



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

April 30, 2019 Government Records Council Meeting

Richard E. Wenger, Esq. (o/b/o David Pereira)
Complainant

Complaint No. 2016-80

v.

Voorhees Fire District No. 3 (Camden)
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council (“Council”) considered the April 23, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council dismiss the complaint because the Complainant’s Counsel withdrew the matter via letter to the Office of Administrative Law on March 25, 2019. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 30th Day of April 2019

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 3, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
April 30, 2019 Council Meeting**

**Richard E. Wenger, Esq. (o/b/o David Pereira)¹
Complainant**

GRC Complaint No. 2016-80

v.

**Voorhees Fire District No. 3 (Camden)²
Custodial Agency**

Records Relevant to Complaint: “All correspondence, including emails, exchanged between the Voorhees Fire District, or its legal representatives, and Rodier Ebersberger Architects, LLC, or its legal representatives, relating to the design phase and/or construction phase of the construction project designated New Voorhees Fire Station, as well as the termination of Pereira Electrical Contracting, Inc. d/b/a PEC/RM.”

Custodian of Record: Michael Wharton

Request Received by Custodian: January 12, 2016

Response Made by Custodian: January 22, 2016

GRC Complaint Received: March 9, 2016

Background

August 29, 2017 Council Meeting:

At its August 29, 2017 public meeting, the Government Records Council (“Council”) considered the August 22, 2017 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. Based on the inadequate evidence in this matter, the GRC is unable to determine whether or not a special service charge in the amount of \$26,050.00 is warranted and,

¹ Represented by Russell Uliase, Esq., and Lilia Londar, Esq., of Weir & Partners, LLP (Cherry Hill, NJ) until June 15, 2017. Represented by Mercedes Diego, Esq. and Charles R. Cohen of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP (Saddle Brook, NJ). In December 2017 Walter M. Luers, Esq. (Clinton, NJ) entered an appearance as co-counsel.

² Represented by Richard K. Tavani, Esq., of Weber Gallagher (Mount Laurel, NJ) until October 2016. Represented by Richard K. Tavani, Esq., of Bennett, Bricklin & Saltzburg, LLC (Marlton, NJ) until May 10, 2017. Represented by Stephen A. Venzie, Esq., and Sam L. Warshawer, Esq., of Venzie, Phillips & Warshawer, PC (Philadelphia, PA). Importantly, Mr. Venzie informed the GRC that by an ordinance dated February 21, 2017, the Voorhees Fire District was dissolved, and its properties and liabilities were transferred to the Township of Voorhees. Notwithstanding the dissolution of the Fire District, however, the instant complaint will retain its present caption.

Richard E. Wenger, Esq. (o/b/o David Pereira) v. Voorhees Fire District No. 3 (Camden), 2016-80 – Supplemental Findings and Recommendations of the Council Staff

therefore, whether the Custodian unlawfully denied access to the requested records. Hence, this complaint remains a contested matter and should be referred to the Office of Administrative Law for a hearing to resolve the facts and determine whether; (1) a special service charge in the amount of \$26,050 is warranted; (2) the Custodian unlawfully denied access to the records, and if so, to order disclosure of the records; and (3) the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee, and if so, to award said fee.

2. 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 conclusion of the Office of Administrative Law's fact-finding hearing.

Procedural History:

On August 30, 2017, the Council distributed its August 29, 2017 Interim Order to all parties. On October 31, 2017, the complaint was transmitted to the Office of Administrative Law ("OAL"). On March 25, 2019, Complainant's Co-Counsel Charles R. Cohen, Esq., submitted a letter to Administrative Law Judge Dorothy M. Incarvito-Garrabrant at the OAL withdrawing the complaint. On March 27, 2019, the OAL transmitted the complaint back to the GRC marked "WITHDRAWAL."

Analysis

No analysis required.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council dismiss the complaint because the Complainant's Counsel withdrew the matter via letter to the Office of Administrative Law on March 25, 2019. Therefore, no further adjudication is required.

Prepared By: John E. Stewart

April 23, 2019



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

August 29, 2017 Government Records Council Meeting

Richard E. Wenger, Esq. (o/b/o David Pereira)
Complainant

Complaint No. 2016-80

v.

Voorhees Fire District No. 3 (Camden)
Custodian of Record

At the August 29, 2017 public meeting, the Government Records Council (“Council”) considered the August 22, 2017 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. Based on the inadequate evidence in this matter, the GRC is unable to determine whether or not a special service charge in the amount of \$26,050.00 is warranted and, therefore, whether the Custodian unlawfully denied access to the requested records. Hence, this complaint remains a contested matter and should be referred to the Office of Administrative Law for a hearing to resolve the facts and determine whether; (1) a special service charge in the amount of \$26,050 is warranted; (2) the Custodian unlawfully denied access to the records, and if so, to order disclosure of the records; and (3) the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee, and if so, to award said fee.
2. 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 conclusion of the Office of Administrative Law’s fact-finding hearing.

Interim Order Rendered by the
Government Records Council
On The 29th Day of August, 2017

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 30, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 29, 2017 Council Meeting**

**Richard E. Wenger, Esq. (o/b/o David Pereira)¹
Complainant**

GRC Complaint No. 2016-80

v.

**Voorhees Fire District No. 3 (Camden)²
Custodial Agency**

Records Relevant to Complaint: “All correspondence, including emails, exchanged between the Voorhees Fire District, or its legal representatives, and Rodier Ebersberger Architects, LLC, or its legal representatives, relating to the design phase and/or construction phase of the construction project designated New Voorhees Fire Station, as well as the termination of Pereira Electrical Contracting, Inc. d/b/a PEC/RM.”

Custodian of Record: Michael Wharton

Request Received by Custodian: January 12, 2016

Response Made by Custodian: January 22, 2016

GRC Complaint Received: March 9, 2016

Background³

Request and Response:

On January 12, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 22, 2016, the seventh (7th) business day following receipt of said request, the Custodian responded in writing through Counsel, informing the Complainant that it is the Custodian’s understanding that the Complainant is withdrawing the portion of the OPRA request which seeks “correspondence,

¹ Represented by Russell Uliase, Esq., and Lilia Londar, Esq., of Weir & Partners, LLP (Cherry Hill, NJ) until June 15, 2017. Represented by Mercedes Diego, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP (Saddle Brook, NJ).

² Represented by Richard K. Tavani, Esq., of Weber Gallagher (Mount Laurel, NJ) until October 2016. Represented by Richard K. Tavani, Esq., of Bennett, Bricklin & Saltzburg, LLC (Marlton, NJ) until May 10, 2017. Represented by Stephen A. Venzie, Esq., and Sam L. Warshawer, Esq., of Venzie, Phillips & Warshawer, PC (Philadelphia, PA). Importantly, Mr. Venzie informed the GRC that by an ordinance dated February 21, 2017, the Voorhees Fire District was dissolved and its properties and liabilities were transferred to the Township of Voorhees. Notwithstanding the dissolution of the Fire District, however, the instant complaint will retain its present caption.

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.

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including emails, which include the legal representatives of the Voorhees Fire District and/or Rodier Ebersberger, LLC.”

The Custodian’s Counsel also informs the Complainant that the requested records are partially denied as inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material, attorney-client privileged material, work product pursuant to R. 4:10-2(c), and as records “exempted by other State or Federal Statutes and Regulations, Executive Orders of the Governor, Rules of Court, Constitution of this State, or judicial case law.”

The Custodian’s Counsel further informs the Complainant that any remaining non-exempt responsive records will be produced, subject to:

1. Additional time required for retrieval of records from storage.
2. Additional time required due to disruption of agency operations.
3. Payment of copying costs (to be calculated).
4. Payment of a special service charge for legal review and redaction (to be calculated).
5. Payment of a deposit of not more than \$500.00 for the special service charge.
6. Complainant’s willingness either to accept the records requested electronically in the format maintained by the agency or to pay an additional special service charge to convert the records to an acceptable electronic medium.

By letter dated February 5, 2016, the Custodian’s Counsel supplemented the Custodian’s January 22, 2016 response by informing the Complainant that the agency will begin to prepare the responsive records for disclosure upon the Complainant’s payment of an \$8,500.00 special service charge. The Custodian’s Counsel calculated the special service charge as follows:

- Attorney review of 6,000 pages of responsive paper copy correspondence will cost \$1,500.00 based upon an attorney reviewing the records for six (6) hours at a rate of \$250.00 per hour.
- Attorney review of 7,000 electronic records will cost \$7,000.00 based upon an attorney reviewing the records for twenty-eight (28) hours at a rate of \$250.00 per hour.

The Custodian’s Counsel states that the Complainant will also have to pay copying charges in an amount to be determined. Counsel also informs the Complainant that the Custodian acknowledges that the Complainant is not withdrawing the portion of the OPRA request which seeks “correspondence, including emails, which include the legal representatives of the Voorhees Fire District and/or Rodier Ebersberger, LLC.” For this reason, Counsel states that all exemptions set forth in the Custodian’s January 22, 2016 response will also apply to this portion of the request. Counsel further informs the Complainant that the Custodian acknowledges that the Complainant will not require hard copy records to be converted into an electronic format.

The Custodian’s Counsel informs the Complainant that once he agrees in writing to the special service charge and pays the \$500.00 deposit, the Custodian will let the Complainant know when the records will be disclosed.

Denial of Access Complaint:

On March 9, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he submitted his OPRA request to the Custodian on January 12, 2016 and that the Custodian responded to the request on January 22, 2016.

The Complainant states that, although the Custodian asserted three privileges, the Complainant is unaware of the merit of the asserted privileges because a Vaughn index was not provided. The Complainant states that the Custodian approximated the responsive records to consist of 6,000 hard copy pages and 7,000 e-mails. The Complainant further states that the Custodian is seeking a special service charge of \$8,500 for thirty-four hours of review because the Custodian contends that an attorney is required to review every record requested.

The Complainant states that in Fisher v. Div. of Law, 400 N.J. Super. 61 (App. Div. 2008), the court held that a special service charge in the amount of \$1,877.93 was reasonable for 52.5 hours of review of 15,000 e-mails. The Complainant asserts that in the instant matter the Custodian is charging a special service charge almost five times greater than the charge in Fisher.

The Complainant states that the Custodian should be able to identify privileged materials and that an attorney review at an exorbitant rate is not required for every responsive record. The Complainant contends that the assessed special service charge is clearly a tool aimed at denying access to the records.

The Complainant attached to the complaint copies of two letters sent to the Custodian’s Counsel, dated January 27, 2016 and February 16, 2016. In the January 27, 2016 letter, the Complainant stated that, contrary to the Custodian’s assertion in his January 22, 2016 response, the Complainant is not withdrawing any portion of the OPRA request. The Complainant also states in the same letter that he will not require the conversion of documents to electronic form. In the February 16, 2016 letter, the Complainant states that he had verbally agreed to a thirty (30) day extension of time for the Custodian to produce the requested records and that records subject to the attorney-client privilege would not have to be produced. The Complainant states that the Custodian’s Counsel totally distorted the agreements. The Complainant contends that the demand for an \$8,500 special service charge is an attempt by the Custodian to deprive the Complainant of an opportunity to review the requested records. The Complainant further informs the Custodian’s Counsel that the Custodian should be able to cull out attorney-client privileged material from responsive records and that initial review by an attorney would not be necessary. The Complainant asserts that attorney review of the records would have to be demonstrated and identified in a privilege log. The Complainant also objects to the estimated time the Custodian and/or his attorney would need to review the records.⁴

Statement of Information:

⁴ The Complainant also attached a copy of a letter dated February 26, 2016, from the Custodian’s Counsel to the Complainant, which was a reply to the Complainant’s February 16, 2016 letter. The letter contains a more detailed explanation of the Custodian’s objections and limitations to the production of records that were contained in Counsel’s January 22, 2016 response to the request.

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On April 6, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 12, 2016, and responded in writing on January 22, 2016. For item number 8 of the SOI, the Custodian stated the following:

“See attached letters to counsel of Pereira dated January 12, 2016 and February 5, 2016 which are submitted in lieu of a table under Item 9. The matter in question pertains to a construction of a new firehouse and there is anticipated litigation (mediation) between Voorhees Fire District, Pereira and Liberty Mutual, Pereira’s Surety will take place shortly. Pursuant to the construction contract and agreement with the Surety the dispute if not settled is to be submitted to mediation. In replying to the OPRA records request we have already advised counsel for Pereira of the special service charge needed to process its request. We also noted that there are 6,000 pages of correspondence and 7,000 emails that will have to be reviewed by counsel for the Voorhees Fire District in order to comply with the request and special service charge is \$8,500.00 which must be paid before itemization and production will be made.”

For SOI items 9 (A through G) and 10, the Custodian stated, “See response to No. 8.” The Custodian deleted items number 11 and 12 from the SOI form.

Additional Submissions:

On April 20, 2016, the Complainant’s Counsel submitted a response to the SOI. Counsel states that the Custodian has denied the Complainant access to the requested records and has not produced a Vaughn Index or any other justification for withholding records pursuant to the claimed exemptions. Counsel asserts that the Custodian has not identified how many records are alleged to be exempt from access and has failed to include a document index in the SOI, which is mandated by the GRC as required by Paff v. NJ Dep’t of Labor, 392 N.J. Super. 334 (App. Div. 2007).

Counsel argues that the Custodian assessed an outrageous special service charge in the amount of \$8,500.00 to produce the records. Counsel states that the courts in Courier Post v. Lenape Reg’l High School Dist., 360 N.J. Super. 191, 202 (Law Div. 2002), and Fisher v. Div. of Law, 400 N.J. Super. 61 (App. Div. 2008), rejected the practice of charging a special service charge for attorney review of documents. Counsel argues that if such a practice was approved, it would be used as a tool by government entities to prevent citizens from obtaining records simply because the citizens could not afford them. Counsel asserts that the amount of the special service charge imposed by the Custodian is unconscionable and is an attempt to withhold public records.

Counsel further argues that because the Custodian failed to provide a Vaughn Index, the number of records and the specific reasons for denial remain unknown. The Complainant’s Counsel further argues that the Custodian has continued to evade his obligation to delineate which records are being withheld and the justification therefor by failing to respond to item number 9 of the SOI. Counsel argues that the Custodian’s refusal to identify which records are

exempt from disclosure is another attempt to preclude access to the records unlawfully. Counsel asks the GRC to compel the Custodian to provide a document index and to disclose the non-exempt records without imposing an unlawful special service charge upon the Complainant.

On June 7, 2016, the GRC e-mailed the Custodian's Counsel, informing Counsel that because the Custodian is assessing a special service charge, the GRC requires the Custodian to complete an attached special service charge questionnaire. The GRC informed Counsel that the questionnaire needs to be completed by the Custodian so that the GRC can determine whether a special service charge is warranted.

On June 7, 2016, the GRC again e-mailed the Custodian's Counsel to inform him that the Custodian's SOI is incomplete because the Custodian failed to provide the required document index, which is item number 9 of the SOI. The GRC informed Counsel that it "must have a properly completed document index in order to fully develop the record and adjudicate the complaint." The GRC further informed Counsel that the GRC generally requires any submissions necessary to complete an SOI to be provided within five (5) business days; however, because the Custodian stated that there are numerous records responsive to the request, the GRC will grant the Custodian up to fifteen (15) business days to prepare and submit the document index.

On June 21, 2016, the GRC e-mailed the Custodian's Counsel, informing him that the GRC was in receipt of a telephone message from Counsel requesting an extension of time for the Custodian to prepare and submit the document index (item number 9 of the SOI). The GRC granted the Custodian an additional extension of five (5) business days and informed Counsel that the Custodian's submission would now be due by July 6, 2016. Per Counsel's July 6, 2016 request, the GRC extended the submission deadline to July 8, 2016.

On July 8, 2016, the Custodian e-mailed a certification to the GRC in response to the GRC's two communications dated June 7, 2016. The Custodian certifies that much of the information that the GRC is seeking is contained in Counsel's letters to the Complainant dated January 22, 2016, January 27, 2016, February 5, 2016, February 16, 2016, and February 26, 2016, as well as in the SOI.

The Custodian begins the certification by stating that "**the Fire District hereby amends and revises its special service charge to the amount of \$26,050.00.**" (Emphasis in original). The Custodian then states that, "[w]ith this as backdrop, the Fire District responds to your requests for further information"

The Custodian's responses to the special service charge questionnaire are set forth in the following table:

NO.	QUESTION	CUSTODIAN'S RESPONSE ⁵
1	What records are requested?	The Custodian set forth the records as requested in the Complainant's OPRA request.

⁵ The Custodian's responses are abbreviated to include only the information responsive to the question.
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2	Give a general nature description and number of the government records requested.	Correspondence (approximately 6,000 pages of paper copies and 7,000 e-mails) pertaining to the design, construction and termination phases of a building project.
3	What is the period of time over which the records extend?	Eight years.
4	Are some or all of the records sought archived or in storage?	The e-mails may be archived in an off-site server(s).
5	What is the size of the agency (total number of employees)?	Thirty-one (31)
6	What is the number of employees available to accommodate the records request?	Two (2)
7	To what extent do the requested records have to be redacted?	ACD material, attorney-client privileged material, work product pursuant to <u>R.</u> 4:10-2(c), records exempted by other State or Federal Statutes and Regulations, Executive Orders of the Governor, Rules of Court, Constitution of this State, or judicial case law, and records subject to the “common interest” doctrine is/are subject to redaction.
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?	For the paper copies, the Deputy Chief and the office assistant (no hourly rate provided). For the e-mails, one firefighter at a rate of \$60.00/hour and one IT vendor at a rate of \$135.00/hour. Ninety (90) hours will be needed to locate, retrieve, and assemble the records.
9	What is the level of personnel, hourly rate, and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?	The Deputy Chief will generally monitor the reproduction (no number of hours or hourly rate provided), but attorney review and redaction will require thirty-four (34) hours. The attorney hourly rate is \$250.00.
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?	See response to number 8.
11	What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	See response to number 9.
12	Who (name and job title) in	Michael Wharton, Deputy Chief (no rate provided)

	the agency will perform the work associated with the records request and that person's hourly rate?	Jason Shafer, firefighter (\$60.00/hour) South Jersey Technology Partners (\$135.00/hour) Stephen A. Venzie, Esq. (\$250.00/hour) Patrick A. Costello, Esq. ((\$250.00/hour) One office clerk (no name or rate provided)
13	What is the availability of information technology and copying capabilities?	Limited copying capability with two older copiers. One copier is leased and the Fire District will incur additional lease charges. E-mails are archived on servers maintained/hosted by South Jersey Technology Partners.
14	What is the actual cost of any media used to transmit the records?	\$0.05/page or the actual cost of production for paper copies.
15	Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce, and return the requested documents.	Ninety (90) hours will be needed for Fire District personnel to locate, retrieve, and assemble the records. Thirty-four (34) hours will be needed for attorney review and redaction.

The Custodian provided the following information for the document index which is item number 9 of the SOI:

(A) List of all Records Responsive to Complainant's OPRA Request (include the number of pages for each record)	(B) List the Records Retention Requirement and Disposition Schedule for each record responsive to the Complainant's OPRA request	(C) List of all records provided to Complainant, in their <u>entirety</u> or <u>with redactions</u> (include the <u>date</u> such records were provided)	(D) If records were disclosed with redactions, give a general nature description of the redaction	(E) If records were denied in their entirety, give a general nature description of the record	(F) List the legal explanation and statutory citation for the denial of access to records in their <u>entirety</u> or <u>with redactions</u>
The Fire District cannot provide this list until the requestor agrees to pay the special service charge.	The Fire District's retention period and destruction schedule is in accordance with the policies set forth by the New Jersey Division of Archive and Records Management, M180000-002.	No records have been produced to the OPRA requestor yet.	Not yet known.	Not yet known.	The exact common law and statutory privileges that will be invoked under Exemption No. 23 will be ultimately determined after review of the records, but at the very least <u>R. 4:10-2(c)</u> , the attorney-client

					privilege, the attorney work product privilege, and the “common interest” doctrine will be asserted.
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On July 29, 2017, the Complainant’s Counsel responded to the Custodian’s July 8, 2017 submission to the GRC. Counsel states that the Custodian has increased its special service charge amount by \$17,525.00, thereby increasing its demand to \$26,050.00. Counsel asserts that OPRA contains no provision allowing for an increase of a special service charge once a complaint has been filed. Counsel questions whether the Custodian would have complied with the Complainant’s request had the Complainant paid the initial \$8,500.00 special service charge. The Complainant’s Counsel states that the Custodian, in reaching the increased special service charge amount, stated that he must employ firefighter Jason Shafer at a rate of \$60.00 per hour. However, Counsel contends that Mr. Shafer’s salary is \$69,864.00 per a New Jersey Active Employee Payroll Data Record for 2016, which Counsel attached as Exhibit A. As such, Counsel approximates his hourly rate at \$33.00, not \$60.00.

The Complainant’s Counsel also argues that Mr. Shafer is not the lowest level employee capable of fulfilling the request. Counsel asserts that a special service charge must be reasonable and based on the actual direct cost of fulfilling the request. Counsel contends that actual direct cost means the hourly rate of the lowest level employee (minus fringe benefits) capable of fulfilling the request.

The Complainant’s Counsel further disputes the Custodian’s estimate of ninety (90) hours necessary to retrieve the records. Counsel states that the Custodian provided no explanation as to how he arrived at such a figure. Counsel contends that the Custodian is preventing disclosure of the requested records by demanding that the Complainant pay an additional \$17,525.00 in special service charges for what Counsel alleges are unnecessary and overpriced services.

Analysis

Here the GRC, despite several attempts, was unable to obtain more specific information about the records responsive to the Complainant’s OPRA request. The Custodian did not complete the SOI in the manner instructed by the GRC; he merely referenced the letters his attorney sent to the Complainant. Of particular concern, the GRC informed the Custodian that he “**must** provide a complete document index containing certain information pursuant to the New Jersey Superior Court decision in Paff v. NJ Dep’t of Labor, 392 N.J. Super. 334 (App. Div. 2007). (Emphasis in original). The Custodian did not provide the required document index. The GRC subsequently informed the Custodian’s Counsel that the Custodian’s SOI was incomplete and that the GRC “must have a properly completed document index in order to fully develop the record and adjudicate the complaint.” Sometime thereafter, the Custodian submitted a document

index in narrative form; however, in response to the GRC's request for a list of all records responsive to the Complainant's OPRA request, the Custodian stated he "cannot provide [the list] until the OPRA requestor agrees to pay the special service charge."

With respect to the special service charge, when the Custodian was asked by the GRC to complete a questionnaire so that the GRC could determine whether the \$8,500.00 special service charge was warranted, the Custodian replied by suddenly tripling the amount of the special service charge to \$26,050.00. Additionally, although the Custodian did provide answers to the GRC's special service charge questionnaire, certain critical information was lacking, such as his own hourly rate of pay. This information is quite important because the Custodian certified that he would be significantly involved in locating, retrieving, and assembling the records. Moreover, the Custodian offered scant justification for the sudden, enormous increase in the special service charge.

The Custodian stated that the requested records in their entirety were denied in whole or in part for several reasons but did not link a specific record or group of records to any particular basis for denial. When asked by the GRC to provide a list of responsive records, the Custodian certified that he could not do so until the Complainant agreed to pay the special service charge; however, the Custodian did not provide the GRC with sufficient information to determine if the special service charge was excessive or even warranted.

Accordingly, based on the inadequate evidence in this matter, the GRC is unable to determine whether or not a special service charge in the amount of \$26,050 is warranted and, therefore, whether the Custodian unlawfully denied access to the requested records. Hence, this complaint remains a contested case and should be referred to the Office of Administrative Law for a hearing to resolve the facts and determine whether: (1) a special service charge in the amount of \$26,050.00 is warranted; (2) the Custodian unlawfully denied access to the records, and if so, to order disclosure of the records; and (3) the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee, and if so, to award said fee.

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 conclusion of the Office of Administrative Law's fact-finding hearing.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Based on the inadequate evidence in this matter, the GRC is unable to determine whether or not a special service charge in the amount of \$26,050.00 is warranted and, therefore, whether the Custodian unlawfully denied access to the requested records. Hence, this complaint remains a contested matter and should be referred to the Office of Administrative Law for a hearing to resolve the facts and determine whether; (1) a special service charge in the amount of \$26,050 is warranted; (2) the Custodian

unlawfully denied access to the records, and if so, to order disclosure of the records; and (3) the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee, and if so, to award said fee.

2. 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 conclusion of the Office of Administrative Law's fact-finding hearing.

Prepared By: John E. Stewart

August 22, 2017