



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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**CHARLES A. RICHMAN**  
*Commissioner*

**FINAL DECISION**

**June 28, 2016 Government Records Council Meeting**

Ruth Paez  
Complainant

v.

Borough of Pompton Lakes (Passaic)  
Custodian of Record

Complaint No. 2015-193

At the June 28, 2016 public meeting, the Government Records Council (“Council”) considered the June 21, 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 Custodian complied with the Council’s May 26, 2016 Interim Order because she responded in the prescribed time frame by providing a copy of the Cit-E-Net invoice and simultaneously providing certified confirmation of compliance to the Executive Director.
2. Although the Custodian did not initially bear her burden of proof that the payment of a special service charge was warranted, she ultimately complied with the Council’s Interim Order either to provide both the Complainant and the GRC with an invoice from the vendor or to disclose the records responsive to the Complainant’s OPRA request. The Custodian also complied with the GRC’s Interim Order by submitting an additional certification on June 13, 2016, ten (10) business days from receipt of the Interim Order, advising the GRC that the Complainant had neither contacted the Custodian nor provided payment of the charge. 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.

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 28<sup>th</sup> Day of June, 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: June 30, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 28, 2016 Council Meeting**

**Ruth Paez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-193**

v.

**Borough of Pompton Lakes (Passaic)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of:

1. “All electronic and hard copy communications (including reports, correspondence, emails, etc.) re: DuPont Pompton Lakes Work Site Contamination between the Borough of Pompton Lakes (including elected officials (Mayor and Council), Borough Administrator, Pompton Lakes Environmental Officer and any other Borough employees) which have been sent to as well as any responses received to the USEPA, NJDEP, ASTDR, NJDHSS and DuPont as well as any other elected officials”
2. “All communications between the Borough of Pompton Lakes Mayor and Council from the year of 2007 until the present date of April 1, 2015 on this subject matter as listed above”

**Custodian of Record:** Elizabeth Brandsness

**Request Received by Custodian:** April 2, 2015; April 24, 2015; April 27, 2015; April 29, 2015; May 1, 2015; May 5, 2015; May 7, 2015; May 21, 2015; May 31, 2015

**Response Made by Custodian:** April 2, 2015; April 27, 2015; April 29, 2015; April 30, 2015; May 1, 2015; May 4, 2015; May 6, 2015; May 11, 2015; May 22, 2015; June 2, 2015

**GRC Complaint Received:** June 22, 2015

**Background**

**May 24, 2016 Council Meeting:**

At its May 24, 2016 public meeting, the Council considered the May 17, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

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

<sup>2</sup> Represented by Joseph Ragno, Esq. (Riverdale, NJ).

1. The Custodian has not borne her burden of proof that the payment of a special service charge was reasonable and warranted, pursuant to O'Shea. Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame, identify any records that are redacted, and state the basis for redacting same. In the alternative, the Custodian may provide both the Complainant and the GRC an invoice from the vendor to evidence the actual cost of retrieval from Cit-E-Net and offer the requestor an opportunity to review and object to the charge prior to it being incurred. N.J.S.A. 47:1A-5(c).
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> to the Executive Director.<sup>4</sup>**
3. **If applicable, the Custodian shall make the amount of the charge available to the Custodian within three (3) business days from receipt of the Council's Interim Order and provide certified confirmation within the five (5) business days. Thereafter, if the Complainant accepts payment, the Custodian shall disclose to the Complainant the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon remittance of the charge within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4, to the Executive Director at that time. If the Complainant fails to pay the special service charge for the requested records by the tenth (10<sup>th</sup>) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director at that time.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On May 26, 2016, the Council distributed its Interim Order to all parties. On May 27, 2016, the Custodian responded to the Council's Interim Order, attaching a copy of the invoice outlining the actual cost of retrieval from Cit-E-Net. On June 13, 2016, the Custodian submitted an additional certification, advising the GRC that the agency had neither been contacted by the Complainant nor received any payment toward the cost of record retrieval.

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

<sup>4</sup> 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.

## Analysis

### Compliance

At its May 24, 2016 meeting, the Council ordered the Custodian either to disclose the records responsive to the Complainant's OPRA requests or, in the alternative, provide both the Complainant and the GRC an invoice from the vendor to evidence the actual cost of retrieval from Cit-E-Net and offer the requestor an opportunity to review and object to the charge prior to it being incurred. The Custodian was also required to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 26, 2016, 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 June 3, 2016. On May 27, 2016, the first business day after receipt of the Council's Order, the Custodian responded to the Council's Interim Order, attaching a copy of the invoice outlining the actual cost of retrieval from Cit-E-Net and submitting same to the Complainant. On June 13, 2016, the Custodian submitted an additional certification, advising the GRC that the agency had neither been contacted by the Complainant nor received any payment toward the cost of record retrieval.

Therefore, the Custodian complied with the Council's May 26, 2016 Interim Order because she responded in the prescribed time frame by providing a copy of the Cit-E-Net invoice and simultaneously providing 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)).

Although the Custodian did not initially bear her burden of proof that the payment of a special service charge was warranted, she ultimately complied with the Council's Interim Order either to provide both the Complainant and the GRC with an invoice from the vendor or to disclose the records responsive to the Complainant's OPRA request. The Custodian also complied with the GRC's Interim Order by submitting an additional certification on June 13, 2016, ten (10) business days from receipt of the Interim Order, advising the GRC that the Complainant had neither contacted the Custodian nor provided payment of the charge. 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's May 26, 2016 Interim Order because she responded in the prescribed time frame by providing a copy of the Cit-E-Net invoice and simultaneously providing certified confirmation of compliance to the Executive Director.
2. Although the Custodian did not initially bear her burden of proof that the payment of a special service charge was warranted, she ultimately complied with the Council's Interim Order either to provide both the Complainant and the GRC with an invoice from the vendor or to disclose the records responsive to the Complainant's OPRA request. The Custodian also complied with the GRC's Interim Order by submitting an additional certification on June 13, 2016, ten (10) business days from receipt of the Interim Order, advising the GRC that the Complainant had neither contacted the Custodian nor provided payment of the charge. 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.

Prepared By: Husna Kazmir  
Staff Attorney

June 21, 2016



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
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CHARLES A. RICHMAN  
Commissioner

INTERIM ORDER

May 24, 2016 Government Records Council Meeting

Ruth Paez  
Complainant

Complaint No. 2015-193

v.

Borough of Pompton Lakes (Passaic)  
Custodian of Record

At the May 24, 2016 public meeting, the Government Records Council ("Council") considered the May 17, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has not borne her burden of proof that the payment of a special service charge was reasonable and warranted, pursuant to O'Shea. Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame, identify any records that are redacted, and state the basis for redacting same. In the alternative, the Custodian may provide both the Complainant and the GRC an invoice from the vendor to evidence the actual cost of retrieval from Cit-i-Net and offer the requestor an opportunity to review and object to the charge prior to it being incurred. N.J.S.A. 47:1A-5(c).
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**
3. **If applicable, the Custodian shall make the amount of the charge available to the Custodian within three (3) business days from receipt of the Council's Interim Order and provide certified confirmation within the five (5) business days. Thereafter, if the Complainant accepts payment, the Custodian shall disclose to the Complainant the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any**

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

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the 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.

**such redaction upon remittance of the charge within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4, to the Executive Director at that time. If the Complainant fails to pay the special service charge for the requested records by the tenth (10<sup>th</sup>) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director at that time.**

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

Interim Order Rendered by the  
Government Records Council  
On The 24<sup>th</sup> Day of May, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 26, 2016**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 24, 2016 Council Meeting**

**Ruth Paez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-193**

v.

**Borough of Pompton Lakes (Passaic)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of:

1. “All electronic and hard copy communications (including reports, correspondence, emails, etc.) re: DuPont Pompton Lakes Work Site Contamination between the Borough of Pompton Lakes (including elected officials (Mayor and Council), Borough Administrator, Pompton Lakes Environmental Officer and any other Borough employees) which have been sent to as well as any responses received to the USEPA, NJDEP, ASTDR, NJDHSS and DuPont as well as any other elected officials”
2. “All communications between the Borough of Pompton Lakes Mayor and Council from the year of 2007 until the present date of April 1, 2015 on this subject matter as listed above”

**Custodian of Record:** Elizabeth Brandsness

**Request Received by Custodian:** April 2, 2015; April 24, 2015; April 27, 2015; April 29, 2015; May 1, 2015; May 5, 2015; May 7, 2015; May 21, 2015; May 31, 2015

**Response Made by Custodian:** April 2, 2015; April 27, 2015; April 29, 2015; April 30, 2015; May 1, 2015; May 4, 2015; May 6, 2015; May 11, 2015; May 22, 2015; June 2, 2015

**GRC Complaint Received:** June 22, 2015

**Background<sup>3</sup>**

**Request and Response:**

On April 2, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, the Custodian responded in writing, “[i]n response to your request – please see attached memo.” In the

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

<sup>2</sup> Represented by Joseph Ragno, Esq. (Riverdale, NJ).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

attachment, the Custodian wrote, “[t]his request is not specific and is overly broad. Please clearly define the specific documents that you are requesting and the Borough will provide same under OPRA.”

On April 24, 2015, the Complainant again wrote to the Custodian, seeking an update as to her April 2, 2015 request. On April 27, 2015, the Custodian responded, stating that she had previously responded on April 2, 2015 and again attached the April 2, 2015 memo attachment. That same day, the Complainant wrote to the Custodian, stating that she had forgotten and asking the Custodian to send her that e-mail again.

On April 29, 2015, the Complainant wrote to the Custodian, stating that she had believed her OPRA request was detailed and clear, but was “willing [to] break it down into steps.” The Complainant then wrote that she sought “all e-mail or hard copy communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council Members and any/all Pompton Lakes’ borough employees that was sent to the EPA, NJDEP, ATSDR, NJDHSS including all attachments which involve all subject matter related to the DuPont contamination” (sic). The Complainant additionally sought “all e-mail and hard copy communications from Pompton Lakes’ Mayor, Council members and Pompton Lakes’ borough employees to all elected officials including communications with the Borough of Pompton Lakes, with the County of Passaic, with State of New Jersey and Federal elected officials with attachment involving all subject matter related to the DuPont contamination” (sic).

Later that same day, the Custodian responded, attaching a memo stating, “[y]our request as written is overly broad and fails to identify specific government records. I request that you narrow the scope of your request and identify the electronic mailings relating to the specific subject matter. Please clearly define the specific documents that you are requesting and the Borough will provide same under OPRA.” The Complainant responded at 9:11 PM, stating “I saw in my phone your message with the information and I even sent you the return receipt but for some reason I am looking in my computer and I cannot find it in all my emails” and requesting the Custodian to “please send it again.” On April 30, 2015, the Custodian wrote to the Complainant, attaching the memo from the previous day.

On May 1, 2015, the Complainant wrote to the Custodian, forwarding her April 29, 2015 e-mail, asking the Custodian to “confirm to me if you already have sent me the information for this email, please?” The Custodian responded that day, stating, “I have attached the memo – this will be the third time I am responding,” and attached the April 21, 2015 memo. The Complainant wrote back to the Custodian that same day and stated, “[t]he memo you have sent me . . . I already have it” and again requested an “answer” to her OPRA request, stating, “I gave you the information on what I was looking for” (sic).

On May 4, 2015, the Custodian responded, clarifying that the memo she sent “is the answer” and that “I need to have specific documents so that I can provide to you. If you require additional assistance please call me so that I can assist you with your request.”

On May 5, 2015, the Complainant wrote to the Custodian, advising that “per your request for clarification . . . I am providing you further detail which is provided and listed as follows.” The Complainant then listed an eight-part request, asking for the following:

1. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members and any/all Pompton Lakes’ Borough employees with the USEPA regarding DuPont.
2. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members and any/all Pompton Lakes’ Borough employees with the ASTDR regarding DuPont.
3. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members and any/all Pompton Lakes’ Borough employees with the NJDEP regarding DuPont.
4. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members and any/all Pompton Lakes’ Borough employees with the NJDHSS regarding DuPont.
5. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members and any/all Pompton Lakes’ Borough employees with the County of Passaic Freeholders’ offices/Passaic County employees regarding DuPont.
6. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members and any/all Pompton Lakes’ Borough employees with New Jersey State elected officials’ offices including the offices of the Governor of New Jersey, our district State Senators (Pennacchio/O’Toole) and State Assemblyman (DeCroce/Webber/Russo/Rumana) offices regarding DuPont.
7. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members and any/all Pompton Lakes’ Borough employees with Congressional offices of Rodney Frelinghuysen and Bill Pascrell Jr. regarding DuPont.
8. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members and any/all Pompton Lakes’ Borough employees with the offices of Senators Robert Menendez, Cory Booker, or Frank Lautenberg regarding DuPont.

On May 6, 2015, the Custodian responded “See attached response,” with a memo attached. The memo stated, “I am in the process of reviewing your OPRA request with the Borough Attorney to see if this is a bona fide request and will respond with a determination.” The Complainant responded to this e-mail on May 7, 2015, writing, “[t]hanks a lot [Custodian]. I do really appreciate your help, I will be looking forward for your answer” (sic).

On May 11, 2015, the Custodian responded, “[p]lease see attached.” In the attached memo, she stated, “I have reviewed your OPRA request with the Borough Attorney and have been advised that you will need to reference specific documents and I will provide the specific documents under OPRA.”

On May 21, 2015, the Complainant wrote to the Custodian, seeking an update. On May 22, 2015, the Custodian responded, “I did respond on May 11 – see attached” and attached the memo from that e-mail. On May 31, 2015, the Complainant wrote to the Custodian, “[p]er your request for clarification regarding my OPRA request, I am providing you further detail which is provided and listed as follows: Please provide all e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members and any/all Pompton Lakes’ borough employees with the USEPA regarding DuPont.”

On June 2, 2015, the Custodian wrote to the Complainant and stated, “[p]lease see attached memo regarding your OPRA request.” She wrote that, “as I have indicated in past memos the OPRA request is overly broad and fails to identify specific government records.” The Custodian stated that in order to provide the Complainant with e-mail correspondence in an efficient manner, she would need a further narrowing of the scope of the request and specific subject matter. She noted that the request “includes searching through 8 years of emails and without specific subject matter the retrieval may include files not associated with your request.”

She then advised the Complainant of the “process and costs associated with the process as per our web consultant.” The Custodian wrote that the mail archive could be searched by keyword or phrase, “so the key to finding the correct emails” was to provide the correct search terms. She estimated that the retrieval process would take approximately 1-3 hours of time at \$135.00 per hour. The Custodian stated that once the e-mails were retrieved and forwarded to her office, she would review each individual document “to verify whether the email contains any confidential information that may require redaction.” She then noted that “an additional fee will be determined based upon the number of emails that are produced and the time required reviewing and redacting information.”

The Custodian advised the Complainant that she required a response on whether the Complainant wished to proceed, along with a check in the amount of \$415.00. She stated that upon receipt of her response and check, she would notify the web consultant to begin the retrieval and would additionally contact the Complainant if additional fees were necessary. The Custodian noted that “[a]ny overture [sic] of fees will be returned.”

#### Denial of Access Complaint:

On June 18, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the clerk advised, “we have to pay \$415.00” to obtain the requested records. The Complainant made no additional legal arguments.

### Statement of Information:

On July 6, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 2, 2015, and responded in writing on April 2, 2015, denying the request as overly broad and requesting the Complainant narrow the scope of the request. The Custodian documented the above-noted back-and-forth correspondence between herself and the Complainant, culminating in the Complainant’s May 5, 2015 e-mail outlining an eight-part request. While the Custodian ultimately responded that the request was “overly broad,” she then advised the Complainant of the “process and costs associated with the process as per our web consultant.”

The Custodian certified that “records requested are not in the physical control of the record keeper” and that records “which may exist are archived electronically outside the Borough.” The Custodian averred that the Borough’s outside vendor, Cit-i-Net, was contacted to determine the cost of archive retrieval and that this cost was passed on to the Complainant.

The Custodian estimated that the retrieval process would take approximately 1-3 hours of time at \$135.00 per hour. The Custodian stated that once the e-mails were retrieved and forwarded to her office, she would review each individual document to determine whether redactions would be necessary. She then noted that any additional fee would be determined based upon the number of e-mails that are produced and the time required to review and redact the information. The Custodian advised the Complainant that she required a response on whether the Complainant wished to proceed, along with a check in the amount of \$415.00. She stated that upon receipt of her response and check, she would notify the web consultant to begin the retrieval and would additionally contact the Complainant if additional fees were necessary. The Custodian noted that “[a]ny overture [sic] of fees will be returned.”

The Custodian noted that as of the SOI’s date, no records were provided to the Complainant. She additionally certified that she had not determined the records retention requirement because “no records have been recovered or provided to date so it is not possible to determine retention period.” She further noted that the retention period for electronic mail is nonetheless as follows: for external mail, three (3) years; for internal mail, periodic review; and for duplicative mail, periodic review.

She argued that the recovery of this requested information would require a cost to the Borough prior to the release of the e-mail documents. She further argued that “[t]he deposit was requested and the Complainant chose not to make the deposit.” N.J.S.A. 47:1A-5(c) and N.J.S.A. 47:1A-5(f). She stated that the required records must be recovered by an outside vendor, Cit-i-net, at cost to the Borough.

### Additional Submissions:

On March 31, 2016, the GRC wrote to the Custodian seeking additional information to determine whether a special service charge was warranted in this case. The GRC requested that the Custodian prepare a 14-point analysis answering the following:

1. What records are requested?
2. Give a general nature description and number of the government records requested.
3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?
13. What is the availability of information technology and copying capabilities?
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

On April 1, 2016, the Custodian submitted a certification. Her responses are summarized in the chart below:

Questions	
1. What records are requested?	<ol style="list-style-type: none"> <li>1. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members, and any/all Pompton Lakes' borough employees with the USEPA regarding DuPont.</li> <li>2. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members, and any/all Pompton Lakes' borough employees with the ASTDR regarding DuPont.</li> <li>3. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members, and any/all Pompton Lakes' borough employees with the NJDEP regarding DuPont.</li> <li>4. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members, and any/all Pompton Lakes' borough employees</li> </ol>

	<p>with the NJDHSS regarding DuPont.</p> <p>5. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members, and any/all Pompton Lakes' borough employees with the County of Passaic Freeholders' offices/Passaic County employees regarding DuPont.</p> <p>6. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members, and any/all Pompton Lakes' borough employees with New Jersey State elected officials' offices including the offices, of the Governor of New Jersey, our district State Senators (Pennacchio/O'Toole) and State Assemblyman (DeCroce/Webber/Russo/Rumana) offices regarding DuPont.</p> <p>7. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members, and any/all Pompton Lakes' borough employees with Congressional offices of Rodney Frelinghuysen and Bill Pascrell, Jr. regarding DuPont.</p> <p>8. All e-mail communications from 2007 to the present between the Mayor of Pompton Lakes, Pompton Lakes Council members, and any/all Pompton Lakes' borough employees with the offices of Senators Robert Menendez, Cory Booker, or Frank Lautenberg regarding DuPont.</p>
<p>2. Give a general nature description and number of the government records requested.</p>	<p>E-mail communications. The number of records requested is undetermined at this time due to the fact that the records are stored on an archival server and have not been retrieved as of this time.</p>
<p>3. What is the period of time over which the records extend?</p>	<p>The request extends for a period from 2007 to the present.</p>

4. Are some or all of the records sought archived or in storage?	E-mail records requested are archived to a server that is maintained by Borough web consultants, not by the Borough itself and not on Borough property.
5. What is the size of the agency (total number of employees)?	98 employees.
6. What is the number of employees available to accommodate the records request?	4 employees.
7. To what extent do the requested records have to be redacted?	The number of records to be redacted is undetermined at this time due to the fact that the records are stored on an archival server and have not been retrieved as of this time.
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?	The records must be retrieved in most part by an outside vendor of the Borough responsible for the archiving of e-mail records.
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?	The records must be retrieved in most part by an outside vendor of the Borough responsible for the archiving of e-mail records.
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?	The records must be retrieved in most part by an outside vendor of the Borough responsible for the archiving of e-mail records.
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	The e-mail records requested are stored and archived to a server that is maintained by Borough web consultants.
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?	Web Consultant at Cit-E-Net, with hourly rate of \$135.00.
13. What is the availability of information technology and copying capabilities?	The records can only be recovered, in most part, by the services of an outside vendor as set forth above.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce, and return the requested documents.	Information provided by vendor – the mail archive can be searched by keyword or phrase. The key to finding correct e-mails is to pick the correct search terms. The search may return e-mails unrelated to the requested information or it may also miss e-mails that had slightly different phrasing.



On April 12, 2016, the GRC submitted a request for additional information to the Custodian, seeking clarification as to what portion of the requested e-mails are in fact archived and whether any responsive e-mails are in possession of the Custodian's office. On April 14, 2016, the Custodian responded, certifying that "Pompton Lakes has archived e-mail from January 1, 2011." The Custodian additionally stated that "[p]rior e-mails are not in possession of the Borough," and attached various Records Disposal Authorizations, dated March 25, 2009; April 13, 2010; February 3, 2012; and July 10, 2013.

### Analysis

#### Special Service Charge

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

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

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

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

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

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian's time was reasonable and consistent with N.J.S.A. 47:1A-5(c). Id. at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an "extraordinary expenditure of time and effort to accommodate"

pursuant to OPRA: (1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place. Id. at 199.

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

Here, the Borough’s Clerk provided responses 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 Township argued the necessity of their web consultant’s hourly cost of \$135.00 being passed onto the Complainant in order to perform approximately 1-3 hours of work to retrieve records responsive to the Complainant’s April 2, 2015 OPRA request.

The current issue is similar to one contemplated by the Council in O’Shea v. Pine Hill Board of Educ., 2007-192 (February 2009), where the Complainant challenged the custodian’s special service charge of \$10 for the cost of reproducing an audio recording of a meeting. The custodian in that matter certified that the Board did not have the resources to duplicate the requested record itself and must therefore contract with an outside vendor to do so. The custodian provided the GRC with a cost estimate from MTG Electronics and Pro-One, LLC, stating the estimated cost to reproduce the record requested by the Complainant. In that instance, the GRC found that the proposed estimate of \$10.48 for duplication was reasonable and consistent with N.J.A.C. 47:1A-5(c).

In the matter currently before the Council, the GRC notes that the Complainant’s OPRA request seeks all e-mail communications between various groups of individuals, from 2007 to the time of the request. The Custodian certified that the Borough’s vendor, Cit-E-Net, which possesses the requested e-mails, must complete an estimated 1-3 hours of work in order to begin retrieval. The charge at issue is the \$415 cited by the Custodian for the retrieval of the requested documents. The Borough’s proposed cost of \$415 was cited due to the outside vendor Cit-i-Net’s hourly rate of \$135 over an estimated 1-3 hours. The Custodian stated that the Complainant would be refunded any necessary portion if “less hours are required.”

However, unlike the Custodian in O’Shea, the Custodian in the instant matter did not provide an invoice or cost estimate from Cit-i-Net as evidence of the \$415 retrieval cost that the Borough “passed on” to the Complainant in order to begin retrieval of records. Furthermore, in response to the GRC’s March 31, 2016 request for additional information as to the special service charge, the Custodian repeatedly stated that “the records must be retrieved in most part” from the archive, in lieu of providing a more detailed breakdown of exactly which records must be retrieved from Cit-i-Net, and whether any responsive records are retrievable from the

Borough's server. The Custodian's response stated "[p]rior e-mails are not in possession of the Borough[,]" but the Custodian provided no further information or clarification.

Therefore, the Custodian has not borne her burden of proof that the payment of a special service charge was reasonable and warranted, pursuant to O'Shea. Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame, identify any records that are redacted, and state the basis for redacting same. In the alternative, the Custodian may provide both the Complainant and the GRC an invoice from the vendor to evidence the actual cost of retrieval from Cit-i-Net and offer the requestor an opportunity to review and object to the charge prior to it being incurred. N.J.S.A. 47:1A-5(c).

### **Knowing and Willful**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not borne her burden of proof that the payment of a special service charge was reasonable and warranted, pursuant to O'Shea. Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame, identify any records that are redacted, and state the basis for redacting same. In the alternative, the Custodian may provide both the Complainant and the GRC an invoice from the vendor to evidence the actual cost of retrieval from Cit-i-Net and offer the requestor an opportunity to review and object to the charge prior to it being incurred. N.J.S.A. 47:1A-5(c).
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup>**
3. **If applicable, the Custodian shall make the amount of the charge available to the Custodian within three (3) business days from receipt of the Council's Interim Order and provide certified confirmation within the five (5) business days. Thereafter, if the Complainant accepts payment, the Custodian shall disclose to**

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

<sup>5</sup> 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.

**the Complainant the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon remittance of the charge within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4, to the Executive Director at that time. If the Complainant fails to pay the special service charge for the requested records by the tenth (10<sup>th</sup>) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director at that time.**

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

Prepared By: Husna Kazmir  
Staff Attorney

May 17, 2016