of eight (8) e-mails. However, the Custodian timely complied with the Council’s April 28, and June 30, 2015, Interim Orders. Further, the Custodian lawfully denied access to the bodies of the eight (8) e-mails reviewed *in camera*. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney’s Fees

OPRA provides that:

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

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

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

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

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

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

OPRA itself contains broader language on attorney’s fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney’s fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason further held that:

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

Id. at 76.

The Complainant initially filed the complaint to challenge the FFD's proposed special service charge. In its July 29, 2014, Interim Order, the Council determined that same was unreasonable and unwarranted. Thus, the Council ordered the Custodian to disclose responsive records to the Complainant. On August 14, 2014, in accordance with said Order, the Custodian disclosed a number of records to the Complainant and identified eight (8) e-mails asserting that same were exempt as "inter-agency or intra-agency advisory, consultative or deliberative" material or under the attorney-client privilege exemptions.

In its September 30, 2014, Interim Order, the Council determined that the Custodian complied with its July 29, 2014, Order, that no knowing and willful violation had occurred, and that the Complainant was a prevailing party. However, the Complainant's Counsel timely filed a request for reconsideration of the Council's Order. Therein, the Complainant's Counsel argued, among other things, that the GRC should have conducted an *in camera* review of the eight (8) e-mails and that the Custodian failed to disclose attachments to responsive e-mails.

In its Order from April 28, 2015, the Council held that the Complainant's Counsel established that the Council should reconsider the complaint to: 1) reverse its decision that the Custodian complied with the July 29, 2014, Interim Order; 2) conduct an *in camera* review of the eight (8) e-mails; and 3) require the Custodian to provide e-mail attachments to the Complainant. The Custodian complied with the Order on May 15, 2015. The Council conducted its *in camera* review and determined that portions of the eight (8) e-mails should be disclosed. Therefore, in its June 30, 2015, Interim Order, the Council ordered the Custodian to disclose portions of the e-mails to the Complainant, which he did on July 14, 2015. Based on the foregoing, the Complainant is a prevailing party entitled to an award of attorney's fees.

Therefore, pursuant to the Council's July 29, September 30, 2014, and June 30, 2015, Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council held that the proposed special service charge was unreasonable and unwarranted, the Custodian disclosed responsive records, the Complainant's Counsel was granted reconsideration of the Council's September 30, 2014, Interim Order, the Council required disclosure of e-mail attachments, and the Custodian disclosed the eight (8) e-mails with redactions per the *in camera* review. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's June 30, 2015, Interim Order because he responded in the extended time frame by disclosing the eight (8) e-mails with appropriate redactions to the Complainant. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian initially failed to respond within the extended time frame, which resulted in a violation of OPRA. N.J.S.A. 47:1A-5(i). Further, the Custodian failed to bear his burden of proving that the proposed special service charge was reasonable and warranted, and he failed to comply fully with the Council's July 29, 2014, Interim Order. Also, the Custodian unlawfully denied access to e-mail attachments and portions of eight (8) e-mails. However, the Custodian timely complied with the Council's April 28, and June 30, 2015, Interim Orders. Further, the Custodian lawfully denied access to the bodies of the eight (8) e-mails reviewed *in camera*. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's July 29, September 30, 2014, and June 30, 2015, Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council held that the proposed special service charge was unreasonable and unwarranted, the Custodian disclosed responsive records, the Complainant's Counsel was granted reconsideration of the Council's September 30, 2014, Interim Order, the Council required disclosure of e-mail attachments, and the Custodian disclosed the eight (8) e-mails with redactions per the *in camera* review. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

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

Reviewed By: Joseph D. Glover
Executive Director

July 21, 2015



State of New Jersey
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

June 30, 2015 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2013-287

v.

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

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s April 28, 2015, Interim Order because he responded in the extended time frame by providing the Complainant all attachments ordered to be disclosed, sending to the GRC all eight (8) e-mails (and related attachments) for an *in camera* review along with a document index, and simultaneously providing certified confirmation of compliance to the Executive Director.
2. **The *in camera* examination set forth in the above table reveals the Custodian has lawfully denied access to the bodies of the records listed in the document index and related attachments pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian must disclose all other portions of the eight (8) requested e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director.**
5. The 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.



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

Interim Order Rendered by the
Government Records Council
On The 30th Day of June, 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: July 1, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
June 30, 2015 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2013-287

v.

**Franklin Fire District No 1 (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Any and all e-mails or correspondence between Don Bell and Joseph F. Danielsen, Todd Brown, the Custodian, Jim Wickman, Jason Goldberg, and Dawn Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts, and computer systems from September 1, 2012 to December 31, 2012.
2. Any and all e-mails or correspondence between Mr. Brown and Mr. Danielsen, the Custodian, Mr. Wickman, Mr. Goldberg, and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts, and computer systems from September 1, 2012 to December 31, 2012.
3. Any and all e-mails or correspondence between the Custodian and Mr. Danielsen, Mr. Wickman, Mr. Goldberg, and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts, and computer systems from September 1, 2012 to December 31, 2012.
4. Any and all e-mails or correspondence between Mr. Wickman and Mr. Danielsen, Mr. Goldberg, and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts, and computer systems from September 1, 2012 to December 31, 2012.
5. Any and all e-mails or correspondence between Mr. Goldberg and Mr. Danielsen and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts, and computer systems from September 1, 2012 to December 31, 2012.

Custodian of Record: Tim Szymborski

Request Received by Custodian: August 5, 2013

Response Made by Custodian: August 14, 2013

GRC Complaint Received: October 1, 2013

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

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Records Submitted for *In Camera* Examination:

- E-mail from Custodian's Counsel to Mr. Goldberg and Mr. Brown, dated September 7, 2012.
- E-mail from Custodian's Counsel to Mr. Brown, dated November 19, 2012.
- E-mail from Mr. Goldberg to Custodian's Counsel and Mr. Brown, dated December 6, 2012 (with attachment).
- E-mail from Mr. Brown to Custodian's Counsel and Mr. Goldberg, dated December 7, 2012 (with attachment).
- E-mail from Custodian's Counsel to Mr. Goldberg and Mr. Brown, dated December 10, 2012.
- E-mail from Mr. Brown to Custodian's Counsel and Mr. Goldberg, dated December 10, 2012.
- E-mail from Mr. Brown to Custodian's Counsel and Mr. Goldberg, dated December 10, 2012.
- E-mail from Custodian's Counsel to Mr. Goldberg and Mr. Brown, dated December 10, 2012.

Background

April 28, 2015 Council Meeting:

At its public meeting on April 28, 2015, the Council considered the April 21, 2015, Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

[T]he Complainant's Counsel was required to establish in his request for reconsideration of the Council's September 30, 2014, Final Decision that: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996). Here, the Complainant's Counsel failed to establish that the complaint should be reconsidered based on a change in circumstances or illegality. However, the Complainant's Counsel has established that the complaint should be reconsidered based on a mistake. Thus, the Complainant Counsel's request for reconsideration should be granted. *Cummings*, 295 N.J. Super. at 384; *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, the Council's Final Decision should be rescinded and re-issued as follows:

1. The Custodian failed to comply with the Council's July 29, 2014, Interim Order, because although he responded in the extended time frame by providing responsive e-mails to the Complainant, a document index identifying privileged e-mails, and certified confirmation of compliance to the Executive Director, he failed to provide all disclosable e-mail

attachments. Thus, the GRC is providing the Custodian a final opportunity to disclose the attachments and/or provide comprehensive arguments as to why same are not subject to disclosure.

2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and shall simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴**
3. The GRC must conduct an *in camera* review of the eight (8) responsive e-mails to determine the validity of the Custodian's assertion that the same are exempt from disclosure under OPRA pursuant to the attorney-client or "inter-agency or intra-agency advisory consultative or deliberative" exemptions. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 3 above), nine (9) copies of the three (3) redacted records, a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On April 29, 2015, the Council distributed its Interim Order to all parties. On May 1, 2015, the Custodian's Counsel sought an extension of thirty (30) days to comply with the

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."

⁴ 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.

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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."

Council's Order. On May 2, 2015, the Complainant's Counsel objected to any extension, arguing that Franklin Fire District No. 1 ("FFD") was well aware of the obligation to comply with the Council's July 29, 2014, Order. On May 6, 2015, the GRC responded to all parties advising that a thirty (30) day extension was unreasonable given the facts of this complaint. However, the GRC did allow for an extension until May 15, 2015.

On May 15, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that he was providing all parties with copies of the attachments from the corresponding e-mails he previously disclosed as part of his response to the Council's July 29, 2014, Order. Additionally, the Custodian certified that he provided nine (9) copies of the responsive e-mails (and corresponding attachments) to the GRC for an *in camera* review in accordance with the Council's Order.

Analysis

Compliance

During its meeting on April 28, 2015, the Council ordered the Custodian to disclose responsive attachments or provide a specific lawful basis for not disclosing same. Additionally, the Council ordered the Custodian to submit nine (9) copies of the eight (8) responsive e-mails and a document index for an *in camera* review. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On April 29, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 6, 2015.

On May 1, 2015, the Custodian's Counsel sought an extension of thirty (30) days to comply with the Council's Order. On May 6, 2015, the GRC denied a thirty (30) day extension but provided the Custodian's Counsel until May 15, 2014. On May 15, 2015, the last day of the extension, the Custodian responded to the Order by providing to the Complainant copies of all attachments and sending the eight (8) e-mails and a document index to the GRC. The Custodian also provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's April 28, 2015, Interim Order because he responded in the extended time frame by providing the Complainant all attachments ordered to be disclosed, sending to the GRC all eight (8) e-mails (and related attachments) for an *in camera* review along with a document index, and simultaneously providing certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

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

OPRA provides that a “government record” shall not include “any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1 (emphasis added). To assert attorney-client privilege, a party must show that there was a confidential communication between lawyer and client in the course of that relationship and in professional confidence. N.J.R.E. 504(1). Such communications are only those “which the client either expressly made confidential or which [one] could reasonably assume under the circumstances would be understood by the attorney to be so intended.” State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989). However, merely showing that “the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear.” Id. at 220-21.

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

OPRA also provides that the definition of a government record “. . . shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” N.J.S.A. 47:1A-1.1. When this exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009)(*citing* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The custodian claiming an exception to the disclosure requirements under OPRA on this basis must initially satisfy two conditions: (1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and (2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted).

The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

In the instant matter, the GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record No.	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination⁸
1.	E-mail from the Custodian's Counsel to Mr. Goldberg and Mr. Brown, dated September 7, 2012 (10:06 a.m.). *Note: Record No. 2 included in chain.	Counsel provides advice about the FFD's Information Technology ("IT") vendor contract.	Attorney-client privileged material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A. 47:1A-6.</u>
2.	E-mail from the Custodian's Counsel to Mr. Brown, dated November 19, 2012 (9:58 a.m.). *Note: Record No. 1 included in chain.	Counsel provides advice about a pending "Request for Proposal" ("RFP").	Attorney-client privileged material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A. 47:1A-6.</u>
3.	E-mail from Mr. Goldberg to Custodian's Counsel and Mr.	Mr. Goldberg provides his assessment of submitted proposals	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail is exempt because it contains opinions,

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

	Brown, dated December 6, 2012 (11:01 p.m.)(with attachment).	in response to the RFP for IT vendor services. Additionally, the attachment provides a detailed account of his deliberations based on the proposals.		deliberations and recommendations regarding the future selection of an IT vendor. Additionally, the attachment contains deliberations and recommendations. Thus, the Custodian lawfully denied access to this portion of the e-mail message and attachment in its entirety. <u>N.J.S.A. 47:1A-6.</u>
4.	E-mail from Mr. Brown to Custodian's Counsel and Mr. Goldberg, dated December 7, 2012 (2:34 p.m.)(with attachment). *Note: Record No. 3 included in chain.	Mr. Brown provides his assessment of submitted proposals in response to the RFP for IT vendor services. Additionally, the attached records are evaluations containing scores and handwritten notes based on each proposal.	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail is exempt because it contains opinions, deliberations and recommendations regarding the future selection of an IT vendor. Additionally, the attachment contains opinions, deliberations, and recommendations. Thus, the Custodian lawfully denied access to this portion of the e-mail message and attachment in its entirety. <u>N.J.S.A. 47:1A-6.</u>
5.	E-mail from Mr. Brown to Custodian's Counsel and Mr. Goldberg, dated December 10, 2012 (11:50 a.m.).	Mr. Brown provides his and Mr. Goldberg's recommendation for IT vendor services to Counsel.	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail is exempt because it contains opinions, deliberations, and recommendations regarding the future

	*Note: Record No. 3, 4, 5, 7, and 8 included in chain.			selection of an IT vendor. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A. 47:1A-6.</u>
6.	E-mail from Custodian's Counsel to Mr. Goldberg and Mr. Brown, dated December 10, 2012 (No time). *Note: Record No. 3, 4, 6, 7, and 8 included in chain.	Counsel provides advice in response to Mr. Brown's recommendation regarding IT vendor services.	Attorney-client privileged material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A. 47:1A-6.</u>
7.	E-mail from Mr. Brown to Custodian's Counsel and Mr. Goldberg, dated December 10, 2012 (12:52 p.m.). *Note: Record Nos. 3, 4, 5, 6, and 8 included in chain.	Mr. Brown seeks clarification of the advice provided by Counsel.	Attorney-client privileged material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A. 47:1A-6.</u>
8.	E-mail from Custodian's Counsel to Mr. Goldberg and Mr. Brown, dated December 10, 2012 (1:16 p.m.). *Note: Record Nos. 3 through 7 included in chain.	Counsel provides clarifying advice to Mr. Brown.	Attorney-client privileged material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A. 47:1A-6.</u>

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

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

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's April 28, 2015, Interim Order because he responded in the extended time frame by providing the Complainant all attachments ordered to be disclosed, sending to the GRC all eight (8) e-mails (and related attachments) for an *in camera* review along with a document index, and simultaneously providing certified confirmation of compliance to the Executive Director.
2. **The *in camera* examination set forth in the above table reveals the Custodian has lawfully denied access to the bodies of the records listed in the document index and related attachments pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian must disclose all other portions of the eight (8) requested e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Acad. Charter Sch. (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of**

compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director.

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

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

Reviewed By: Joseph D. Glover
Executive Director

June 23, 2015



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

April 28, 2015 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2013-287

v.

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

At the April 28, 2015 public meeting, the Government Records Council (“Council”) considered the April 21, 2015 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 failed to fully comply with the Council’s July 29, 2014, Interim Order because although he responded in the extended time frame, providing responsive e-mails to the Complainant, a document index identifying privileged e-mails, and simultaneously providing certified confirmation of compliance to the Executive Director, he failed to provide all disclosable e-mail attachments. Thus, the GRC is providing the Custodian a final opportunity to disclose the attachments and/or provide comprehensive arguments as to why same are not subject to disclosure.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
3. The GRC must conduct an *in camera* review of the eight (8) responsive e-mails to determine the validity of the Custodian’s assertion that the same are exempt from disclosure under OPRA pursuant to the attorney-client or “inter-agency or intra-agency advisory consultative or deliberative” exemptions. *See Paff v. NJ Dep’t of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

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

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



4. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 3 above), nine (9) copies of the three (3) redacted records, a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁵ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 29, 2015

³ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
April 28, 2015 Council Meeting

Robert A. Verry¹
Complainant

GRC Complaint No. 2013-287

v.

Franklin Fire District No 1 (Somerset)²
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Any and all e-mails or correspondence between Don Bell and Joseph F. Danielsen, Todd Brown, the Custodian, Jim Wickman, Jason Goldberg, and Dawn Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts, and computer systems from September 1, 2012 to December 31, 2012.
2. Any and all e-mails or correspondence between Mr. Brown and Mr. Danielsen, the Custodian, Mr. Wickman, Mr. Goldberg, and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts, and computer systems from September 1, 2012 to December 31, 2012.
3. Any and all e-mails or correspondence between the Custodian and Mr. Danielsen, Mr. Wickman, Mr. Goldberg, and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts, and computer systems from September 1, 2012 to December 31, 2012.
4. Any and all e-mails or correspondence between Mr. Wickman and Mr. Danielsen, Mr. Goldberg, and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts, and computer systems from September 1, 2012 to December 31, 2012.
5. Any and all e-mails or correspondence between Mr. Goldberg and Mr. Danielsen and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts, and computer systems from September 1, 2012 to December 31, 2012.

Custodian of Record: Tim Szyborski
Request Received by Custodian: August 5, 2013
Response Made by Custodian: August 14, 2013
GRC Complaint Received: October 1, 2013

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

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Background

September 30, 2014 Council Meeting:

At its September 30, 2014, public meeting, the Council considered the September 23, 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:

1. The Custodian complied with the Council's July 29, 2014, Interim Order because he responded in the extended time frame, providing responsive e-mails and a document index to the Complainant and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian's failure to respond timely to the Complainant's OPRA request resulted in "deemed" denial of access, and the Custodian failed to bear his burden of proving that the proposed special service charge was reasonable and warranted. However, the Custodian timely complied with the Council's July 29, 2014, Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's July 29, 2014, Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 51. Specifically, the Council determined that the proposed special service charge was unreasonable and unwarranted and ordered disclosure of all responsive e-mails to the Complainant, which the Custodian did on August 14, 2014. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6; Teeters, 387 N.J. Super. at 432; Mason, 196 N.J. at 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Procedural History:

On October 1, 2014, the Council distributed its Final Decision to all parties. On October 9, 2014, the Complainant's Counsel filed a request for reconsideration of the Council's September 30, 2014, Interim Order based on a mistake, change in circumstances, and illegality.

According to Complainant's Counsel, the Council made the following reversible errors in rendering its decision:

1. The GRC erred in determining that the Custodian complied with its Order because he failed to disclose all e-mail attachments.
2. The GRC did not accept competent, credible evidence regarding the Custodian's failure to comply with the Council's Order ahead of its September 30, 2014, adjudication.
3. The GRC failed to address the Custodian's failure to provide a document index as part of the Statement of Information ("SOI").
4. The GRC failed to follow Appellate Division case law in conducting an *in camera* review of any records to which the Custodian denied access.

The Complainant's Counsel stated that he attempted to submit a letter brief refuting the Custodian's August 14, 2014, response to the Council's July 29, 2014, Order on September 23, 2014. The Complainant's Counsel stated that the GRC rejected this submission; however, the ensuing e-mail exchange indicated that the Complainant had a reasonable expectation to believe that the GRC would have done its due diligence in reviewing the Custodian's compliance prior to determining that he complied. The Complainant's Counsel noted that, although the submission followed the GRC's notification of the scheduling of this complaint, the GRC should have tabled the matter based on his submission.

Regarding the Custodian's failure to disclose attachments, the Complainant's Counsel argued that such an issue was already addressed in Carter v. Franklin Fire District No. 1 (Somerset), GRC Complaint Nos. 2012-284 *et seq.* and 2012-288 *et seq.* (Interim Orders dated March 25, 2014, which are currently at the Office of Administrative Law). The Complainant's Counsel contended that the Custodian, who is also the custodian of record in Carter, cannot claim that he was unaware of his obligation to provide attachments. The Complainant's Counsel thus argued that the Custodian's failure to provide attachments represents additional proof that he is intentionally withholding responsive records. The Complainant's Counsel requested that, as a matter of public policy, the GRC always require a custodian to disclose e-mails and their attachments in order to comply successfully with an interim order. The Complainant's Counsel also requested that the GRC apply this policy to the Custodian.

Regarding the Custodian's failure to submit a document index as part of the SOI, the Complainant's Counsel contended that the GRC's continued silence on his explicit objection would render this issue ripe for an appeal. Also, the Complainant's Counsel argued that the GRC's failure to address this issue is arbitrary, capricious, and prejudicial to the Complainant. The Complainant's Counsel noted that he has raised similar arguments in Carter, GRC 2012-284 *et seq.*, Carter, GRC 2012-288 *et seq.*, and other complaints recently filed against the FFD that are currently pending adjudication. Thus, he is giving the GRC a chance to address the issue before taking the issue to the Appellate Division. The Complainant's Counsel contended that he believed the GRC would address this issue because it deferred the knowing and willful analysis in its July 29, 2014, Interim Order. The Complainant's Counsel requested that the GRC, as a matter of public policy, hold any custodian failing to file a document index in "Contempt of Council." The Complainant's Counsel also reiterated that the GRC should apply this policy to the Custodian.

Regarding the GRC's failure to order an *in camera* review of records to which the Custodian denied access, the Complainant's Counsel contended that the GRC did not adhere to the precedent set in Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and multiple GRC decisions. See Ciccarone v. NJ Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (January 2013); Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (February 2012); Renna v. Cnty. of Union, GRC Complaint No. 2008-217 (December 2009). The Complainant's Counsel asserted that the GRC cannot accept a custodian's claim of privilege based solely on its assertion prior to or during the pendency of a complaint without conducting an *in camera* review. The Complainant's Counsel argued that even if certain portions of the record are exempt, a custodian is still required to provide said record with redactions. The Complainant's Counsel argued that the GRC must conduct an *in camera* review of the privileged records.

Also, the Complainant's Counsel argued that the Complainant was not required to take issue with the exempted records. Rather, the GRC has an express obligation to review same *in camera* and failed to do so. Further, the Complainant's Counsel averred that the Appellate Division's decision in Hyman v. City of Jersey City & GRC, 2012 N.J. Super. Unpub. LEXIS 2032, 20-21 (App. Div. 2012) applies here in that the Court expressly determined that the GRC has a unique adjudicative capacity to review records *in camera* without unilaterally reclassifying records. The Complainant's Counsel reasons that the GRC's obligation to conduct an *in camera* review is based on the Custodian's failure to submit a document index. Additionally, the Complainant's Counsel contended that the GRC shifted its adjudicatory responsibilities to the Complainant by requiring him to dispute the exempted e-mails. The Complainant's Counsel requested that, as a matter of public policy, the GRC should always conduct an *in camera* review on any records that a custodian asserts are exempt. Counsel also reiterated that the GRC should apply this policy to the Custodian.

The Complainant's Counsel also requested that the GRC refer this complaint to the Office of Administrative Law for a fact-finding hearing to determine whether the Custodian knowingly and willfully violated OPRA.

Analysis

Reconsideration

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

In the matter before the Council, the Complainant's Counsel filed the request for reconsideration of the Council's Order dated September 30, 2014, on October 9, 2014, six (6) business days from the issuance of the Council's Order.

Applicable case law holds that:

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

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

Compliance & In Camera Review

The Complainant’s Counsel argued that the Custodian failed to include attachments as part of his compliance. The Complainant’s Counsel asserted that the Custodian, as the custodian of record in Carter, GRC 2012-284 *et seq.*, was already aware of his obligation to provide attachments prior to receiving the Interim Order relevant to this complaint. Further, the Complainant’s Counsel argued that the GRC had an obligation to review the eight (8) e-mails to which the Custodian denied access.

This Council’s adjudication of this matter is similar to its prior decision in DeRobertis v. Twp. of Montclair (Essex), GRC Complaint No. 2012-199 (Interim Order dated October 29, 2013).³ There, the Council reconsidered its July 23, 2013 Final Decision after the complainant submitted a request for reconsideration to the Council arguing that he did not believe the Township had complied with an earlier interim order. The fact that the Complainant’s Counsel here submitted objections after this complaint was sent to the Council for review is no different than the complainant’s reconsideration after the Council’s Final Decision in DeRobertis, GRC 2012-199.

A review of the e-mails provided yields multiple e-mails with attachments, with a number of them appearing to be the same bid package for IT services. Other types of attachments include draft request for proposals and Custodian Counsel’s virtual Microsoft Outlook® contact file. The Council’s prior decision in Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009), supports Counsel’s argument that the Custodian was required to disclose attachments as part of the e-mails. The Council also briefly

³ The GRC notes that the Complainant’s Counsel admitted to not submitting any additional arguments until after the GRC notified the parties that this complaint was scheduled for adjudication -- nearly a month and a half after the GRC received the Custodian’s compliance package.

addressed disclosability of e-mail attachments in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-284 *et seq.* (Interim Order dated March 25, 2014) and Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.* (Interim Order dated March 25, 2014).

Document Index

Counsel argued that he believed the GRC would address the Custodian's failure to provide a document index as part of the SOI; however, the GRC failed to do so. Counsel contended that he was giving the GRC a chance to address the issue prior to filing an appeal on the issue.

The GRC rejects this argument based on the fact that requiring a document index in this specific incident would have required the FFD to incur the disputed cost to provide same. While the GRC is well aware of the requirement to submit a document index pursuant to Paff v. NJ Dep't of Labor, 392 N.J. Super. 334 (App. Div. 2007), as part of the SOI, the Complainant's Counsel cannot ignore that there may be certain situations where a custodian cannot complete a document index, whether for lack of responsive records or other extent issues. The instant complaint presented such a situation where it was reasonable to address the main issue of a special service charge prior to requiring a custodian to incur same. The fact here remains that the Custodian submitted a privilege log at the time of his compliance with the Council's Order after the special service charge issue was decided. The GRC also finds as misplaced Complainant Counsel's assertion that he thought the GRC would address the issue merely because the knowing and willful analysis was deferred. Since its inception, the GRC has routinely deferred a knowing and willful analysis until all relevant conclusions affecting an analysis have been addressed. The Council's July 29, 2014, Interim Order required the Custodian to comply by disclosing records to the Complainant. Thus, the GRC could not have analyzed the knowing and willful violation without first addressing the issue of compliance.

As the moving party, the Complainant's Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. Here, the Complainant's Counsel failed to establish that the complaint should be reconsidered based on a change in circumstances or illegality. However, the Complainant's Counsel has established that the complaint should be reconsidered based on a mistake. Specifically, the Custodian failed to disclose those e-mail attachments not otherwise exempt from disclosure. Further, the Complainant took issue with those five (5) e-mails of which the GRC should conduct an *in camera* review. Thus, the Complainant Counsel's request for reconsideration should be granted. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Based on the foregoing, the Council should rescind its September 30, 2014, Final Decision and re-issue same as follows:

1. The Custodian failed to comply fully with the Council's July 29, 2014, Interim Order because although he responded in the extended time frame providing responsive e-mails to the Complainant, a document index identifying privileged e-mails and simultaneously providing certified confirmation of compliance to the Executive Director, he failed to provide all disclosable e-mail attachments. Thus, the GRC is providing the Custodian a final opportunity to disclose the attachments and/or provide comprehensive arguments as to why same are not subject to disclosure.
2. The GRC must conduct an *in camera* review of the eight (8) responsive e-mails to determine the validity of the Custodian's assertion that the same are exempt from disclosure under OPRA pursuant to the attorney-client or "inter-agency or intra-agency advisory consultative or deliberative" exemptions. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find the Complainant's Counsel was required to establish in his request for reconsideration of the Council's September 30, 2014, Final Decision that: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996). Here, the Complainant's Counsel failed to establish that the complaint should be reconsidered based on a change in circumstances or illegality. However, the Complainant's Counsel has established that the complaint should be reconsidered based on a mistake. Thus, the Complainant Counsel's request for reconsideration should be granted. *Cummings*, 295 N.J. Super. at 384; *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, the Council's Final Decision should be rescinded and re-issued as follows:

1. The Custodian failed to fully comply with the Council's July 29, 2014, Interim Order because although he responded in the extended time frame, providing responsive e-mails to the Complainant, a document index identifying privileged e-mails, and simultaneously providing certified confirmation of compliance to the Executive Director, he failed to provide all disclosable e-mail attachments. Thus, the GRC is providing the Custodian a final opportunity to disclose the attachments and/or provide comprehensive arguments as to why same are not subject to disclosure.

2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
3. The GRC must conduct an *in camera* review of the eight (8) responsive e-mails to determine the validity of the Custodian's assertion that the same are exempt from disclosure under OPRA pursuant to the attorney-client or "inter-agency or intra-agency advisory consultative or deliberative" exemptions. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 3 above), nine (9) copies of the three (3) redacted records, a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁸ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

Reviewed By: Joseph D. Glover
Executive Director

April 21, 2015

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

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

⁶ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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."



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

September 30, 2014 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2013-287

v.

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

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 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 complied with the Council’s July 29, 2014 Interim Order because he responded in the extended time frame providing responsive e-mails and a document index to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to timely respond to the Complainant’s OPRA request resulted in “deemed” denial of access and the Custodian failed to bear his burden of proving that the proposed special service charge was reasonable and warranted. However, the Custodian timely complied with the Council’s July 29, 2014 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s July 29, 2014 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 51. Specifically, the Council determined that the proposed special service charge was unreasonable and unwarranted and ordered disclosure of all responsive e-mails to the Complainant, which the Custodian did on August 14, 2014. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. *See* N.J.S.A. 47:1A-6; Teeters, 387 N.J. Super. at 432; Mason, 196 N.J. at 51. **Thus, the Complainant, or his attorney, is entitled**



to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).

Interim Order Rendered by the
Government Records Council
On The 30th Day of September, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: October 1, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2013-287

v.

**Franklin Fire District No 1 (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Any and all e-mails or correspondence between Don Bell and Joseph F. Danielsen, Todd Brown, the Custodian, Jim Wickman, Jason Goldberg and Dawn Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems from September 1, 2012 to December 31, 2012.
2. Any and all e-mails or correspondence between Mr. Brown and Mr. Danielsen, the Custodian, Mr. Wickman, Mr. Goldberg and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems from September 1, 2012 to December 31, 2012.
3. Any and all e-mails or correspondence between the Custodian and Mr. Danielsen, Mr. Wickman, Mr. Goldberg and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems from September 1, 2012 to December 31, 2012.
4. Any and all e-mails or correspondence between Mr. Wickman and Mr. Danielsen, Mr. Goldberg and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems from September 1, 2012 to December 31, 2012.
5. Any and all e-mails or correspondence between Mr. Goldberg and Mr. Danielsen and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems from September 1, 2012 to December 31, 2012.

Custodian of Record: Tim Szymborski

Request Received by Custodian: August 5, 2013

Response Made by Custodian: August 14, 2013

GRC Complaint Received: October 1, 2013

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

² Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

Background

July 29, 2014 Council Meeting:

At its July 29, 2014 public meeting, the Council considered the July 22, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant's OPRA request in writing initially proposing a special service charge and then seeking an extension of time, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. The Custodian has not borne his burden of proof that, prior to disclosure, the payment of a special service charge is warranted because of Network Blade, LLC, was required to respond to the request and that an extraordinary amount of time and effort. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). Thus, the Custodian shall disclose the sought OPRA requests to the Complainant and must identify any records that are redacted and state the basis for redacting same.
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 1:4-4,³ to the Executive Director.⁴**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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."

⁴ 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.

Procedural History:

On July 30, 2014, the Council distributed its Interim Order to all parties. On the same day, the Custodian's Counsel requested an extension of ten (10) days to respond to the Council's Order. On August 1, 2014, the GRC granted an extension of time until August 15, 2014.

On August 14, 2014, the Custodian responded to the Council's Interim Order. The Custodian certified that he provided to the Complainant copies of the e-mails responsive to the subject OPRA request. Further, the Custodian certified that included is a document index regarding three (3) e-mails determined to be exempt from disclosure as "inter-agency or intra-agency advisory, consultative or deliberative" ("ACD") material and five (5) e-mails determined to be exempt under the attorney-client privilege exemption.⁵ The Custodian certified that it took Franklin Fire District No. 1 ("FFD") over two (2) hours to retrieve the records and two (2) hours to review same for responsiveness and possible exempt material.

The Custodian also reiterated from previous submissions that his denial was based on the FFD's position that some charge should be passed to a requestor when fulfilling OPRA requests seeking e-mails. The Custodian contended that the FFD took a legal stance that the GRC overturned and that such stance was not a deliberate attempt to withhold access to the responsive records.

Analysis

Compliance

At its July 29, 2014 meeting, the Council ordered the Custodian to disclose e-mails responsive to the Complainant's OPRA requests and identify any records that are redacted and state the basis for redacting same. On July 30, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on August 6, 2014.

On July 30, 2014, the same day as receipt of the Council's Order, the Custodian's Counsel sought an extension of ten (10) days. On August 1, 2014, the GRC granted an extension until August 15, 2014, or nine (9) days. On August 14, 2014, the Custodian provided responsive e-mails and a document index to all parties and simultaneously provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's July 29, 2014 Interim Order because he responded in the extended time frame providing responsive e-mails and a document index to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director.

⁵ The Complainant did not dispute the exempted e-mails.

Knowing & Willful

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

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

Here, the Custodian’s failure to timely respond to the Complainant’s OPRA request resulted in “deemed” denial of access, and the Custodian failed to bear his burden of proving that the proposed special service charge was reasonable and warranted. However, the Custodian timely complied with the Council’s July 29, 2014 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney’s Fees

OPRA provides that:

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

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

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

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

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

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

OPRA itself contains broader language on attorney’s fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney’s fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason, further held that:

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

Id. at 76.

In this matter, the Complainant disputed the FFD's proposed special service charge and requested that the Council order disclosure of all responsive e-mails. The Council subsequently evaluated the special service charge and determined that same was unreasonable and unwarranted. The Council thus ordered disclosure of the responsive e-mails in its July 29, 2014 Interim Order, which the Custodian complied with on August 14, 2014. For these reasons, the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Therefore, pursuant to the Council's July 29, 2014 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 51. Specifically, the Council determined that the proposed special service charge was unreasonable and unwarranted and ordered disclosure of all responsive e-mails to the Complainant, which the Custodian did on August 14, 2014. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6; Teeters, 387 N.J. Super. at 432; Mason, 196 N.J. at 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's July 29, 2014 Interim Order because he responded in the extended time frame providing responsive e-mails and a document index to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian's failure to timely respond to the Complainant's OPRA request resulted in "deemed" denial of access and the Custodian failed to bear his burden of proving that the proposed special service charge was reasonable and warranted. However, the Custodian timely complied with the Council's July 29, 2014 Interim

Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's July 29, 2014 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 51. Specifically, the Council determined that the proposed special service charge was unreasonable and unwarranted and ordered disclosure of all responsive e-mails to the Complainant, which the Custodian did on August 14, 2014. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6; Teeters, 387 N.J. Super. at 432; Mason, 196 N.J. at 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

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

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

September 23, 2014



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

July 29, 2014 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2013-287

v.

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

At the July 29, 2014 public meeting, the Government Records Council ("Council") considered the July 22, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant's OPRA request in writing initially proposing a special service charge and then seeking an extension of time, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. The Custodian has not borne his burden of proof that, prior to disclosure, the payment of a special service charge is warranted because of Network Blade, LLC, was required to respond to the request and that an extraordinary amount of time and effort. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). Thus, the Custodian shall disclose the sought OPRA requests to the Complainant and must identify any records that are redacted and state the basis for redacting same.
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 1:4-4,¹ 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."

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

Interim Order Rendered by the
Government Records Council
On The 29th Day of July, 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: July 30, 2014

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
July 29, 2014 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2013-287

v.

**Franklin Fire District No 1 (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Any and all e-mails or correspondence between Don Bell and Joseph F. Danielsen, Todd Brown, the Custodian, Jim Wickman, Jason Goldberg and Dawn Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems from September 1, 2012 to December 31, 2012.
2. Any and all e-mails or correspondence between Mr. Brown and Mr. Danielsen, the Custodian, Mr. Wickman, Mr. Goldberg and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems from September 1, 2012 to December 31, 2012.
3. Any and all e-mails or correspondence between the Custodian and Mr. Danielsen, Mr. Wickman, Mr. Goldberg and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems from September 1, 2012 to December 31, 2012.
4. Any and all e-mails or correspondence between Mr. Wickman and Mr. Danielsen, Mr. Goldberg and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems from September 1, 2012 to December 31, 2012.
5. Any and all e-mails or correspondence between Mr. Goldberg and Mr. Danielsen and Ms. Cuddy regarding computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems from September 1, 2012 to December 31, 2012.

Custodian of Record: Tim Szymborski

Request Received by Custodian: August 5, 2013

Response Made by Custodian: August 14, 2013

GRC Complaint Received: October 1, 2013

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

² Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

Background³

Request and Response:

On August 4, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 5, 2013, the Custodian acknowledged receipt of the Complainant’s OPRA request. On August 14, 2013, the Custodian responded in writing stating that he determined that a special service charge is warranted. N.J.S.A. 47:1A-5. The Custodian noted that he is an elected official with limited time to fulfill his duties as a custodian of record and Franklin Fire District No. 1 (“FFD”) only employs one (1) full time employee that is currently a temp. The Custodian stated that the IT vendor will spend two (2) hours retrieving responsive e-mails and charge FFD a rate of \$120 per hour. The Custodian requested that the Complainant advise whether he objected to the proposed fee.

On August 15, 2013, the Complainant responded objecting to the proposed fee. Further, the Complainant noted that the Custodian’s response came after business hours on the seventh (7th) business day, but that he would allow the Custodian until August 16, 2013, to provide all responsive records. On August 20, 2014, the Custodian sought an extension of fourteen (14) business days for the reasons presented in his initial response, as well as because of the number of OPRA requests received on a daily basis.

On August 21, 2013, the Complainant objected to the extension arguing that it was unreasonable. However, he allowed for an extension until September 10, 2013 only if the Custodian was releasing the responsive records. Paff v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-77 (June 2012). On August 22, 2013, the Complainant noted that the Custodian’s August 14, 2013 response was on the eighth (8th) business day and was thus untimely.⁴ On September 20, 2013, the Custodian advised that despite his cooperation, the Custodian deliberately failed to disclose records by the expiration of the extended time frame. The Complainant allowed the Custodian one (1) last extension until noon on September 23, 2013 and advised that a failure to respond would force him to take action against the Custodian.

Denial of Access Complaint:

On October 1, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian went to great lengths to delay responding to the subject OPRA request to include a \$240.00 special service charge and excessive extension request.

The Complainant requested that the GRC examine the facts here in tandem with Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-284 *et seq.* and Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.*, because of the

³ 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.

⁴ The GRC notes that taking into consideration that the Custodian received the request on August 5, 2013, he responded on the seventh (7th) business day.

similarity of facts contained therein. The Complainant argued that those complaints include a failure to respond within an extended time frame component, which is clearly at issue here.

Further, the Complainant asserted that the Custodian could not contend that he was unaware of his obligation to search for and disclose responsive e-mails because the Council determined such in Carter, GRC 2012-284, *et seq.*, and Carter, GRC 2012-288, *et seq.* (citing Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-114 *et seq.*). The Complainant noted that the Custodian never disputed the validity of the request.

The Complainant thus requested the GRC: 1) determine that the Custodian's failure to timely respond resulted in a "deemed" denial; 2) order immediate disclosure of all responsive records; 3) determine that the Custodian knowingly and willfully violated OPRA warranting an assessment of the civil penalty; and 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Statement of Information:

On October 25, 2013, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on August 5, 2013 and responded in writing on August 14, 2013.

The Custodian certified that in August 2012, the FFD decided that it would utilize its IT vendor to handle the retrieval of e-mail from FFD accounts. The Custodian affirmed that this policy was meant to curtail scrutiny over allegations of withholding e-mails and because the FFD is run by elected officials employing one (1) full time position. Thus, the FFD would provide OPRA requests to the vendor, who would estimate the amount of time necessary to search for and retrieve all response e-mails. The Custodian affirmed that once the IT vendor advised of the amount of time necessary to perform a search, he would utilize the 14-point analysis to determine whether a special service charge was warranted. The Complainant certified that, in this case, he followed FFD's protocol and determined a special service charge was warranted based on the following:

1. What records are requested?

E-mail communications and correspondence between seven (7) individuals.

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

See above. The subjects of the e-mails and correspondence are "computer technician, computer maintenance, computer services, computer repairs, computer warranties, computer contracts and computer systems." The Custodian does not know the number of records requested because no search was performed after the Complainant rejected the proposed charge.

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

From September 1, 2012 through December 31, 2012.

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

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

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

One (1) employee for the entire agency.

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

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

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

Not sure, All potentially responsive records would have to be reviewed.

8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?

FFD's only employee makes \$20.00 an hour. The IT vendor, whom is definitely qualified to perform the search charges \$120.00 an hour and has estimated it will take two (2) hours to locate, retrieve, group and convert the records. These two (2) hours are not inclusive of review for redactions or preparation of/and disclosure, which FFD would not include in the charge.

9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?

FFD's only employee could monitor inspection at \$20.00 an hour, but any examination would need to be conducted by Counsel.⁵ This cost would have been passed to the Complainant.

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

N/A.

11. What is the reason that the agency employed, or intends to employ, the particular

⁵ The GRC notes that the Custodian included arguments for charging a monitoring fee by Counsel. The evidence of record indicates that a monitoring fee was not included.

level of personnel to accommodate the records request?

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

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

FFD's IT vendor – Network Blade, LLC at an hourly rate of \$120.00.

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

Full availability.

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

The IT vendor, whom is definitely qualified to perform the search charges \$120.00 an hour and has estimated it will take two (2) hours to locate, retrieve, group and convert the records.

The Custodian certified that the Complainant rejected the proposed special service charge on August 15, 2013, but did not attempt to reach a compromise on the fee. Further, the Custodian asserted that because the Complainant failed to agree to the proposed special service charge, he had no choice but to deny the Complainant access to the responsive records.

Regarding the request for an extension, the Custodian certified that due to the number of requests received around the time of the subject OPRA request, he accidentally sent the Complainant a request for an extension on August 20, 2013.

Additional Submissions:

On November 21, 2013, the Complainant's Counsel first noted that the Custodian failed to submit a document index to the GRC in accordance with Paff v. NJ Dep't of Labor, 392 N.J. Super. 334 (App. Div. 2007). Counsel further argued that although the Custodian attempted to paint FFD as an overburdened agency, it does not fall within the limits provided for in OPRA allowing for limited OPRA hours. N.J.S.A. 47:1A-5(a).

Counsel contended that the Custodian, who chose to run for office, is paid a \$5,000 stipend and is by no means "virtually volunteer." Counsel also asserted that any inability for FFD to appropriately staff their agency should not affect the Complainant's ability to request and receive records as provided for in OPRA.

Regarding the 14-point analysis, Counsel disputed that only one (1) employee could accommodate the request seeing as the Custodian is one of the named senders/recipients and Mr. Bell serves as FFD's Deputy Clerk and should assist with OPRA requests similar to deputy clerks in municipalities. Counsel requested that the GRC take judicial notice of its decision in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-234 (February 2014), because the evidence there sheds light on the job duties of Ms. Cuddy, FFD's administrative aide.⁶ Further, Counsel noted that Ms. Cuddy was hired, in part, because of her internet and computer skills, which qualifies her as much as Network Blade to respond to requests for e-mails. Counsel further noted that Custodian's Counsel responded to requests and Network Blade is clearly searching for and retrieving responsive records; thus, no less than five (5) individuals are available to accommodate OPRA requests. Counsel also disputed that records need to be converted because, by their very nature, they are electronic.

Counsel contended that raising the issue of monitoring a request, which the Complainant did not request, raises unspoken credibility questions about Mr. Danielsen, who is a sender/recipient in the request.⁷ Counsel asserted that given Ms. Cuddy's computer skills as noted in her resume and FFD's alleged credibility issues with Mr. Danielsen, he should recuse himself from any requests to which he is directly associated.

Lastly, regarding the request for an extension, Counsel disputed that the Custodian accidentally sent the August 20, 2013 e-mail to the Complainant. Counsel argued that had this been the case, the Custodian could have advised the Complainant of such after receiving the Complainant's August 21, and August 22, 2013 e-mails. However, the Custodian failed to respond at all, even after the Complainant's third e-mail on September 20, 2013. For these reasons, Counsel contended that the GRC should hold that the Custodian violated OPRA. Carter, GRC 2012-284, *et seq.*, and Carter, GRC 2012-288, *et seq.*

Analysis

Timeliness

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). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁸ 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

⁶ The GRC notes that the administrative aide at the time of Carter, GRC 2011-234, was Debi Nelson.

⁷ The GRC notes that the 14-point analysis includes a question for monitoring inspection as part of the special service charge calculation. Thus, the issue of monitoring was addressed by the Custodian.

⁸ 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.

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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's OPRA request, seeking an extension of time until April 20, 2007, to fulfill the complainant's OPRA request. However, the evidence of record showed that no records were provided until May 31, 2007. The Council held that:

“[t]he Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) ... however ... [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.” *Id.*

Here, the Custodian certified in the SOI that his request for an extension was sent in error. Although this may very well be the case, the Complainant granted an extension until September 10, 2013, and the Custodian failed to notify the Complainant thereafter that the extension request was made in error. This matter is further complicated by the fact that the Custodian did not respond to the Complainant's August 15, 2013 objection e-mail advising that the Complainant's request was officially denied because he objected to the proposed fee. Thus, similar to the facts in Kohn, the Custodian responded in writing to the Complainant's OPRA request in a timely manner proposing a special service charge and then seeking an extension after the proposed fee was rejected. However, the Custodian failed to respond in writing to the Complainant within that extended time. *See also* Hardwick v. NJ Dep't of Transportation, GRC Complaint No. 2007-164 (February 2008).

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant's OPRA request in writing initially proposing a special service charge and then seeking an extension of time, the Custodian's failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn, GRC 2007-124. *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).

Special Service Charge

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

Whenever a records custodian asserts that fulfilling an OPRA records request requires an “extraordinary” expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5(c). In this regard, OPRA provides:

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies”

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

The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of the variety of factors discussed in The Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. Id. at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. Id.

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5(c). Id. at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA: (1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place. Id. at 199.

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

Here, the Custodian has provided a response to questions posed by the GRC that reflect the analytical framework outlined in the Courier Post regarding the proper assessment of a special service charge. The Custodian argues the necessity of Network Blade’s cost being passed onto the Complainant in order to perform two (2) hours of work at \$120.00 per hour for an unknown number of possible responsive records.

The current issue is similar in principle to one issue contemplated by Court in Courier Post. There, the Court held that “[a]ttorneys' fees will not be allowed to be charged to the Post or to any other requestor of documents for review and redaction of exempt material.” Id. at 207. In reaching this decision, the Court reasoned that “[t]he Legislature could have enacted an attorney review clause, but it did not. Neither did it create a special subclass for attorney bills and accord to them any kind of special treatment. It appears rather conclusively that the custodian is responsible for asserting the privilege and making [redactions].” Id. at 203-204. *But see Fisher v. Div. of Law*, 400 N.J. Super. 61 (App. Div. 2008)(affirming the Council’s decision that the custodian could charge for deputy attorney general time spent retrieving and redacting records based on special circumstances).

The Council later applied the Court’s decision in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). There, the custodian sought to charge the attorney’s hourly rate of \$150.00 for 2.5 to 3 hours for reviewing 78 pages of invoices. The Council, citing to Courier Post, and noting that OPRA does not prohibit a public agency’s use of an attorney to advise, supervise or even to perform such redactions, determined that:

[A]lthough the original Custodian sought Mr. Cooper’s aid in redacting the responsive vendor list, the Custodian cannot attempt to pass the cost of Mr. Cooper’s services onto the Complainant because OPRA clearly requires “... that the *custodian* is responsible for asserting the privilege and making the redaction.” Courier Post . . . at 203-204. Moreover, the current Custodian failed to prove that Counsel’s expertise is required to review the vendor list and redact personal information. Thus, the proposed special service charge of \$375.00 to \$450.00 is not reasonable or warranted pursuant to N.J.S.A. 47:1A-5(c). Therefore, the current Custodian must redact and provide the responsive list to the Complainant at no charge.

Id. at 13. *See also Nummermacker v. City of Hackensack*, 2014 N.J. Super. Unpub. LEXIS 1287 (May 27, 2014).

In the matter currently before the Council, the GRC first notes that the Complainant’s request is five (5) items, however, each request omits one additional name. Thus, all five (5) items are essentially the same exact request, as opposed to separate and distinct items.

The Custodian has proposed passing the cost of utilizing Network Blade to search for and retrieve an unknown number of responsive records between as many as seven (7) people for a three (3) month period over two (2) hours. In part, this action is not any different from passing the cost of utilizing an attorney to retrieve and redact invoices. A custodian’s duties under OPRA include complying with “. . . a request to inspect, examine, copy, or provide a copy of a government record.” N.J.S.A. 47:1A-5(g). As in Carter, although OPRA does not prohibit assistance from other employees, officials, vendors, *etc.*, this does not necessarily mean that a custodian may charge for the assistance any time it is utilized.

The evidence here indicates that a search for records responsive to the Complainant's OPRA request could be adequately performed by the full-time employee and/or persons identified in the request. As in both Courier Post, and Carter, and notwithstanding both parties arguments on the number of persons ability to accommodate OPRA requests, the GRC is not satisfied that utilizing Network Blade falls within an extraordinary amount of time or effort, or that no other person is capable of searching for the responsive records. Further, although utilizing Network Blade might be the most succinct way to search for all responsive e-mails, the evidence of record does not support that doing so is such a necessity that the Custodian had no other option. Also, given current programs such as Microsoft Outlook®, searching for e-mails/electronic correspondence does not take an IT level expertise. Thus, the proposed fee is unwarranted here.

Therefore, the Custodian has not borne his burden of proof that, prior to disclosure, the payment of a special service charge is warranted because of Network Blade was required to respond to the request and that an extraordinary amount of time and effort was required. *See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post*, 360 *N.J. Super.* at 199; *Carter*, GRC 2011-71. Thus, the Custodian shall disclose the sought OPRA requests to the Complainant and must identify any records that are redacted and state the basis for redacting same.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant's OPRA request in writing initially proposing a special service charge and then seeking an extension of time, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009).
2. The Custodian has not borne her burden of proof that, prior to disclosure, the payment of a special service charge is warranted because of Network Blade, LLC, was

required to respond to the request and that an extraordinary amount of time and effort. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). Thus, the Custodian shall disclose the sought OPRA requests to the Complainant and must identify any records that are redacted and state the basis for redacting same.

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 1:4-4,⁹ to the Executive Director.¹⁰**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

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

July 22, 2014

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 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.