



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

**FINAL DECISION**

**March 25, 2014 Government Records Council Meeting**

Harry B. Scheeler, Jr.  
Complainant

Complaint No. 2013-190

v.

N.J. Department of Education  
Custodian of Record

At the March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 18, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s January 29, 2014 Interim Order because she responded in the prescribed extended time frame providing the requested records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian violated N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), N.J.S.A. 47:1A-5(c), the Custodian disclosed redacted copies of the requested records to the Complainant after the GRC determined that no special service charge was warranted. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of March, 2014

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: March 27, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
March 25, 2014 Council Meeting**

**Harry B. Scheeler, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-190**

v.

**N.J. Department of Education<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** “All OPRA requests submitted to the NJ [Department] of Education (“DOE”) in 2013. . . . I am not requesting the documents released[.] I am . . . asking for all responses responsive to the same requests.”

**Custodian of Record:** Paul Crupi<sup>3</sup>  
**Request Received by Custodian:** May 8, 2013  
**Response Made by Custodian:** May 17, 2013  
**GRC Complaint Received:** July 2, 2013

**Background**

**January 28, 2014 Council Meeting:**

At its January 28, 2014 public meeting, the Council considered the January 21, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian timely responded to the Complainant’s May 8, 2013 OPRA request in writing requesting an extension of time to respond, the Custodian’s failure to timely respond in writing within the extended deadline of June 7, 2013, results in a “deemed” denial. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian has not borne her burden of proof that, prior to disclosure, 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. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). Thus, the Custodian shall disclose the sought

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<sup>1</sup> No legal representation is listed in the record.

<sup>2</sup> No legal representation is listed in the record.

<sup>3</sup> The current Records Custodian is Kimberly A. Gatti.

OPRA requests to the Complainant upon the Complainant's payment of the actual cost of the materials and supplies used to copy the requested records. N.J.S.A. 47:1A-5(b); Paff v. Township of Teaneck (Bergen), GRC Complaint No. 2010-09 (May 2011). The Custodian must identify any documents that are redacted and state the basis for redacting such documents.

3. **The Custodian shall comply with item number one (1) above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On January 29, 2014, the Council distributed its Interim Order to all parties. On February 5, 2014, the Custodian requested a one (1) day extension of time to respond.

On February 6, 2014, the Custodian responded to the Council's Interim Order. The Custodian certified that:

- Consistent with my email to Mr. Scheeler, on Thursday, February 6, 2014, I provided the requested records, per the Interim Order, to Mr. Scheeler via email at [harryrescue911@gmail.com](mailto:harryrescue911@gmail.com). The documents were sent over 2 emails due to file size restrictions on the email system. They are marked as DOE Set 1 0001 – DOE Set 1 0238 and DOE Set 2 0241.
- The final review of the request resulted in 243 responsive documents, the majority of which contained the address, telephone number and email address of OPRA requestors during the identified time period.
- Pursuant to N.J.S.A. 18A:47:1A-1, the records have been redacted to protect reasonable expectations of privacy in the *personal* addresses, email addresses and telephone numbers contained in the responsive documents. City and state information, however, has not been redacted, nor has any apparent business

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

<sup>5</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

address, business based email or business telephone numbers. If I was uncertain if the information provided was business based, it was redacted.

Certification of Kimberly A. Gatti, dated February 6, 2014 (footnote omitted) (emphasis in original).

The Custodian also noted that, since the time of the original request, the DOE's technological capability has changed and, thus, she was able to provide the documents in a more efficient manner than first anticipated.

## Analysis

### Compliance

At its January 28, 2014 meeting, the Council ordered the Custodian to disclose the sought OPRA requests to the Complainant upon the Complainant's payment of the actual cost of the materials and supplies used to copy the requested records, identifying any documents that are redacted and stating the basis for redacting such documents, within five business days from receipt of the Order and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On January 29, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on January 5, 2014.

On January 5, 2014, the Custodian requested a one (1) day extension of time to respond due to the State of Emergency declared by the Governor. On January 6, 2014, the sixth (6<sup>th</sup>) business day after receipt of the Council's Order, the Custodian disclosed a redacted copy of the requested records to the Complainant and a copy of her certification to the GRC.

Therefore, the Custodian complied with the Council's January 29, 2014 Interim Order because she responded in the prescribed extended time frame providing the requested records and simultaneously provided certified confirmation of compliance to the Executive Director.

### Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states "[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian violated N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), N.J.S.A. 47:1A-5(c), the Custodian disclosed redacted copies of the requested records to the Complainant after the GRC determined that no special service charge was warranted. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's January 29, 2014 Interim Order because she responded in the prescribed extended time frame providing the requested records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian violated N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), N.J.S.A. 47:1A-5(c), the Custodian disclosed redacted copies of the requested records to the Complainant after the GRC determined that no special service charge was warranted. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Robert T. Sharkey, Esq.  
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel  
March 18, 2014



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

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RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

January 28, 2014 Government Records Council Meeting

Harry B. Scheeler, Jr.  
Complainant

Complaint No. 2013-190

v.

N.J. Department of Education  
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian timely responded to the Complainant’s May 8, 2013 OPRA request in writing requesting an extension of time to respond, the Custodian’s failure to timely respond in writing within the extended deadline of June 7, 2013, results in a “deemed” denial. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian has not borne her burden of proof that, prior to disclosure, 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. 47:1A-6; N.J.S.A. 47:1A-5.c; The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). Thus, the Custodian shall disclose the sought OPRA requests to the Complainant upon the Complainant’s payment of the actual cost of the materials and supplies used to copy the requested records. N.J.S.A. 47:1A-5(b); Paff v. Township of Teaneck (Bergen), GRC Complaint No. 2010-09 (May 2011). The Custodian must identify any documents that are redacted and state the basis for redacting such documents.
3. **The Custodian shall comply with item number one (1) above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

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

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

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

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of January, 2014

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: January 29, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 28, 2014 Council Meeting**

**Harry B. Scheeler, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-190**

v.

**N.J. Department of Education<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** “All OPRA requests submitted to the NJ [Department] of Education in 2013. . . . I am not requesting the documents released[.] I am . . . asking for all responses responsive to the same requests.”

**Custodian of Record:** Paul Crupi<sup>3</sup>  
**Request Received by Custodian:** May 8, 2013  
**Response Made by Custodian:** May 17, 2013  
**GRC Complaint Received:** July 2, 2013

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

**Request and Response:**

On May 8, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 17, 2013, seven (7) business days later, the Custodian responded in writing seeking authorization for a special service charge that he stated was necessary to fulfill the request. The Complainant did not assent to the special service charge, and the Custodian requested an extension of time to respond until May 24, 2013. On May 24, 2013, the Custodian requested an additional extension of time until May 31, 2013, and on May 31, 2013, he requested a further extension of time until June 7, 2013. On June 11, 2013, the Custodian confirmed in writing that the Complainant refused to pay the special service charge and, as such, denied the request.

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<sup>1</sup> No legal representation is listed in the record.

<sup>2</sup> No legal representation is listed in the record.

<sup>3</sup> The current Records Custodian is Kimberly A. Gatti.

<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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On July 2, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that on May 17, 2013, he received and disputed the Custodian’s notice regarding the necessity of a service charge. The Complainant further states that he received the Custodian’s requests for extensions of time on May 17, May 24, and May 31, but that he objected to the May 31 extension as impermissible under OPRA for being too open-ended. The Complainant contests the Custodian’s statement that several hours will be needed to redact the requested documents, arguing that the Custodian has had sufficient time to respond and that any redactions will not be significant enough to warrant a special service charge.

Statement of Information:

On August 22, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that the Complainant’s request required the search for, and review of, approximately 220 OPRA requests submitted to the New Jersey Department of Education (“DOE”) between January 1, 2013 and May 8, 2013. The Custodian states that each responsive file needed to be printed and scanned to create a single .pdf document, in addition to being redacted to obscure any personal information. *Citing Paff v. Warren Cnty. Office of the Prosecutor*, GRC Complaint No. 2007-167 (February 2008). The Custodian argues that performing this search, review, redaction, and ultimate production of the final document required a special service charge. *Citing Fisher v. Dep’t of Law & Pub. Safety, Div. of Law*, GRC Complaint No. 2004-55 (August 2006).

Additional Submissions:

The Custodian provided the following in response to the GRC’s fourteen (14) point questionnaire regarding the propriety of imposing a special service charge:

Question	Custodian’s Response
What records are requested?	Pursuant to the NJDOE’s record regarding the subject request, Mr. Scheeler (“Requestor”) sought the following when he filed OPRA request #W76731 – “All OPRA requests submitted to the NJ Department of Education in 2013.” He then clarified that request stating “I am not requesting the documents release I am however asking for all responses responsive to the same requests.”
Give a general nature description and number of the government records requested.	The documents sought are the receipts (for the period of time identified in the request) generated by the Records Custodian and sent to a requestor following the Custodian’s completion of an OPRA request. The receipts contain the personal information of requestors, including personal telephone numbers and personal email addresses, along with details of the information/records requested, maximum anticipated cost, method of delivery, etc. At the time the subject request was

	processed, it was determined that there were approximately 220 responsive documents.
What is the period of time over which the records extend?	Request #W76731 sought records that were approximately 4 months in range, from January 2013 to the date of the request, May 8, 2013.
Are some or all of the records sought archived or in storage?	No.
What is the size of the agency?	Based on the information gathered from Human Resources within NJDOE, NJDOE employs approximately 757 employees at its offices located at Riverview Plaza.
What is the number of employees available to accommodate the records request?	At the time the request was made, there was one individual assigned to complete and respond to all OPRA requests received by NJDOE. Based upon a review of the available data from 2012-2013, the NJDOE received several OPRA requests per day.
To what extent do the requested records have to be redacted?	Of the approximately 220 documents responsive to the request, each one of those documents will likely require some form of redaction to protect the personal information of each requestor, including personal email addresses and personal telephone numbers.
What is the level of personnel, hourly rate, and number hours, if any, required for a government employee to locate, retrieve, and assemble the records for copying?	At the time the request was made, Mr. Crupi estimated the entire process of gathering the records, reviewing them and then redacting them would take approximately four (4) hours, with a service charge totaling \$83.84, which reflects an hourly rate of \$20.96 for his work.
What is the level of personnel, hourly rate, and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?	The Records Custodian is the individual gathering, redacting and completing the entire processing of the request. Accordingly, there is no additional monitoring or inspection fee that was anticipated by Mr. Crupi.
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 space?	For the subject request, the time to return records would be minimal since the records did not have to be retrieved from archives. There would be no other expense associated with retrieving the documents from archives.
What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	The records Custodian, at the time of the subject request, was the only individual responsible for reviewing, processing and responding to OPRA requests. Given Mr. Crupi's estimate, it would essentially take him one-half (1/2) of an entire work day to process the subject request. This one request is just one of several hundred received by the NJDOE each year.
Who in the agency will	At the time the subject request was submitted, Paul Crupi

perform the work associated with the records request and that person's hourly rate?	served as the Records Custodian. Accordingly, he would have been the individual responsible to process and respond to the request. It is my understanding that he sought to charge \$20.96 per hour for processing the request.	
What is the availability of information technology and copying capabilities?	The NJDOE has copying and scanning machines located on each floor of the Riverview Plaza Offices. At the time of the subject request, it would have been necessary to copy the original documents (or retrieve them from the electronic database and print them), then make the redactions on the copied/printed document by hand with a thick marker, then scan the redacted documents into the system. At the time of this request, the NJDOE was unable to make redactions electronically, but rather made all redactions manually with a marker to paper. Those redacted documents then needed to be scanned into a .pdf file. It is also important to note that at times it was also necessary to make a copy of the redacted document and redact again to ensure the text is properly redacted.	
Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce, and return the requested documents.	Activity	Time Allotted
	Run a search on the Department of Education's OPRA database to determine what OPRA file numbers are responsive.	Approximately 15 minutes
	Retrieve the physical files of approximately 220 OPRA records/receipts or retrieve them from the online database and/or print each document from the online database.	Approximately 1 hour
	Ensure that any missing documents are retrieved and/or review the online system to ensure accuracy.	Approximately 30 minutes
	Review 220 documents to ensure documents are responsive and make the necessary redactions.	Approximately 1.5 hours
	Scan the redacted documents to create a .pdf file so that they can be sent electronically to the requestor.	Approximately 30 minutes or more
	Separately email the .pdf files to requestor as he does not accept documents on CD (due to the volume of the documents and email system limitations, several emails would need to be drafted and sent in order to submit the documents to requester via email).	Approximately 15 minutes or more
	Total Time	Approximately 4 plus hours

## Analysis

### Timeliness

OPRA mandates that a custodian must either 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 within the required seven (7) business days 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).<sup>5</sup> 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Moreover, OPRA provides that:

If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.

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

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. No records were provided until May 31, 2007. Id. The GRC held that:

The [c]ustodian properly requested an extension of time to provide the requested records to the [c]omplainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the [c]ustodian failed to provide the [c]omplainant access to the requested records by the extension date anticipated by the [c]ustodian, the [c]ustodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

Id.

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<sup>5</sup> 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.

Here, the Custodian timely responded to the Complainant's May 8, 2013 OPRA request but failed to further respond within the extended time frame he requested on May 31, 2013. Thus, the Complainant's OPRA requests are "deemed" denied. Id.

Therefore, although the Custodian timely responded to the Complainant's May 8, 2013 OPRA request in writing requesting an extension of time to respond, the Custodian's failure to timely respond in writing within the extended deadline of June 7, 2013, results in a "deemed" denial. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124.

### **Special Service Charge**

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

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

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

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

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

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian's time was reasonable and consistent with N.J.S.A. 47:1A-5(c). Id. at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an "extraordinary expenditure of time and effort to accommodate" pursuant to OPRA: (1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records

sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place.

Id. at 199.

The court determined that in the context of OPRA, the term “extraordinary” will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. Id. at 202. “[W]hat may appear to be extraordinary to one school district might be routine to another.” Id. The Custodian has provided a response to questions posed by the GRC that reflect the analytical framework outlined in the Courier Post regarding the proper assessment of a special service charge.

Here, the evidence of record does not demonstrate that the “extraordinary expenditure of time and effort” required to impose a special service charge is needed to fulfill the Complainant’s OPRA request.

On one hand, the record establishes that the Custodian identified approximately 220 documents responsive to the Complainant’s request. The Custodian stated that the records contain personal information of requestors, and that the Custodian alone would be responsible for reviewing and redacting such information. Also, at the time of the request, DOE could not make redactions electronically and, instead, must print, manually redact, and re-scan documents prior to disclosure.

However, the record also indicates that the requested OPRA files need not be retrieved from storage, that no monitoring of the review process is necessary, and that the requisite copying and scanning facilities are present at DOE’s offices. Unlike the records requested in Courier Post, which consisted of thousands of pages produced by four (4) law firms over six (6) years, the Custodian here stated that the records are all located on DOE’s OPRA database and can be retrieved by using a search function. *See* Courier Post, 360 N.J. Super. at 193.

Additionally, the proposed special service charge of \$83.84 is based on four hours of estimated work. While this may represent a significant portion of the Custodian’s working day, and DOE may receive several hundred OPRA requests each year, the time required does not place an “extraordinary burden” on either the Custodian or DOE. *See id.* As noted in Courier Post:

The process of review and redaction . . . cannot be used to frustrate the goal of [OPRA] . . . to “promptly permit access to the remainder of the [redacted] record.” Redaction of privileged or confidential data cannot cause the release of otherwise public information to be placed in a straight jacket.

Id. at 206.

The court in Courier Post further stated that:

[A]n individual with sufficient education and experience to hold the position of a custodian of records[] should be able to quickly ascertain the presence of, and delete, confidential and privileged information to enable that custodian to “promptly comply with a request to inspect . . .” a government record.

Id.

Notably, however, the bulk of the time estimate submitted by the Custodian is devoted to the printing, manual redacting, and re-scanning necessitated by DOE’s inability to redact documents electronically. In Paff v. Township of Teaneck (Bergen), GRC Complaint No. 2010-09 (May 2011), the custodian also had to make paper copies of the requested records in order to redact certain information before providing electronic copies of same to the complainant. OPRA provides that a custodian may charge the actual cost of duplicating the record, including the “cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy . . . .” N.J.S.A. 47:1A-5(b).

The Council recognized in Paff that, though the cost of providing electronic copies is likely \$0.00, the Custodian properly assessed the related cost for making the copies necessary to redact the records based on N.J.S.A. 47:1A-5(b). Id. Thus, the Custodian here is entitled to charge the Complainant for the actual cost of the materials and supplies used to copy the requested records prior to the redaction and scanning of such records.<sup>6</sup>

Therefore, the Custodian has not borne her burden of proof that, prior to disclosure, 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. 47:1A-6; N.J.S.A. 47:1A-5.c; Courier Post, 360 N.J. Super. at 199 Thus, the Custodian shall disclose the sought OPRA requests to the Complainant upon the Complainant’s payment of the actual cost of the materials and supplies used to copy the requested records. N.J.S.A. 47:1A-5(b); Paff, GRC 2010-09. The Custodian must identify any documents that are redacted and state the basis for redacting such documents.

### **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.

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<sup>6</sup> In the Custodian’s SOI, she certified that DOE could not “make redactions electronically” at the time of the Complainant’s request. In instances where a custodian *does have* the capability to electronically redact in a visually obvious manner a record requested to be provided electronically, a custodian shall not charge for electronic delivery of those electronically redacted records. See Paff, GRC 2010-09.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian timely responded to the Complainant's May 8, 2013 OPRA request in writing requesting an extension of time to respond, the Custodian's failure to timely respond in writing within the extended deadline of June 7, 2013, results in a "deemed" denial. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian has not borne her burden of proof that, prior to disclosure, 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. 47:1A-6; N.J.S.A. 47:1A-5.c; The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). Thus, the Custodian shall disclose the sought OPRA requests to the Complainant upon the Complainant's payment of the actual cost of the materials and supplies used to copy the requested records. N.J.S.A. 47:1A-5(b); Paff v. Township of Teaneck (Bergen), GRC Complaint No. 2010-09 (May 2011). The Custodian must identify any documents that are redacted and state the basis for redacting such documents.
3. **The Custodian shall comply with item number one (1) above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Robert T. Sharkey, Esq.  
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

January 21, 2014

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<sup>7</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>8</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.