



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 25, 2018 Government Records Council Meeting

Damiano M. Fracasso, Esq.
Complainant

Complaint No. 2015-310

v.

Township of Rockaway (Morris)
Custodian of Record

At the September 25, 2018 public meeting, the Government Records Council (“Council”) considered the September 18, 2018 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. Ms. Palmieri complied with the Council’s July 31, 2018 Interim Order. The evidence in the record demonstrates that Ms. Palmieri provided the Complainant with the form required to be completed in order to receive his refund check within the extended deadline, as well as a certification of compliance to the Council Staff.
2. The original Custodian failed to provide a sufficient response to the Complainant’s September 3, 2015 OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Additionally, the original Custodian improperly asserted a special service charge to the Complainant. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c). Furthermore, Ms. Gianattaio failed to fully comply with the Council’s April 24, 2018 Interim Order. However, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian’s actions did 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 25th Day of September, 2018

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: September 27, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
September 25, 2018 Council Meeting**

**Damiano M. Fracasso, Esq.¹
Complainant**

GRC Complaint No. 2015-310

v.

**Township of Rockaway (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic or fax copies of:

1. “True and complete copies of all Requests for Proposals, vouchers, purchase orders, invoices, proofs of payment and maintenance records of an concerning video recording devices and their respective storage devices located within 65 Mt. Hope Road, Rockaway, New Jersey on July 22, 2015;
2. True and complete copies of all Rockaway Township Police Department policies and procedures in effect on July 22, 2015 regarding the use of all MVR [“Motor Vehicle Recording”] devices installed in all Rockaway Township Police Department automobiles;
3. True and complete copies of all installation, maintenance and user manuals pertaining to all MVR devices installed on Rockaway Township Police Department automobiles during the year 2015.
4. True and complete copies of all advertisements and/or postings for promotional examinations relative to employees of the Rockaway Township Police Department from January 1, 2014 to present.
5. True and complete copies of all visual and audio media content generated by the MVR system installed in all police cruiser(s) to which Ptl. Michael Hatzimihalis (Badge #100) was an occupant in any capacity between 12:00 am prevailing time on July 22, 2015 through 3:00 am prevailing time on July 22, 2015.
6. True and complete copies of all GPS related tracking records of all police cruiser(s) to which Ptl. Michael Hatzimihalis (Badge #100) was an occupant in any capacity between 12:00 am prevailing time on July 22, 2015 through 3:00 am prevailing time on July 22, 2015.
7. True and complete copies of all police radio transmissions involving Ptl. Michael Hatzimihalis (Badge #100) between 12:00 am prevailing time on July 22, 2015 through 3:00 am prevailing time on July 22, 2015.
8. Two (2) true and complete copies of all MVR recordings generated on July 22, 2015 pertaining to Rockaway Township Department Case Number I-2015-014273

¹ No legal representation listed on record.

² Represented by John Iacofano, Esq. of Iacofano & Perrone, Esqs. (Morristown, NJ).

9. True and complete copies of all Notice(s) of Tort Claim filled with the Township of Rockaway which reference Ptl. Michael Hatzimihalis (Badge #100) by name from January 1, 2009 to present.”

Custodian of Record: Christina Clipperton³

Request Received by Custodian: September 3, 2015

Response Made by Custodian: September 3, 2015; September 17, 2015; September 21, 2015; September 22, 2015; September 23, 2015; September 24, 2015

GRC Complaint Received: September 30, 2015

Background

July 31, 2018 Council Meeting:

At its July 31, 2018 public meeting, the Council considered the July 24, 2018 Findings and Recommendations of the Council Staff 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 failed to comply with the Council’s April 24, 2018 Interim Order because although she responded within the prescribed extended time frame providing a certification from Lt. Ryerson, she failed to include a certified confirmation of compliance to the Council Staff.
2. The evidence in the record indicates that the special service charge assessed to the Complainant, \$129.60, was unwarranted and unreasonable pursuant to N.J.S.A. 47:1A-5(c). Although Lt. Ryerson has unique access to the MVR footage, he certified that the task of auditing/reviewing, noting redactions, and creating a disc copy of the record are part of his regular duties; he did not certify that this particular request required an extraordinary amount of time and effort to fulfill; and he did not certify that fulfilling this request prevented him from performing any other work. Rivera v. Rutgers, The State University of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). Therefore, the Complainant is entitled to a refund for the cost of the assessment.
3. **The Custodian shall comply with Item No. 2 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 Rules, R. 1:4-4,⁴ to the Council Staff.**

³ The original Records Custodian was Susan Best, who has since retired. Marcy Gianattaio was the Records Custodian who responded to the Council’s April 24, 2018 Interim Order.

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."

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 August 2, 2018, the Council distributed its Interim Order to all parties. That same day, Counsel for the Custodian ("Counsel") requested an extension of time to respond to until August 16, 2018, asserting that the Acting Clerk, Marcy Gianattaio ("Ms. Gianattaio"), was not re-appointed by the Township of Rockaway ("Township"). Counsel stated that the Township was without a Clerk/Records Custodian until July 25, 2018, when Christina Clipperton ("Custodian") was appointed. However, Counsel stated that Ms. Clipperton's appointment resolution was defective, and informed that she would be properly appointed on or about August 7, 2018. On August 3, 2018, the Complainant objected to the request, asserting that Council is continuing to bring undue delay in adjudicating the complaint. The Complainant also included copies of a municipal court order and certification from the Rockaway Township municipal prosecutor, pertaining to a discovery action for the records at issue in this matter. The Complainant asserted that the attachments demonstrated that the requested MVR footage was no longer available, and accused the Police Department of malfeasance in destroying the records.

On August 8, 2018, the GRC granted the extension to until August 16, 2018. On August 10, 2018, the Custodian responded to the Interim Order. The response included a certification from the Township's Chief Financial Officer, Lisa Palmieri ("Ms. Palmieri"), and a copy of a purchase order submitted to the Complainant.

Ms. Palmieri certified that as the Chief Financial Officer for the Township, she was responsible for the issuance of all checks and payments, and can therefore certify the compliance as required in the Interim Order. Ms. Palmieri certified that on August 10, 2018, she mailed a purchase order form for the Complainant to fill out and complete. Ms. Palmieri certified that in order for any reimbursement to occur, the Complainant was required to complete the form and return it to the Township. Ms. Palmieri certified that upon receipt of the form, the refund check could be drafted and mailed to the Complainant. Ms. Palmieri attached a copy of the purchase order to her certification.

On August 16, 2018, the Complainant responded to the Custodian, asserting that he did not believe that he should be required to file a purchase order to obtain a refund check. The Complainant asserted that this was an attempt by Counsel to conceal the outcome of this proceeding from the Township Council, and asks Counsel to explain why the Township Council could not authorize the refund payment via resolution versus a purchase order. That same day, Counsel replied to the Complainant, asserting that completion of a purchase order was "consistent with proper and required municipal financial practice" in order to obtain his refund check, and that there were no underlying motivations surrounding this requirement.

Analysis

Compliance

At its July 31, 2018 meeting, the Council ordered Ms. Gianattaio to provide and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff. On August 2, 2018 the Council distributed its Interim Order to all parties, providing the Ms. Gianattaio five (5) business days to comply with the terms of said Order. Thus, Ms. Gianattaio's response was due by close of business on August 9, 2018.

On August 2, 2018, Counsel sought an extension of time to respond, informing the GRC that Ms. Gianattaio was no longer the Custodian and that the next Custodian would not be appointed until around August 7, 2018. The Custodian also asked whether a certification from Ms. Palmieri could suffice if the Custodian was unable to sign the certification. The GRC granted an extension of time to until the end of business at August 16, 2018, and allowed Ms. Palmieri to provide the certification as an alternative to the Custodian.

Ms. Palmieri, as the Township's Chief Financial Officer, certified to the rules and practices regarding disbursement of payments by municipalities. Ms. Palmieri also certified that she provided the Complainant with the purchase order to be filled out within the extended deadline. The Complainant's refusal to complete the additional steps necessary to obtain payment should not be held against Ms. Palmieri, and the Complainant has not provided evidence to contradict Ms. Palmieri's certification.

Therefore, Ms. Palmieri complied with the Council's July 31, 2018 Interim Order. The evidence in the record demonstrates that Ms. Palmieri provided the Complainant with the form required to be completed in order to receive his refund check within the extended deadline, as well as a certification of compliance to the Council Staff.

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 currently before the Council, the original Custodian failed to provide a sufficient response to the Complainant's September 3, 2015 OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Additionally, the original Custodian improperly asserted a special service charge to the Complainant. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c). Furthermore, Ms. Gianattaio failed to fully comply with the Council's April 24, 2018 Interim Order. However, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's actions did 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 Council Staff respectfully recommends the Council find that:

1. Ms. Palmieri complied with the Council's July 31, 2018 Interim Order. The evidence in the record demonstrates that Ms. Palmieri provided the Complainant with the form required to be completed in order to receive his refund check within the extended deadline, as well as a certification of compliance to the Council Staff.
2. The original Custodian failed to provide a sufficient response to the Complainant's September 3, 2015 OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Additionally, the original Custodian improperly asserted a special service charge to the Complainant. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c). Furthermore, Ms. Gianattaio failed to fully comply with the Council's April 24, 2018 Interim Order. However, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's actions did 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: Samuel A. Rosado
Staff Attorney

September 18, 2018



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

July 31, 2018 Government Records Council Meeting

Damiano M. Fracasso, Esq.
Complainant

Complaint No. 2015-310

v.

Township of Rockaway (Morris)
Custodian of Record

At the July 31, 2018 public meeting, the Government Records Council ("Council") considered the July 24, 2018 Supplemental Findings and Recommendations of the Council Staff 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 comply with the Council's April 24, 2018 Interim Order because although she responded within the prescribed extended time frame providing a certification from Lt. Ryerson, she failed to include a certified confirmation of compliance to the Council Staff.
2. The evidence in the record indicates that the special service charge assessed to the Complainant, \$129.60, was unwarranted and unreasonable pursuant to N.J.S.A. 47:1A-5(c). Although Lt. Ryerson has unique access to the MVR footage, he certified that the task of auditing/reviewing, noting redactions, and creating a disc copy of the record are part of his regular duties; he did not certify that this particular request required an extraordinary amount of time and effort to fulfill; and he did not certify that fulfilling this request prevented him from performing any other work. Rivera v. Rutgers, The State University of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). Therefore, the Complainant is entitled to a refund for the cost of the assessment.
3. **The Custodian shall comply with Item No. 2 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 Rules, R. 1:4-4,¹ to the Council Staff.**

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.

Interim Order Rendered by the
Government Records Council
On The 31st Day of July, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: August 2, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
July 31, 2018 Council Meeting**

**Damiano M. Fracasso, Esq.¹
Complainant**

GRC Complaint No. 2015-310

v.

**Township of Rockaway (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic or fax copies of:

1. “True and complete copies of all Requests for Proposals, vouchers, purchase orders, invoices, proofs of payment and maintenance records of an concerning video recording devices and their respective storage devices located within 65 Mt. Hope Road, Rockaway, New Jersey on July 22, 2015;
2. True and complete copies of all Rockaway Township Police Department policies and procedures in effect on July 22, 2015 regarding the use of all MVR [“Motor Vehicle Recording”] devices installed in all Rockaway Township Police Department automobiles;
3. True and complete copies of all installation, maintenance and user manuals pertaining to all MVR devices installed on Rockaway Township Police Department automobiles during the year 2015.
4. True and complete copies of all advertisements and/or postings for promotional examinations relative to employees of the Rockaway Township Police Department from January 1, 2014 to present.
5. True and complete copies of all visual and audio media content generated by the MVR system installed in all police cruiser(s) to which Ptl. Michael Hatzimihalis (Badge #100) was an occupant in any capacity between 12:00 am prevailing time on July 22, 2015 through 3:00 am prevailing time on July 22, 2015.
6. True and complete copies of all GPS related tracking records of all police cruiser(s) to which Ptl. Michael Hatzimihalis (Badge #100) was an occupant in any capacity between 12:00 am prevailing time on July 22, 2015 through 3:00 am prevailing time on July 22, 2015.
7. True and complete copies of all police radio transmissions involving Ptl. Michael Hatzimihalis (Badge #100) between 12:00 am prevailing time on July 22, 2015 through 3:00 am prevailing time on July 22, 2015.
8. Two (2) true and complete copies of all MVR recordings generated on July 22, 2015 pertaining to Rockaway Township Department Case Number I-2015-014273

¹ No legal representation listed on record.

² Represented by John Iacofano, Esq. of Iacofano & Perrone, Esqs. (Morristown, NJ).

9. True and complete copies of all Notice(s) of Tort Claim filled with the Township of Rockaway which reference Ptl. Michael Hatzimihalis (Badge #100) by name from January 1, 2009 to present.”

Custodian of Record: Marcy Gianattaio³

Request Received by Custodian: September 3, 2015

Response Made by Custodian: September 3, 2015; September 17, 2015; September 21, 2015; September 22, 2015; September 23, 2015; September 24, 2015

GRC Complaint Received: September 30, 2015

Background

April 24, 2018 Council Meeting:

At its April 24, 2018 public meeting, the Council considered the April 17, 2018 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian’s written response was legally insufficient because the Custodian failed to respond to each item contained in the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). Further, the Custodian’s response was equally insufficient because she failed to provide a date certain of when the requested records would be made available after the Complainant paid the special service charge. N.J.S.A. 47:1A-5(i); Starkey v. N.J. Dep’t of Trans., GRC Complaint No. 2007-315, 316, & 317 (Interim Order dated October 29, 2008).
2. The Custodian may have improperly imposed a special service charge against the Complainant. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). As such, the Custodian shall provide an in-depth account of the police officer’s work performed as stated in her October 12, 2017 e-mail.
3. **The Custodian shall comply with Item No. 2 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 Rules, R. 1:4-4,⁴ to the Council Staff.**
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.

³ The original Records Custodian was Susan Best, who has since retired.

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."

Procedural History:

On April 25, 2018, the Council distributed its Interim Order to all parties. That same day, Counsel for the Custodian requested an extension of time to respond to until May 25, 2018, asserting that the original Custodian had since resigned and it would take time to reach out to her. The Complainant objected to the request, asserting that the extension is to further cause an undue delay in adjudicating the matter. Additionally, the Complainant included copies of a municipal court order and certification from the Rockaway Township municipal prosecutor, pertaining to a discovery action for the records at issue in this matter. The Complainant asserted that the attachments demonstrated that the requested MVR footage was no longer available, and accused the police department of malfeasance in destroying the records.

The GRC granted an extension to until May 16, 2018. On May 11, 2018, the Custodian responded to the Interim Order. The response included a certification from Lt. Wade Ryerson (“Lt. Ryerson”) of the Rockaway Township Police Department.

Additional Submissions:

On May 18, 2018, the Complainant e-mailed the GRC. The Complainant argued that the Custodian’s response was non-compliant with the Council’s Interim Order. The Complainant asserted that Lt. Ryerson was not the correct individual to author the certification. The Complainant asserted that the response is additional evidence supporting the claim that the Custodian has been intentionally denying access records he is entitled to obtain under OPRA. Notwithstanding, the Complainant contended that Lt. Ryerson did not certify to any specialized training that would grant him greater knowledge over OPRA’s laws governing access to police video recordings than the Custodian. Thus, the Complainant asserted that the Custodian should not have delegated review of the records to Lt. Ryerson, then assess a special service charge for the work.

Analysis

Compliance

At its April 24, 2018 meeting, the Council ordered the Custodian to provide an account of the work performed by the police officer who reviewed the responsive records prior to disclosure, and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff. On April 25, 2018 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 2, 2018.

On April 25, 2018, the same day as receiving the Council’s Order, Counsel sought an extension of time to respond, noting that the original Custodian had since retired and needed to be reached. The GRC granted an extension of ten (10) business days to respond to the Council’s Order, through the end of business on May 16, 2018.

On May 11, 2018, the Custodian responded to the Council’s Order, providing a certification from Lt. Ryerson, detailing the work performed in reviewing the responsive records. However, no certified confirmation of compliance from the original or current Custodian was included in the response.

Therefore, the Custodian failed to comply with the Council’s April 24, 2018 Interim Order because although she responded within the extended time frame providing a certification from Lt. Ryerson, she failed to include a certified confirmation of compliance to the Council Staff.

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.

The Custodian’s response contained a certification from Lt. Ryerson, who certified that he conducted the audit/review of the responsive records to the Complainant’s OPRA request. Therein, Lt. Ryerson certified that the responsibility of perform this task was assigned only to command-level police officers due to their training and experience. Lt. Ryerson certified that he tasks included locating and accessing the responsive records, reviewing the record, noting any points in the record requiring redactions, and creating a copy of the record. Lt. Ryerson also certified that because this type of task is a common occurrence, he was able to provide the Custodian with an accurate estimate of the time needed to review the records. Lt. Ryerson certified that although time has passed since the review and no corroborating documentation, he assumed that the Custodian’s time assessed for review was accurate. Additionally, Lt. Ryerson certified that the \$43/hour assessment was accurate.

In Rivera v. Rutgers, The State University of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012), in determining the validity of a special service charge, the custodian provided a certification from a police officer who was tasked with reviewing motor vehicle recorder (“MVR”) footage in response to an OPRA request. The officer certified that he was one (1) of only three (3) officers with access to the footage. Additionally, the officer certified that the total work expended was over ten (10) hours in reviewing and copying 30 to 40 videos, and expended approximately three (3) hours of that time on the responsive record. Moreover, the officer certified that throughout the copying procedure, he was unable to complete any other work on his computer. The Council found that the special service charge assessed by the custodian was reasonable, not only due to the officer’s unique access to the records, but because of the officer’s inability to complete other tasks on his computer while fulfilling the OPRA request.

Here, the Custodian certified that she did not have access to the records to conduct the review herself. However, Lt. Ryerson certified that he was specifically assigned by the Chief of Police to audit/review MVR footage of incidents of the kind referenced in the OPRA request. Lt. Ryerson also certified that the task he performed was “relatively common,” as the police department receives several similar requests relating to traffic and other criminal matters. Lt. Ryerson however did not certify that the time taken for this particular request was more taxing or required an extraordinary amount of time than other similar requests. Notably, in contrast with the officer in Rivera, GRC 2009-311, Lt. Ryerson did not certify that performing the audit/review prevented him from completing other duties assigned to him.

Therefore, the evidence in the record indicates that the special service charge assessed to the Complainant, \$129.60, was unwarranted and unreasonable pursuant to N.J.S.A. 47:1A-5(c). Although Lt. Ryerson has unique access to the MVR footage, he certified that the task of auditing/reviewing, noting redactions, and creating a disc copy of the record are part of his regular duties. Lt. Ryerson did not certify that this particular request required an extraordinary amount of time and effort to fulfill, nor did he certify that fulfilling this request prevented him from performing any other work. Rivera, GRC 2009-311. Therefore, the Complainant is entitled to a refund for the cost of the assessment.

Knowing & Willful

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

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian failed to comply with the Council's April 24, 2018 Interim Order because although she responded within the prescribed extended time frame providing a certification from Lt. Ryerson, she failed to include a certified confirmation of compliance to the Council Staff.
2. The evidence in the record indicates that the special service charge assessed to the Complainant, \$129.60, was unwarranted and unreasonable pursuant to N.J.S.A. 47:1A-5(c). Although Lt. Ryerson has unique access to the MVR footage, he certified that the task of auditing/reviewing, noting redactions, and creating a disc copy of the record are part of his regular duties; he did not certify that this particular request required an extraordinary amount of time and effort to fulfill; and he did not certify that fulfilling this request prevented him from performing any other work. Rivera v. Rutgers, The State University of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). Therefore, the Complainant is entitled to a refund for the cost of the assessment.
3. **The Custodian shall comply with Item No. 2 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 Rules, R. 1:4-4,⁵ to the Council Staff.**
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 "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."

Prepared By: Samuel A. Rosado
Staff Attorney

July 24, 2018



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

April 24, 2018 Government Records Council Meeting

Damiano M. Fracasso, Esq.
Complainant

Complaint No. 2015-310

v.

Township of Rockaway (Morris)
Custodian of Record

At the April 24, 2018 public meeting, the Government Records Council ("Council") considered the April 17, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's written response was legally insufficient because the Custodian failed to respond to each item contained in the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). Further, the Custodian's response was equally insufficient because she failed to provide a date certain of when the requested records would be made available after the Complainant paid the special service charge. N.J.S.A. 47:1A-5(i); Starkey v. N.J. Dep't of Trans., GRC Complaint No. 2007-315, 316, & 317 (Interim Order dated October 29, 2008).
2. The Custodian may have improperly imposed a special service charge against the Complainant. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). As such, the Custodian shall provide an in-depth account of the police officer's work performed as stated in her October 12, 2017 e-mail.
3. **The Custodian shall comply with Item No. 2 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 Rules, R. 1:4-4,¹ to the Council Staff.**

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.

Interim Order Rendered by the
Government Records Council
On The 24th Day of April, 2018

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 25, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
April 24, 2018 Council Meeting**

**Damiano M. Fracasso, Esq.¹
Complainant**

GRC Complaint No. 2015-310

v.

**Township of Rockaway (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic or fax copies of:

1. “True and complete copies of all Requests for Proposals, vouchers, purchase orders, invoices, proofs of payment and maintenance records of an concerning video recording devices and their respective storage devices located within 65 Mt. Hope Road, Rockaway, New Jersey on July 22, 2015;
2. True and complete copies of all Rockaway Township Police Department policies and procedures in effect on July 22, 2015 regarding the use of all MVR [“Motor Vehicle Recording”] devices installed in all Rockaway Township Police Department automobiles;
3. True and complete copies of all installation, maintenance and user manuals pertaining to all MVR devices installed on Rockaway Township Police Department automobiles during the year 2015.
4. True and complete copies of all advertisements and/or postings for promotional examinations relative to employees of the Rockaway Township Police Department from January 1, 2014 to present.
5. True and complete copies of all visual and audio media content generated by the MVR system installed in all police cruiser(s) to which Ptl. Michael Hatzimihalis (Badge #100) was an occupant in any capacity between 12:00 am prevailing time on July 22, 2015 through 3:00 am prevailing time on July 22, 2015.
6. True and complete copies of all GPS related tracking records of all police cruiser(s) to which Ptl. Michael Hatzimihalis (Badge #100) was an occupant in any capacity between 12:00 am prevailing time on July 22, 2015 through 3:00 am prevailing time on July 22, 2015.
7. True and complete copies of all police radio transmissions involving Ptl. Michael Hatzimihalis (Badge #100) between 12:00 am prevailing time on July 22, 2015 through 3:00 am prevailing time on July 22, 2015.
8. Two (2) true and complete copies of all MVR recordings generated on July 22, 2015 pertaining to Rockaway Township Department Case Number I-2015-014273

¹ No legal representation listed on record.

² Represented by John Iacofano, Esq. of Iacofano & Perrone, Esqs. (Morristown, NJ).

9. True and complete copies of all Notice(s) of Tort Claim filled with the Township of Rockaway which reference Ptl. Michael Hatzimihalis (Badge #100) by name from January 1, 2009 to present.”

Custodian of Record: Susan Best

Request Received by Custodian: September 3, 2015

Response Made by Custodian: September 3, 2015; September 17, 2015; September 21, 2015; September 22, 2015; September 23, 2015; September 24, 2015

GRC Complaint Received: September 30, 2015

Background³

Request and Response:

On September 3, 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, acknowledging receipt of the request, and sought a two-week extension of time to respond. On September 17, 2015, the Custodian responded in writing providing responsive records for some of the listed items with redactions made to Social Security numbers and unlisted telephone numbers. The Custodian further stated that the video recordings would need to be reviewed for redactions. The Custodian stated that such a review warranted the imposition of a special service charge and asked whether the Complainant still required those records before providing an estimate. The Complainant replied that day, stating that he still required those records.

On September 21, 2015, the Custodian provided the Complainant with an estimate of \$129.60 to review the video recordings. The Custodian elaborated further that once the review completed and it was determined that editing was required for redactions, a third-party would be tasked to edit the records. The Custodian stated that an additional charge estimate would be assessed for the editing costs stemming from using the third-party vendor. The Custodian requested payment up front prior to conducting the review. The Complainant replied that same day, accepting the charge and stated that he would drop off a check at the Custodian’s office later that day. However, the Complainant noted that the review and editing process for the videos are only just starting several days beyond the two-week extension deadline sought by the Custodian. He asked the Custodian how long the review and editing process would take if he provided a check that day. The Custodian responded stating that reviewing would take place as soon as she received payment, but noted that should the videos require editing, that would take time to complete by a third-party contractor. Further, the Custodian stated that an individual from the Rockaway Police Department would conduct the review.

On September 21, 2015, the Complainant sent a letter to counsel for the Custodian, stating that the Custodian’s reply regarding time needed and person responsible to perform a review and edit of video records was unacceptable. The Complainant stated that it was 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.

Custodian's job to conduct a review for records and ascertain whether redactions are necessary, as it is presumed that she has the proper OPRA training. Counsel for the Custodian responded that day, stating that is a long-accepted practice for Custodians to delegate review of specialized records to employees with the training and experience with those types of records. Counsel stated that in this case, a properly trained police officer would have more knowledge and familiarity with police terminology and protocols than the Custodian to review the records. He concluded that auditing would be completed promptly as soon as possible after the Complainant provided payment of the cost estimate.

On September 21, 2015, the Complainant responded to the Counsel's e-mail, breaking down the audio/visual items of his request to specific events allegedly recorded therein. The Complainant stated that the total amount of recorded content to review would be around five (5) hours. He further stated that it should take less than a day to review the records prior to disclosure. Additionally, the Complainant stated that the Custodian is ultimately responsible for the production of responsive records, and not the person delegated for that task. The Complainant stated that he is entitled to know the reason why any requested record is withheld or redacted. The Complainant also stated that he expects the Custodian to provide a complete response by no later than 3:00 pm on September 25, 2015, or else he would file a complaint with the Government Records Council ("GRC") on the following day.

On September 22, 2015, the Complainant provided proof of payment for the assessed charge. Later that day, the Complainant sent another e-mail to the Custodian, providing clarifying information regarding the audio/video portions of his request in order to assist in expediting the review process. Additionally, the Complainant asserted that he has not received responses to Items 1, 3, 4, 5, 6, 7, and 8 as of that day. He reiterated that he treat his OPRA request as a deemed denial if he does not receive a response prior to 3:00 pm on September 25, 2015.

On September 23, 2015, the Custodian responded to the Complainant, stating that all "paper" or "hard copy" portions of his OPRA request had been provided, and that any missing requested records are to be assumed that they do not exist. The Custodian also stated that review of the recordings was in progress, but should redactions be needed, the recordings would be forwarded to a third-party contractor for editing.

On September 23, 2015, the Complainant responded to the Custodian, attaching copies of the responsive records already received, and requesting that the Custodian identify which record is responsive to which portion of his OPRA request. The Complainant also requested that the Custodian specifically identify which requested items have not been produced and an explanation for its non-disclosure. The Complainant compared the process to respond to this OPRA request to a similar request to another municipality, and claimed he received responsive records the next day and for a \$3.00 charge. The Complainant also reiterated the deadline for complete production of his OPRA request, and reserved his right to challenge the \$129.60 assessment for producing the audio/video portions of the request.

On September 24, 2015, the Rockaway Township Registrar notified the Complainant via e-mail that discs containing the recordings were available for pick-up.

Denial of Access Complaint:

On September 30, 2015, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant first challenged the costs incurred associated with the OPRA request and demanded a refund, claiming that he never received an itemized bill for the costs. The Complainant also claimed to know that he was denied access to records based upon the assumption that they did not exist. The Complainant also alleged that redactions made to the records were unlawful under OPRA, while other records were intentionally withheld without good cause.

The Complainant further alleged that he was unlawfully denied access to police station footage, tracking information, purchase orders for surveillance cameras, and claimed that the radio recordings and dashcam video were improperly edited and/or “cherry-picked” as to what he received.

Lastly, the Complainant asserted that the time the Custodian took to fulfill the request was excessive and the provided records were intentionally withheld without good cause.

Statement of Information:⁴

On December 28, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 3, 2015. The Custodian certified that she responded in writing on September 17, 2015, providing responsive records to a portion of the request. The Custodian also stated that production of the audio/visual portion of the request would warrant a special service charge and inquired as to whether the Complainant still needed the records. Upon receiving the affirmative from the Complainant, the Custodian certified that she provided the Complainant with an estimated charge of \$129.60, and noted that should the recordings require redactions, they would be forwarded to a third-party for editing. The Custodian certified that she provided the audio/visual portion of the request on September 24, 2015. She also certified that she obtained the records from several municipal departments, corresponding with the type of record sought. Under Item 12, the Custodian responded to the Complainant’s allegations.

Regarding the Complainant’s claim that he was overcharged, the Custodian argued that the Complainant did not provide factual evidence to support his claim. The Custodian claimed that an itemized invoice was not provided in conjunction with the estimate because the amount was the exact cost for the “lowest grade qualified police officer” to audit the recordings relevant to the request. The Custodian stated that she informed the Complainant that because the requested records were maintained by the police department, it was appropriate to have the records audited prior to release.

On the claim that some redactions to records were improper, the Custodian stated that the Complainant does not specify which redactions he is objecting to, or explain why the redactions

⁴ On December 1, 2015, the matter was referred to mediation. The complaint was then referred from mediation on December 9, 2015.

were inappropriate. The Custodian stated that the redactions were the Social Security numbers and private telephone numbers that were contained in the records responsive to the Complainant's request for tort claim notices.

Regarding the Complainant's objection over the length of time needed to provide the responsive records, the Custodian argued that the Complainant's request was extensive in size and scope, and the Complainant was informed on the date of receipt that an extension of time was needed to process the request. Additionally, the Custodian asserted that with the exception of the audio/video recordings, the remaining requests were provided to the Complainant within the extended time period. As to the recordings, the Custodian asserted that she supplied them to the Complainant in a timely manner and consistent with her prior representations to the Complainant.

The Custodian rejected the Complainant's allegation that the provided records were intentionally withheld. The Custodian noted that the Complainant agreed to the extensions announced by the Custodian, and that such extensions were appropriate considering the nature and scope of the request and the work needed to ensure compliance.

The Custodian then argued that she is not under an obligation to label or mark the responsive records to correspond to the Complainant's OPRA request. The Custodian contended that the Complainant's claim that the responsive records did not correlate to his request is belied by his other claim that he was not provided responsive records that "he knows" to exist.

In regards to the additional claims by the Complainant, the Custodian asserted the following:

- The Complainant did not make a request for "police station footage."
- It is the Custodian's understanding that the requested tracking information was contained in the computer discs provided to the Complainant.
- For the records such as the "surveillance camera purchase orders, cancelled, checks, etc.," the Custodian stated that if such records were not provided, then they did not exist.
- In regards to the police car video recordings, the Custodian certified that she has no knowledge of editing or manipulation of the video recordings, nor any knowledge as to the Complainant's reference to other materials beyond the video footage that he requested.
- Regarding the police radio recordings, the Custodian asserted that she is unable to respond to the claim that "information" the Complainant was entitled was removed or improperly edited. The Custodian asserted that the Complainant did not provide descriptive information to support his claim.

Additional Submissions:

On September 29, 2017, the GRC requested additional information from the Custodian. Specifically, the GRC sought completion of the fourteen (14) point analysis regarding the application of a special service charge for an OPRA request. That same day, the Custodian

request and received an extension of time to respond to until October 16, 2017. On October 12, 2017, the Custodian responded to the GRC's request as follows:

1. What records are requested?

Response: See Complainant's OPRA request form dated September 3, 2015 (Exhibit A).

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

Response: with respect to Question 2, the Custodian noted that "the Complainant was defending an individual charged with Driving Under the Influence in the Rockaway Twp. Municipal Court. The records that the Complainant sought were an extraordinary variety of records, documents, recordings, etc. tangentially related to that case. On the advice of counsel, it is my understanding that a considerable portion of the records requested in the Complainant's OPRA request would likely not have been available in the discovery to which the Complainant would ordinarily be entitled to in the context of the Driving Under the Influence case. I note that the records sought are adequately described in Items 1-9 of Complainant's Request Form (Exhibit A)."

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

Response: "[T]he time periods are variable depending upon the numbered request. For example, requested Item #1 seeks a wide variety of records going back for an unlimited period of time from July 22, 2015. Request #5 goes back for approximately 18 months prior to and including September 3, 2015, the date of the request. The balance of the requests made generally concern periods of the 24 hours or less, however, most are extensive or complicated in nature within that shorter time period. Please see requested items #6, #7, and #8 on the Request Form (Exhibit A).

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

Response: "[M]any of the records pertinent to Item #1 on the Request Form were stored. However, requested Items #6, #7, #8, and #9 required the specific ability and authorization to access dedicated servers maintained by the Police Department on which the requested materials were stored."

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

Response: "As of 2005, Rockaway Township had a total of approximately 175 employees across departments. That number includes approximately 54 employees in the Police Department."

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

Response: “At the time, there were two people in my office including myself. My recollection is that two officers in the Police Department had the necessary authorization and access to the records requested.”

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

Response: “[R]edactions were required to delete ‘personal and private information’ such as social security numbers and private telephone numbers from records requested.”

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

Response: The charge is composed of 3.0 hours of the approximated 16 total hours of work as follows:

Employee	Hours Spent	Hourly Rate
Qualified Police Officer	3.0	\$43.00

The Custodian determined that 3.0 hours went beyond the ordinary retrieval and copying of records, since Item nos. 6-9 of the Complainant’s request necessitated the use of a police officer with access and authorization of the records. The Custodian asserted that the total charge was \$129.60. The Custodian noted that additional charges were not assessed for the other requested records, nor was there any adjustment of the original estimate.

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

Response: “No additional employees were required to monitor the inspection or examination of the records requested with the exception of myself. There was no estimate of charges for my work and no charges for my time.”

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

Response: “[W]ith respect to Items #6 - #9 of the Complainant’s request, no time was required to ‘return’ the records to their ‘original storage place’ because the records were on specific computer servers and did not need to be ‘returned.’ Approximately five hours of time were required to return ‘paper’ records pertaining to the balance of the Complainant’s requests, however the Complainant was not charged for that time.

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

Response: “[T]he ‘personnel’ necessary to accommodate Items #6 - #9 of the Complainant’s request was an appropriately trained and authorized police officer with the ability to locate / access / retrieve information stored on dedicated computer servers located solely within the Police Department.”

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

Response: “I do not recall the name of the police officer who performed the work associated with Items #6 - #9 of the Complainant’s request. I do recall that, at the time, the hourly rate of the officer was approximately \$43 per hour.”

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

Response: “[T]he records requested in Items #6 - #9 of the Complainant’s request were stored on dedicated and limited access computers / servers solely accessible by the Rockaway Township Police Department. The computers / servers are not accessible to myself or anyone other than Rockaway Township Police Department authorized employees.”

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

Response: The following is required to response to the Complainant’s OPRA request:

Employee	Work Required
Qualified Police Officer	3.0 hours (\$43.00) to locate, extract and copy to disc the records requested by the Complainant in Items #6 - #9 of his request. Total: \$129.60
Custodian and other non-police employees.	16.0 hours to satisfy the balance of the Complainant’s request. Total: N/A

Analysis

Sufficiency of Response

OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6. In Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the Council held that “. . . [t]he Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the

Custodian has violated N.J.S.A. 47:1A-5(g).” See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).

Further, OPRA provides that “[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g). OPRA requires that, when providing access to redacted records, a custodian shall provide a specific lawful basis for redactions. In Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), the custodian responded in a timely manner providing redacted records to the complainant; however, the custodian failed to provide a specific legal basis for said redactions. The Council held that “[t]he Custodian’s response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction . . .” Id. at 4. The Council further held that “. . . the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and has not borne his burden of proving the denial of access to the redacted portions was authorized by law. . .” Id. at 5. See Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February, 2005)(setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial); Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010)(noting that N.J.S.A. 47:1A-5(g) requires a custodian of record to indicate the specific basis for noncompliance).

Additionally, OPRA provides that a custodian may have an extension of time to respond to a complainant’s OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i). In Starkey v. N.J. Dep’t of Trans., GRC Complaint No. 2007-315, 316, & 317 (Interim Order dated October 29, 2008), the custodian sought an extension of time to respond to the custodian’s OPRA request within the initial seven (7) business day time period. Within the extended period, the custodian informed the complainant that a special service charge would be assessed, and would not proceed with fulfilling the request until they received a 50% deposit. However, the custodian failed to provide an anticipated date of when the requested records can be made available, informing the complainant that it would take an estimated twenty (20) hours to locate, redact, and assemble the requested records. GRC 2006-54. Therefore, the Council held that the custodian violated N.J.S.A. 47:1A-5(i) for failing to notify the Complainant in writing of when the requested records would be available after the Complainant paid the deposit.

Here, on September 17, 2015, the Custodian responded in writing to a portion of the Complainant’s OPRA request within the extended time period. However, the Custodian failed to respond to each request item individually. Specifically, the Custodian failed to indicate whether the provided documents are responsive to each request item. The Custodian did not clarify that the lack of responsive records to specific request items should have indicated that they did not exist until September 23, 2015, after the extended deadline. Additionally, the Custodian told the Complainant that a special service charge would be assessed regarding the audio/visual portions of the request, and asked the Complainant whether he still needed the records. The Complainant stated he still needed those records, and on September 21, 2017, the Custodian informed the Complainant of an assessment of \$129.60, to which the Complainant agreed. However, the Custodian failed to provide the Complainant with an anticipated date of when the record would

be available after receiving the Complainant's payment. The Custodian only made mention that review of the records would begin "as promptly as possible" after receiving payment, and that "additional time" could be needed should the records needed redaction.

As such, the Custodian's written response was legally insufficient because the Custodian failed to respond to each item contained in the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff, GRC 2007-272. See also Lenchitz, GRC 2012-265. Further, the Custodian's response was equally insufficient because she failed to provide a date certain of when the requested records would be made available after the Complainant paid the special service charge. N.J.S.A. 47:1A-5(i); Starkey GRC 2007-315, 316, 317.

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 provided a response to questions posed by the GRC that reflect the analytical framework outlined in Courier Post, 360 N.J. Super. at 199, regarding the proper assessment of a special service charge. The Custodian argued that the proposed charge of \$120.60 represented 3.0 of the approximately 16.0 hours the Township expended to produce responsive records as follows:

Employee	Work Required
Qualified Police Officer	3.0 hours (\$43.00) to locate, extract and copy to disc the records requested by the Complainant in Items #6 - #9 of his request. Total: \$129.60

In Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012), the Council in part reviewed an assessment charged based upon three (3) hours of work from a police officer. Similar to the current matter, the police officer was among the few available employees with access to MVR footage. However, the record lacks a certification from the officer as to the specific work performed to produce the record. It is unknown how many separate recordings needed to be reviewed, the time needed to review the relevant recordings, or even the total length of each produced recording. Such information is required to determine the validity of the Custodian’s special service assessment.

Therefore, the Custodian may have improperly imposed a special service charge against the Complainant. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Rivera, GRC 2009-311. As such, the Custodian shall provide an in-depth account of the police officer’s work performed as stated in her October 12, 2017 e-mail.

Knowing & Willful

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

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian's written response was legally insufficient because the Custodian failed to respond to each item contained in the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). Further, the Custodian's response was equally insufficient because she failed to provide a date certain of when the requested records would be made available after the Complainant paid the special service charge. N.J.S.A. 47:1A-5(i); Starkey v. N.J. Dep't of Trans., GRC Complaint No. 2007-315, 316, & 317 (Interim Order dated October 29, 2008).
2. The Custodian may have improperly imposed a special service charge against the Complainant. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). As such, the Custodian shall provide an in-depth account of the police officer's work performed as stated in her October 12, 2017 e-mail.
3. **The Custodian shall comply with Item No. 2 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 Rules, R. 1:4-4,⁵ to the Council Staff.**
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: Samuel A. Rosado
Staff Attorney

April 17, 2018

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."