



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**

**May 19, 2020 Government Records Council Meeting**

Shamsiddin Abdur Raheem  
Complainant

Complaint No. 2016-283

v.

NJ Department of Corrections  
Custodian of Record

At the May 19, 2020 public meeting, the Government Records Council (“Council”) considered the May 12, 2020 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 portion of the Council’s February 26, 2020 Interim Order requiring submission of the Internal Management Procedures for *in camera* review. Specifically, the Custodian responded in the prescribed time frame providing nine (9) unredacted copies of the Internal Management Procedures for review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian did not fully comply with the portion of the Council’s Order seeking confirmation of the Complainant’s willingness or refusal to pay the special service charge. Specifically, although the Custodian sought an extension of time, said extension request came one (1) day after expiration of the ten (10) business day time frame. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action and the Custodian certified to this fact. Thus, per the Council’s Order, the Custodian is under no obligation to disclose those records covered by the special service charge.
3. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to Internal Management Procedures No. 101 - North Compound Close Custody Housing Units and IMP.NJSP.106.001 - 2A: General Population Housing Office pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6.**
4. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA 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 19<sup>th</sup> Day of May 2020

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 20, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
May 19, 2020 Council Meeting**

**Shamsiddin Abdur Raheem<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-283**

**v.**

**New Jersey Department of Corrections<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:<sup>3</sup>**

May 13, 2016 OPRA request: Hardcopies via U.S. mail of all Internal Management Procedures (“IMP”) for New Jersey State Prison (“NJSP”).

May 17, 2016 OPRA request: Hardcopies via U.S. mail and on-site inspection of:

1. IMPs for NJSP; and
2. Standard Operating Procedures (“SOP”) for NJSP.

June 6, 2016 OPRA request: Hardcopies via U.S. mail of IMPs reflecting policy and schedule of barber services for general population and Closed Custody Unit inmates.

June 21, 2016 OPRA requests: Hardcopies via U.S. mail of:

1. E-mails concerning the Complainant sent or received by NJSP personnel members Steven Johnson, “G. Lewis,” “E. Rodriguez,” Timothy Maines, Michael Ptazenski, Omar Mendoza, Kevin Koch, Nancy Zook, Lisa Swift, and Linda Santoro
2. E-mails concerning the Complainant sent or received by New Jersey Department of Corrections (“DOC”) employees Gary M. Lonigan, Stephen D’Ilio, Antonio Campos, George Robinson, Cynthia Johnson, Charles Warren, Jr., James Barnes, Stephen Alaimo, “D. Berg,” Mervin Ganesh, Michael Crawford, “R. DeFazio,” Sean Patterson, Jacalyn Zimmerman, Tina Cortes, Lisa Jantz, and John Falvey

August 8, 2016 OPRA request: Hardcopies via U.S. mail of all “Level 1” IMPs for DOC and NJSP.

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

<sup>2</sup> Represented by Deputy Attorney General Nicole E. Adams.

<sup>3</sup> Each of the Complainant’s OPRA requests sought additional records that are not at issue in this complaint.

**Custodian of Record:** John Falvey

**Request Received by Custodian:** May 13, 2016; May 17, 2016; June 6, 2016; June 21, 2016 (2 requests); August 8, 2016

**Response Made by Custodian:** June 1, 2016; May 20, 2016; June 23, 2016; July 19, 2016; August 2, 2016 (2 responses); August 31, 2016

**GRC Complaint Received:** November 2, 2016

**Records Submitted for *In Camera* Examination:**

1. IMP No. 101 - North Compound Close Custody Housing Units.
2. IMP.NJSP.106.001 - 2A: General Population Housing Office.

**Background**

**February 26, 2020 Council Meeting:**

At its February 26, 2020 public meeting, the Council considered the February 19, 2020 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 bore his burden of proof that the overall proposed special service charge of \$7,699.56 comprised of 173.65 hours at a rate of \$44.34 to review and redact 2,1671 individual potentially responsive records is warranted and reasonable. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (October 28, 2002). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Custodian deny access to any of the responsive records in total, he must provide a specific lawful basis for each. Finally, should the total amount of time expended fall short of 173.65, the Custodian should adjust the special service charge accordingly and notify the Complainant.
2. **The Complainant shall comply with conclusion No. 1 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall deliver<sup>4</sup> to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's**

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<sup>4</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

**response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.<sup>5</sup>**

3. The GRC must conduct an *in camera* review of the two (2) responsive barber Internal Management Procedures to determine the validity of the Custodian's assertion that the records are exempt under the security and surveillance exemption present in OPRA. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
4. **The Custodian shall deliver<sup>6</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), a document or redaction index<sup>7</sup>, as well as a legal certification from the Custodian, in accordance with R. 1:4-4,<sup>8</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On February 27, 2020, the Council distributed its Interim Order to all parties on. On March 3, 2020, the Government Records Council ("GRC") received the Custodian's response to conclusion No. 3 of the Interim Order. Therein, the Custodian certified that he was providing to the GRC nine (9) copies of the unredacted IMPs for review *in camera*. The Custodian reiterated his prior arguments that the IMPs were exempt under N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9, and N.J.A.C. 10A:22-2.3(a)(9).<sup>9</sup>

On March 13, 2020, the Custodian sought an extension of time to respond to conclusion Nos. 1 and 2 of the Council's Order. The Custodian also noted that he was not sure whether the GRC required him to provide a response as to whether he received payment from the Complainant. On the same day, the GRC responded providing additional time until March 19, 2020 to complete the additional required actions outlined in conclusion No. 2 of the Interim Order. On March 17,

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<sup>5</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>6</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

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

<sup>8</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>9</sup> The GRC notes that N.J.A.C. 10A:22-2.3(a)(9) was not part of DOC's promulgated regulations until December 19, 2016, at least five (5) months after the final OPRA request at issue in this complaint. OPRA does not allow an agency to retroactively apply an access-limiting regulation unless the promulgating agency can express an emergent need. N.J.S.A. 47:1A-5(a). Because DOC has not expressed a specific emergent need in this case, the GRC will not address the applicability of the provision.

2020, the Custodian responded to the Council's Interim Order. Therein, the Custodian submitted a supplemental certification affirming that he received no correspondence from the Complainant regarding payment of the proposed special service charge.

### Analysis

#### Compliance

At its February 26, 2020 meeting, the Council ordered the Complainant to either remit the total special service charge payment or state that he declined to purchase the records. Further, the Council noted that the Complainant's failure to act within five (5) business days would be construed as a declination of the records. The Council also ordered the Custodian to submit to the GRC nine (9) unredacted copies of the responsive IMPs for an *in camera* review, as well as to certify to the Complainant's willingness or refusal to pay the special service charge. The Council provided the Custodian five (5) and ten (10) business days respectively from receipt of the Council's Interim Order to provide certified confirmation of compliance to the Executive Director.

On February 27, 2020, the Council distributed its Interim Order to all parties. Thus, the Complainant's response was due by close of business on March 5, 2020. Further, the Custodian's response was due by close of business on March 5 and 12, 2020 respectively.

On March 3, 2020, the third (3<sup>rd</sup>) business day after receipt of the Council's Order, the Custodian submitted nine (9) unredacted copies of the responsive IMPs to the GRC. Thereafter, on the eleventh (11<sup>th</sup>) business day after receipt of the Order, the Custodian sought and was granted an extension through March 19, 2020 to submit an additional compliance response. On March 17, 2020, the Custodian responded providing a supplemental response wherein he affirmed that the Complainant did not respond to the Order. Based upon the forgoing, the GRC is satisfied that the Custodian complied with one portion of the Order but did not fully comply with the other portion due to a timeliness issue.

Therefore, the Custodian complied with the portion of the Council's February 26, 2020 Interim Order requiring submission of the IMPs for *in camera* review. Specifically, the Custodian responded in the prescribed time frame providing nine (9) unredacted copies of the IMPs for review and simultaneously provided certified confirmation of compliance to the Executive Director.

However, the Custodian did not fully comply with the portion of the Council's Order seeking confirmation of the Complainant's willingness or refusal to pay the special service charge. Specifically, although the Custodian sought an extension of time, said extension request came one (1) day after expiration of the ten (10) business day time frame. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action and the Custodian certified to this fact. Thus, per the Council's Order, the Custodian is under no obligation to disclose those records covered by the special service charge.

## Unlawful Denial of Access

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

OPRA provides that:

A government record shall not include the following information which is deemed to be confidential . . . emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein.

[N.J.S.A. 47:1A-1.1.]

In Reid v. N.J. Dep’t of Corr., GRC Complaint No. 2013-165 (January 2014), the Council addressed the disclosability of IMP No. 101 – North Compound Custody Housing Units. There, the complainant argued that the custodian misapplied N.J.S.A. 47:1A-1.1 in denying access to the IMP. In the SOI, the custodian certified to the contents of the IMP and argued that he lawfully denied access to it. The Council, in looking to Fischer v. N.J. Dep’t of Corr., GRC Complaint No. 2005-171 (February 2006), upheld the custodian’s denial under N.J.S.A. 47:1A-1.1 based on his certification and description of the IMP

In the instant matter, the GRC first notes that the Council ordered an *in camera* review because it was not clear from the evidence of record that the Custodian denied access to the IMP and a similar IMP at issue in Reid, GRC 2013-165. The results of this *in camera* review are as follows.

The contents of each IMP are a comprehensive guide on how DOC operates its facilities or sections within a facility. In fact, both IMPs are as described in Reid, GRC 2013-165. To be more specific, the information contained in the responsive IMPs includes “all safety and security measures taken by staff including the physical setup of units, searches and inmate movements.” Id. at 2. It should be noted that both IMPs include a brief section on barber services, but do not address “how often inmates were entitled to utilize barber services” as sought by the Complainant. Abdur-Raheem, GRC 2016-283 (Interim Order dated February 26, 2020) at 4.

Upon review, it is apparent that both IMPs are plainly exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1. There is no doubt that an inmate in possession of the IMPs would have a detailed playbook on how to exploit a facility’s weaknesses to plot nefarious activities. Thus, disclosure of the IMPs could easily result in catastrophic events within a DOC facility. Additionally, the Council’s decision in Reid, GRC 2013-165 offers precedential support in finding that the IMPs are not disclosable under OPRA. For these reasons, the GRC is satisfied that the responsive IMPs are exempt from disclosure under OPRA.

Accordingly, the Custodian lawfully denied access to the requested IMPs because they contained emergency and security information exempt under OPRA. N.J.S.A. 47:1A-1.1; Reid, GRC 2013-165. Thus, the Custodian did not unlawfully deny access to either IMP. N.J.S.A. 47:1A-6.

Finally, because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the portion of the Council's February 26, 2020 Interim Order requiring submission of the Internal Management Procedures for *in camera* review. Specifically, the Custodian responded in the prescribed time frame providing nine (9) unredacted copies of the Internal Management Procedures for review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian did not fully comply with the portion of the Council's Order seeking confirmation of the Complainant's willingness or refusal to pay the special service charge. Specifically, although the Custodian sought an extension of time, said extension request came one (1) day after expiration of the ten (10) business day time frame. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action and the Custodian certified to this fact. Thus, per the Council's Order, the Custodian is under no obligation to disclose those records covered by the special service charge.
3. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to Internal Management Procedures No. 101 - North Compound Close Custody Housing Units and IMP.NJSP.106.001 - 2A: General Population Housing Office pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6.**
4. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Executive Director

May 12, 2020





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**

**February 26, 2020 Government Records Council Meeting**

Shamsiddin Abdur Raheem  
Complainant

Complaint No. 2016-283

v.

NJ Department of Corrections  
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the February 19, 2020 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 bore his burden of proof that the overall proposed special service charge of \$7,699.56 comprised of 173.65 hours at a rate of \$44.34 to review and redact 2,1671 individual potentially responsive records is warranted and reasonable. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 202 (October 28, 2002). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Custodian deny access to any of the responsive records in total, he must provide a specific lawful basis for each. Finally, should the total amount of time expended fall short of 173.65, the Custodian should adjust the special service charge accordingly and notify the Complainant.
2. **The Complainant shall comply with conclusion No. 1 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant’s failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council’s Interim Order, the Custodian shall deliver<sup>1</sup> to the Executive Director a statement with respect to the Complainant’s willingness or refusal to purchase the requested records. The Custodian’s**

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**response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.<sup>2</sup>**

3. The GRC must conduct an *in camera* review of the two (2) responsive barber Internal Management Procedures to determine the validity of the Custodian's assertion that the records are exempt under the security and surveillance exemption present in OPRA. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
4. **The Custodian shall deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), a document or redaction index<sup>4</sup>, as well as a legal certification from the Custodian, in accordance with R. 1:4-4,<sup>5</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of February 2020

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: February 28, 2020**

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<sup>2</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>3</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

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

<sup>5</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
February 26, 2020 Council Meeting**

**Shamsiddin Abdur Raheem<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-283**

**v.**

**New Jersey Department of Corrections<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:<sup>3</sup>**

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1. IMPs for NJSP; and
2. Standard Operating Procedures (“SOP”) for NJSP.

June 6, 2016 OPRA request: Hardcopies via U.S. mail of IMPs reflecting policy and schedule of barber services for general population and Closed Custody Unit inmates.

June 21, 2016 OPRA requests: Hardcopies via U.S. mail of:

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2. E-mails concerning the Complainant sent or received by New Jersey Department of Corrections (“DOC”) employees Gary M. Lonigan, Stephen D’Ilio, Antonio Campos, George Robinson, Cynthia Johnson, Charles Warren, Jr., James Barnes, Stephen Alaimo, “D. Berg,” Mervin Ganesh, Michael Crawford, “R. DeFazio,” Sean Patterson, Jacalyn Zimmerman, Tina Cortes, Lisa Jantz, and John Falvey

August 8, 2016 OPRA request: Hardcopies via U.S. mail of all “Level 1” IMPs for DOC and NJSP.

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

<sup>2</sup> Represented by Deputy Attorney General Nicole E. Adams.

<sup>3</sup> Each of the Complainant’s OPRA requests sought additional records that are not at issue in this complaint.

**Custodian of Record:** John Falvey

**Request Received by Custodian:** May 13, 2016; May 17, 2016; June 6, 2016; June 21, 2016 (2 requests); August 8, 2016

**Response Made by Custodian:** June 1, 2016; May 20, 2016; June 23, 2016; July 19, 2016; August 2, 2016 (2 responses); August 31, 2016

**GRC Complaint Received:** November 2, 2016

### **Background**<sup>4</sup>

#### **Request and Response:**

##### **May 13, 2016 OPRA request**

On May 13, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 1, 2016, the Custodian responded in writing advising that he located 292 records of varying lengths responsive to the request. The Custodian stated that each record had to be reviewed and estimated that a week of time would be necessary to complete the review. The Custodian stated that based on this, a special service charge was warranted. The Custodian stated that the fee for the lowest paid employee to conduct the work is \$44.34. The Custodian averred that when multiplied by 40 hours, the total special service charge was \$1,773.60. The Custodian stated that monies would be reimbursed if the actual time was less than the estimated hours, but that he would contact the Complainant if additional fees may be incurred. The Custodian stated that the review would begin once payment was received.

On September 8, 2016, the Custodian sent a letter to the Complainant confirming receipt of a September 1, 2016 correspondence.<sup>5</sup> The Custodian reiterated that 292 IMPs specific to NJSP existed. The Custodian further stated that there were 446 Level 1 IMPs that may apply to NJSP. The Custodian stated that in addition to the original fee, the Complainant would incur an additional special service charge of \$2,660.40 (based on the initial calculation) to review the Level 1 IMPs. Finally, the Custodian stated that the Complainant may wish to identify IMPs by specific topics, which would likely negate the need for a special service charge.

##### **May 17, 2016 OPRA request**

On May 17, 2016, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On May 20, 2016, the Custodian responded in writing reiterating his response to the May 13, 2016 OPRA request that a special service charge of \$1,773.60 was warranted to review 292 records.

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<sup>4</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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

<sup>5</sup> Neither party provided the GRC with a copy of this correspondence; thus, the nature of same is unclear.

#### June 6, 2016 OPRA request

On June 6, 2016, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On June 23, 2016, the Custodian responded in writing denying access to two (2) IMPs under N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-9. The Custodian stated that the responsive IMPs contained “emergency or security information” or “security measures and surveillance techniques,” the disclosure of which would jeopardize security.

#### June 21, 2016 OPRA requests

On June 21, 2016, the Complainant submitted two (2) OPRA requests to the Custodian seeking the above-mentioned records. On August 2, 2016, the Custodian responded to OPRA request No. 1 stating that he located 658 e-mails varying in lengths and attachments from a time period of August 1, 2012 through July 22, 2016. The Custodian stated that due to the volume of records, a special service charge for review of the responsive records was warranted. The Custodian stated that it would take an estimated three (3) minutes to open and review each e-mail for a total of 32.9 hours. The Custodian stated that at \$44.34 an hour, the total special service charge would be \$1,458.79. The Custodian stated that monies would be reimbursed if the actual time was less than the estimated hours, but that he would contact the Complainant if additional fees may be incurred. The Custodian stated that the review would begin once payment was received.

On the same day, the Custodian responded to OPRA request No. 2 stating that he located 1,280 e-mails varying in lengths and attachments from a time period of August 1, 2012 through July 22, 2016. The Custodian stated that due to the volume of records, a special service charge for review of the responsive records was warranted. The Custodian stated that it would take an estimated three (3) minutes to open and review each e-mail for a total of 64 hours. The Custodian stated that at \$44.34 an hour, the total special service charge would be \$2,837.76. The Custodian stated that monies would be reimbursed if the actual time was less than the estimated hours, but that he would contact the Complainant if additional fees may be incurred. The Custodian stated that the review would begin once payment was received.

#### August 8, 2016 OPRA request

On August 8, 2016, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On August 31, 2016, the Custodian responded in writing stating that he located approximately 441 Level 1 IMPs that may apply to NJSP. The Custodian averred that due to the volume of records responsive to the request, a special service charge was warranted. The Custodian stated that it would take an estimated five (5) minutes to review each IMP for a total of 36.75 hours. The Custodian stated that at \$44.34 an hour, the total special service charge would be \$1,629.50. The Custodian stated that monies would be reimbursed if the actual time was less than the estimated hours, but that he would contact the Complainant if additional fees may be incurred. The Custodian requested that the Complainant advise how he would like to proceed.

### Denial of Access Complaint:

On November 2, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant first disputed each of the proposed special service charges assessed by the Custodian. The Complainant contended that the Custodian utilized the charge to prevent him from accessing the records based on his inability to afford the fees. The Complainant contended that the Custodian had an obligation to locate responsive records and charge only the reasonable approximate fee. Paff v. N.J. Dep’t of Labor, 392 N.J. Super. 334 (App. Div. 2007); Smith v. Hudson Cnty. Register, 411 N.J. Super. 538 (App. Div. 2010). The Complainant further argued that the Custodian previously disclosed records of a similar volume without charging a fee. The Complainant cited to examples of the Custodian disclosing 112, 40, 76, and 58 pages of records without a charge in support of his position.

The Complainant also contended that the Custodian unlawfully denied him access to the responsive barber IMPs. The Complainant noted that he sought the IMPs to determine how often inmates were entitled to utilize barber services. The Complainant expressed disbelief that the IMP would contain security concerns. The Complainant alleged that the Custodian denied access because DOC did not want inmates to know how often they can utilize the service. Further, the Complainant alleged that denying the IMP would make it difficult for inmates to challenge being denied barber services.

### Statement of Information:

On November 18, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA requests on May 13, May 17, June 6, June 21 (two (2) requests), and August 8, 2016. The Custodian certified that he responded in writing on June 1, May 20, June 23, July 19, August 2 (two (2) responses), and August 31, 2016.

The Custodian first contended that the proposed special service charges were warranted and reasonable under N.J.S.A. 47:1A-5(c). See Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 202 (October 28, 2002); Fisher v. Div. of Law, 400 N.J. Super. 61, 69 (App. Div. 2008). The Custodian averred that each request to which he applied a special service charge involved a voluminous amount of records requiring careful review. The Custodian noted that in each response, he provided the Complainant a detailed calculation breakdown of the charge. The Custodian also averred that the fee was based on his time as the lowest paid DOC employee capable of performing the review, as follows:

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

**Response:** IMPs and SOPs (May 13, May 17, & August 8, 2016 OPRA requests) for NJSP and DOC, as well as e-mails (June 21, 2016 OPRA requests).

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

**Response:** IMPs and SOPs, which may contain sensitive security information exempt from disclosure under OPRA (May 13, May 17, & August 8, 2016 OPRA requests) – 292 IMPs

representing over 2,000 pages of records for each of the May 13, and 17, 2016 OPRA requests alone. The Custodian did not provide an estimate for the August 8, 2016 OPRA requests, which comprised of 441 responsive records.

E-mails regarding the Complainant (June 21, 2016 OPRA requests) – 1,938 e-mails of varying lengths and containing attachments.

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

**Response:** No time frame for the IMPs and SOPs.

The Complainant did not include a time frame in his June 21, 2016 OPRA requests seeking e-mails. However, the Custodian identified in his response a time frame of August 1, 2012 through July 22, 2016 (which post-dates the June 21, 2016 OPRA requests by approximately a month).<sup>6</sup>

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

**Response:** N/A.

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

**Response:** 8,400 employees.

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

**Response:** One - The Custodian is the only designated custodian of record for DOC.

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

**Response:** All records needed review for possible redactions of information that may implicate the security and surveillance exemptions.

**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 following identifies the hourly charge for each OPRA request:

<b>Employee</b>	<b>Estimated Hours</b>	<b>Hourly Rate</b>
<b>Custodian (May 13, 2016 OPRA request)</b>	40 hours	\$44.34
<b>Custodian (May 17, 2016 OPRA request)</b>	40 hours	\$44.34
<b>Custodian (June 21, 2016 OPRA request No. 1)</b>	32.9 hours	\$44.34

<sup>6</sup> Although the Council has found that requests for e-mails not containing the proper criteria under Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010) were invalid, the Custodian identified a time frame. Further, the Complainant did not dispute the added time frame. For this reason, the GRC will not address the validity of the June 21, 2016 OPRA requests.

<b>Custodian (June 21, 2016 OPRA request No. 2)</b>	64 hours	\$44.34
<b>Custodian (August 8, 2016 OPRA request)</b>	36.75 hours	\$44.34

**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:** N/A.

**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:** N/A.

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

**Response:** The Custodian is the only DOC employee qualified to review the responsive records and respond to OPRA requests. The Custodian certified that he processes approximately 100 to 150 OPRA requests per month, which makes the subject OPRA requests especially burdensome.

**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:** The Custodian (\$44.34 per hour).

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

**Response:** N/A.

**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 respond to the Complainant's OPRA request:

<b>Employee</b>	<b>Estimated Time</b>
Custodian May 13, 2016 OPRA request	40 hours (\$44.34 per hour) to review 292 IMPs (over 2,000 pages) for responsiveness and exemptions.  Total: \$1,773.60
Custodian May 17, 2016 OPRA request	40 hours (\$44.34 per hour) to review 292 IMPs/SOPs (over 2,000 pages) for responsiveness and exemptions.  Total: \$1,773.60



Custodian June 21, 2016 OPRA request No. 1	32.9 hours (\$44.34 per hour) to review 658 e-mails and any relevant attachments for responsiveness, and exemptions (at three (3) minutes per e-mail).  Total: \$1,458.79
Custodian June 21, 2016 OPRA request No. 2	64 hours (\$44.34 per hour) to review 1,280 e-mails and any relevant attachments for responsiveness, and exemptions (at three (3) minutes per e-mail).  Total: \$2,837.67
Custodian August 8, 2016 OPRA request	36.75 hours (\$44.34 per hour) to review 441 IMPs/SOPs (no page total identified) for responsiveness and exemptions (at five (5) minutes per record).  Total: \$1,629.50

The Custodian also disputed Complainant’s assertion that the proposed fees amounted to an “intimidation’ tactic” on DOC’s part. The Custodian asserted that upon locating the responsive records, it became clear that an extraordinary amount of time and effort was necessary to comply with each OPRA request. The Custodian also argued that the fact that the Complainant is an inmate is of no moment: there is no case law supporting that such a charge is impermissible for requests made by inmates. The Custodian noted that the GRC previously held that custodians did not unlawfully deny access simply because an inmate had insufficient funds to purchase records. See Santos v. N.J. State Parole Bd. GRC Complaint No. 2004-74 (August 2004); Bragg v. N.J. Dep’t of Corr., GRC Complaint No. 2010-145 (March 2011).

Regarding the Complainant’s June 6, 2016 OPRA request seeking the closed custody unit and general population barber IMPs, the Custodian argued that he lawfully denied access to same pursuant to N.J.S.A. 47:1A-1.1. The Custodian certified that both records detail the day-to-day and hourly running of units within NJSP. The Custodian averred that the records detail security staff and post assignments, shift changes, timing of inmate moves, and potential search windows. The Custodian thus asserted that disclosure would jeopardize the orderly running and security of the facility in question.

Finally, the Custodian argued that the Courts have long deferred to the DOC when making safety and security decisions. The Custodian stated that DOC has “broad discretionary power” to promulgate regulations aimed at maintaining security and order inside correctional facilities. Jenkins v. Fauver, 108 N.J. 239, 252 (1987). The Custodian stated that the Courts have noted that “[p]risons are dangerous places, and the courts must afford appropriate deference and flexibility to administrators trying to manage this volatile environment.” Russo v. NJ Dep’t of Corr., 324 N.J. Super. 576, 584 (App. Div. 1999). See also Florence v. Bd. of Chosen Freeholders, Burlington Cnty., 132 S.Ct. 1510, 1515 (2012) (“[m]aintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face[.]”)

### Additional Submissions:

On November 28, 2016, the Complainant submitted a letter responding to the Custodian's SOI. The Complainant argued that the Custodian failed to support his position that a special service charge was warranted. The Complainant argued that the Custodian charged for a search and review that the statute required and failed to explain why he "could not and has not attempted to review these records . . . during his regular business hours." The Complainant noted that the Custodian could have reviewed the records over weeks or months and that he would not object. The Complainant also noted that the Custodian misconstrued his argument regarding an inmate's inability to pay special service charges. The Complainant asserted that to the contrary, his argument is that the Custodian charged an unreasonable fee to prevent disclosure.

Moreover, the Complainant contended that the Custodian contradicted his assertion that he was the only DOC employee capable of reviewing the responsive records. The Complainant asserted that the Custodian admitted that the records were "deemed confidential by the Commissioner's Office [and Office of the Commissioner]." The Complainant thus contended that the Custodian was not the only person capable of reviewing the responsive records.

Lastly, the Complainant disputed the Custodian's assertion that the barber IMPs were exempt under N.J.S.A. 47:1A-1.1. The Complainant contended that he did not seek any information regarding officer shifts or inmate movements but rather how often inmates are permitted to receive barber services. The Complainant contended that the Custodian could have redacted all exempt information and disclosed the IMPs.

## Analysis

### Special Service Charge

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 that:

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

[Id. (emphasis added).]

The determination of what constitutes an "extraordinary expenditure of time and effort" under OPRA must be made on a case by case basis and requires an analysis of a variety of factors. These factors were discussed in Courier Post, 360 N.J. Super. at 199. 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.

Further, OPRA provides that if a custodian “. . . asserts that part of a particular record is exempt from public access . . . the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5(g). Further, the court determined that the responsibility of the review and redaction rests with the custodian. Courier Post, 360 N.J. Super. at 203-204.

In the matter presently before the Council, the special service charge issue<sup>7</sup> applies to four (4) OPRA requests seeking the total universe of IMPs and SOPs for NJSP, Level 1 IMPs for DOC and NJSP, and e-mails regarding the Complainant. It should be noted that the Complainant’s May 13, and 17, 2016 OPRA requests sought essentially the same records. Thus, the Custodian identified the same responsive records (292), as well as the same proposed special service charge (\$1,773.60). Based on this, the GRC will address the proposed special service charge resulting only from the May 17, June 21, and August 8, 2016 OPRA requests, and omitting the May 13, 2016 OPRA request that produced a duplicative response.

The Custodian provided as part of his SOI responses to the 14-point analysis as part of a legal certification. That legal certification reflects 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 total special service charge of \$7,699.56 represented 173.65

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<sup>7</sup> The GRC notes that in Abdur-Raheem v. N.J. Dep’t of Corr., GRC Complaint No. 2016-204, being concurrently adjudicated with this complaint, the Council reviewed the validity of a request item seeking all “non-confidential . . . IMP[s] and SOP[s] for NJSP.” While the Council ultimately addresses the validity issue there, it relies on judicial notice to defer the question of disclosure to this complaint to avoid a duplicative adjudication of the special service charge issue already before the Council. Id. at 8-9 (citing N.J.A.C. 1:1-15.2(a) and (b)).

hours of time to review and redact, where applicable, 2,671 potentially responsive records. The Custodian certified to the individual components of the overall fee as follows:

May 17, 2016 OPRA request	40 hours (\$44.34 per hour) to review 292 IMPs/SOPs (over 2,000 pages) for responsiveness and exemptions.  Total: \$1,773.60
June 21, 2016 OPRA request No. 1	32.9 hours (\$44.34 per hour) to review 658 e-mails and any relevant attachments for responsiveness, and exemptions (at three (3) minutes per e-mail).  Total: \$1,458.79
June 21, 2016 OPRA request No. 2	64 hours (\$44.34 per hour) to review 1,280 e-mails and any relevant attachments for responsiveness, and exemptions (at three (3) minutes per e-mail).  Total: \$2,837.67
August 8, 2016 OPRA request	36.75 hours (\$44.34 per hour) to review 441 IMPs/SOPs (no page total identified) for responsiveness and exemptions (at five (5) minutes per record).  Total: \$1,629.50

The Custodian also certified that among the 8,400 DOC employees, he was the only one designated as the “custodian of record;” thus, the obligation of reviewing and redacting the responsive records rested with him.

A review of the forgoing supports firmly that the expenditure of 173.65 hours represents an extraordinary amount of time and effort to produce responsive records given the number of potentially responsive records. The GRC is further persuaded by the fact that, assuming the Custodian’s average workweek spans 35 hours, complying with the instant OPRA requests would consume nearly five (5) full work weeks. The Custodian also provided a per-record time estimate by which he based his overall time expenditure. Taken together, the time commitment necessary to fully respond to the subject OPRA requests is extraordinary, even for a State agency like DOC. Thus, the evidence of record adequately supports that a special service charge for 173.65 hours of time is warranted here.

Further, the GRC is persuaded that the proposed fee of \$7,699.56 is reasonable. Specifically, the GRC concludes that the Custodian’s hourly rate of \$44.34 to review and redact the sensitive records at issue here is on point with Courier Post’s mandate that the defined “custodian of record” is responsible for such actions. The number of potentially responsive pages, as well as the need to perform a careful review to ensure the nondisclosure of sensitive surveillance and security information is also compelling.

Briefly, the GRC is not persuaded by the Complainant’s argument against the imposition of the special service charge. Of note, the Complainant’s assertion that DOC did not previously

charge for prior OPRA requests yielding a fraction of the responsive records is of no moment here. This is especially true for two (2) reasons. First, the Custodian's responses to those OPRA requests are not presently before the Council. Second, the number of pages associated with those OPRA requests are infinitesimal compared to the number of responsive records at issue here. Additionally, the Complainant's argument that the Custodian could have reviewed responsive IMPs and SOPs over a longer period of time to reduce the fee fails to appreciate the amount of time necessary to fulfill the subject OPRA requests in the first place.

Accordingly, the Custodian bore his burden of proof that the overall proposed special service charge of \$7,699.56 comprised of 173.65 hours at a rate of \$44.34 to review and redact 2,1671 individual potentially responsive records is warranted and reasonable. N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199. Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Custodian deny access to any of the responsive records in total, he must provide a specific lawful basis for each. Finally, should the total amount of time expended fall short of 173.65, the Custodian should adjust the special service charge accordingly and notify the Complainant.

### **Unlawful Denial of Access**

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

OPRA provides that:

A government record shall not include the following information which is deemed to be confidential . . . emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein.

[N.J.S.A. 47:1A-1.1.]

Further, in Fischer v. N.J. Dep't of Corr., GRC Complaint No. 2005-171 (February 2006), the complainant requested "existing policies/post orders" for an area of East State Jersey Prison, stating that he is an employee of that area. The custodian denied access to the records stating that the records constituted emergency and security information ". . . which, if disclosed, jeopardize security of the building or facility or persons therein . . ." In the SOI, the custodian's counsel noted that the "ACSU" was utilized to house inmates removed from general population for disciplinary or other security reasons. The Council agreed with the custodian's denial of access, holding that ". . . regardless of whether the Complainant is an employee of the department, the records are not disclosable pursuant to OPRA." Id. See also Durham v. N.J. Dep't of Corr., GRC Complaint No. 2012-35 (March 2013); Reid v. N.J. Dep't of Corr., GRC Complaint No. 2013-165 (January 2014).

However, in Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>8</sup> that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The court stated that:

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

In the matter before the Council, the Complainant's June 6, 2016 OPRA request sought IMPs reflecting barber service information for closed custody and general population. The Custodian identified two (2) responsive records and denied access to them under N.J.S.A. 47:1A-1.1. In the Denial of Access Complaint, the Complainant argued that he sought the IMPs to ascertain how often inmates were entitled to use barber services. The Complainant argued that the Custodian could have redacted any security information and disclosed the IMPs. In the SOI, the Custodian argued that the IMPs contained DOC personnel scheduling and movement information exempt from disclosure. The Custodian argued that disclosure would jeopardize the safe and secure operation of DOC's facilities.

Upon review of the arguments advanced by the parties, the GRC cannot determine whether the Custodian properly denied access to the responsive IMPs. While the Council found that the custodian lawfully denied the IMPs responsive to the requests at issue in Fischer and its progeny, those IMPs clearly related to post orders, schedules, and other intrinsic information the disclosure

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<sup>8</sup> Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

of which would jeopardize the safe and secure operation of the facilities in question. In contrast here: the responsive IMPs do not clearly implicate that they are of a sensitive nature in total. For this reason, “meaningful review” is necessary to determine whether the responsive IMPs contain the type of security and surveillance information necessary to fall within the asserted exemption. Paff, 379 N.J. Super. at 355.

Therefore, the GRC must conduct an *in camera* review of the two (2) responsive barber IMPs to determine the validity of the Custodian’s assertion that the records are exempt under the security and surveillance exemption present in OPRA. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

### **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 bore his burden of proof that the overall proposed special service charge of \$7,699.56 comprised of 173.65 hours at a rate of \$44.34 to review and redact 2,1671 individual potentially responsive records is warranted and reasonable. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 202 (October 28, 2002). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Custodian deny access to any of the responsive records in total, he must provide a specific lawful basis for each. Finally, should the total amount of time expended fall short of 173.65, the Custodian should adjust the special service charge accordingly and notify the Complainant.
2. **The Complainant shall comply with conclusion No. 1 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant’s failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council’s Interim Order, the Custodian shall deliver<sup>9</sup> to the Executive Director a statement with respect to the Complainant’s willingness or refusal to purchase the requested records. The Custodian’s**

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<sup>9</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

**response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.<sup>10</sup>**

3. The GRC must conduct an *in camera* review of the two (2) responsive barber Internal Management Procedures to determine the validity of the Custodian's assertion that the records are exempt under the security and surveillance exemption present in OPRA. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
4. **The Custodian shall deliver<sup>11</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), a document or redaction index<sup>12</sup>, as well as a legal certification from the Custodian, in accordance with R. 1:4-4,<sup>13</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Executive Director

February 19, 2020

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<sup>10</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>11</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

<sup>12</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>13</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."