



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

June 30, 2020 Government Records Council Meeting

Dale L. Archer
Complainant

Complaint No. 2018-270

v.

County of Gloucester
Custodian of Record

At the June 30, 2020 public meeting, the Government Records Council (“Council”) considered the June 23, 2020 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 should dismiss the complaint because on June 1, 2020, the parties voluntarily executed a stipulation of dismissal of the complaint and claim for costs with prejudice, thereby negating the need for any further adjudication.

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 June 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: July 2, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 30, 2020 Council Meeting**

Dale L. Archer¹

GRC Complaint No. 2018-270

v.

**County of Gloucester²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “[a]ny and all email to and from Michelle Shirey dated April 1, 2018 to [October 24, 2018] including any of the following terms: East Greenwich, Dale, Archer, election, campaign, sign(s), fundraiser, meet, greet, Sweeney, meeting, Chris or Fay.”³

Custodian of Record: Laurie Burns

Request Received by Custodian: October 25, 2018

Response Made by Custodian: November 2, 2018

GRC Complaint Received: November 16, 2018

Background

April 28, 2020 Council Meeting:

At its April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 21, 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request because the Custodian did not request an extension of time to respond to the Complainant’s request, and although the Custodian did seek clarification of the request, such clarification was unnecessary because the request was clear and valid N.J.S.A. 47:1A-6. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 and 2009-08 (April 8, 2010). See also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (I/O March 28, 2007). As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed”

¹ Represented by Marla D. Gaglione, Esq., of Holston, McDonald, Uzdevinis & Myles, P.A. (Woodbury, NJ). Original Counsel was Mark B. Shoemaker, Esq. (Woodbury, NJ).

² Represented by Linda A. Galella, Esq., of Parker McCay, P.A. (Mount Laurel, NJ).

³ There were other records requested that are not relevant to this complaint.

denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Custodian has borne her burden of proof that, prior to disclosure of the balance of the records (as recalculated to conform to the specific request), the payment of a special service charge is warranted because of an extraordinary expenditure of time and effort needed to fulfill the Complainant's request. N.J.S.A. 46:1A-6; N.J.S.A. 47:1A-5(c). See Courier Post, 360 N.J. Super. 191, 199. Thus, the Custodian shall disclose the requested records to the Complainant upon the Complainant's payment of the special service charge.
3. **The Custodian shall recalculate the appropriate special service charge in accord with paragraph #2 above and make the amount of the charge available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge amount, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be obligated to disclose the requested records pursuant to N.J.S.A. 47:1A-5. Within twenty (20) business days following receipt of the Council's Interim Order, the Custodian shall deliver to the Executive Director a statement that the requested records were disclosed to the Complainant together with a detailed document index explaining the lawful basis for any redactions or a statement that the Complainant declined to purchase the records. Such statement shall be in the form of a certification in accordance with N.J. Court Rule, R. 1:4-4.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On April 29, 2020, the Council distributed its April 28, 2020 Interim Order to all parties. On May 4, 2020, the Custodian's Counsel e-mailed the GRC requesting a two (2) week extension of time to comply with the Interim Order due to issues resulting from the COVID-19 pandemic. On May 6, 2020, the GRC granted the Custodian's request for a two (2) week extension of time and informed the Custodian's Counsel that compliance would be due on May 20, 2020. On May 18, 2020, the Custodian's Counsel requested and was granted an additional two (2) week extension of time to comply with the Interim Order. On May 21, 2020, the Custodian's Counsel notified the GRC via e-mail that the complaint was resolved by and

between the parties and a stipulation of dismissal was forthcoming. On June 1, 2020, the Custodian's Counsel e-mailed the stipulation of dismissal to the GRC.

Analysis

Compliance

On April 28, 2020, the Council ordered the above-referenced compliance. On April 29, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or before May 6, 2020. On May 4, 2020, the third (3rd) business day following receipt of the Council's Interim Order, the Custodian e-mailed the GRC requesting a two (2) week extension of time for the Custodian to comply with the Interim Order. Counsel stated that the extension was needed due to issues resulting from the COVID-19 pandemic. On May 6, 2020, the GRC granted the Custodian's request and informed the Counsel that compliance would be due on May 20, 2020. Thereafter, on May 18, 2020, the Custodian's Counsel requested and was granted an additional two (2) week extension of time to comply with the Interim Order. As such, compliance would have been due on or before June 3, 2020. On May 21, 2020, the Custodian's Counsel notified the GRC that the complaint was resolved, and a stipulation of dismissal was forthcoming.

On June 1, 2020, the Custodian's Counsel e-mailed a letter to the GRC, wherein Counsel stated that the complaint was resolved because the County was foregoing the special service charge that the Council found was warranted and the Complainant was dismissing the complaint and claim for attorney's fees. A stipulation of dismissal was enclosed with the letter. The stipulation of dismissal, also dated June 1, 2020, was executed by Counsel for the parties and provided that the parties agreed that the complaint be dismissed with prejudice and without cost.

Therefore, the Council should dismiss the complaint because on June 1, 2020, the parties voluntarily executed a stipulation of dismissal of the complaint and claim for costs with prejudice, thereby negating the need for any further adjudication.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council should dismiss the complaint because on June 1, 2020, the parties voluntarily executed a stipulation of dismissal of the complaint and claim for costs with prejudice, thereby negating the need for any further adjudication.

Prepared By: John E. Stewart
Staff Attorney

June 23, 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

April 28, 2020 Government Records Council Meeting

Dale L. Archer
Complainant

Complaint No. 2018-270

v.

County of Gloucester
Custodian of Record

At the April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 21, 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request because the Custodian did not request an extension of time to respond to the Complainant’s request, and although the Custodian did seek clarification of the request, such clarification was unnecessary because the request was clear and valid N.J.S.A. 47:1A-6. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 and 2009-08 (April 8, 2010). See also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (I/O March 28, 2007). As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has borne her burden of proof that, prior to disclosure of the balance of the records (as recalculated to conform to the specific request), the payment of a special service charge is warranted because of an extraordinary expenditure of time and effort needed to fulfill the Complainant’s request. N.J.S.A. 46:1A-6; N.J.S.A. 47:1A-5(c). See Courier Post, 360 N.J. Super. 191, 199. Thus, the Custodian shall disclose the requested records to the Complainant upon the Complainant’s payment of the special service charge.
3. **The Custodian shall recalculate the appropriate special service charge in accord with paragraph #2 above and make the amount of the charge available to the Complainant within five (5) business days from receipt of the Council’s Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge amount, deliver to the Custodian (a) payment of the special**

service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be obligated to disclose the requested records pursuant to N.J.S.A. 47:1A-5. Within twenty (20) business days following receipt of the Council's Interim Order, the Custodian shall deliver to the Executive Director a statement that the requested records were disclosed to the Complainant together with a detailed document index explaining the lawful basis for any redactions or a statement that the Complainant declined to purchase the records. Such statement shall be in the form of a certification in accordance with N.J. Court Rule, R. 1:4-4.

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

Interim Order Rendered by the
Government Records Council
On The 28th Day of April 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: April 29, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 28, 2020 Council Meeting**

Dale L. Archer¹

GRC Complaint No. 2018-270

v.

**County of Gloucester²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “[a]ny and all email to and from Michelle Shirey dated April 1, 2018 to [October 24, 2018] including any of the following terms: East Greenwich, Dale, Archer, election, campaign, sign(s), fundraiser, meet, greet, Sweeney, meeting, Chris or Fay.”³

Custodian of Record: Laurie Burns

Request Received by Custodian: October 25, 2018

Response Made by Custodian: November 2, 2018

GRC Complaint Received: November 16, 2018

Background⁴

Request and Response:

On October 24, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 2, 2018, the sixth (6th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that fulfilling the request would require substantial time and allocation of resources to provide because it would be necessary for the agency to review approximately 1,065 e-mails for redaction of information exempt under OPRA. The Custodian stated that such a review would cause a “. . . ‘substantial disruption to agency operations’ . . .”

The Custodian further informed the Complainant that N.J.S.A. 47:1A-5(g) permits a government agency to deny access or impose a special service charge when expenditure of significant time and effort by an agency is involved. The Custodian stated that a custodian is only required to provide government documents a requestor seeks; not to do research or survey

¹ Represented by Marla D. Gaglione, Esq., of Holston, McDonald, Uzdavinis & Myles, P.A. (Woodbury, NJ). Original Counsel was Mark B. Shoemaker, Esq. (Woodbury, NJ).

² Represented by Linda A. Galella, Esq., of Parker McCay, P.A. (Mount Laurel, NJ).

³ There were other records requested that are not relevant to this complaint.

⁴ 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.

agencies for information. The Custodian asked the Complainant to articulate his objectives more clearly such that the Custodian could focus a records search and thereby minimize expenses. In the alternative, the Custodian informed the Complainant that he could narrow the scope of the request in order to reduce the time and expense necessary to fulfill the request.

By letter dated November 12, 2018, the Complainant's Counsel replied to the Custodian's November 2, 2018 response. Counsel asserted that in the letter he noted that the Custodian stated that she located 1,065 e-mails responsive to the request, which contradicts the Custodian's assertion that the request was vague. The Complainant's Counsel further stated that the Custodian's requirement that the Complainant narrow his request or pay a special service charge amounts to an outright denial of access in violation of OPRA. Counsel stated that in his letter he informed the Custodian that based on case law and prior GRC decisions she must produce the responsive e-mails at no cost to the Complainant.

On November 15, 2018, the Custodian e-mailed the Complainant's Counsel in reply to his November 12, 2018 letter. Therein, the Custodian stood by her original position that production of the requested records would involve substantial time and allocation of resources thereby necessitating a special service charge. The Custodian further stated that she required an extension of time up to November 30, 2018 in order to review responsive documents. On the same day, the Complainant's Counsel replied stating the Custodian that twenty-two (22) days had elapsed since the Complainant submitted his OPRA request and he questioned the need for additional time. Counsel also informed the Custodian that he was preparing a Denial of Access Complaint and demanded attorney's fees.

On November 16, 2018, the Custodian again e-mailed the Complainant's Counsel. The Custodian recounted the history of the correspondence exchanged between the parties; however, she did not alter her position with respect to the special service charge.

Denial of Access Complaint:

On November 16, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that the Custodian responded to his request on November 2, 2018. The Complainant asserted that the Custodian stated that fulfilling the request would entail substantial time and allocation of resources. The Complainant also asserted that the Custodian stated that OPRA permits a custodian to deny access or impose a special service charge when a significant expenditure of time and effort is involved. The Complainant further stated that the Custodian informed him that she is not required to do research, and therefore asked him to articulate his objectives more clearly and/or to narrow his request to reduce time and expense.

The Complainant's Counsel, after summarizing the recent history of communications with the Custodian, cited Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 and 2009-08 (April 8, 2010), as establishing the necessary criteria to request e-mail communications. The Complainant asserted that valid e-mail requests must contain: (1) the content and/or subject of the e-mails, (2) the specific date or range of dates during which the e-mails were transmitted, and (3) the identity of the sender and/or the recipient thereof. Counsel

argued that the Complainant’s request satisfied all three prongs of the test. The Complainant’s Counsel also stated that the Council, in Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (I/O March 28, 2007), ruled on a similar fact pattern. Counsel stated that in Sandoval the requestor sought e-mail communications between two individuals from April 1, 2005 through June 23, 2006 and included 17 key words. Counsel stated that in that complaint the Council found that the complainant requested specific e-mails by recipient, by date range, and by content, and based on that information located 1,046 e-mails. The Complainant’s Counsel stated that the Council determined that the request was not overly broad or invalid merely because the custodian had to review the responsive e-mails for privileged material.

The Complainant’s Counsel argued that in the instant complaint the request was valid, and that in response to the request the Custodian was able to quickly identify 1,065 e-mails. Counsel further argued that there is no basis to charge the Complainant a special service charge for review and redaction of the e-mails. Counsel also stated that a prevailing party is entitled to an award of attorney’s fees.

Supplemental Response:

On December 4, 2018, the Custodian’s Counsel sent a letter to the Complainant’s Counsel stating that the County’s IT Department initially identified 1,065 e-mails that were determined to be responsive to the request. The Custodian’s Counsel stated that the e-mails constituted approximately 5,700 pages of records and that each page had to be reviewed to determine if the e-mail was a public record. The Custodian’s Counsel further stated that the original search yielded another 6,000 e-mails estimated to include more than 10,000 pages which all need to be reviewed for potential redaction. The Custodian’s Counsel further stated that a redaction index needs to be created. The Custodian’s Counsel stated that the work will trigger a special service charge and provided a 14-point analysis for the Complainant’s Counsel to consider. The Custodian’s Counsel provided a 14-point analysis as follows:

1	What records are requested?	The request sought e-mails containing one of thirteen terms that resulted in more than 7,000 e-mails and approximately 15,700 pages of potentially responsive documents.
2	Give a general nature description and number of the government records requested.	The IT Department identified 7,000 e-mail communications. Each document contains at least one of thirteen of the search words. Each e-mail requires review for privacy consideration or other exemptions under OPRA.
3	What is the period of time over which the records extend?	The request sought seven months of e-mails. This is a significant amount of materials to review.
4	Are some or all of the records sought archived or in storage?	The County stores all of the documents electronically. The County needs to retrieve and place each e-mail in an electronic system capable of review and redaction. The County did not attempt to charge for the many hours of retrieval, nor the first 5,700 pages of e-mails.
5	What is the size of the agency (total number of	The County employs hundreds of full and part time employees, however, almost all of these employees work in

	employees)?	positions unrelated to the OPRA request. The County identified a specific individual for the multiple requests. The County chose the least expensive person capable of performing the task.
6	What is the number of employees available to accommodate the records request?	As noted above, the County identified specific individuals to perform the tasks of retrieval and review. The County identified Laurie J. Burns, Clerk of the Board and Gloucester County Custodian of Records as the lowest paid person to perform the review and redaction and creation of the redaction log. County Counsel will review the work product before release to ensure accuracy with the law. County Counsel's time is not part of the requested special service fee estimate.
7	To what extent do the requested records have to be redacted?	The County needs to review each page of the materials to ensure redactions are made when necessary to comply with the statute.
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?	As noted on the invoice, the County chose the lowest paid individual to perform the task. That rate is \$36 per hour.
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?	As noted, the County is not charging for the review and oversight expenses.
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?	This criterion is not applicable.
11	What is the reason that the agency employed, intends to employ, the particular level of personnel to accommodate the records request?	The County chose the least expensive staff worker availability to perform the requested task.
12	Who (name and job title) in the agency will perform the work associated with the	Laurie J. Burns, Clerk of the Board and Gloucester County Custodian of Records, \$36 per hour.

	records request and that person's hourly rate?	
13	What is the availability of information technology and copying capabilities?	This criterion is not applicable.
14	Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, productions and to return the requested documents.	The County calculates the special service fee estimate at \$5,976. The County derives this fee from an estimate of one minute per page. 10,000 minutes equates to 166 hours. Multiplied by the hourly rate of \$36, the fee is estimated at \$5,976. This estimate assumes each e-mail is one or two pages and there are no attachments. The one minute per page could fluctuate if the e-mails are larger than anticipated.

The Custodian's Counsel stated that, based on the 14-point analysis, the special service charge is realistic and appropriate. The Custodian's Counsel asked the Complainant's Counsel to have the Complainant submit a deposit of fifty percent (50%) of the estimate so that the County could commence review and redaction of the requested records.

Statement of Information:

On December 6, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on October 25, 2018 and responded in writing on November 2, 2018. The Custodian certified that once all responsive e-mails are identified by the agency's IT Department, each e-mail will have to be opened individually, converted and saved as a readable .pdf file. The Custodian certified that thereafter each e-mail page must be reviewed, redacted and logged pursuant to OPRA. The Custodian certified that this process will entail an expenditure of significant time and effort by the agency. The Custodian further certified that N.J.S.A. 47:1A-5(g) permits a government agency to deny access or impose a special service charge when expenditure of significant time and effort by an agency is involved.

The Custodian certified that on December 5, 2018, she disclosed to the Complainant 5,712 pages of requested records with an accompanying redaction index in partial fulfillment of his request. The Custodian certified that an additional 29,713 pages of responsive records have not been provided to the Complainant because they were recently converted to a readable .pdf format and need to be reviewed and redacted.

Additional Submissions:

On December 6, 2018, the Custodian's Counsel informed the Complainant's Counsel that the Custodian disclosed 5,712 pages of records to the Complainant for which the Custodian agreed to waive the special service charges. However, the Custodian's Counsel stated that the number of pages of records increased to 35,425. The Custodian's Counsel stated that because there is an increase of 29,713 pages of records, the Custodian is not able to perform the necessary review and redaction work. For this reason, the Custodian's Counsel stated that she

will perform the work. The Custodian's Counsel stated that the County will charge the same \$36.00 per hour rate previously quoted, which now represents a \$229.00 per hour loss to the County based on the difference between the Custodian's hourly rate and Counsel's hourly rate.

The Custodian's Counsel stated that the County recalculated the special service fee based upon an increase to 29,713 pages of records, and that the special service charge will now be \$17,820. Counsel stated that the County derives this fee from an estimate of one minute per page, resulting in 29,713 minutes, or 495 hours of review and redaction work. Multiplied by the hourly rate of \$36, the fee is estimated at \$17,820. The Custodian's Counsel asked if, due to the large number of documents, the Complainant was willing to narrow the scope of his request. The Custodian's Counsel also stated that the County needed an extension of time until January 18, 2019 to prepare the records for disclosure.

In a second letter dated December 6, 2018, the Custodian's Counsel stated that she was supplementing the Custodian's SOI. The Custodian's Counsel stated that while the first part of the Complainant's request meets the requirements of Elcavage, GRC 2009-07, the words in the search request generated an abundance of responsive documents. Counsel stated that the Custodian asked the Complainant to refine the request by eliminating some of the search words to no avail. Counsel stated that the Custodian originally sought both an extension of time and a special service charge, and thereafter, waived the special service charge for the initial 5,712 pages of records. The Custodian's Counsel stated that the Complainant rejected the extension of time and the special service charge; however, Counsel reiterated that the Custodian will need an extension of time until January 18, 2019 to fully respond to the request.

The Custodian's Counsel stated that in Werner v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012), the Council determined that when a custodian properly requests an extension of time within the statutorily timeline and provides an anticipated deadline date of when the requested records would be made available, a complaint filed before the extension expires is untimely. Counsel argued that the facts of the instant complaint are nearly identical to the facts of Werner. Here, Counsel argued, the request was received on October 25, 2018, and the Custodian responded within the seven (7) business day period seeking a "refinement of the request due to generic words in the subject areas." The Custodian's Counsel stated that the Complainant replied on November 12, 2018 by refusing to refine the request; and thereafter on November 15, 2018, the Custodian informed the Complainant's Counsel that an extension until November 30, 2018 was required. Counsel stated that on November 16, 2018, the Complainant filed the complaint. The Custodian's Counsel argued that the complaint was improperly filed because it was prematurely filed during the pendency of the extension period.

The Custodian's Counsel asked the GRC to dismiss the complaint as improper and untimely. Counsel further asked the GRC to award her attorney's fees and costs for the time and effort expended in defending a frivolous complaint.

On December 14, 2018, the Complainant's Counsel submitted to the GRC a reply to the Custodian's SOI. Counsel argued that the complaint is not frivolous because the Custodian in her November 2, 2018 response stated that she identified approximately 1,065 e-mails; however, following the filing of the complaint an additional 6,000 responsive e-mails were discovered.

Counsel also asserted that a cursory review of the records disclosed to the Complainant thus far revealed that the Custodian disclosed records that did not include any of the specified search terms; therefore, the Custodian's search was overly broad. Counsel objected to paying a special service fee for unnecessary work that was not corrected upon subsequent review. Counsel asked the GRC to compel production of all properly responsive e-mails without assessment of a special service charge. Further, Counsel stated he is seeking attorney's fees and is reserving any argument with respect to the propriety of redactions.

On December 19, 2018, the Custodian's Counsel submitted to the GRC a letter in response to the Complainant's December 14, 2018 reply to the Custodian's SOI. The Custodian's Counsel stated that because the Complainant listed "generic words" in his OPRA request, the yield was broader than it would have been had the Complainant narrowed the scope of the search terms. The Custodian's Counsel stated that the keywords the Complainant listed in his request yielded numerous records, some of which were forms of the listed keyword or contained sequential letters of the keyword contained within a word that was not one of the listed keywords.⁵ The Custodian's Counsel stated that the County's expansive search resulted from the Complainant's failure to identify the specific government records sought.

On December 19, 2018, the GRC e-mailed the Custodian's Counsel to advise Counsel that the GRC's regulations provide for one submission each from the Complainant and the Custodian; however, the GRC may request additional submission(s) from the parties if deemed necessary. The GRC further advised Counsel that unapproved or unexpected submissions may not be considered by the GRC in the adjudication of the complaint.

On January 23, 2019, the Complainant's Counsel informed the GRC via e-mail that the Custodian has been periodically disclosing requested records to the Complainant. The Complainant's Counsel stated that he has noted that the Custodian has been copying the GRC with the disclosures.⁶ The Complainant's Counsel stated that there are four (4) remaining issues. First, Counsel asked if the Custodian disclosed all of the requested records. Second, Counsel asked if the County waived its request for any special service charges by periodically disclosing records throughout the pendency of the complaint. Third, Counsel asked the GRC to determine the amount of prevailing party attorney's fees. Fourth, Counsel stated that records disclosed on January 18, 2019 also contained a redaction index, and stated that the Complainant is seeking a methodology and forum for a third party evaluation of the redactions.

On January 25, 2019, the Custodian's Counsel submitted a letter in response to the January 23, 2019 letter the Complainant's Counsel submitted to the GRC. After the Custodian's Counsel reiterated several arguments already made in previous communications, she addressed the fourth issue contained in Counsel's January 23, 2019 letter. With respect to that issue, the

⁵ The Custodian's Counsel provided examples, such as e-mails containing the words "least" and "breast" being located in response to input of the keyword "East."

⁶ The GRC previously informed the Custodian's Counsel via e-mail dated December 19, 2018 that the GRC would request additional submissions if deemed necessary by the GRC. The GRC did not request the submissions referenced here by the Complainant's Counsel, and therefore did not open or review the disclosures contained therein.

Complainant's Counsel stated that the redaction index cited to statutory authority or case law in support of each redacted page. The Complainant's Counsel argued that there is no support or authority for a forum for third party evaluation of the redacted portions of the responsive records.

On January 28, 2019, the GRC replied to the inquiries submitted by the Complainant's Counsel. The GRC informed the Complainant's Counsel that it is up to the Complainant to determine if all requested records were received by him. The GRC also informed the Complainant's Counsel that the Custodian must provide the Complainant with an estimate of the special service charges prior to seeking payment for the charges. The GRC further informed Counsel that the GRC will determine whether there is a prevailing party entitled to attorney's fees. Finally, the GRC informed Counsel that if there is a dispute with respect to redacted material the Council may conduct an *in camera* examination of the records and issue an order containing their findings.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond accordingly results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁷ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Custodian responded in writing on the sixth (6th) business day, informing the Complainant that fulfilling the request would require substantial time and allocation of resources. The Custodian stated that N.J.S.A. 47:1A-5(g) permits a government agency to deny access or impose a special service charge when expenditure of significant time and effort by an agency is involved. The Custodian stated that a custodian is only required to provide government documents a requestor seeks; not to do research or survey agencies for information. The Custodian asked the Complainant to articulate his objectives more clearly so the Custodian could focus a records search and thereby minimize expenses.

The Custodian did not inform the Complainant that his request was denied pending the payment of a special service charge. Additionally, the Custodian did not seek an extension of time to respond to the request. Although the response was somewhat oblique, the GRC interprets the Custodian's response as a request for clarification. The Council has held that when a custodian seeks clarification of a request, the time for the custodian to respond will begin anew

⁷ A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

once such clarification is received by the custodian. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012), in which the Council stated:

[S]hould a requestor amend or clarify an OPRA request, it is reasonable that the time frame for a custodian to respond should begin anew; thus, providing a custodian with the statutorily mandated time frame to respond to the new or altered OPRA request. N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).

[Id. at 6.]

Accordingly, the Custodian would have had seven (7) business days to respond to the request in a timely manner once the Complainant provided clarification. However here, the Complainant argued that clarification was not necessary because the request was clear and valid on its face. The Complainant asserted that the records relevant to the complaint were e-mails to and from Michelle Shirey dated from April 1, 2018 to October 24, 2018, and the subject of the e-mails was identified by keywords.

In Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010), the Council established criteria deemed necessary under OPRA to request an e-mail communication. For such requests to be valid the Council determined that they must contain: (1) the content and/or subject of the e-mails, (2) the specific date or range of dates during which the e-mails were transmitted, and (3) the identity of the sender and/or the recipient thereof. See also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007), where the Council determined that the complainant's request for e-mails by recipient, by date range and by content resulted in the identification of 146 responsive e-mails, and concluded that the request was not overly broad or invalid merely because the custodian had to review the e-mails for privileged material.

In the instant complaint, the Custodian did not request an extension of time to respond to the Complainant's request. Although the Custodian did seek clarification of the request, such clarification was unnecessary because the request was clear and valid. Elcavage, GRC 2009-07; Sandoval, GRC 2006-167. Therefore, the time for the Custodian to respond, beginning anew upon receipt of clarification, is not applicable.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request because the Custodian did not request an extension of time to respond to the Complainant's request, and although the Custodian did seek clarification of the request, such clarification was unnecessary because the request was clear and valid N.J.S.A. 47:1A-6. See Elcavage, GRC 2009-07. See also Sandoval, GRC 2006-167. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

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.

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

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

[N.J.S.A. 47:1A-5(c) (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 the variety of factors discussed in The Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. Id. at 193. The school district assessed a special service charge due to the “extraordinary burden” placed upon them in fulfilling 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 identified the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate the request” pursuant to OPRA:

- The volume of government records involved;
- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying;
- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and

- 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.

In the instant matter, the Custodian in the SOI provided a response to the GRC’s 14-point analysis, which is an evaluative tool that the GRC designed to reflect the analytical framework outlined in Courier Post regarding the proper assessment of a special service charge. Based upon the Custodian’s response to the statements contained in the 14-point analysis, as supplemented by Counsel’s December 6, 2018 letter, the Custodian has demonstrated that an “extraordinary expenditure of time and effort” is needed to fulfill the Complainant’s OPRA request, thereby warranting a special service charge.

In favor of imposing a special service charge, the record establishes that the Custodian identified over 7,000 e-mails, comprising 35,425 pages of records responsive to the Complainant’s request. And although the retrieval process itself may not warrant a special service charge because it can be accomplished electronically, the process of reviewing the thousands of pages of records to make sure each record is responsive to the request, examining the content for exempt material and redacting such exempt material when necessary, is time-intensive and does lend itself to assessment of a special service charge. The Custodian estimated the time needed to perform the review and redaction process at one (1) minute per page, which is not excessive. Further, the Custodian certified that the time would be billed at the amount of the lowest paid individual capable of performing the task, which is \$36 per hour. The Custodian certified that, although legal review would be required to ensure compliance with the law, the County would not charge for such legal review. Moreover, the Custodian certified that there would be no special service charges assessed for the first 5,712 pages of responsive records, which represents an approximate reduction of the total charges by \$3,420. This reduction further supports the reasonableness of the total special service charge for 35,425 pages of records.

The Custodian’s Counsel stated that the revised special service charge is estimated at \$17,820. This is calculated for 495 hours of review and redaction work multiplied by the hourly rate of \$36. This special service charge amount was based on a yield of 29,713 pages of records. However, the Custodian’s Counsel in her letter to the GRC dated December 19, 2018, stated that many of the records retrieved contained forms of the listed keyword or contained sequential letters of the keyword contained within a word that was not one of the requested keywords. As such, those records are not responsive to the Complainant’s request and must be eliminated from the total number of retrieved records. Only those records that contain the *specific keyword(s)* listed by the Complainant are records responsive to the request. The Custodian must therefore recalculate the page yield to conform with the request by removing any records that do not

contain the following specific terms: East Greenwich, Dale, Archer, election, campaign, sign, signs, fundraiser, meet, greet, Sweeney, meeting, Chris, Fay.⁸

Therefore, the Custodian has borne her burden of proof that, prior to disclosure of the balance of the records (as recalculated to conform to the specific request), the payment of a special service charge is warranted because of an extraordinary expenditure of time and effort needed to fulfill the Complainant's request. N.J.S.A. 46:1A-6; N.J.S.A. 47:1A-5(c). See Courier Post, 360 N.J. Super. 191, 199. Thus, the Custodian shall disclose the requested records to the Complainant upon the Complainant's payment of the special service charge.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request because the Custodian did not request an extension of time to respond to the Complainant's request, and although the Custodian did seek clarification of the request, such clarification was unnecessary because the request was clear and valid N.J.S.A. 47:1A-6. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 and 2009-08 (April 8, 2010). See also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (I/O March 28, 2007). As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has borne her burden of proof that, prior to disclosure of the balance of the records (as recalculated to conform to the specific request), the payment of a special service charge is warranted because of an extraordinary expenditure of time and effort needed to fulfill the Complainant's request. N.J.S.A. 46:1A-6; N.J.S.A.

⁸ It is clear from the structure of the OPRA request that "East Greenwich" was intended to be one term, not two separate keywords.

47:1A-5(c). See Courier Post, 360 N.J. Super. 191, 199. Thus, the Custodian shall disclose the requested records to the Complainant upon the Complainant's payment of the special service charge.

3. **The Custodian shall recalculate the appropriate special service charge in accord with paragraph #2 above and make the amount of the charge available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge amount, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be obligated to disclose the requested records pursuant to N.J.S.A. 47:1A-5. Within twenty (20) business days following receipt of the Council's Interim Order, the Custodian shall deliver to the Executive Director a statement that the requested records were disclosed to the Complainant together with a detailed document index explaining the lawful basis for any redactions or a statement that the Complainant declined to purchase the records. Such statement shall be in the form of a certification in accordance with N.J. Court Rule, R. 1:4-4.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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